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,

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

REPLY BRIEF

Lance H. Lubel
J. Robert Black
HEARD, ROBINS, CLOUD,
BLACK & LUBEL, LLP
3800 Buffalo Speedway,
Suite 550
Houston, TX 77098
(713) 650-1200

Marion J. Craig, III
MARION J. CRAIG, III PC
601 West 2nd St., Ste. 8
Roswell, NM 88201
(575) 622-1106

Steven L. Tucker
TUCKER LAW FIRM, PC
520 Agua Fria St.
Santa Fe, NM 87501
(505) 982-3467

Attorneys for Plaintiff-Appellant

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STATEMENT OF COMPLIANCE

By his signature at the end of this document, Lance Lubel states that, based on the word-count feature of WordPerfect, version 11, the body of this brief contains 4351 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 two significant hearings held in the trial court. Citations to the transcript of the *Daubert/Alberico* hearing held on August 18, 2008, will be with "Tr. {page}."

Plaintiff-Appellant, Connie Lea Gibson Andrews, Individually and as Personal Representative of Tommy Lindell Andrews, Deceased, files this Reply Brief.

SUMMARY OF THE REPLY

Trial courts should not resolve disputed fact issues on summary judgment, exclude expert testimony because of alleged imperfections in the underpinnings of their opinions, or weigh the evidence or pass on the credibility of the witnesses. Here, the trial court did all of the above. And, it did so while granting summary judgment on a ground not asserted by Defendants.

The trial court's disposition of this case was simply a summary bench trial, in which the court considered conflicting expert testimony, excluded one side's experts, and then declared the other side the winner. The court's exclusion of the Plaintiffs' evidence was an abuse of discretion. Its resolution of disputed fact issues on summary judgment was error. Reversal and remand is proper so that a jury can weigh the experts' conclusions and resolve the genuine fact issues that exist.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY BASED SUMMARY JUDGMENT ON A GROUND NOT RAISED BY DEFENDANTS.

Rule 1-007 requires that summary judgment motions "state with particularity the grounds therefor." Rule 1-007(B)(1) NMRA. "The ... purpose of 1-007(B) is to

inform a party of the basis for his opponent's motion." *Nat'l Excess Ins. Co. v. Bingham*, 106 N.M. 325, 327, 742 P.2d 537, 539 (N.M. Ct. App. 1987). "Courts should ensure compliance with Rule 1-007, otherwise the purpose and intent ... will be 'whittled away and become meaningless.'" *Id.*

Here, Plaintiff sued for wrongful-death, asserting her husband had AML, which caused his death, and which resulted from his exposure to benzene.[1] RP 372. In their motion, Defendants did not assert that benzene does not cause AML. Rather, they challenged Plaintiff's medical expert for: (1) having no plausible theory to support causation; and (2) being unable to show a link between the benzene contained in gasoline and Liquid Wrench to the disease which caused his death. RP 1609.

Because it is undisputed benzene exposure in sufficient amounts causes AML, the only issue properly before the trial court on summary judgment was whether Lindell Andrews' AML and resulting death were caused by his exposure to benzene. Thus, to defeat summary judgment, Plaintiff was required only to create a fact issue as to whether Lindell was exposed to sufficient amounts of benzene to cause his AML.

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[1] It is undisputed that Lindell had AML. RP 2492, 2538; Tr. 100, 264. And, it is undisputed that significant exposures to benzene can cause AML. RP 1817, 2538; Tr. 56-57, 77.

On appeal, Defendants do not address the dispositive issue – whether Lindell's AML was caused by benzene. Instead, Defendants continue to argue Plaintiff's expert should not have been permitted to testify about whether Lindell had RARS, which Defendants assert is not causally related to benzene. RP 1608.

