IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
CASE NO. 29, 120

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

Plaintiffs/Appellants,

vs.

AMERICAN SUPERIOR FEEDS, INC., et al.

Defendants/Appellees.

APPELLANTS' OPENING BRIEF

ON APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO, COUNTY OF GRANT
HONORABLE KEVIN SWEAZEA

JOHN S. THAL
CLIFFORD K. ATKINSON
ELIZABETH LOSEE
201 Third Street, NW, Suite 1850
Albuquerque, NM 87102
505-764-8111

Attorneys for Defendant-Appellee

LAURENCE M. BERLIN (7097)
P.O. BOX 685
RESERVE, NM 87830
575-533-6688

BRADLEY L. BOOKE *pro hac vice*
MORIARITY, BADARUDDIN & BOOKE
8 East Broadway, Suite 312
Salt Lake City, UT 84111
801-326-8090
801-521-0546 fax

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

10th Circuit State Cases

Other State Cases

Federal Cases

Rules

Treatises

Statement of Compliance

Pursuant to Rule 12-213A(1)(c) NMSA the body of Plaintiffs' Brief In Chief, inclusive of headings, footnotes, quotations and all other text, is 10,888 words in length, typed in proportionally-spaced Times New Roman typeface.

I. SUMMARY OF PROCEEDINGS

Joey and Paula Parkhill, on their own behalf and on behalf of their minor children, Victoria Parkhill and Rebekah Parkhill appeal from three separate decisions of the district court which (1) excluded James Dahlgren, M.D. from testifying [RP 3247-3248 – *Order On Defendant's Motion In Limine to Exclude Plaintiffs' Experts Gregory Koury, M.D. and James Dahlgren, M.D.*]; (2) limited Gregory Koury, M.D. to testimony of care and treatment [RP 4406-4410 – *Order On Defendant's Motion for Reconsideration Of Ruling On Dr. Koury and For Order Limiting His Testimony to Care and Treatment*]; and (3) dismissed Joey Parkhill's health claims. [RP 4400-4405 – *Order On Defendants' Motion to Dismiss Joey Parkhill's Health Claims Based Upon Plaintiff's Repeated and Willful Discovery Abuse*]. Dr. Koury was and is Plaintiffs' treating family physician. Dr. Dahlgren was and is a retained expert in the fields of environmental medicine and toxicology. Joey Parkhill suffered the greatest physical harms of the Plaintiffs.

The district court's decisions occurred during long and protracted litigation that began in March of 2005. Plaintiffs were harmed by toxically adulterated horse feed, contaminated during Defendants' manufacturing process, and subsequently sold

to Plaintiffs. [RP 1-35 – *Complaint*; RP 146-180 – *Amended Complaint*].[1] In October 2008, Plaintiffs settled with Defendant for the deaths, abortions, and lameness caused to approximately 50 of their American Quarter Horses. The district court entered final judgment on November 6, 2008. [RP 4816-4818 – *Stipulated Motion for Entry of Final Judgment*; RP 4819-4820 – *Final Judgment, Dismissal With Prejudice*]. The settlement between the parties reserved Plaintiffs' right to pursue claims for damages related to their personal health. Consequently, this appeal ensues.

Proceedings specific to the two appealed orders pertaining to Dr. Koury and Dr. Dahlgren began in February 2007. Defendant filed a motion to preclude testimony by these experts' on causation regarding the Parkhills' medical problems resulting from exposure to the monensin tainted feed. [RP 1527-1714 – *Motion to Exclude Plaintiffs' Experts Gregory Kourey, M.D. and James Dalhgren, M.D. and Request for Daubert Hearing Pursuant to Rule 11-104*]. Plaintiffs filed their opposition on March 20, 2007, arguing Dr. Koury's differential diagnosis analysis is a well-established medical/scientific method, that Dr. Dahlgren had carefully studied the available product data and scientific

[1] The feed contained monensin, an antibiotic intentionally added to cattle feed, but lethal to horses and scientifically proven to damage human cells and indicative for permanent tissue damage, skin and respiratory irritation, heart muscle damage, and heart arrhythmias. [RP 2089-2100, *Plaintiffs' Partial Evidentiary Submission and Opposition to Defendants' Motion to Exclude Testimony of Dr. Koury and Dr. Dahlgren*].

literature, that at least five scientific studies demonstrated monensin toxicosis on human cells, and *all* of the veterinary and medical doctors deposed agreed on the mechanism by which monensin damages mammalian cells. [RP 2067-2121, *Plaintiffs' Partial Evidentiary Submission and Opposition*].

On April 2, 2007, Defendant filed their *Reply In Support of Motion.* [RP 2800-2822]. Subsequently, on May 15-16, 2007, a *Daubert* hearing was conducted at which Dr. Koury, Dr. Dahlgren, Dr. Fisher (Defendant's toxicology expert), Dr. Oehme (Plaintiffs' veterinary toxicologist), and Dr. Behnke (Plaintiffs' feed mill expert) testified. Closing arguments were submitted by both parties on June 12, 2007, with replies to closing arguments submitted June 18-19, 2007. [RP 2908-2968 – *Plaintiffs' Closing Argument RE: "Daubert/Alberico" Motion*; RP 2971-3161 – *Defendant's Closing Arguments On Motion*; RP 3162-3168 – *Defendant's Reply to Plaintiffs' Closing Argument On Motion*; and RP 3169-3175 – *Plaintiffs' Reply to Closing Argument RE: "Daubert/Alberico Motion*].

On August 7, 2007, the district court ordered Dr. Koury's testimony, as Plaintiffs' treating physician, admissible while Dr. Dahlgren's testimony was precluded. [RP 3247-3248 – *Order on Defendant's Motion*]. The rationale underlying this decision was previously explained during the court's telephonic *Judge's Ruling.* [Tr. District Court's Ruling July 13, 2007]. The court concluded Dr.

Koury's testimony should be analyzed differently given he was a treating physician consulted by Plaintiffs for medical diagnosis, as opposed to merely being retained for litigation. The court found Koury qualified as a doctor; the differential diagnosis methods he employed reliable; and his testimony helpful to the trier of fact. [Tr. Ruling July 13, 2007 p. 3-4,7]. Meanwhile, Dr. Dahlgren was deemed unqualified and his methods inadequate pursuant to *Daubert-Alberico* criteria.

Defendant filed a motion for reconsideration on August 15, 2007, seeking an order limiting Dr. Koury's testimony solely to care and treatment of the Plaintiffs. [RP 3325-3353 – *Motion for Reconsideration of Ruling on Dr. Koury and for Order Limiting His Testimony to Care and Treatment*]. Plaintiffs countered – in addition to the court's ruling being correct regarding Dr. Koury, Defendants' assertions of inadequate general causation evidence were unfounded and that differential diagnosis – as conducted by Dr. Koury – was legally established as reliable. In addition, the Federal Judicial Center's Reference Manual, which Defendants relied upon to refute differential diagnosis, to the contrary, deemed differential diagnosis a reliable scientific method. [RP 3363-3550 – *Opposition to Defendant's Motion for Reconsideration of Ruling On Dr. Koury*]. Further oral argument ensued in April 2008. [Tr. April 2, 2007; Tr. April 3, 2007].

On September 2, 2008 the district court reversed its prior ruling and limited Dr. Koury's testimony, applying *Daubert* criteria to a treating

physician's hands-on diagnosis. [RP 4406-4440 – *Order On Defendant's Motion for Reconsideration*]. The order was a verbatim adoption of Defendant's proposed order wherein Dr. Koury was precluded from giving any testimony of monensin exposure as the cause of Plaintiffs' injuries.

Proceedings specific to the order dismissing Joey Parkhill's health claims began in August of 2007. Defendants filed their *Motion to Dismiss Joey Parkhill's Health Claims Based Upon Plaintiffs' Repeated and Willful Discovery Abuse* on August 15, 2007 [RP 3251-3324]. Allegedly, Plaintiffs had failed to disclose a prior injury Mr. Parkhill had sustained. Plaintiffs responded September 9, 2007 with their *Opposition to Defendants' Motion to Dismiss.* [RP 3553-3588]. Plaintiffs countered that the alleged oversight of a "pre-existing condition" was actually disclosed to Defendants in the original course of discovery, no prejudice had occurred to Defendants, the 18-month delay in "discovery" of the "pre-existing condition" was due to Defendants' lack of diligence, and the previous injury was completely unrelated to the ailments Mr. Parkhill suffered via monensin exposure – not to mention he had fully recovered from what amounted to a post-traumatic concussion seven years prior. [RP 3553-3557].

