ORIGINAL

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' REPLY BRIEF

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

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I. ARGUMENT

A. DR'S KOURY AND DAHLGREN'S TESTIMONY IS ADMISSIBLE.

1. DR'S KOURY AND DAHLGREN ARE QUALIFIED.

Appellee's first attack upon Appellants' experts focuses upon the supposed mandate that toxicology related opinions be rendered by a toxicologist. Appellee's Answer Brief (AAB) relies upon *State v. Downey*, 2008-NMCA-061, 145 N.M. 4232, 195 P.3d 1244 for the contention that New Mexico precedent requires "specialization" for toxicology opinions and the AAB further advances the need for membership in toxicological organizations. (AAB 25-26).

To begin, *Downey* does not even address the issue of expert qualification. Instead, the appellant failed to properly raise and argue the matter of qualification. *Downey*, 2008-NMSC-061, ¶ 27. The issue was reliability of the expert's testimony based upon insufficient facts. *Supra*, ¶ 37. Therefore, Appellee incorrectly relies upon *Downey* for the proposition that a toxicologist is required to render a toxicology opinion. This aside, the *Downey* opinion notes – despite the failure of reliability due to insufficient facts – that the State's expert had previously qualified and testified over 300 times (presumably for alcohol and illicit drug intoxication) despite a lack of "specialized" qualifications. He was non-college educated and devoid of

any professional degrees, despite being the State's chief toxicologist. This reality underscores Appellant's overall point – New Mexico does not mandate expert specialization to be a toxicologist or render toxicology opinions.

Appellant's Opening Brief (AOB) supports this legal reality by citing *Frederick v. Younger Van Lines,* 74 N.M. 320, 329, 393 P.2d 438, 444 (1965); *State v. Downey*, 2007-NMCA-046, 141 N.M. 455, 157 P.3d 209[1]; *State v. McDonald*, 1998-NMSC-034, 126 N.M. 44, 966 P.2d 752; and *State v. Hernandez*, 115 N.M. 6, 846 P.2d 312 (1993). This resounding precedent aside, the very case Appellee relies upon to contend otherwise states, "the use of the disjunctive "or" in Rule 11-702 permits a witness to be qualified under a wide variety of bases, "knowledge, skill, experience, training, or education." *Downey*, 2008-NMSC-061, ¶ 26. As previously argued in the AOB, Dr's Koury and Dahlgren are qualified by way of experience and knowledge – not to mention by the District Court's own admission, "Dr. Corey (sic) is qualified as a doctor [and] the methods he employed in

[1] This Court's 2007 opinion in Downey, unlike the 2008 Supreme Court opinion, does address the issue of expert qualification. The 2007 decision deemed the expert qualified irrespective of specialization, such as a college education; professional degrees; or membership in professional organizations.

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].

In summarizing the claimed inadequate qualifications of Koury and Dahlgren Appellee asserts that these experts opinions were "solely for the purposes of advancing" litigation. AAB 26. To begin, as evidenced throughout the record, Dr. Koury was the Parkhills' treating physician – not a hired gun retained to for litigation. RP 2082. Incredulously, the AAB further suggests that because counsel for the Parkhills' name and phone number were written in Dr. Koury's initial progress notes after meeting with the Parkhills, a subsequent conversation with counsel thereafter resulted Dr. Koury blaming all of the Parkhills problems on monensin. AAB 14. The implied assumption is patently incorrect. In addition, Dr. Koury testified at his deposition that he initially sought – well before the Parkhills filed suit – a toxicologist's opinion to augment his evaluation of the Parkhills. Koury Dep. 20:15-21:10. Thus, the impetus for utilizing a toxicologist was part of the Parkhills' medical care and treatment.

2. APPLICATION OF *ALBERICO* IS NOT MANDATED AND IRRESPECTIVELY DR.'S KOURY AND DAHLGREN PERFORMED THEIR EVALUATIONS RELIABLY.

Appellant's fundamental point is *Daubert-Alberico* analysis is not necessitated every time a scientific opinion is rendered. This is congruent

with current New Mexico law which "requires only that the trial court establish the reliability of scientific knowledge, and does not apply the *Daubert-Alberico* standard to all expert testimony." *State v. Torres,* 1999-NMSC-010, ¶ 24, 127 N.M. 20, 976 P.2d 20. More specifically, the AAB fails to recognize Appellant's distinction that unique situations involving treating physician testimony (such as Dr. Koury) may not require comprehensive *Alberico* analysis.[2] Appellant's argue that Dr. Koury's testimony falls within this exception to *Alberico's* application.[3]

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[2] As noted in the AOB 24-25, *Banks v. IMC Kalium Carlsbad Potash Co.,* 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014 relies on non-worker's compensation cases where a treating physician's testimony was not subject to *Daubert.* The underlying rational for this preclusion of *Daubert* is that a treating physician is "employed to cure", bases his opinion upon "experience and training", and a treating physician's reliably performed differential diagnosis is a valid foundation for an expert opinion, as set forth in *Holbrook v. Lykes Bros. S.S. Co.,* 80 F.3d 777 (3d Cir. 1996) and *Westberry v. Gislaved Gummi AB,* 178 F.3d 257 (4th Cir. 1999). *Banks*, 2003-NMSC-026, ¶ 22.