Whether Lindell had RARS is a red herring. Defendants did not contend in their summary-judgment motion that Lindell's AML was not caused by benzene. Instead, in their motion to strike, Defendants challenged Dr. Gardner's methodology and conclusions about whether Lindell had RARS. RP 1713 *et seq.* As set forth above, whether Lindell had RARS is irrelevant to the issue of whether his benzene exposure caused his AML; consequently, the trial court granted summary judgment on a ground Defendants did not specify in their motion.

That the trial court based summary judgment on an unspecified ground is revealed in the court's conclusions of law. There, the court concluded:

* Dr. Gardner's testimony about whether Lindell had RARS was unreliable. RP 5324;

* There is no reliable evidence that exposure to benzene causes RARS. RP 5325;

* There is no reliable evidence to support that RARS, as a precursor to AML, is linked to benzene exposure. RP 5325.

Based upon those three irrelevant conclusions regarding RARS, the trial court concluded"Dr. Gardner's testimony that benzene caused the disease from which Mr. Andrews died — [AML] – is not reliable." RP 5325. It is apparent the court based its summary judgment on the premise that Plaintiff was required to adduce evidence that benzene caused RARS. But, Plaintiff's claims are not predicated on the premise that Lindell died from RARS. Plaintiff did not claim that Lindell's benzene exposure caused RARS, or that RARS ultimately resulted in Lindell's AML and death.

Nevertheless, in granting summary judgment, the trial court expressly found that "there is no reliable scientific evidence ... benzene exposure ... cause[s] RARS." RP 5321. Thus, the trial court based its summary judgment on a finding that is irrelevant to the dispositive issue in this case – whether there is reliable evidence that benzene causes AML.

Because the trial court based its summary judgment on a ground not raised by Defendants, and on a premise upon which Plaintiff's claims were not predicated, summary judgment was improper. *See Williams v. Stewart*, 2005-NMCA-061, ¶27, 137 N.M. 420, 427-28, 112 P.3d 281, 288-89 (summary judgment improper if premised on theory not relied upon by plaintiffs as a basis of recovery). Reversal and remand for this reason alone is proper.

II. THE TRIAL COURT'S EXCLUSION OF PLAINTIFF'S EXPERTS WAS AN ABUSE OF DISCRETION.

A. The proper focus of Rule 702.

Under Rule 702, "the proper focus is whether the expert testimony is competent; then the trier of fact has the discretion to evaluate expert testimony just like any other admissible evidence." *State v. Alberico*, 116 N.M. 156, 177, 861 P.2d 192, 212-13 (N.M. 1993). The Rules "do not require clairvoyance or omnipotence from experts," but only that the experts' testimony is "based on a well-recognized scientific principle or discovery . . . capable of supporting opinions based upon a reasonable probability rather than conjecture." *Id.*

"The requirement of being reliable enough to constitute a factual basis for underlying an expert's assumption, however, is not particularly onerous." *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 2009 WL 3672495 *10 (D. N.M. Sept. 29, 2009). Reliability is demonstrated by showing the knowledge offered is "more than speculative belief or unsupported speculation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993). Certainty, however, is not required. *Id.*

Indeed, "a review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." *Id.* "Vigorous cross-

examination, presentation of contrary evidence, and careful instruction of the burden of proof are [still] the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

B. Defendants' challenges to the plaintiff's experts' opinions do not provide a basis for the exclusion of the experts' testimony.

Defendants' attacks on Plaintiff's experts, Dr. Gardner (the hematologist) and Dr. Nicas (the industrial hygienist), may provide a proper basis for "vigorous cross-examination," but they do not provide a proper basis for exclusion.

Dr. Gardner.

The majority of Defendants' attacks on Dr. Gardner focus on his opinions relating to whether Lindell had RARS. The attacks fail for two reasons. First, as demonstrated above, whether Lindell had RARS is irrelevant to the dispositive issue – whether Lindell's AML was caused by benzene. Second, Defendants' complaints about Dr. Gardner's conclusions go to the weight of his testimony, not to its admissibility.