Plaintiffs concurred Mr. Parkhill erroneously omitted, during original discovery, that a lawsuit ensued from this concussion incident. He had believed it

was basically an insurance claim. Yet, this omission was in good faith and neither this act nor the supposedly subverted pre-existing condition qualified as willful and deliberate abuse of the discovery process. [RP 3556]

On October 5, 2007, Defendants filed their *Reply In Support of Defendants' Motion to Dismiss Joey Parkhills Health Claims* [RP 3592-3606] which was followed by *Errata to Plaintiffs' Opposition to Dismiss Joey Parkhill's Health Claims*, filed October 11, 2007. [RP 3607-3615]. Eight months later, *Plaintiffs' Sur-Response to Defendants' Motion to Dismiss Joey Parkhill's Health Claims and Motion to Strike and for Sanctions* was filed on June 26, 2008. [RP 3778-3800]. Plaintiffs' filing reiterated that original disclosure of the "pre-existing condition" had occurred and simultaneously disclosure of the treating hospital had occurred. An accompanying medical release form was also provided to Defendants. Furthermore, Defendants' claim that pertinent medical records had been destroyed, was patently false. Given the false allegations and general misstatement of the facts by Defendants, Plaintiffs also moved to strike and sought sanctions against Defendants.

Oral argument on Defendants' motion to dismiss Joey Parkhill's health claims occurred on July 8, 2009. [Tr. July 8, 2008]. Following this hearing, *Defendant AC-NM's Opposition to Plaintiffs' "Sur-Response"* was filed on August 25, 2008 [RP 4361-4394]. The trial court issued its order dismissing Joey Parkhill's health claims on September 2, 2008. [RP 4400-4405].

II. FACTS RELEVANT TO ISSUES

A. FACTS PERTINENT TO DR. KOURY AND DAHLGREN'S EXCLUSION

In April of 2004, Plaintiffs operated horse breeding operations in Grant and Hildago Counties with a satellite location in Chaves County. Plaintiffs had approximately 50 registered American Quarter Horses. [RP 153]. On or about April 17, 2004, Plaintiff Joey Parkhill purchased two tons of Defendants' "Rancher's Choice" horse feed. It was fed to the horses in the same condition as received from Defendants. [RP 154-155]. Within two weeks, by May 2, 2004, nine horses had died and mares had begun to spontaneously abort; all due to what was later identified as monensin toxicity. [RP 154-156, 158]. As soon as the Parkhills realized the feed was suspect, they stopped its use.

The New Mexico Department of Agriculture (NMDA) immediately sent investigators whose analysis confirmed the presence of prohibited monensin in the feed. The NMDA investigation also found that there were excessive fines (dust/powder) in the feed sacks. Postmortem veterinary analysis of several of the horses diagnosed death caused by monensin toxicosis. [RP 70-71].

All of the members of the Parkhill family were engaged in feeding their herd. For 12 days, Joey Parkhill fed almost every morning and evening

by lifting sacks onto his shoulder and pouring the feed in front of his face into feed troughs. Mrs. Parkhill helped but, unable to lift the sacks onto her shoulder, poured by means such that the feed and the dusty fines were not quite as close to her face. Similarly, their teenage daughters, Victoria and Rebekah, helped with feedings several times a week. *See* Depositions of Joey Parkhill, Vol. II, p. 44; Paula Parkhill, p. 23; Victoria Parkhill, p. 15; and Rebekah Parkhill p. 15. Supplement to Record Proper.

Monensin's Material Safety Data Sheet (MSDS) warns of its toxicity and the need for respirators and protective clothing during handling. [RP 2098-2100]. These warnings were not communicated to the Parkhills, however, because horse feed is not permitted to contain *any* monensin. Consequently, the Parkhills wore no protective gear as they appropriately assumed the feed was safe. [Dep. JP, Vol. II, 48; Dep. PP 47; and Dep. VP, 20, Supplement to the Record Proper]. Unfortunately, the pouring of feed resulted in feed dust covering the Plaintiffs from head to toe. [Dep. PP, 41, Supplement to Record Proper]. Plaintiffs also handled the feed by hand. Varying symptoms developed within days of exposure to the monensin laced feed: skin rashes, irritated eyes, brittle nails, and diarrhea. Dep. JP, Vol. II, 14-15; Dep. PP, 51-54; Dep., VP, 12-14; Dep. RP, 21-25, Supplement to Record Proper. More ailments developed over time, more problems

developing more severely in Joey first, then in Mrs. Parkhill, with the daughters' remaining mild in relation.

Mr. Parkhill presented to Dr. Koury within weeks of the NMDA confirming monensin contamination in the feed. Thus *began* the process of Dr. Koury making a differential diagnosis of the cause of the Parkhills' symptoms. Before their exposures to monensin, none of the Parkhills were experiencing symptoms akin to their post-exposure ailments. Dep. PP 58; Dep. VP 21; Dep. RP 12. Supplement to Record Proper.

The method utilized by Dr. Koury to determine the Parkhills' monensin toxicosis is detailed in *Plaintiffs' Closing Argument* [RP 2908-2917] and the May 15, 2007 *Daubert* hearing [Tr. May 15, 2005 84-117]. Briefly summarized:

- Mr. Parkhill presented with heart abnormalities, elevated blood pressure, weight gain, shortness of breath, a rash, diarrhea, bilateral ankle swelling, shoulder, arm and chest pains.
- Physical exam and patient history were taken with referral for diagnostic testing.
- History indicated monensin exposure; Dr. Koury read MSDS warning per heart and other injuries via inhalation, ingestion, and skin. Dr. Koury also observed the horses and the similarity between their symptoms and his patients.
- Concerted effort to find other possible causes including numerous clinical and laboratory tests, and a heart biopsy, plus conventional treatments for ailments that should have been effective – if symptoms had conventional causes – were conducted.

- Based on repeated exams, clinical and lab tests, attempts at several modes of treatment, the manufacturer's warnings, and the similarity of the Parkhills' conditions to those warned against; family history based diagnoses and other possibilities ruled out, a diagnosis of "monensin toxicity" was assessed.

Similarly, Dr. Dahlgren's methods utilized to determine the Parkhills' monensin toxicosis, is also detailed in *Plaintiffs' Closing Argument.* [RP 2917-2920] and extensively discussed during the May 15, 2007 and May 16, 2007 *Daubert* hearing. [Tr. May 15, 2007 232-263; Tr. May 16, 2007 267-285]. Briefly summarized:

- Reviews of Dr. Koury's numerous exams, clinical and lab data, and patient's responses to treatments. Evaluated additional set of medical and exposure histories of timing, nature, and extent of monensin exposure, and the onset, nature, and extent of symptoms following exposure.

- Studied the veterinary, scientific, and human medical literature concerning monensin, as well as MSDS, and FDA regulations limiting trace monensin. Utilized studies to evaluate lethal, sub-lethal and non-effect levels of exposure and develop qualitative estimate of exposure; calculating exposure at six times maximum permitted by FDA. Also considered "temporal" and "dose-response" relationships and fact monensin was the only common denominator among the four Parkhills' at onset of illnesses.

As described above, and more completely in portions of the record proper, Dr. Koury performed a classical "differential diagnosis" and

likewise, Dr. Dahlgren performed a "differential diagnosis," but with added environmental and toxicological considerations.[2]

B. FACTS PERTINENT TO DISMISSAL OF JOEY PARKHILL'S HEALTH CLAIMS

Almost seven years before he was exposed to monensin in Defendant's horse feed, Mr. Parkhill received a *head* injury on September 2, 1997. He was helping a friend move a mule. A rope on the mule wrapped around Mr. Parkhill's leg and when the mule lurched, Mr. Parkhill flipped in the air, landed on the side of his jaw, and was rendered unconscious for approximately 11 minutes. He was 28 years old. [RP 3557, 3783 *Plaintiffs' Sur-Response to Motion to Dismiss*]; [Tr. July 8, 2008 438]; [Dep. JP, Vol. II, 18-19, 61-68, also at RP 3564-3568].

Mr. Parkhill's permanent injuries included certain visual, auditory and *memory* impairments. All other sequelae were transient, including headaches, nausea and projectile vomiting, and vertigo. Predictably, it took about three years – until 2000 – for his condition to stabilize and for the transient symptoms to resolve fully. [RP 3783-3784 *Plaintiffs' Sur-Response*]; [RP 3798-3799 University Hospital Discharge Summary, 10/9/07], and [RP 3806-3808 Aff. of Phyllis Tulk, FNP].

---

[2] *See also,* Dahlgren Deposition, at 101-102, 110, 111-112, Supplement to Record Proper and Dr. Dahlgren's evaluations of Joey, Paula, Victoria, and Rebekah Parkhill [RP 2538-2597].