[3] The AAB notes that *Lopez v. Reddy,* 2005-NMCA-054, 137 N.M. 554, 113 P.3d 377 appears to limit the rational applied in Banks. But, *Lopez* is easily distinguished by: (1) the pivotal issue was the qualifications of the expert, not whether *Alberico* applied. The Court even stated "the reliability of scientific methods, however, was not at issue in this case," *Lopez*, 2005-NMCA-054,¶ 22; and (2) the expert was testifying on standard of care (as opposed to rendering a differential diagnosis on causation); and (3) the *Lopez* expert was not a treating physician. Thus the rational discussed in *Banks* was inapplicable to *Lopez*. In contrast, this Court now has a case before it with a treating physician's testimony.

Should this Court affirm that *Alberico* was appropriate to apply to Dr. Koury's testimony, and likewise analyze the District Court's application of *Alberico* to Dr. Dahlgren, Appellees contend these experts' differential diagnosis methodologies were reliable. The *Alberico* opinion, *State v. Alberico*, 116 N.M. 156, 861 P.2d 192, itself is instructive regarding reliability and differential diagnosis. Two different psychologists (non-treating) essentially performed differential diagnoses on alleged rape victims to determine if post-traumatic stress disorder (PTSD) existed, and consequently if sexual trauma had occurred. Despite the fact the victims had numerous stressors all of which could have created PTSD, the experts ruled these other causes out even though it is difficult to pinpoint the cause of PTSD. *Alberico*, 861 P.2d at 196-197. Similarly, albeit it with more accurate medical scientific tests (CPK levels; EKG; echocardiogram; 24-hour urine test; etc., see TR 89:1-91:10[4]), Dr. Koury ruled out other possible causes of the Parkhills' ailments.

[4] Unless otherwise specified, all transcript references pertain to the May 15-16, 2007 *Daubert* hearing.

3. COURTS ADJUST *DAUBERT* CRITERIA WITHIN THE RUBRIC OF TOXIC TORT.

Appellee's AAB makes the inaccurate claim that Appellant's argue "toxicological causation opinion is not subject to an *Alberico-Daubert* analysis." AAB 29. To the contrary, Appellant's AOB states, "[s]ubstantial foreign precedent adjusts *Daubert* criteria to the unique circumstances and challenges of diagnosing human toxicosis." AOB 27[5]. Appellants back this assertion with analysis and precedent by numerous jurisdictions (AOB 27-36) best summarized by the Supreme Court of New Jersey, "there must be a different standard for determining the reliability of scientific theories of causation in toxic-tort litigation...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." AOB 34; *Rubanick v. Witco Chemical Corp.*, 593 A.2d 733, 739-740 (N.J., 1991).

Appellee attempts to claim New Mexico definitively applies *Alberico-Daubert* with no adaptation for toxic tort by citing *State v. Torres,* 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20 and *Downey*. AAB 29. First, neither

[5] Appellant's only argue *Alberico-Daubert* inapplicability to Dr. Koury's differential diagnosis, given he is the Parkhills' treating physician.

of these cases entails causation regarding an environmental toxin and human injury. *Torres* pertains to expert testimony regarding the horizontal gaze nystagmus test, a field sobriety evaluation for drunk drivers, while *Downey* deals with retrograde analysis relative to alcohol consumption and impairment. Furthermore, neither of the cases involves the application of differential diagnosis to ascertain causation. Appellants do concede that no New Mexico case speaks directly to environmental toxicology and expert witness testimony (AAB 30) which is exactly why this case is now before this Court. Seeing that no New Mexico precedent is exactly on point now is the time to render a clarifying decision.[6]

Despite the AOB's review of precedent that applies latitude for *Daubert* analysis and causation analysis in toxic tort, Appellee makes the bold assertion that dose, general causation, and specific causation "must be demonstrated" to guarantee causation and such is "beyond dispute." AAB 31. In arguing this inaccuracy, the first misstatement of Appellee is Dr. Dahlgren agrees that application of these three factors is beyond dispute. A closer inspection of Dr. Dahlgren's testimony indicates he believes the