For example, Defendants attack Dr. Gardner's rejection of RARS as a diagnosis because they allege he originally rejected the diagnosis without reviewing bone marrow slides, and then reviewed the slides in a manner they contend was unreliable. ANSWER BRIEF at p. 9. Dr. Gardner's methodology, however, is

consistent with the WHO classification for diagnosing RARS. Dr. Gardner counted the ringed sideroblasts and found they did not meet the 15% threshold for a WHO classification of RARS. RP 4710, 5318; *see also* Natelson Ex. 1, p. 69.

Nevertheless, Defendants contend he should have counted ringed sideroblasts "on representative fields" as Drs. Natelson and Irons did. ANSWER BRIEF at p. 11-12. The problem with Defendants' argument, however, is that Defendants have acknowledged the WHO classification count does not endorse the methodology their experts used; nor does it reject the methodology used by Dr. Gardner. ANSWER BRIEF at p. 15. Thus, the experts simply disagree on the appropriate method of counting ringed sideroblasts.

A disagreement among experts is not surprising. It is surprising, however, that the trial court adopted Defendants' methodology as the *only* proper methodology when WHO has not done so. And, it is even more surprising that the trial court excluded Dr. Gardner's testimony simply because his methodology was different than Defendants' experts' methodology.

While Defendants may criticize the alleged infirmities in Dr. Gardner's counting of the sideroblasts, those alleged infirmities go to the weight of the evidence, not its admissibility. *State v. Anderson*, 118 N.M. 284, 299, 881 P.2d 29, 44 (N.M. 1994). Because Defendants' complaints go to the weight of Dr. Gardner's

evidence, Defendants are entitled to "vigorously cross-examine" Dr. Gardner and to present their own experts "to demonstrate why the results were unreliable, the procedures flawed, and the evidence not infallible." 118 N.M. at 302, 881 P.2d at 47.[2]

In cases like this, however, where there is an unresolved controversy over how the sideroblasts should be counted, exclusion of an expert is improper. *See State v. Duran*, 118 N.M. 303, 305-06, 881 P.2d 48, 50-51 (N.M. 1994) (ongoing controversy over how DNA typing evidence should be calculated is a dispute that goes to weight, not admissibility). Indeed, the "battle of the experts" over the proper counting methodology is precisely the kind of dispute that can "properly take place before the jury." *Id.*

Defendants' attacks on Dr. Gardner are "more properly made to the jury, rather than in asking the Court to preclude" Dr. Gardner from testifying. *See Guidance Endodontics*, 2009 WL 3672495 *10. The trial court erred in excluding Dr. Gardner simply because it preferred the Defendants' expert's methodology. *Chemical, Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003) ("Rule 702 ... is not intended

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[2] *See also Newman v. State Farm Fire & Cas. Co.*, 290 Fed.Appx. 106, 113 2008 WL 2967663 *7 (10th Cir. 2008) (affirming the cross-examination, the presentation of contrary evidence, and instructions regarding the burden of proof are the appropriate means of attacking evidence).

to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.").[3]

Defendants next attempt to support the trial court's disposition by advancing several arguments they did not make in the trial court. For example, Defendants assert Dr. Gardner failed to make a reliable causal connection between Lindell's exposure to benzene in gasoline and/or Liquid Wrench and his AML. ANSWER BRIEF at p. 18. In the trial court, however, Defendants attacked Dr. Gardner's opinions about RARS; they did not attack his opinions about AML. *See* RP 1722 (Motion to Exclude at p. 10, "There is No Reliable Scientific or Medical Literature Demonstrating that Exposure to Benzene is a Cause of RARS"; complaining Dr. Gardner "is wholly unfamiliar with ... literature regarding any ... causal association between exposure to benzene and RARS."); RP 1729 (Motion to Exclude at p. 17, "Gardner ... is not familiar with any studies where the persons exposed to benzene as