Principal diagnosis and treatment of the head injury was at University of New Mexico Health Sciences Center (University Hospital) in Albuquerque during an in-patient admission to the neurology service from October 7-9, 1997, for a "full evaluation" of a suspected basilar skull fracture. Also, Mr. Parkhill's blood pressure, heart rate and respirations were monitored throughout the admission. [Tr. July 8, 2008 440].

Mr. Parkhill was discharged with diagnoses of "post concussion syndrome" and "posttraumatic headache." His only medication at discharge was Motrin. His cardiovascular and respiratory systems were noted to be *normal*, as were his blood work (CBC), electrolytes and urinalysis. [RP 3783 Plaintiffs' Sur-Response]; [Tr. July 8, 2008 440-441]; [RP 3798-3799 University Hospital Discharge Summary, 10/9/07]; and Dr. Carlow's letter report to Dr. Sidd, 10/7/97, Supplement to Record Proper.

Additional medical care for the head injury included the emergency room at Eastern New Mexico Medical Center (ENMMC), where Mr. Parkhill was examined and treated but not admitted, and from which he was referred to his long-time Family Nurse Practitioner, Phyllis Tulk, for follow up. Nurse Tulk examined him and referred him to ophthalmologist Richard Sidd, M.D., who, upon examination referred him to Dr. Carlow at University Hospital. [RP 3814-3820 ENMMC Medical Records]; [Tr. July 8, 2008

439-440]; [RP 3806-3808 Aff. of Phyllis Tulk, FNP]; and Records of Nurse Tulk, Supplement to Record Proper.

The claim filed on Mr. Parkhill's behalf against his friend's (the mule owner's) homeowner's insurance included boilerplate claims of disabling injuries. In the course of resolving that claim, both sides performed Independent Medical Examinations during 1998 and 1999. *None* of their reports indicate the presence of *any* of the conditions for which Mr. Parkhill has been treating since his exposure to monensin in April 2004.[3] [Independent Medical Exams, authored by Dr. Chiuli, Ph.D. Saint Joseph Health Care; Dr. John Henry Sloan, M.D.; and Dr. Don Seelinger, M.D., Neurology Consultants, Ltd., Supplement to Record Proper].

The 1998 and 1999 IME reports *do confirm Mr. Parkhill's memory problems*:

---

[3] Treating physician Gregory Koury, M.D., reviewed the head injury records, including without limitation the ENMMC emergency room records, the University Hospital Records, and the IME reports. He states:

> "More specifically, chest x-rays taken in relation to the 'mule accident' reported a normal size heart and no lung problems. The 'mule accident' records support the history that Mr. Parkhill had no elevated heart rate (tachycardia), no elevated blood pressure (hypertension), no congestive heart failure and none of the gastrointestinal, liver, respiratory, skin, or other conditions for which I have been treating him since he was exposed to monensin."

Dr. Koury affidavit, June 20, 2008, at ¶ 6. [RP 3809-3813].

- "On interview with his wife and his participating, Mr. Parkhill reported that his short term memory is not very good. He indicated that he forgets measurements right after he takes them, and notes that he is often off by a year on recall of dates. There are specific dates that are important to his work on horse breeding, and these to have been difficult for him to report accurately.."."The results of this assessment indicate severe difficulty with attention, and some difficulty with memory." Dr. Chiuli, Ph.D., Saint Joseph Health Care, September 29, 1998.

- "He currently complains of severe problems with headaches, dizziness, short-term memory difficulties, irritability and forgetfulness." Dr. John Henry Sloan, M.D., October 8, 1998.

- "He complains of memory loss. He does not seem to have a good concept of sequential memory events. He has trouble with dates which he never had before." * * * "Diagnosis and Clinical Impression: 1. Head injury with short period of retrograde and a longer period of post-traumatic amnesia and signs and symptoms consistent with concussion." Dr. Don Seelinger, M.D., Neurology Consultants, Ltd., April 7, 1999.

[Independent Medical Exams, Supplement to Record Proper]

Between stabilizing from the head injury in 2000 and his exposure to monensin in 2004, Mr. Parkhill was also treated at ENMMC for passing a kidney stone in 2001 and at Hidalgo Medical Services for a hay hook in his knee in 2003 (months before his exposure to monensin). In both instances, Mr. Parkhill misremembered the year of his head injury and in neither instance was there any indication of the heart, lung, gastrointestinal, liver, skin or other conditions for which he has required treatment ever since being exposed to monensin. [RP 3784 *Plaintiffs' Sur-Response*]; [RP 3814-3820

ENMMC Medical Records]; Hidalgo Medical Services records Supplement to Record Proper]; and [RP 3809-3813 Aff. of Koury].

Phyllis Tulk, FNP, was Mr. Parkhill's primary care physician for most of his adult life, including many years before and several years after the mule accident. She saw him in follow up on September 5, 1997, three days after the mule accident. Nurse Tulk states that the post concussion syndrome fully resolved in about three years, leaving only the residual visual, auditory and *memory* deficits; and that the head injury in 1997 did not cause any of the symptoms that Dr. Koury has been treating ever since Mr. Parkhill was exposed to monensin. [RP 3806-3808 Aff. of Phyllis Tulk].

In the present case, Mr. Parkhill served Defendant's counsel with answers to interrogatories on August 16, 2005, along with the *broadest possible HIPAA compliant authorization for the release of his medical records* as well as copies of medical records that had already been gathered by Plaintiff's counsel. [HIPAA authorization release, Supplement to Record Proper]. Without limitation, interrogatories and answers included:

- #20 – Asked for "complete details of your physical and mental medical history." Mr. Parkhill objected to the scope of the inquiry and, without waiving the objection, disclosed that he'd been treated for a "Fractured Skull" at University Medical Center in Albuquerque in 1995.

- #22 and 23 – Asked whether Mr. Parkhill was claiming "an aggravation of a pre-existing condition," with description and

explanation. Mr. Parkhill was and is not claiming any aggravation of any pre-existing condition, and indicated that he'd never had the same symptoms that he's had ever since the exposure to monensin.

- #12 – Asked if Mr. Parkhill had been a party to any other civil action. Mr. Parkhill's memory and understanding of his "insurance claim" concerning the mule accident were confused, resulting in his failure to identify it.

Thus, five months after filing his lawsuit and 2 years before Defendant filed its motion for sanctions, Mr. Parkhill had disclosed his head injury, the hospital where it was principally treated, and provided authorization to obtain the records; but he had not disclosed civil suit that he'd understood to be an "insurance claim." [RP 3554-3556 *Plaintiffs' Opposition to Motion to Dismiss*].

Defendant's counsel, then the law firm of Butt, Thornton & Baehr, *chose* not to request the records of the head injury. Instead, five months after disclosure of the head injury, Defendant's counsel sent the records release to University Hospital, but only "request[ed] medical records for the years **2000** to the present." (Boldface in original.) [January 6, 2006, Letter from Butt, Thornton & Baehr to University Medical Center, Supplement to Record Proper] Defendant's counsel correctly understood that Mr. Parkhill's interrogatory answers had disclosed a head injury treated at University Hospital, confirming that understanding *twice* in correspondence dated July 28 and August 11, 2006. [RP 3575-3576, 3577-78]; [Tr. July 8, 2008 445-

446]. Defendant then took Mr. Parkhill's deposition *all day* on August 22, 2006, without asking a single question relating in any way to the head injury or to any of Mr. Parkhill's medical conditions or damages – not past, present or future. [Tr. July 8, 2008 445-446].

In order to avoid any prejudice, and although the discovery completion date had passed, Mr. Parkhill stipulated to a second deposition to be focused on his medical conditions. At that deposition on February 10, 2007 – 18 months after disclosure of the head injury and provision of the records release – Defendant finally asked Mr. Parkhill about the head injury and it became apparent that his memory and attention problems might have confused him about the nature of his "insurance claim." Mr. Parkhill was forthright in his answers – the first time he was asked – and that led directly to discovery of the fact that his attorney had to file a lawsuit in pursuit of that claim. [RP 3556, 3558, 3564-68 *Plaintiffs' Opposition to Motion to Dismiss*]; [Tr. July 8, 2008 448-449].

Again in order to avoid any prejudice, Mr. Parkhill stipulated to a third deposition on May 2, 2007, for the purpose of addressing materials and

information relating to the mule accident claim,[4] including the pleadings and the IME reports noted above. Again, Mr. Parkhill was forthright.