[6] The underlying need for this Court to define precedent belies a fortunate fact for New Mexicans. Unlike other jurisdictions such as New Jersey and states with heavy industry, New Mexico has been relatively free of industrial pollutants such as PCB's, benzene, etc.

evaluation of toxicological evidence section of *Reference Manual on Scientific Evidence*, upon which Appellee rests for their assertions regarding dose, general causation, and specific causation, is not on point for causation in the instant case. More pertinent to determining the Parkhills' ailments is the *Manual's* section on medical causation. TR 139:18-140:6. Second, Dr. Dahlgren notes that contrary to Appellee's contention that all toxic tort expert analysis starts with general causation, the number one factor for toxic assessment, as stated in the *Manual* is, "whether the disease can be related to chemical exposure by a biologically plausible theory." TR 154: 16-20; 156:11-157:13. In the instant case, such a biologically plausible mechanism exists based on the resounding animal studies referenced throughout proceedings.[7,8]

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[7] In addition, Appellee's claim that failure to prove any of these steps requires exclusion, citing *Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769 (10th Cir. 2009), is misguided. *Tyson Foods* was not a toxic tort case entailing proof of dose as well as general and specific causation with respect to a human injury. Instead, testimony pertained to environmental DNA contamination. Oklahoma's experts were limited due to the fact they failed to account for alternative sources of contamination (*Oklahoma,* 565 F.3d at 778) unlike Dr.'s Koury and Dahlgren who ruled out alternative causes of the Parkhills' symptoms.

[8] At the same time Appellee argues imperative proof of dose, general, and specific causation, it also argues the AOB's cited cases at 28-29 inadequately support differential diagnosis with adjusted *Daubert* analysis pursuant to toxic tort's unique circumstances. But, the AOB's specific cases that adjust dose, general causation, and specific causation requirements are

With respect to general causation, Appellee makes the bold contention that Dr. Dahlgren's reference to a study examining the effects of monensin on single cells and thereby extrapolating general causation was "thoroughly discredited." AAB 36. Yet, at the same hearing Dr. Fisher's claimed discrediting of Dr. Dahlgren's reasoning was fully refuted and countered by Dr. Behnke. TR 495:24-497:21. The analysis and testimony is not as simple and clear-cut as Appellee claims.

As for Appellee's assertions on specific causation Dr. Dahlgren testified, congruent with the *Manual's* specific causation requirements,[9] that toxicity levels were measured in the feed by the New Mexico Department of Agriculture and the Parkhills, according to Dr. Kory as well, were exposed

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discussed during pages 31-36. Regardless, an examination of the cases on pages 28-29 (that Appellant cites for the general contention that differential diagnosis is a recognized and viable means to determine causation in toxic tort) reveals the following: *Benedi v. McNeil-P.P.C., Inc.,* 66 F.3d 1378 (4th Cir. 1995)(no epidemiological data supporting general causation that aspirin and alcohol use results in liver disease, differential diagnosis sustained based on temporal relationship); *Zuchowicz v. United States,* 140 F.3d 381 (2d Cir. 1998)(no epidemiological studies indicating causation between toxin and rare ailment, testimony still allowed); *Ambrosini v. Labarraque,* 101 F.3d 129, 139 (D.C. Cir. 1996)(expert allowed to testify to causation despite no cause-effect relationship conclusively established by animal or epidemiological studies).

[9] The *Manual* sets forth the following specific causation inquiry: "Was the plaintiff exposed to the substance, and, if so, did the exposure occur in a manner that can result in absorption into the body...measured in one of three ways...Exposure can be directly measured in the medium in question, air, water, food, or soil." TR 171:5-9; 172:3-6.

to monensin by a combination of inhalation and skin contact. TR 157: 7-12; 23:22-25; 100:13-25; 111:1-10; and 256:22-257:21. Irrespective of such, Appellee counters that specific causation fails in the case of the Parkhills based on an incongruent temporal relationship. AAB 41. Supposedly, the Parkhills lack of documented medical ailments until they met with Dr. Koury approximately 10 weeks after exposure equates to no immediate harm. To begin, the Parkhills' ailments entailed a gradual onset of symptoms, which by the time they visited Dr. Koury had become significant enough to merit medical examination. More importantly, Dr. Koury and Dr. Dahlgren both testified that a key component of the temporal relationship and symptoms was that all of the Parkhills experienced similar symptoms all within a "same cluster of time." TR 110:1-111:10; 116:7-18; 276:13-277:15. For Appellee to contrarily claim no temporal relationship exists reveals a lack of understanding of what constitutes a temporal relationship. Not only do temporal factors include correlation of onset with exposure – which need not be immediate[10] – but a temporal relationship can exist due to

[10] Appellee's claim that temporal relationship requires strong, undisputed, and immediate correlation and the cases cited in AOB's note 14 the stand for such a strong, undisputed, and immediate correlation is wrong. In *Magaw v. Middletown Bd. of Educ.*, 731 A.2d 1196, 1203 (N.J. Super. App. Div., 1999), the aggrieved party was a tonsil cancer sufferer whose ailment manifested after 26 years of exposure to second-hand smoke. In addition,

multiple victims exhibiting similar constellations of symptoms in a similar time frame.