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[3] *See also Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1518 (10th Cir. 1996) (if there is a logical basis for an expert's opinion, alleged weaknesses in the underpinnings of the opinion go to weight, not admissibility); *Primrose Oper. Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004) (questions relating to bases of expert's opinion generally affect weight to be assigned to opinion, rather than its admissibility); *Kudabeck v. Kroger Co.*, 338 F.3d 856, 861-62 (8th Cir. 2003) (attacks regarding completeness of methodology go to the weight and not the admissibility); *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 184 (6th Cir. 2009) (alleged problems with expert's methodology do not warrant total exclusion).

a constituent in gasoline ... developed MDS at a statistically significant excess rate."). Because Defendants did not challenge Dr. Gardner's conclusions about Lindell's AML, the exclusion of his testimony and summary judgment on an unspecified ground is improper.

Finally, Defendants argue Dr. Gardner's testimony was properly excluded because he did not "eliminate other possible causes" of Lindell's disease, which Defendants contend Dr. Gardner was required to do before testifying about causation. ANSWER BRIEF at p. 27. There are several problems with that assertion.

First, under New Mexico law, "there may be more than one proximate cause of an injury." *Andrews v. Saylor*, 2003-NMCA-132, ¶ 23, 134 N.M. 545, 552, 80 P.3d 482, 489. A proximate cause need not be the *only* cause of an injury. *Id.*

Second, an expert's alleged failure to rule out all possible alternative causes does not render the testimony inadmissible. *Goebel v. Denver and Rio Grande Western R.R. Co.*, 346 F.3d 987, 998-99 (10th Cir. 2003); *McDonald v. North American Ins. Co.*, 224 Fed.Appx. 761, 767, 2007 WL 867190 * 4 (10th Cir. 2007). To testify appropriately about causation, an expert is only required to consider an alternative cause.[4] *See Sanchez v. Zanio's Foods, Inc.*, 2005-NMCA-134, ¶ 50, 138

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[4] Even so, Dr. Gardner considered and ruled out lupoid hepatitis as a possible cause. RP 2503. And, Defendant's own expert, Dr. Natelson, acknowledged that Lindell's bone marrow was abnormal before he was prescribed Plaquenil, the

N.M. 555, 568, 123 P.3d 788, 801. Contrary to Defendants' assertions, experts are not required to "categorically exclude each and every possible alternative cause"; that "would mean that few experts would ever be able to testify." *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1125 n. 6 (10th Cir. 2004). In short, Dr. Gardner's alleged failure to rule out other possible causes is not a proper basis for the exclusion.

Dr. Nicas.

Defendants argue Dr. Nicas's testimony should not be considered because his opinions regarding Lindell's exposure are based solely on the alleged "sham" affidavits of Terry Andrews. In the trial court, Defendants argued Terry's affidavits, one of which was tendered before Defendants moved for summary judgment, were "sham" affidavits. RP 1627. The trial court agreed. RP 5323. Defendants' arguments are baseless, and the trial court's conclusions are erroneous.

An affidavit may not be disregarded solely because it conflicts with the affiant's prior sworn statements. *Law Co., Inc. v. Mohawk Constr. & Supply Co., Inc.*, 577 F.3d 1164, 1169 (10th Cir. 2009). Although trial courts have discretion to disregard a contrary affidavit, filed in an attempt to create a sham fact issue, the Tenth Circuit has expressly noted that "cases in which an affidavit raises but a sham issue [are] unusual." *Id.*

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other cause Defendants contend was a possible cause of Lindell's disease. Tr. 35.

In determining whether an affidavit raises only a sham issue, courts consider whether the affiant: (1) was cross-examined on the matter in controversy during earlier testimony; (2) had access to the pertinent evidence at the time of the earlier testimony; and (3) attempts to explain earlier confusion in the later affidavit. *Id.* Here, a timeline of Terry's testimony illustrates his affidavits were not given only as an attempt to create a sham fact issue.

* 12/13/07 - Terry gives his deposition. RP 1704.

* 05/08/08 - Terry gives affidavit testimony to provide more specific dermal exposure information requested by Dr. Nicas. RP 4087; 1944-45.