Further to avoid any prejudice, Plaintiff did not object to Defendant's toxicology expert, Dr. Donald Fisher's, late update of his opinions based on newly discovered information concerning the head injury . . . and anything else he found relevant. Dr. Fisher was briefly redeposed on May 8, 2007. [RP 3788 *Plaintiffs' Sur-Response to Motion to Dismiss*].

In August 2007 – two years after Mr. Parkhill disclosed the head injury treated at University Hospital and provided a records release; 20 months after Defendant's counsel *chose* not to request the head injury records when requesting other records from University Hospital; and 12 months after Defendant's counsel chose not to ask a single question concerning health history in Mr. Parkhill's day long deposition – Defendant filed its *Motion to Dismiss Joey Parkhill's Health Claims Based Upon Plaintiff's Repeated And Willful Discovery Abuse.* [RP 4400-4405]. It *falsely accused* Mr. Parkhill of deliberately concealing both the head injury

[4] By this time, Butt, Thornton & Baehr had been replaced by Atkinson & Thal as Defendants' counsel. After an aggressive examination in which counsel attempted to make a liar out of Mr. Parkhill concerning his medical history, he was advised that Mr. Parkhill had required nitroglycerine for his heart during the break that had just been taken. Defendant's counsel chose that time to provoke Mr. Parkhill further with unfounded rumors to the effect that his wife had an affair ten years earlier.

and resulting legal claims and *falsely represented* that before the head injury was discovered the records of numerous treating health care providers had been destroyed, prejudicing Defendant's ability to assess preexisting injuries.

Response and Reply briefs were timely filed and Plaintiffs' counsel did additional checking with healthcare providers, further to sort out the truth concerning Defendants' claims. As a result of that additional checking, Plaintiff's filed their *Sur-Response To Defendant's Motion to Dismiss Joey Parkhill's Health Claims and Motion to Strike and For Sanctions* pursuant to Civil Rules 1-011, 16-301 and 16-303. [RP 3778-3800]. This Sur-Response was supplemented by the aforementioned affidavits of Dr. Koury and Nurse Practitioner Tulk.

At the hearing on Defendant's Motion to Dismiss, Hon. Kevin Sweazea had not reviewed Plaintiff's Sur-Response or the affidavits of Nurse Practitioner Tulk and Dr. Koury and would not allow their substance to be argued at the hearing. Judge Sweazea indicated, however, that if he ruled against Mr. Parkhill, the Court would treat the Sur-Response as a Motion for Reconsideration. [Tr. July 8, 2008 418]. But that reconsideration was never completed. Hearing on reconsideration *began* on September 12, 2008. Although Judge Sweazea expressed his interest in

hearing Plaintiffs' full argument, much of it was put off to a time to be determined before the start of the impending trial. Further rulings resulted in this appeal and divestment of the District Court's jurisdiction before reconsideration could be completed. [Tr. September 12, 2008 394-395]; [RP 4819-4820 Final Judgment].

Defendant-Appellee's motion for sanctions and the District Court's Order are based on the contentions that Mr. Parkhill "concealed" information concerning his head injury from "Defendants in the current case and his own health care professionals" and that the "concealed" information reflected "similar symptoms to some of those that he advances in the current lawsuit [and that the] existence of that information would have been essential to the Defendants' (sic) preparation of its case." [RP 3253 Defendants' Motion to Dismiss]; [RP 4400-4405 Order]. Yet, Dr. Gregory Koury, M.D., who has been Mr. Parkhill's primary care physician since shortly after his exposure to monensin determined after reviewing the emergency room and hospital records of the head injury and other events in Mr. Parkhill's medical history, and after reviewing the IME reports concerning the head injury, that:

> "Review of the "mule accident" records and other older records from the two hospitals further confirm that the history Joey Parkhill gave when he first came to me for treatment was correct and appropriate to the circumstances. Mr. Parkhill

> presented in June 2004 [weeks after his exposure to monensin] with elevated blood pressure, palpitations, racing heart, heart beating hard; the signs and symptoms of recent congestive heart failure; feeling washed out after strenuous work; left shoulder, ear and arm pain and numbness; bilateral ankle swelling, and a rash. These symptoms are completely distinct from the sequelae of the head injury, which had been resolved for years, as their absence from the kidney stone records confirms. The hospitals' records confirm that Mr. Parkhill did not present to me with any aggravation or exacerbation of any preexisting condition. I would not expect a patient presenting with Mr. Parkhill's complaints to report a prior head injury with the attendant posttraumatic headache and nausea that had resolved years earlier or with the visual and hearing impairments that had been stable for years." (Emphasis added.) [RP 3812-3813].

Similarly, there is no support for sanctions in the work of Defendants' own expert toxicologist, Dr. Donald Fisher. He prepared a chart of his opinions concerning "Objective diagnoses for the Parkhill family" including a column for "Proximate medical cause for this individual." After review of *all* of Mr. Parkhill's medical records, Dr. Fisher does *not* relate *any* of Mr. Parkhill's complaints in this case to the head injury in 1997 e.g., Dr. Fisher relates the hypertension to "Obesity, sleep apnea, genetic factors" and denies that the applicability of congestive heart failure. [RP 3579-3580]; [Tr. July 13, 2007 435-437].

Notwithstanding the District Court's harsh sanction, its own Order belies the purported seriousness of any arguable overlap between the head injury symptoms and the monensin damage. Paragraph 5 of the Findings of

Fact lists eleven bullet point symptoms that the Court finds Mr. Parkhill and his doctors attribute solely to the monensin. (Oddly, the list leaves off important problems as congestive heart failure, gastrointestinal problems, and liver problems.) Comparing that to finding #7, in which the Court quotes injuries claimed on behalf of Mr. Parkhill in support of the head injury, the only overlap is headaches, dizziness and loss of memory. [RP 4400-4405].

III. ARGUMENT

Standard of Review: Expert Exclusion, Issues 1 - 2

In general, review of a district court's decision on admissibility of expert testimony under Rule 11-702 NMRA is premised upon abuse of discretion. In determining whether an expert witness is competent or qualified to testify, "The admission or exclusion of evidence is within the discretion of the trial court. On appeal, the trial court's decision is reviewed for abuse of discretion." *State v. Armendariz,* 2006-NMSC-036, ¶ 6, 140 N.M. 182, 141 P.3d 526. Abuse of discretion entails reasoning that, "is manifestly wrong or the trial court has applied wrong legal standards in the determination." *Dahl v. Turner,* 80 N.M. 564, 568, 458 P.2d 816, 820 (Ct.App.1969). However, the appellate court reviews de novo "the threshold question of whether the trial court applied the correct evidentiary rule or

standard." *State v. Torres,* 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20.

Meanwhile, applicability of *Daubert-Alberico* criteria requires *de novo* review due to interrelated law and factual considerations. "[T]he *Alberico-Daubert* evidentiary standard gives rise to mixed questions of law and fact, and that the determination of whether to admit or exclude particular testimony under this standard may result from an inquiry that is "'essentially factual.'" *State v. Attaway,* 117 N.M. 141, 144, 870 P.2d 103, 106 (1994) As such, the initial determination of whether to apply the *Alberico-Daubert* standard entails a conclusion of law that is subject to de novo review." *State v. Torres,* 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20.

Preservation of Issues: Experts' Exclusion

Appellants preserved these issues by raising and arguing same in *Plaintiffs' Partial Evidentiary Submission and Opposition to Defendants' Motion to Exclude Testimony of Dr. Koury and Dr. Dahlgren.* [RP 2067 – 2121].

1. THE TRIAL COURT ERRED IN APPLYING *ALBERICO* TO THE DIFFERENTIAL DIAGNOSIS OF A TREATING PHYSICIAN

New Mexico adopted the federal "*Daubert*" gate keeping test for scientific evidence in *State v. Alberico,* 116 N.M. 156, 167, 861 P.2d 192, 203 (1993). The question arises, though, when should *Daubert* be utilized to assess admissibility? In the case *sub judice*, the trial court applied *Daubert-*

Alberico standards to Dr. Koury's testimony from the start, as evidenced by conducting a *Daubert* hearing in May 2007 [Tr. May 15, 2007; Tr. May 16, 2007] and the *Daubert-Alberico* criteria referenced in the court's final order limiting Dr. Koury's testimony to treatment and care. [RP 4406-4410] (e.g., dosage and exposure levels, proof of general causation, etc.).