In support imperative quantification of dose Appellee claims Dr. Dahlgren agrees that dose is the "cornerstone" of a toxicological opinion. AAB 33. This is not true. Dr. Dahlgren testified that dose is important, but "dose is not the whole story" and further a critical issue is *susceptibility*. TR 14:24-145:16. Although Dr. Dahlgren and Dr. Koury did testify that an exact qualitative measurement of dose was not taken, this inability to obtain specific measurement is often present in toxic exposure cases. Yet, such does not preclude a finding of causation, as exemplified by the numerous cases in Appellant's AOB at note 12. As the *Reference Manual on Scientific Evidence* 187 (1994) observes, "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." If the Federal Judicial Center identifies such as nearly impossible how can Appellee assert dose is "an absolute prerequisite"? AAB 32.[11]

Appellee's mis-cite the AOB as it is note 13 that actually speaks to temporal relationship based precedent.

[11] Dr. Dahlgren also discussed the same difficultly and usual impossibility of measuring dose, as explained in the *Manual*, during his testimony. In addition, he elaborates how qualitative estimation can be more accurate than Appellee expert's quantitative estimate. TR 502:19-505:1.

Appellee takes the dose argument a step further by claiming the cases cited by Appellant entailed *substantial* and excessive exposure, therefore specific dose quantification was unnecessary. (AAB 34). To begin, in *Westberry v. Gislaved Gummi AB,* 178 F.3d 257 (4th Cir. 1999), dose exposure was based solely on the testimony of the plaintiff who stated he was exposed to "high concentrations." *Westberry*, 178 F.3d at 260. Meanwhile, in *Wisner v. Illinois Cent. Gulf R.R.*, 537 So.2d 740 (La. App. 1 Cir., 1988), no readings were taken at the scene of a train derailment with chemical cars, but circumstantial evidence of the plaintiff's health before and after the event was deemed sufficient to support quantifiable exposure and causation. Meanwhile, in *Cavallo v. Star Enter.,* 892 F.Supp. 756 (E.D.Va.1995), the aggrieved party was exposed to fumes for merely 5 minutes while walking across a parking lot, no measurements were taken, and the court did not determine, as Appellee asserts for all the aforementioned cases, that "substantial exposure had in fact occurred." AAB 34.

Appellee, in addition, challenges the unique circumstances underlying the Parkhills' exposure to monensin. AAB 37. Essentially, because monensin has been used for numerous years in cattle feed, as opposed to horse feed in which it has deadly consequences, Appellee proffers that the

Parkhills' ailments could not be related to the feed. The adulterated horse feed the Parkhills received from Appellant, though, was excessively powdery, dusty, or in industry parlance had excessive "fines". Thus, as the Parkhills dispersed feed inhalation would have occurred, particularly in Joey Parkhill's case since he poured bags of feed from his shoulder right in front of his face. As Dr. Dahlgren explained, this airborne inhalation of the finer particulate monensin dust would create an increased risk of toxicosis since the liver is bypassed in such a process. TR 258:20-259:20.

In attempting to refute the unique circumstances of the Parkhills' toxic exposure, the AAB also challenges the "sporadic accident" model referenced by Appellee's AOB. AAB 37-38. First, the fact that Kansas, wherein the cited case of *Kuhn v. Sandoz Pharmaceuticals Corp.*, 14 P.3d 1170 (Kan. 2000) originates, has not adopted the *Daubert* standard does not negate the concept of sporadic accident toxic tort. This concept was not "invented" by Kansas. An examination of the opinion reveals that *Kuhn* relies upon two different treatises that acknowledge the legal concept of sporadic accidents: Modern Scientific Evidence: The Law and Science of Expert Testimony: (1) *The Role of Epidemiological Evidence in Toxic Tort Cases*. § 28-1.3.2, pp. 307-08 and (2), the internally cited reference, *A Mass Exposure Model of*

Toxic Causation: The Content of Scientific Proof and the Regulatory Experience, 18 Colum.J.Envtl. L. 181, 188 [1993].) *Kuhn,* 14 P.3d at 1185.