* 07/02/08 - Defendants move for summary judgment.

* 07/22/08 - Terry gives affidavit testimony to clarify a single statement he made in his deposition testimony. RP 4089.

Terry provided his first affidavit two months before Defendants moved for summary judgment. Nevertheless, Defendants argued it was created only to raise a sham issue. RP 1627. As support, Defendants cite *Rivera v. Trujillo*, 1999-NMCA-129, 128 N.M. 106, 990 P.2d 219. *Rivera* provides no support for Defendants' arguments or the trial court's conclusions.

In *Rivera*, the plaintiff filed the affidavit the trial court found to be a sham after the plaintiff had been deposed and after the defendant had moved for summary

judgment. 1999-NMCA-129, ¶ 1, 128 N.M. at 107, 990 P.2d at 220. Here, Terry filed the first affidavit, which detailed Lindell's exposure, in response to a request by Dr. Nicas and two months before Defendants moved for summary judgment. Thus, there is no reason to believe Plaintiff manufactured Terry's affidavit testimony for the sole, improper purpose of creating an issue of fact to defeat summary judgment.

Rivera provides no support for the novel proposition that trial courts can strike an affidavit filed before a motion for summary judgment is filed, or strike an affidavit that was filed for a reason other than to defeat a summary-judgment motion. Indeed, Defendants have not cited a single case that supports the proposition that trial courts can disregard as a sham an affidavit that is filed months before the summary-judgment motion at issue.

Moreover, a reading of Terry's affidavit reveals that it does not directly contradict his prior deposition testimony. For example, in his deposition, Terry testified his father used Liquid Wrench at least four or five times a week, and sometimes up to "four or five times a day." RP 1711. In his first affidavit, Terry did not attempt to embellish or increase the number of times his father used Liquid Wrench. Rather, he testified consistently that his father used Liquid Wrench "at least 4 times a week." RP 4088. Terry's affidavit did not conflict with his deposition.

Likewise, in his deposition, Terry *estimated* that he got one 16-ounce can of Liquid Wrench per month, which would total 192 ounces a year.[5] RP 1712. That estimation included Liquid Wrench used by Terry and his dad, but not most of the other workers because they did not work any of the equipment in the field. RP 1712. In his first affidavit, Terry estimated his dad used one ounce of Liquid Wrench four times a week for 48 weeks during the year. RP 4088; *see also* RP 1654. That would total 192 ounces a year, which is the same amount of Liquid Wrench Terry estimated buying. Thus, Terry's affidavit does not directly contradict his deposition testimony.

Terry also testified in his deposition that he recalled actually "seeing" his dad cleaning off a part in a pan five or six times a year.[6] RP 2696. Then, in his first affidavit, Terry testified that, "once a week especially dirty parts were cleaned by soaking the parts in a tray." RP 4087-88. There is no conflict between his deposition and his affidavit because Terry did not testify that he actually saw his dad clean off a part once a week; he testified that his dad was required to clean parts once a week.

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[5] Defendants misleadingly assert Terry testified to a total use of 150 ounces a year in his deposition. ANSWER BRIEF at p. 33. That assertion flatly ignores Terry's estimate of purchasing 12, 16-ounce cans per year, for a total of 192 ounces.

[6] Defendants distort Terry's deposition testimony in their brief, asserting Terry stated in his deposition he thought it might be 5-6 times per year that his dad cleaned parts in a tray, when Terry testified that he actually saw his dad clean parts in a tray 5-6 times per year. ANSWER BRIEF at p. 33.

Id. Put simply, Terry did not have to actually witness his dad's cleaning parts to know that he did so.