But, *Daubert-Alberico* is not applied to every expert whose testimony may relate to science. In *State v. Lente*, 2005-NMCA-111, 138 N.M. 312, 119 P.3d 737, this Court recognized that, "New Mexico law requires only that the trial court establish the reliability of scientific knowledge, and does not apply the *Daubert-Alberico* standard to all expert testimony." *Lente*, 2005-NMCA-111, ¶ 4. New Mexico's Supreme Court reiterates the same in *Banks v. IMC Kalium Carlsbad Potash Co.,* 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014:

> In *Torres,* 1999-NMSC-010, ¶ 43, 127 N.M. 20, 976 P.2d 20, further, we limited the requirements of *Daubert/Alberico* to testimony that requires scientific knowledge. We held that " 'application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training.' " *Id.*

Banks, 2003-NMSC-026, ¶ 19. More specifically, with respect to a treating physician, the *Banks* court explained:

> A treating physician is uniquely qualified to give an opinion about his or her diagnosis of a patient and the admissibility of such testimony should be given due deference. As one federal court explained, "[t]he rationale for giving greater weight to a treating physician's opinion is

> that he [or she] is employed to cure and has a greater opportunity to know and observe his [or her] patient...." *Holbrook v. Lykes Bros. S.S. Co.,* 80 F.3d 777, 783 (3d Cir.1996). A treating physician's testimony is based more on "experience and training" than on the kind of scientific knowledge to which New Mexico courts apply *Daubert/Alberico*. *See Torres,* 1999-NMSC-010, ¶ 43, 127 N.M. 20, 976 P.2d 20; *cf. Westberry v. Gislaved Gummi AB,* 178 F.3d 257, 262-63 (4th Cir.1999)(holding "that a reliable differential diagnosis provides a valid foundation for an expert opinion," despite the fact that in federal court *Daubert* applies to all expert testimony, scientific or not)..[thus]..the expertise of a treating physician is the training, experience and familiarity with the patient whom he or she is treating.

(Emphasis added.) *Banks, supra* at ¶22. Consequently, the *Banks* court refused to apply *Alberico* criteria to the subject expert's testimony.

The *Banks* holding, though, was limited to testimony pursuant to the Workers Compensation Act (see *Lopez v. Reddy,* 2005-NMCA-054, ¶ 13, 137 N.M. 554, 113 P.3d 377.).[5] Yet, the espoused reliability of a treating physician's differential diagnosis remains, and New Mexico law as noted in *Lente* and *Torres* does not mandate application of *Daubert-Alberico* criteria. Therefore, the initial question before this Court is whether Dr. Koury had sufficient experience and training as well as familiarity with the Parkhill's health to render a reliable differential diagnosis. If so, his opinion would not be subject to *Daubert-Alberico*.

---

[5] Ultimately, *Lopez* provides little guidance on *Alberico* application, as the opinion focuses on the qualifications of an expert under Rule 11-702 NMRA. *Alberico* analysis was deemed "inapplicable to the issue at hand." *Lopez*, 2005-NMCA-054, ¶ 13.

To begin, by the trial court's own admission, "Dr. Corey (sic) is qualified as a doctor [and] the methods he employed in connection with the attempt to diagnose and treat the plaintiffs was shown to be reliable." [Tr. District Court's Ruling July 13, 2007 3-4, 7]. The evidence in the record proper also demonstrates Dr. Koury's high degree of experience and training to make differential diagnoses, including but not limited to: training starting in medical school, cumulative visits and evaluations of the Parkhills [Tr. May 15, 2007 84-117], patient-doctor interaction and treatments with the Parkhills for 5 months before rendering his causation opinion of monensin toxicosis [RP 3615], plus his years of experience as a doctor utilizing differential diagnosis, as evidenced by his curriculum vita [Dr. Koury's CV, Supplement to Record Proper]. Taking Dr. Koury's experience, training, and familiarity with the Parkhills as their treating physician into account, and *Banks*' recognition that differential diagnosis is reliable, Dr. Koury's opinion that monensin to a reasonable medical probability caused the Parkhill's ailments should have been admitted – and not subjected to *Daubert-Alberico* analysis.[6]

[6] The depth and breadth of Dr. Koury's effort to deduct a reliable differential diagnosis is further elaborated in Plaintiffs' original Opposition to the motion to preclude the doctors. [RP 2118].

2. THE TRIAL COURT ERRED IN LIMITING THE TESTIMONY OF DR. KOURY AND DALHGREN VIA *ALBERICO*, PARTICULARLY WITHIN THE UNIQUE CONTEXT OF A TOXIC TORT

Assuming the district court was correct in subjecting Dr. Koury's testimony to *Daubert-Alberico* analysis, as well as Dr. Dahlgren's, the court did not properly apply the evidentiary factors an *Alberico* inquiry requires. Furthermore, the trial court misapplied *Alberico* within the unique context of toxic tort – where New Mexico precedent is non-existent. Substantial foreign precedent adjusts *Daubert* criteria to the unique circumstances and challenges of diagnosing human toxicosis.

State v. Fry, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516, defines the elements that constitute a *Daubert-Alberico* analysis. These factors include, but are not limited to, the following:

> (1) whether a theory or technique "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known potential rate of error" in using a particular scientific technique "and the existence and maintenance of standards controlling the technique's operation"; ... (4) whether the theory or technique has been generally accepted in the particular scientific field ... [; and (5)] "whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture.

Fry, 2006-NMSC-001, ¶ 54. A court's application of these criteria must focus on the validity of the relevant scientific technique itself whereas the assessment of the validity and reliability of the conclusions drawn by the

experts is a jury question. *State v. Downey*, 2007-NMCA-046, ¶¶ 15-17, 141 N.M. 455, 157 P.3d 20.

Although New Mexico case law lacks application of *Alberico* to a differential diagnosis that assesses human symptoms and ailments (in a non-Workers Compensation context), most federal courts that have addressed differential diagnosis conducted under *Daubert*, whether the opinion is proffered by a treating or non-treating expert, have allowed the experts' testimony. *Westberry*, cited by *Banks* to support differential diagnosis as a reliable scientific technique, identifies five cases where this medical technique was admitted pursuant to *Daubert*.[7] Additional federal toxic tort

---

[7] "We previously have upheld the admission of an expert opinion on causation based upon a differential diagnosis. *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1383-85 (4th Cir. 1995)(expert testimony by treating physician to cause of liver failure – acetaminophen combined with alcohol – admissible despite the lack of epidemiological data). And, the overwhelming majority of the courts of appeals that have addressed the issue have held that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong of the Rule 702 inquiry... *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, at 154, 156-57 (3rd Cir. 1999)(proper differential diagnosis is adequate to support opinion on causation); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228-30 (9th Cir.1998)(District Court abused its discretion excluding an expert causation opinion based on reliable differential diagnosis), *Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248, 252-53 (1st Cir. 1998)(differential diagnosis rendered expert causation opinion sufficiently reliable); *Zuchowicz v. United States,* 140 F.3d 381, 385-87 (2nd Cir.1998)(expert opinion was reliable in part based on differential diagnosis); and *Ambrosini v. Labarraque,* 101 F.3d 129, 140-41 (D.C.Cir.1996).(because expert opinion

cases and 10th circuit state case law, most relating to toxic tort, are replete with admission of differential diagnosis under *Daubert.*[8]

Given this general acceptance of differential diagnosis testimony in toxic tort, a dissection of the trial court's orders limiting Dr. Koury's testimony to care and treatment [RP 4406-4410] and completely precluding Dr. Dahlgren is appropriate [RP 3247-3248][9]:

---

was based on differential diagnosis, District Court abused its discretion in refusing to admit it)." Westberry, 178 F.3d at 263.

[8] An abbreviated list includes: *McCullock v. HB Fuller Co.*, 61 F.3d 1038, 1044 (2nd Cir.1995)(treating doctor's differential diagnosis allowed, based on care, treatment; medical history; pathological studies; manufacturer's MSDS; training and experience; and reference to scientific and medical treatises. Disputes to credentials, faulty diagnosis, or lack of textual authority, go to weight. Lack of physician's specialization was unwarranted expansion of *Daubert* gatekeeper role); *Burton v. R.J. Reynolds Tobacco Co.*, 181 F.Supp.2d 1256 (D. Kan. 10th Cir., 2002)(treating physician's differential diagnosis of causation need only show agent caused *or contributed to* plaintiff's injuries, plaintiff not required to eliminate all other factors); *Kuhn v. Sandoz Pharmaceuticals Corp.*, 14 P.3d 1170, 1181 (Kan., 2000)(Kansas Supreme Court admits medical causation differential diagnosis, holding Frye test inapplicable where opinion based on expert's own observation, experimentation, and work); *Alder v. Bayer Corp., AGFA Div.*, 61 P.3d 1068, 461 (Utah, 2002)(Utah Supreme Court allows differential diagnosis of examining physicians, holds such not subject to Utah's version of *Daubert-Alberico*); and *Easum v. Miller*, 92 P.3d 794, 804 (Wyo., 2004)(Wyoming Supreme Court allows physician's differential diagnosis identifying reflex sympathetic dystrophy caused by electrical shocks).