B. DISCOVERY SANCTIONS WERE INAPPROPRIATE.

1. MR. PARKHILL WAS FORTHCOMING AND NEVER OBSTRUCTED DISCOVERY.

The very first disclosures made by any party in this case included Mr. Parkhill's disclosure of the preexisting injury at issue. In August 2005, Mr. Parkhill disclosed his head injury, the alleged "concealment" of which was the basis of the motion for sanctions. At the same time, he also disclosed the hospital in which it was principally diagnosed and treated and he provided opposing counsel with a HIPAA compliant release with which the Appellee could have obtained the head injury records.[12] These disclosures were made five months after the Complaint was filed, a year before the first of Mr. Parkhill's three depositions, and *two years before* Appellee's motion for sanctions was filed. AOB 16, 44.

Appellee's AAB does not deny (or even address) the foregoing facts. Similarly, Appellee's brief fails to cite a single case in which *any* sanction

[12] While Mr. Parkhill misremembered the year of his head injury, indicating in his interrogatory answer that it was 1995 rather than 1997, it is also true that he reported the same date in two other hospital records after the head injury and *before* the exposure to monensin. (i.e., it was obviously Mr. Parkhill's honest recollection, not something made up to mislead Appellee. Moreover, a request for records since 1995 would have gotten everything.) AOB 14-15.

(let alone the ultimate sanction of dismissal) has been affirmed under such circumstances by any court. It is unlikely that any such case exists.

Moreover, counsel for Appellee confirmed in writing his understanding that Mr. Parkhill had disclosed a head injury treated at University of New Mexico Hospital. Appellee's counsel (then Butt, Thornton & Baehr) confirmed that understanding in *two* letters in 2006 – a year after receiving the disclosures and almost a year *before* his successor as counsel filed the motion for sanctions. With that documented awareness, counsel for Appellee *chose* not to order the head injury records although he did order other, more recent, records from University Hospital.

Presumably, Appellee's counsel chose not to request records old enough to include the *head injury* for the obvious reason that he was aware it would have *no relevance to the heart, respiratory, liver, and other injuries resulting from the monensin exposure.* Presumably, his common sense (or his consultants') led him to the same conclusion that the primary treating physician, Dr. Koury, and Appellee's own expert, Dr. Fisher, came to: There is no connection between the head injury in 1997 and the monensin injuries sustained in 2004. AOB 20-21. Again, Appellee's AAB does not deny (or even address) this disconnect.

2. APPELLEE NOW ABANDONS MISLEADING POSITIONS THAT INFLAMED THE COURT BELOW AND FAILS TO ADDRESS PERTINENT FACTS.

After inflaming the trial court with false allegations and misleading tactics, Appellee's AAB appears to have *abandoned* most of its arguments below and fails to address many of the more accurate facts presented in the AOB. For example:

- Appellee appears to abandon the claim that extensive head injury *records were destroyed* and unavailable – in truth, Appellee's counsel had virtually all of the records before that representation was included in the motion for sanctions.
- Appellee appears to abandon the claim that *preparation of its case was prejudiced* by the alleged failure to disclose information concerning the mule incident that caused the head injury and the claim for damages arising from it. In truth, once successor counsel for Appellee decided to make an issue of it, the records of the head injury and of the subsequent injury claim were reviewed by the medical personnel in the case. As a result, Appellee's own expert toxicologist found no connection between the sequelae of the head injury and any of the harm claimed in this case – confirming that the monensin injuries are not and aggravation or exacerbation of the

preexisting head injury – and the Parkhills' treating physician pointed out that the earlier records supported his diagnosis of monensin toxicity by establishing that the heart, respiratory, liver and other symptoms he was treating did not exist prior to the exposure to monensin.

- Appellee appears to abandon its reliance (and fails to support the trial court's reliance) on *Sandoval v. Martinez,* 109 N.M. 5, 780 P.2d 1152 (App. 1989) – instead of addressing the myriad ways in which the two cases are distinguished on the facts, distinctions that demonstrate how unfair and inappropriate the sanction is in this case.[13] Appellee just glibly says it isn't so. AOB 40-44; and AAB 47-48.

As well as abandoning many of the inflammatory (and untrue) allegations made below, Appellee has failed to respond to much of the AOB concerning the sanctions issue. Appellee clings to the unfounded conclusion that Mr. Parkhill deliberately and repeatedly "concealed" information concerning the head injury and subsequent claim but *fails to address* the salient fact that the head injury was disclosed, that treatment at University

[13] In the face of the AOB's clear demonstration that Mr. Parkhill disclosed his head injury "from the first ring of the discovery bell," (AOB 39, *quoting Sandoval*, 109 N.M. at 10; 780 P.2d at 1157) the AAB does not even to attempt to justify Appellee's claim below that Mr. Parkhill's interrogatory answer was worse than none at all.