There is no material contradiction between Terry's deposition testimony and the testimony he provided in his first affidavit. Thus, Terry's affidavit is not the type that will support a conclusion that his pre-summary judgment affidavit was a sham. *Rivera*, which involved an affiant's attempt to "nullify [prior] unambiguous admissions under oath" to create a fact issue, does not support the exclusion of Terry's first affidavit, which was filed months before Defendants' motion for summary judgment, and which affidavit does not directly contradict Terry's prior deposition testimony. Considering the timing of the first affidavit, and considering that it does not expressly contradict Terry's prior testimony in any material way, there is no basis for concluding that the affidavit was tendered to create a sham fact issue. *See American Commerce Ins. Co. v. Bachicha*, 256 F.Supp. 1219, 1222 (D. N.M. 2003). The trial court erred in concluding it could not be considered by Dr. Nicas.

With regard to the second affidavit,there is also no basis for concluding that it was a sham. The second affidavit provides no testimony that is directly contrary to Terry's prior deposition testimony. It merely stated Terry did not remember his father

using a container of Liquid Wrench labeled "deodorized."[7] RP 4089. Terry was not specifically asked, or cross-examined on that issue. Thus, the sham-affidavit doctrine was never triggered, *see Law v. Mohawk*, 577 F.3d at 1169, and the trial court erred in concluding the second affidavit could not be considered by Dr. Nicas.

In addition to attacking Dr. Nicas for relying on affidavits Defendants contend were a sham, Defendants also advance several attacks on Dr. Nicas's methodology. For example, they criticize his adding inhalation-exposure estimates to dermal-exposure estimates as "inherently unreliable." ANSWER BRIEF at p. 35. They criticize his "flux" estimates of how materials are absorbed through the skin and travel into a person's body. *Id.* at p. 36. They criticize the flux rate Dr. Nicas used. *Id.* at p. 37. And, they challenge Dr. Nicas's assumption that damaged skin, like that Lindell exhibited, results in increased dermal exposure. *Id.* at p. 38.

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[7]Footnotes 1 and 3 of Radiator's and USS's Answer Brief discuss newly-discovered documents regarding the formulations of Liquid Wrench. RSC/USS ANSWER BRIEF at 2, 5. Although Defendants claim this evidence is "indicative that in the 1950s the Liquid Wrench likely did not contain benzene," Defendants fail to mention that the documents provide some evidence that beginning in 1961, the "deodorized version" of Liquid Wrench likely contained raffinate. Defendants also fail to mention the "newly discovered" documents and Defendants' conduct during discovery are the subject of matters pending in the Eastern District of Texas in *Oakley v. Air Products & Chemicals*, No. 2:07-CV-351 where the court is considering holding RSC in contempt for violating an order and sanctioning USS for other discovery abuses. This information, of course, is not in the record in this case.

While Defendants criticize Dr. Nicas's calculations and assumptions, there was a valid factual basis for them. Dr. Nicas expressly considered Terry's affidavit and several depositions that were taken in arriving at his exposure estimates. RP 1653. Dr. Nicas calculated Lindell's exposure to benzene from gasoline separately from his exposure to benzene in Liquid Wrench. RP 1653, 1658. Dr. Nicas did not assume that either gasoline or Liquid Wrench was 100% benzene, but used reliable data to calculate the percentage of benzene that each contained before expressing an opinion about Lindell's total exposure. RP 1654-55, 1658. And, Dr. Nicas calculated Lindell's inhalation exposures and dermal exposures separately because Lindell had both dermal contact and inhalation exposure. RP1655-56, 1658-59.

While Defendants criticize Dr. Nicas's methodology, he based his methodology on accepted scientific techniques. For example, Dr. Nicas used a flux rate taken from literature, which was perfectly appropriate. RP 1655; *see also* Spencer Ex. 8, p. 320 (expressly recognizing that the flux rate can be determined empirically, taken from literature, or computed). And, Dr. Nicas correctly assumed that damaged skin absorbed benzene more rapidly than undamaged skin. RP 1655.

Not only were Dr. Nicas's assumptions reliable, they were not aggressive. For example, Dr. Nicas used a flux rate of .4 when the parameter ranged from .25 - 1.85. RP 1655. Because he was not provided the size of the tray that Lindell used to soak

parts in gasoline, Dr. Nicas "conservatively assumed a small surface area." RP 1657. And, when calculating dermal exposure, he reduced the benzene contact with the skin because it evaporated while Lindell used it. RP 1659-60.