[9] The trial court's August 7, 2007 Order precluding Dr. Dahlgren from testifying lacks any analysis, therefore the July 13, 2007 hearing on this matter is referenced [Tr. Ruling July 13, 2007].

a. Experts Need Not Be Toxicologists to Render Their Differential Diagnoses

The trial court's second and third conclusions of law in its about-face order limiting Dr. Koury assert lack of training and experience, essentially surmising that a non-toxicologist cannot render a differential diagnosis. [RP 4407-4408]. Similarly, the judge's ruling on Dr. Dahlgren [Tr. Ruling July 13, p. 4] relies on the fact he did not appear to have "any specialized training in toxicology."[10] Yet, New Mexico law does not mandate specialization or definitive experience and training for expert testimony.[11] Federal precedent

---

[10] The matter of qualifications, although discussed under the rubric of proper *Daubert* application, is a Rule 11-702 NMRA criteria, subject to abuse of discretion review: "Rule 11-702 creates three prerequisites for the admission of expert testimony: (1) the expert must be qualified; (2) the testimony must assist the trier of fact; and, "closely related" to the second requirement, (3) the expert may testify only as to "scientific, technical or other specialized knowledge." *Fry*, 2006-NMSC-001, ¶ 54.

[11] See *Frederick v. Younger Van Lines,* 74 N.M. 320, 329, 393 P.2d 438, 444 (1965)(fact medical witness is not a specialist goes to weight, not admissibility; general practitioner need not be ophthalmologist to testify cause of eye injury); *Downey*, 2007-NMCA-046, ¶ 13. (expert despite not being certified specialist or having substantial knowledge on retrograde extrapolation met qualification threshold; perceived deficiency in education and training relevant to weight); *State v. McDonald*, 1998-NMSC-034, ¶¶ 10, 18-21, 126 N.M. 44, 966 P.2d 752 (DNA expert's knowledge, skill, and experience deemed determinative, lack of post-graduate degree specialization inapplicable); and *State v. Hernandez*, 115 N.M. 6, 24, 846 P.2d 312, 330 (1993)(expert's lack specific training and education are not dispositive, years of experience qualify expert, while deficiencies go to weight).

holds the same, and does so in a toxic differential diagnosis analysis. See *McCullock*, 61 F.3d at 1044.

Dr. Koury has practiced medicine since 1990, rendering countless differential diagnoses in that time. Specific to the Parkhills, as their treating physician, he has been in contact with them 2-3 times per week, and examined them approximately 100 times since the monensin exposure. Early in his evaluation of them, Dr. Koury identified symptoms consistent with human ailments specified in the MSDS authored by monensin's manufacturer – as well as those described by the American Board of Veterinary Toxicology. [RP 2080-83]. Meanwhile, Dr. Dahlgren is a board-certified medical doctor who has practiced medicine since 1968. He currently specializes in occupational and environmental medicine with an emphasis in toxic exposures, as evidenced by his lengthy and substantial curriculum vitae. [RP 2652-2659].

b. Quantifying Exposure Is Not Imperative for Toxicosis Differential Diagnosis

Both rulings on Dr. Koury and Dr. Dahlgren negate these experts for lack of "scientifically reliable" dosage or duration quantification – a clear application of *Daubert-Alberico* criteria [RP 4408]; [Tr. Ruling July 13, 2007 5]. New Mexico lacks precedent regarding differential diagnosis in toxic tort, but foreign precedent, given the unique challenges of proving

toxicosis in humans, adjusts the *Daubert* dosage-exposure criterion.[12] This adjustment of *Daubert* is also due to the fact a temporal relationship between exposure and the onset of ailments can buttress causation.[13] In the instant

---

[12] "[o]nly rarely are humans exposed to chemicals in a manner that permits a quantitative determination of adverse outcomes...it is usually difficult, if not impossible, to quantify the amount of exposure. Federal Judicial Center, *Reference Manual on Scientific Evidence* 187 (1994). Consequently, while precise information concerning the exposure necessary to cause specific harm to humans and exact details pertaining to the plaintiff's exposure are beneficial, such evidence is not always available, or necessary, to demonstrate that a substance is toxic to humans given substantial exposure and need not invariably provide the basis for an expert's opinion on causation." *Westerberry* at 264. Also see *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 671 (5th Cir. 1999)(precise level of toxic exposure not required, more importantly multitude of plaintiffs demonstrating similar symptoms congruent with a toxins' known ailments substantiates harmful level of exposure); *Christian v. Gray*, 65 P.3d 591, 606 (Okla., 2003)(actual measurement of airborne toxin not necessary, requiring such would preclude most lawsuits based upon single exposure event); and *Wisner v. Illinois Cent. Gulf R.R.*, 537 So.2d 740, 748 (La. App. 1 Cir., 1988)(where there are no facts to exact degree of exposure, held experts still entitled to offer conclusions based on their areas of expertise, circumstantial evidence, i.e. patients health before and after the accident, and medical tests given).

[13] "Depending on the circumstances, a temporal relationship between exposure to a substance and the onset of a disease or a worsening of symptoms can provide compelling evidence of causation." *Heller*, 167 F.3d at 157 (airborne volatile organic compounds in carpet, correlation between carpet installation and respiratory problems); Also see *Zuchowicz v. US,* 140 F.3d at 385, 390 (2nd Cir. 1998)(despite limited epidemiological studies of toxic overdose, onset of illness relative to exposure sufficient as temporal relationship to admit testimony); *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1059 (9th Cir. 2003)(temporal relationship between oil spill and oysters death); and *Cavallo v. Star Enter.,* 892 F.Supp. 756, 774 (E.D.Va. 1995)(explaining that "there may be instances where the temporal connection between exposure to a given chemical and subsequent injury is

case, both Dr. Koury and Dr. Dahlgren integrated the fact that a constellation of symptoms occurred between all four of the Parkhills simultaneously and the onset of symptoms was simultaneous with exposure. [RP 2082; Tr. May 15, 2007 116, 139, 246-248]. Furthermore, with respect to dose and exposure, science has established that monensin damages cells at exquisitely low exposure levels. [Tr. May 15, 2007 236-238]. Regardless Dr. Dahlgren did estimate that Mr. Parkhill's dose was six times greater than the maximum permitted by FDA regulations that are intended for human protection. [RP 2918].

c. Toxic Tort's Unique Evidentiary Circumstances Do Not Mandate Proof of General Causation

The trial court relies upon the premise that general causation is indispensable for Dr. Koury and Dr. Dahlgren to proffer their opinions. [RP 4408]; [Tr. Ruling July 13, 2007 5, "theory has not been tested"]. Toxic tort, though, creates unique circumstances where general causation is not necessarily required under *Daubert* – and there is substantial case law to support this.[14] The New Jersey Supreme Court explains, "We recognize,

---

so compelling as to dispense with the need for reliance on standard methods of toxicology," for example, if one were exposed to a substantial amount of "chemical X and immediately thereafter developed symptom Y").

[14] *Heller*, 167 F.3d at 154 (3rd Cir., 1999)(research studies supporting general causation not required, assuming thorough differential diagnosis

too, that because of the extremely high level of proof required before scientists will accept a new theory, and particularly because of the current inability of science to fully comprehend carcinogenesis .. plaintiffs in toxic-tort litigation, despite strong and indeed compelling indicators that they have been tortiously harmed by toxic exposure, may never recover if required to await general acceptance by the scientific community of a reasonable, but as yet not certain, theory of causation...[our] Appellate Division's unanimous recognition that there must be a different standard for determining the reliability of scientific theories of causation in toxic-tort litigation finds growing and impressive authoritative support." *Rubanick v. Witco Chemical Corp.*, 593 A.2d 733, 739-740 (N.J., 1991).

Toxic tort litigation also presents a unique causation context relative to "sporadic accident" incidences – such as the case at bar where only a few plaintiffs suffer exposure.

---

conducted ruling out other causes with valid and strong temporal relationship between aggravating agent and symptoms); *Zuchowicz v. United States,* 140 F.3d 381, 387 & 390 (2d Cir.1998)(despite no previous link between toxin and human ailment, strong temporal relationship between exposure and illness onset supported causation); *Magaw v. Middletown Bd. of Educ.*, 731 A.2d 1196, 1203 (N.J. Super. App. Div., 1999)(no studies existed connecting second-hand smoke to tonsil cancer, but causation testimony allowed, "judicial system does not have the leisure to defer decision until proper and definitive scientific or medical studies are available...in toxic-tort litigation, a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately-founded scientific methodology."