Hospital was disclosed, and that a release of the records was provided – all in a most timely manner.

Appellee fails to address the fact that a simple request for the University Hospital records would have been the font from which all records concerning the head injury would have flowed and that original counsel from Butt, Thornton & Baehr *chose* not to request those records.

Appellee fails to address the fact that the medical practitioners – including its own expert, Dr. Fisher – indicated that there was no connection between the sequelae of the head injury and the monensin claims. AOB 21. Indeed, Appellee's AAB does not even mention Dr. Fisher's name in the context of its argument for sanctions. AAB 4-5, 17-22, 45-49. Appellee does not even reference its own expert at AAB 22, when attempting to discredit Dr.'s Koury and Dahlgren's statements.

Furthermore, Appellee fails to address the public policies:

1. That the law has a strong preference for the resolution of claims on their merits;
2. That such a severe sanction as dismissal should only be used as a last resort and only in the most "extreme" cases "upon a clear showing of willfulness or bad faith;" and

3. That appellate courts should be "particularly scrupulous" to assure that lower courts do not "too lightly resort to this extreme sanction." AOB 38, *quoting Sandoval*, 109 N.M. at 9; 780 P.2d at 1156.

Moreover, Appellee fails to address *Sandoval's* quote from the amicus brief of the New Mexico Defense Lawyers Association, warning against skillful and persistent litigators utilizing Rule 1-037 "from the first ring of the discovery bell" to "achieve a victory that the merits of the case might never sustain" – i.e., warning against the kind of litigating for sanctions that we see in this case after the departure of Butt, Thornton & Baehr as Appellee's counsel. AOB 39; *Sandoval,* 109 N.M. at 10; 780 P.2d at 1157.

Similarly, Appellee's AAB fails to address Mr. Parkhill's "posttraumatic amnesia" and memory problems relating to the head injury. This sequela of the head injury (which is no part of Mr. Parkhill's monensin claim) is well documented by the treating providers and the IME providers on both sides of the mule incident claim and particularly includes records of "poor memory for the period following the injury" and that Mr. Parkhill's memory was gradually improving. Instead, Appellee points out that Mr. Parkhill remembered a small claims matter concerning an air conditioning unit that he handled himself during his recovery from the head injury as if that negates Mr. Parkhill's posttraumatic amnesia, especially concerning the

trauma that caused it and what his lawyer was doing to get his medical bills paid.

3. *MEDINA* AND *REED* ARE NO MORE HELP TO APPELLEE THAN *SANDOVAL*.

Having essentially abandoned *Sandoval* (as well as the false claims that Mr. Parkhill failed to disclose his head injury, so records became unavailable, prejudicing Appellee's preparation of its case), Appellee now cites only two other cases: *Medina v. Foundation Reserve Inc.*, 117 N.M. 163, 870 P.2d 125 (1994) and *Reed v. Furr's Supermarkets, Inc.*, 2000-NMCA-091, 129 N.M. 639, 11 P.3d 603. Appellee relies on these cases for the proposition that prejudice is not required for the imposition of the sanction of dismissal. The AAB ignores, however, that although each of the two cases affirmed dismissals, they both also reiterated the importance that such sanctions be a last resort and a response only to the most egregious abuse of the discovery systems and the truth seeking function of the courts. *Medina*, 870 P.2d at 129; *Reed*, 2000-NMCA-091, ¶¶ 20-21.

Perhaps even more significantly, the AAB fails to address the facts of *Medina* and *Reed*. Like *Sandoval*, both cases are distinguished from the present case by their facts. Both exemplify far more egregious and intentional discovery abuse than any mistake by Mr. Parkhill (whether or not the Court believes it was intentional). For example, in neither *Medina* nor

Reed did the sanctioned party make the kind of disclosure, provide the kind of access to records, or submit to depositions as Mr. Parkhill did. *Medina* and *Reed* resisted, evaded and lied to avoid the cooperation that Mr. Parkhill volunteered.

In *Medina*, our Supreme Court was faced with a situation in which a law student disobeyed three separate discovery orders; got caught in lies concerning at least five specific relevant topics; gave evasive, incomplete and "I guess so" answers in his deposition; failed to meet court imposed deadlines; etc. Despite such egregious obstruction of discovery, the trial court's dismissal was subject to reinstatement upon Medina's payment of sanctions and costs. *Medina*, 117 N.M. at 163; 870 P.2d at 125. There is no way to apply *Medina* to Mr. Parkhill, who disobeyed no discovery orders, told no lies, was not evasive and voluntarily submitted to three depositions, and ignored no deadlines. Nevertheless, Mr. Parkhill was sanctioned far more harshly than Medina, as he was not even permitted to reinstate his claim by payment of a sanction and costs.