After considering Dr. Nicas's methodology, it is apparent that the knowledge he offered satisfies *Daubert/Alberico* because it is "more than speculative belief or unsupported speculation." 590 U.S. at 590. All of the alleged infirmities of which Defendants complain go to the weight of Dr. Nicas's testimony, not its admissibility. *See Anderson*, 118 N.M. at 299, 881 P.2d at 44.

Defendants are entitled to attack Dr. Nicas at trial about his assumptions. *Guidance Endodontics*, 2009 WL 3672495 at *10. Defendants are entitled to "vigorously cross examine" Dr. Nicas about his methodology; and, they are entitled to present their own experts to "demonstrate why the results were unreliable, the procedures, flawed, and the evidence not infallible." *Anderson*, 118 N.M. at 302, 881 P.2d at 47.

What Defendants were not entitled to is the exclusion of Dr. Nicas's testimony simply because the trial court believed Defendants' version of the facts rather than Plaintiff's. *Chemical*, 317 F.3d at 1392; *Compton*, 82 F.3d at 1518. As this Court expressly recognized, "different experts arrive at different numbers using the various methods," but this conflicting testimony is properly "placed before the jury, which

will be free to believe or disbelieve any of the testimony before it." *Duran*, 118 N.M. at 306, 881 P.2d at 51. The trial court erred in excluding Dr. Nicas's testimony.

CONCLUSION

"Summary judgment is an extreme remedy that should be imposed with caution." *Ocana v. American Furniture Co.*, 135 N.M. 539, 549, 91 P.3d 58, 68 (2004). A trial court should not summarily cut to a dispositive issue without a trial on the merits, even if the court believes the ultimate disposition is foreseeable. *Bergerson Plumbing & Heating, Inc. v. Poole*, 111 N.M. 525, 528, 807 P.2d 223, 226 (1991).

But that is precisely what the trial court did in this case. It heard conflicting expert testimony, chose to believe Defendants' experts instead of Plaintiff's, believed Defendants would ultimately prevail and declared Defendants the winner. In doing so, the trial court erred. *Montoya v. Kirk-Mayer, Inc.*, 120 N.M. 550, 554-55, 903 P.2d 861, 865-66 (N.M. Ct. App. 1995).

For all of these reasons and for those set forth in Plaintiff's/Appellant's Brief in Chief, the judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Lance Lubel (by permission)

Lance H. Lubel
J. Robert Black
Heard, Robins, Cloud & Lubel, LLP
3800 Buffalo Speedway, Suite 550
Houston, Texas 77098
713.650.1200
and
300 Paseo de Peralta, Suite 200
Santa Fe, New Mexico 87501
505.986.0600

&
MARION J. CRAIG, III, P.C.
Marion J. Craig, III
New Mexico State Bar No. 586
601 West 2nd St., Ste. 8
Roswell, NM 88201
(575) 622-1106

STEVEN L. TUCKER
Tucker Law Firm, PC
520 Agua Fria St.
Santa Fe, NM 87501
(505) 982-3467

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Richard E. Olson and Rebecca Nichols Johnson
Hinkle, Hensley, Shanor & Martin, L.L.P.
Post Office Box 10
Roswell, NM 88202-0010

Phillip S. Sykes, Lea Ann Smith & Tim Gray
Forman, Perry, Watkins, Krutz & Tardy, L.L.P.
Post Office Box 22608
Jackson, MS 39225-2608

Robert P. Scott
Abrams, Scott & Bickley, L.L.P.
700 Louisiana, Suite 4000
Houston, Texas 77002-2727

James M. Riley, Jr. and Stacy K. Yates
Coats, Rose, Yale, Ryman & Lee, P.C.
3 East Greenway Plaza, Suite 2000
Houston, Texas 77046

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