"[G]eneral causation requirements (requiring plaintiffs to present confirming epidemiological evidence to make out a prima facie case) have typically been applied in cases involving mass exposures:

> "Cases that have not imposed this requirement [general causation] typically involve injuries that may be placed in the 'sporadic accident model of tort law.' In [these] cases, where only a single plaintiff or a few plaintiffs have allegedly suffered an injury due to some exposure, a medical doctor will be permitted to render an opinion as to whether the exposure caused the plaintiff's injury solely on an examination of the plaintiff and a differential diagnosis of the source of the plaintiff's injury, sometimes supplemented with toxicological evidence....
>
> "In many of these cases there is relatively little epidemiological data available and the courts are reluctant to burden 'first plaintiffs' with the task of using epidemiology to prove general causation." Faigman, Keye, Saks & Sanders, Modern Scientific Evidence: The Law and Science of Expert Testimony: The Role of Epidemiological Evidence in Toxic Tort Cases. § 28-1.3.2, pp. 307-08
>
> The scope of plaintiffs' case here does not approach that of mass tort litigation. In addition, general causation requirements are usually imposed in cases with large existing epidemiological records."

Kuhn, 14 P.3d at 1184-1185 (internal citations omitted).

Given the fact the Parkhills exposure and toxicosis via monensin falls within a "sporadic accident" model, and the fact courts adjust general causation criteria in toxic differential diagnosis, the trial court was mistaken in requiring definitive proof of general causation. Irrespective, the instant case is not devoid of general causation. The manufacturer's own MSDS and warnings recognize the ailments that can be caused by monensin exposure. [RP 2098-2100]. Additionally, extensive studies on animals as well as

mammalian cells document the destructive harm monensin causes – and these are the same kinds of studies regulatory agencies use to determine if compounds are harmful to humans. [Tr. May 15, 2007 247][15] Dr. Koury and Dr. Dahlgren reviewed this cumulative evidence and properly assumed that monensin is capable of causing the ailments presented in the Parkhills. Noteworthy is the fact Defendants have failed to come forth with any evidence to the contrary, that monensin is proven to not harm humans – evidence that would actually prove general causation does not exist.[16]

d. Specific Causation, Within the Context of Differential Diagnosis, Was Properly Researched

The trial court's September 2, 2008, Order limiting Dr. Koury to merely testifying to treatment and care asserts that he inadequately performed specific causation research. [RP 4408]. This incorrect conclusion and inappropriate application of *Daubert* criterion completely overlooks the extensive research and evaluations Dr. Koury conducted in the course of developing his differential diagnosis. He performed lengthy and substantial assessments of the Parkhills' ailments and concrete correlation of these

[15] Additional and more complete reference to the biologically plausibility of harm monensin causes in humans is described and summarized in *Plaintiffs' Reply to Closing Argument RE: Dauber-Alberico Motion* [RP 3173-3174].

[16] See *Goebel v. Denver and Rio Grand Western RR Co.*, 346 F.3d 987, 993 (10th Cir., 2003), where Defendant failed to come forward with any contrary general causation evidence to refute expert performing differential diagnosis.

symptoms with the monensin toxicosis symptoms of their horses and symptoms indicated by the monensin's MSDS as well as medical and scientific literature. Besides approximately 100 "hands-on" examinations of the Parkhills, Dr. Koury ordered and evaluated laboratory tests, as well as cardiac catheterization and heart biopsies, and reviewed and evaluated pathology/laboratory information. He visited their ranch, observing the similar symptoms in their horses, and combined this information with medical and scientific research on monesin's effects to ultimately reach his differential diagnosis. [RP 2118; specific factors also summarized RP 3173-3174].

e. Dr. Koury and Dr. Dahlgren's Testimony Will Assist the Trier of Fact

In an inexplicable reversal, the trial court after determining "that [Dr. Koury's] evidence will be helpful to the trier of fact in the case" [Tr. July 13, 2007 4], contrarily claims his testimony "will not assist the trier of fact, and should be excluded." [RP 4409]. This Rule 11-702 NMRA requirement of helpfulness to the trier of fact should be based on the relevancy of an expert's testimony. "The prerequisite that expert testimony must 'assist the trier of fact to understand the evidence or to determine a fact in issue ... goes primarily to relevance.'" *State v. Hughey*, 2007-NMSC-036, ¶ 17, 142 N.M. 83, 163 P.3d 470, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509

U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In the instant case, it is clear both opinions by Drs. Koury and Dahlgren are relevant to the personal injury claims Plaintiffs suffered.

3. THE TRIAL COURT ERRED IN ITS SANCTION DISMISSING JOEY PARKHILL'S HEALTH CLAIMS

Standard of Review: Dismissal of Joey Parkhill's Health Claims

"The choice of sanctions for abuse of the discovery process falls within the sound discretion of the trial court and will be reversed only for abuse of discretion." *Medina v. Foundation Reserve Ins. Co.,* 117 N.M. 163, 166, 870 P.2d 125, 128 (1994). "[T]he discretion we speak of is fact-based" and "requires us to look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence." *Lopez v. Wal-Mart Stores, Inc.,* 108 N.M. 259, 260, 771 P.2d 192, 193 (Ct.App.1989)." " '[A]n appellate court's review should be particularly scrupulous lest the district court too lightly resort to this extreme sanction....' " *Sandoval v. Martinez*, 109 N.M. 5, 9, 780 P.2d 1152, 1156 (1989), *quoting, United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 203, 629 P.2d 231, 279 (1980).

Preservation of Issue: Dismissal of Joey Parkhills Health Claims

Appellants preserved this issue by raising and arguing same in *Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiff Joey Parkhill's Health Claims. Dahlgren.* [RP 3553 – 3588].

a. Discovery sanction of dismissal requires willful obstruction of discovery in flagrant bad faith and callous disregard.

The law favors the resolution of legal claims on the merits. *Gocolay v. New Mexico Federal Savings & Loan Ass.,* 968 F.2d 1017 (1992). Dismissal is a severe sanction that should only be used as 'a weapon of last, rather than first, resort.' " *Id.,* at 1021.

> "[I]n the long shadow of the *United Nuclear* case, there is a reality in New Mexico that many cases get litigated from the first ring of the discovery bell as a project to achieve a default sanction. Rule 1-037 was never intended to become a tool that the skillful litigator, if he's just persistent enough, can utilize to achieve a victory that the merits of the case might never sustain. *Sandoval v. Martinez,* 109 N.M. 5, 10, 780 P.2d 1152, 1157 (1989), *quoting,* brief of New Mexico Defense lawyers Association as Amicus Curiae.

Mere negligence does not warrant the penalty of dismissal. *Sandoval,* 109 N.M. at 9, 780 P.2d at 1156, *citing,* Moore's Federal Practice at ¶ 37.03[2-5]. "[Default] sanctions are to be imposed only in extreme cases and only upon a clear showing of willfulness or bad faith." *Id., quoting, United Nuclear,* 96 N.M. at 241, 629 P.2d at 317. Willfulness requires conscious or intentional failure to comply, in callous disregard of discovery

responsibilities; and the degree to which the willfulness or bad faith obstructs further discovery is also a factor. *Rio Grande Gas Company v. Gilbert,* 83 N.M. 274, 491 P.2d 162 (1971); *Reed v. Furr's Supermarkets, Inc.,* 2000-NMCA-091, ¶20, 129 N.M. 639, 11 P.3d 603.

> "While the severest of sanctions should be reserved for extreme circumstances, the district court does not abuse its discretion by imposing the sanction of dismissal when a party demonstrates flagrant bad faith and callous disregard for its responsibilities." *Medina,* 117 N.M. at 166, 870 P.2d at 128 (1994), *quoting, United Nuclear,* 96 N.M. at 239, 629 P.2d at 315.

In the present case, Mr. Parkhill was not guilty of any discovery abuse, let alone the "flagrant bad faith and callous disregard" that is required for such an extreme sanction. He not only disclosed his head injury and provided a records release "from the first ring of the discovery bell" but was as fully cooperative as his brain damaged memory allowed at all stages of discovery, including giving the forthright answers deposition that led directly to discovery of what his memory could not provide.

b. Mr. Parkhill's Disclosures Were More Than Reasonable.