Medina also acknowledges that, while the dismissal sanction is not preconditioned on the importance of the false or deceptive information, the sanction imposed should be guided by the extent to which the preparation for trial has been obstructed. 870 P.2d at 128-129; *see, Reed,* at ¶ 20. Again,

and in stark contrast to *Medina*, Mr. Parkhill disclosed the head injury very early and that disclosure was confirmed twice by opposing counsel, who sensibly decided not to follow up on it.

In *Reed*, the Court of Appeals was faced with a supermarket slip and fall case in which Plaintiff's deposition and answers to interrogatories were each requested "on many occasions," leading to a motion and order compelling that discovery. *Reed,* 2000-NMCA-091, ¶¶ 3, 9. Moreover, it "was not a situation of isolated instances of vague or unresponsive answers." *Supra* ¶ 14. In contrast, Mr. Parkhill's answers to interrogatories were the first disclosures in the case and included disclosure of his head injury, the principal place it was treated, and also voluntarily provided a records release. Also, Mr. Parkhill submitted to a full day deposition the first time he was asked, on the eve of the discovery cutoff, and two more depositions thereafter – all without the need of any court order. Comparison of Reed's medical records with her eventual answers to interrogatories and in deposition revealed at least 11 categories of misrepresentation. *Supra* ¶ 4.

With respect to the two Plaintiffs' approaches to the depositions in the two cases, the contrast is also stark. Reed attempted to evade being deposed with the excuse that she was unable to withstand the physical and emotional demands of a deposition. Mr. Parkhill, however, genuinely burdened by a

severe and life threatening heart condition, consulted with his doctor to find out how to safely get through a day of deposition and the original counsel for Appellee, from Butt, Thornton & Baehr, had the courtesy to conduct the full day deposition in accordance with the doctor's guidelines for breaks. Again, Mr. Parkhill submitted to the deposition the first time it was requested – and then submitted to a second deposition, and then a third.[14]

Clearly, any comparison of the Mr. Parkhill's conduct to the facts in *Medina* or *Reed* cuts against sanctioning Mr. Parkhill, just as the facts in *Sandoval* cut against such sanctions.

4. THE ANSWER BRIEF PERSISTS IN MISLEADING AND INACCURATE ASSERTIONS.

The AAB lists head injury symptoms that were reported in relation to that claim in 1998, still early in the period of recovery from post concussion syndrome, as if those were permanent injuries. AAB 20. They were not. As reflected in the medical records related to the head injury and in the Affidavit of the treating Family Nurse Practitioner Phyllis Tulk, (RP 3806-3808; AOB 11-13, 15, 19, 44, and 45) it took about three years to stabilize

[14] By the third deposition of Mr. Parkhill, Butt, Thornton & Baehr had been replaced by present counsel who, within five minutes of being informed that Mr. Parkhill had just taken nitroglycerine during a break to mediate angina brought on by his interrogation, took the opportunity to ask outrageous questions about a false rumor that Mr. Parkhill's wife had an affair years earlier.

gradually, after which time the only residuals were the visual, hearing and memory deficits. There are no medical records reflecting headaches, dizziness, head/neck/back pain, or problems performing simple tasks during the four years leading up to the monensin exposure because there were no longer any such problems. Moreover, all of the medical personnel in the case agree – including Appellee's expert, Dr. Fisher – that the sequelae of the head injury have nothing to do with monensin exposure. AOB 18, 20-21.

The AAB persists in Appellee's misleading representation concerning healthcare "providers" for the head injury. AAB 21. As Appellee well knows, at least three of the "providers" on its list did IMEs and provided no care. Appellee is also aware that Family Nurse Practitioner Tulk worked in the office of P. Kelly, D.O., who provided no healthcare to Mr. Parkhill. RP 3806-3808. Moreover, most of the diagnostic and treatment work was done at University of New Mexico Hospital which was fairly disclosed in the first round of discovery in August 2005, but which Appellee has artfully left off its list of providers. Instead, Appellee lists at least three others who saw Mr. Parkhill *only* at University Hospital and whose records are included in the University Hospital records. On the other side of the coin, Appellee double dips with respect to the emergency room treatment of the head injury at Eastern New Mexico Medical Center, listing ENMMC and at least two of

the personnel there as if they were not all part of the single ER treatment on the day of the mule incident and as if they each had separate records. They did not. AAB 21; AOB 11-13; Plaintiff's Sur-Response to Motion to Dismiss, RP 3778-3800, *generally* and specifically RP 3787-91.

Appellee is making the mutually exclusive arguments that: (1) Mr. Parkhill suffered such a significant head injury from the mule incident that he should be most severely sanctioned for not disclosing the subsequent claim even though he did disclose the injury; ***but***, Appellee also argues (2) any confused or incomplete disclosures by Mr. Parkhill's were clearly "willful," "flagrant," "callous" and "in bad faith" and could not possibly have been the result of any memory impairment from the head injury, which Appellee implies does not exist notwithstanding the opinions of the treating providers and IME consultants for both sides in the mule accident claim.

The AAB quotes the court below for its skepticism; i.e., its unfounded *assumption* that Mrs. Parkhill checked her husband's answers to interrogatories, so any mistakes must be deliberate. AAB 46. In truth, Mrs. Parkhill was working on the two sets of interrogatories that were propounded to her, not looking over her husband's shoulder. With all due respect, Judge Sweazea's skeptical statement was made before he reviewed Appellant's Sur Response, including the Affidavit of Phyllis Tulk, FNP, and

before argument on his reconsideration, a procedure that was never completed. The statement makes up a hypothetical conversation between Mr. and Mrs. Parkhill out of whole cloth, with no evidence to support that such a conversation ever took place. The Parkhills understood that each was to do his/her own homework – and they did.

The AAB mischaracterizes the treatment of the head injury as covering years. In truth, the incident occurred on September 2, 1997 and Mr. Parkhill was discharged from University Hospital on October 9, 1997, following a two night admission for evaluation. Thereafter, there was no treatment, just the IMEs and the three years it took to gradually heal and stabilize. AAB 47.

Appellee also cites Judge Sweazea's indication that he'd considered the even more harsh sanction of dismissing all of the claims, which would have meant dismissing the claims for the decimation of the family's herd of Quarter Horses and the claims of Mrs. Parkhill and their two daughters for their own injuries. AAB 47. Obviously, this consideration would have been a non-starter, as the innocent spouse and children against whom no motion was filed and who certainly did nothing to justify their injury claims being dismissed also owned the herd.

Finally, the AAB cleverly mischaracterizes Mr. Parkhill's second deposition as "[t]he deposition in which Mr. Parkhill mentions the mule accident for the first time." AAB 49. In truth, it was not a matter of Mr. Parkhill "mentioning" the mule incident. That deposition in February 2007 was the first time Appellee asked Mr. Parkhill anything at all about his head injury in the 18 months since he disclosed it in August 2005. In contrast to the cases on which Appellee has relied (*Sandoval, Medina,* and *Reed*), Mr. Parkhill answered forthrightly the first time he was asked. Moreover, the reason that second deposition was taken six months after the discovery cutoff was that Appellee failed to ask a single question abut Mr. Parkhill's health or health history during the full day deposition Appellee took on the eve of the discovery cutoff – so, Mr. Parkhill *stipulated* to the additional deposition in order to give Appellee *another* chance to examine him about his health.

Notwithstanding Appellee's claims that Mr. Parkhill did not tell Dr. Dahlgren about the mule incident, and notwithstanding that Appellee deposed Mr. Parkhill for a full day in August 2006 (with Dr. Dahlgren's report in hand), Appellee complains because it waited until its *second* deposition of Mr. Parkhill, in February 2007, to ask him "about a reference

to a mule accident noted in an attachment to Dr. Dahlgren's report." AAB 19. Appellee now complains because it didn't ask sooner.

II. CONCLUSION

Dr.'s Koury and Dahlgren's testimony should be allowed. Based upon training and experience, as well as reliably performed differential diagnoses, and the unique parameters of *Daubert* analysis within the context of toxic tort, both these experts' opinions satisfy evidentiary muster. Questions as to their methodologies should be addressed by "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596.

With respect to sanctions, Mr. Parkhill made early disclosures and went the extra mile to cooperate fully with his discovery obligation. No case supports imposition of sanction (let alone such severe sanctions) on any reasonable interpretation of the facts. In that respect, the AAB fails to address the facts of the only cases it cites: *Sandoval, Medina,* and *Reed.* The sanction of dismissal should be vacated and the case should be remanded for trial of Mr. Parkhill's personal injury claims.

RESPECTFULLY SUBMITTED this 7th day of October, 2009.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2009, service of the foregoing: **APPELANTS' REPLY BRIEF** was made upon the following via email and mailing a true and correct copy thereof in an envelope, securely sealed, postage prepaid and addressed as follows:

Seven paper copies to:

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

One paper copy to:

John S. Thal and Clifford K. Atkinson
ATKINSON & THAL, PC
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