Both Defendant and the District Court relied heavily on *Sandoval v. Martinez*, 109 N.M. 5, 780 P.2d 1152 (1989). *Sandoval*, however, is grossly distinguished on the *true* facts; i.e., there is a contrast between Sandoval's obvious concealment of preexisting injuries to the same part of her body, as opposed to Mr. Parkhill's disclosures in interrogatory answers of prior injury

to a different part of his body and his cooperation in three depositions. In light of the District Court's reliance on *Sandoval*, it is instructive to compare Sandoval's conduct in discovery to Mr. Parkhill's[17]:

- Initial voluntary disclosure: A motion to compel was necessary to get Sandoval to answer interrogatories. *In contrast,* after mutual extensions among several parties, Mr. Parkhill was the first to respond to written discovery; and that earliest discovery in the case disclosed the head injury and where it was principally treated and provided a records release.
- Interrogatories: In answers to interrogatories, Sandoval lied about prior auto collision, failed to disclose injury from prior collision; and failed to disclose prior surgery – all without objection and without any later explanation or excuse. The prior injury and surgery were to same part of her body at issue in that case. *In contrast,* Mr. Parkhill objected to the scope of the interrogatory requesting complete details of his medical and mental health history but also disclosed the head injury, etc.; he indicated that he did not (and still does not) claim any aggravation of any preexisting condition (as the mule accident injured

[17] The *Sandoval* discovery facts are at 109 N.M. 5, ¶¶ 13-14, 780 P.2d 1152. The Parkhill discovery facts are presented with citation to the record in the section above, titled Facts Relevant To Dismissal Of Joey Parkhill's Health Claims.

his head and the monensin injured his heart, respiratory system, liver, etc.) and that they symptoms are different. As a result of the head injury, from which he was still recovering at the time, Mr. Parkhill misunderstood and misremembered that his insurance claim over the head injury was also a lawsuit and, therefore, failed to disclose the lawsuit in answer to interrogatories.

- Depositions: Sandoval submitted to a single deposition in which she lied to conceal receiving citations in the prior five years. She was asked for a records release and to supplement her interrogatory answered, which she did by effectively repeating her earlier lies. *In contrast,* Mr. Parkhill submitted to three depositions. In the first, which took all day, he was not asked a single question about his head – not one. Although discovery was supposed to have been completed months earlier, Mr. Parkhill stipulated to a second deposition to answer health questions in order to avoid any possibility of prejudice. When finally asked about his head injury (18 months after he disclosed it), Mr. Parkhill was forthright, indicating that a claim had been pursued on his behalf, that he had still been in the post concussion recovery period and did not have much memory or understanding of it, and providing sufficient information to lead

directly to discovery of he lawsuit. Mr. Parkhill then stipulated to a third deposition, again to avoid any possibility of prejudice, to answer questions about the discovery of additional head injury information.

- Records releases: Sandoval eventually provided a records release with which opposing counsel went back more than a decade to discover two prior accidents with injuries to same parts of her body that were affected in the case at bar. *In contrast,* Mr. Parkhill provided a records release at "the first ring of the discovery bell" but opposing counsel chose not to use it to obtain records of the head injury, even while obtaining other records from the same hospital.
- Obstruction of discovery: Sandoval lied consistently and repeatedly and never hinted at the truth. *In contrast,* Mr. Parkhill never lied and was consistently cooperative and forthcoming, telling the truth the best that he knew and could remember it. To the limited extent that his initial written disclosures were incomplete, it was the result of brain injury that affected his comprehension and memory, and he cleared up everything he was able to as soon as he was examined on the subject in deposition.
- Prejudice: Sandoval tried to hide prior injury and surgery that permanently affected the same part of the body affected in the case at

bar. *In contrast,* Mr. Parkhill made early disclosure of the injury, which was to a different part of his body than those at issue in the case at bar. Moreover, Mr. Parkhill's treating providers (Tulk and Koury) and Defendant's expert (Fisher) each indicate that the problems resulting from the head injury were distinct from the problems resulting from the exposure to monensin. Thus, there would have been no prejudice.

Clearly, there is no basis to find that Mr. Parkhill willfully obstructed discovery and that he acted in flagrant bad faith and with callous disregard for his discovery responsibilities. It is well documented that Mr. Parkhill's memory for the mule accident and related matters is damaged. He did the best he could to make complete and honest disclosures – and his disclosures effectively conveyed the facts. In the first disclosure by any party in the case, he made his head injury known along with where it was principally treated and provided a records release. Defendants chose not to get the records. Defendants' counsel at that time (Butt, Thornton & Baehr) apparently understood that a head injury is distinct from monensin poisoning.) Defendants waited until the last days of discovery to depose Mr.Parkhill and then asked no questions about his health. So, Mr. Parkhill stipulated to further deposition and when he was finally examined about the

head injury, it led directly to discovery of the balance of the head injury information. It was not until Defendants' new counsel (Atkinson & Thal) were introduced to the case, after Mr. Parkhill's first deposition, that skillful and persistent litigators distorted the record to use Rule 1-037 to achieve a victory that merits might never sustain. *See, Sandoval* 109 N.M. at 10, 780 P.2d 1157.

Finally, it appears that the District Court was inflamed by the false and misleading allegations of Defendant's motion. Although Judge Sweazea did not consider Mr. Parkhill's Sur-Response or the Affidavits of treating providers Tulk and Koury prior to ordering the extreme sanction of dismissal, he recognized that there might be more than met his eye, indicating that he'd treat those items as a motion for reconsideration. But he never had the opportunity to complete that reconsideration; and Defendant's counsel have not accounted for their grossly inflated and inaccurate complaints. *See, Gonzales v. New Mexico Health Department,* 2000-NMSC-029, ¶16, 129 N.M. 274, 11 P.3d 550.

IV. CONCLUSION

The restriction on the testimony of the primary treating physician, Dr. Gregory Koury, should be reversed and he should be permitted to testify to his diagnosis and how he reached it. Under Rule 11-702 NMRA he is a

highly qualified physician whose experience and training – both generally and specifically with respect to his extraordinary opportunity to know and observe Mr. Parkhill – qualify him to testify to his differential diagnosis. Furthermore, if *Daubert-Alberico* analysis applies, given the unique context of toxicosis evaluation, Dr. Koury's methodology is appropriate to the circumstances. His differential diagnosis was performed in a reasonably reliable fashion, is relevant, and would assist the jury.

The preclusion of Dr. Dahlgren's testimony should be reversed. He is a physician who is highly qualified by training and experience in environmental medicine and toxicology who has applied generally accepted methods – both legally and medically – to this case fitting the "sporadic accident" model. Although not necessary to such a case, there is evidence of general causation and dosage to support his differential diagnosis, a methodology that is appropriate to the circumstances and that was performed in a reasonably reliable fashion. His opinions are relevant and would assist the jury.

The sanction of dismissal of Mr. Parkhill's health claims should be vacated. He was informative and cooperative in discovery at all times, acting responsibly and in good faith, including disclosure of his prior head injury notwithstanding memory impairment resulting from the brain damage

it caused. There is no evidence to support the extreme sanction of dismissal, as Mr. Parkhill was not willfully obstructionist or deceitful. Moreover, the District Court's dismissal of his health claims is the result of its exposure to Defendant-Appellee's inflated and inaccurate accusations without consideration of Mr. Parkhill's Sur-Response or the Affidavits of his treating health care providers.

RESPECTFULLY SUBMITTED this _27th_ day of July, 2009.

/s/

Laurence M. Berlin, Esq.
Lower Negrito Creek
P.O. Box 685
Reserve, New Mexico 87830
(505) 533-6688
Trial and Appellate Counsel for Plaintiff-Appellants

Bradley L. Booke

Bradley L. Booke, *Pro hac vice*
MORIARITY BADARUDDIN & BOOKE
Trial and Appellate Counsel for Plaintiffs
8 Broadway East, Suite 312
Salt Lake City, Utah 84111
(801) 326-8090
Trial and Appellate Counsel for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July __27__, 2009, service of the foregoing: **APPELANTS' BRIEF IN CHIEF** was made upon the following by mailing a true and correct copy thereof in an envelope, securely sealed, postage prepaid and addressed as follows:

Six paper copies and one bound set of transcripts to:

Clerk of Court
New Mexico Court of Appeals
PO Box 2008
Santa Fe, NM 87504-2008

VIA FEDERAL EXPRESS

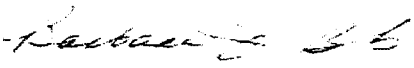
One paper copy to:

John S. Thal and
Clifford K. Atkinson
ATKINSON & THAL, PC
201 Third Street, N.W., Suite 1850
Albuquerque, New Mexico 87102

VIA US POSTAL SERVICE

Electronically served to

Elizabeth Losee
<BLosee@atb-law.com>



Employee of Moriarity Badaruddin & Booke