

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

SEP 16 2009

San H. Martin

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

vs.

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

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

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

ANSWER BRIEF
OF DEFENDANTS-APPELLEES
CHEVRON USA, INC. AND CONOCOPHILLIPS COMPANY

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STATEMENT OF COMPLIANCE

By his signature at the end of this document, Rebecca Nichols Johnson states that, based on the word-count feature of Microsoft Office Word 2003 the body of this brief contains 10,954 words and, therefore, complies with the word limitation provision in Rule 12-213(F)(3) NMRA.

REFERENCES TO THE TRANSCRIPT

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

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Defendants-Appellees, Chevron USA, Inc. (“Chevron”) and ConocoPhillips Company (“ConocoPhillips”), file this Answer Brief for this Court’s consideration, and **also adopt the arguments made in the separate Answer Brief filed by Appellees, United States Steel Corporation and Radiator Specialty Company.**

**APPELLANT MISSTATES SOME OF APPELLEES’
CONTENTIONS IN HER SUMMARY OF PROCEEDINGS**

Appellees are not required to include a Summary of Proceedings in the Answer Brief unless deemed necessary. Almost half of Appellant’s Brief in Chief (“**BIC**”) is dedicated to the Summary of Proceedings, wherein Appellant makes detailed arguments regarding various facts, being Appellant’s characterization of those facts. To the extent Appellees dispute Appellant’s characterization of those facts, or any of the evidence cited related to those facts, those will be addressed in the Argument below. However, Appellees deem it necessary to correct some of the mischaracterizations of “Defendants’ Contentions,” as set forth by Appellant in her Summary of Proceedings. For one, Appellant states that, “Defendants contended, and the Court found, that Dr. Gardner’s methodology was flawed because he diagnosed Lindell with AML” (**BIC 5**). To the contrary, the Court’s **FOF 3** specifically states that Mr. Andrews had AML at the time of his death (which was also supported by the testimony of Dr. Ethan Natelson, one of Appellees’ experts who testified at the

Daubert/Alberico hearing). Tr. 239.¹ Dr. Gardner's initial failure to review Mr. Andrews' pathology slides before he first attacked the RARS diagnosis (RP 4968, 4974) became an issue, among other defects in his methodology, which will be discussed in the Argument below.

Similarly, Appellant misstates another of Appellees' contentions claiming in her Summary of Proceedings that:

Defendants never contended, as part of either their motion for summary judgment or their motions to exclude the testimonies of Dr. Nicas or Dr. Gardner, that there was no evidence that benzene, one of the ingredients in Liquid Wrench, had not been shown to be causally related to RAEB, RAEBt or AML. The Court's ruling purported to conclusively resolve an issue that was never raised.

BIC 12. Yet ¶4 of Appellees' *Motion for Summary Judgment (as to Causation)* ("MSJ") states:

The methodology of Plaintiff's medical expert, Frank Gardner, M.D. ("Dr. Gardner"), is likewise fatally flawed, as he has no biologically plausible theory to support causation in this case, and **is unable to show**

¹ Specifically, FOF 3 states:

Mr. Andrews was initially diagnosed with Refractory Anemia with Ringed Sideroblasts ("RARS"), which subsequently evolved to Refractory Anemia with Excess Blasts ("RAEB"), and which had or was evolving into acute myelogenous leukemia ("AML") at the time of Mr. Andrews' death.

RP 5304.

any link between the benzene contained in gasoline and Liquid Wrench (allegedly used by the decedent), **to the disease which caused his death**. The testimony of Dr. Gardner is the subject of a separate **Motion to Exclude the Testimony of Frank Gardner, M.D.** [emphasis added].

RP 1609.

Regarding the Court's exclusion of Dr. Nicas' testimony, Appellant incorrectly states in her Summary of Proceedings that, "the Court made no express findings on Defendants' alternative argument that Dr. Nicas' dermal exposure estimates and analysis were not 'plausible'" (**BIC 13**). This, too, is incorrect. Appellees argued in their **MSJ** that:

The end result of Nicas' dermal exposure estimates and analysis is not plausible, as the levels of benzene exposure by Lindell Andrews, based on Nicas' assumed conditions, are **not consistent with repeated exposures that could be tolerated by a person for 24 years of chronic exposure** [citation to **Affidavit of Irons at ¶15**] [emphasis added].

RP 1854. After hearing all of the evidence at the **Daubert/Alberico** hearing, the Court made a very specific **FOF 29** regarding the implausibility of Nicas' analysis as follows:

Using the 50 fold greater than benzene typical concentrations of toluene, xylene and alkanes present in gasoline, and applying the same assumptions and conditions made by Dr. Nicas, Mr. Andrews would have absorbed doses of toluene and xylene alone at approximately 700 to 1000 times greater than his estimated benzene absorption, during the same 2½ hour period, **which absorption at such concentrations would have resulted in acute central nervous system toxicity that could not have been tolerated for 24 years of chronic exposure** [emphasis added].

RP 5309-5310. Additional arguments regarding the above contentions, and other facts and evidence addressed by Appellant in her Summary of Proceedings will be dealt with below.

ARGUMENT

I. APPLICABLE STANDARDS OF REVIEW

A. The Standard of Review Is Abuse of Discretion for Reviewing the Court's Exclusion of Appellant's Experts.

“The admission or exclusion of evidence is within the discretion of the trial court,” and “[o]n appeal, the trial court’s decision is reviewed for abuse of discretion.”

Indeed, “[a]n abuse of discretion arises when the evidentiary ruling is clearly contrary to logic and the facts and circumstances of the case.” State v. Downey, 2008-NMSC-061, ¶24, 145 N.M. 232, 195 P.3d 1244.

As explained in Mitchell v. Gencorp Inc., 165 F.3d 778 (10th Cir. 1999), in a toxic tort case, where the trial court excludes “evidence essential to maintain a cause of action, the propriety of summary judgment depends, as here, entirely on the evidentiary ruling.” Id. at 780, citing Allen v. Pennsylvania Engineering Corp., 102 F.3d 194, 196 (5th Cir. 1996). In such a case, the district court’s evidentiary ruling is reviewed for an abuse of discretion. Mitchell, 165 F.3d at 780, citing General Electric v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 519 (1997). The Court in Ruggiero v. Warner-Lambert Co., 424 F.3d 249 (2nd Cir. 2005), elaborated on the appropriate standard of

review as follows:

A district court's decision as to how the reliability of expert testimony should be determined, as well as the ultimate decision as to whether that testimony is reliable, are reviewed for abuse of discretion. *See Kumho Tire Co. v. Carmichael*, 526 U. S. 137, 152, 119 S.Ct. 1167, 143 L.Ed. 2d 238 (1999); *see also Joiner*, 522 U.S. at 142-43, 118 S.Ct. 512 (**abuse of discretion standard persists at summary judgment stage**) [emphasis added].

424 F.3d at 253-254. The standard of review is not *de novo*, as suggested by Appellant (BIC 22).

The Tenth Circuit recently described the abuse of discretion standard as meaning that it will not disturb a trial court's decision to exclude evidence unless it has a "definite and firm conviction that the trial court has made a clear error of judgment or exceeded the bounds of permissible choice." *Attorney General of the State of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009). The "scope [of the Court's] review is quite narrow." *Id.* In this case, as in *Mitchell*, once the Court excluded Appellant's expert witnesses, there was no evidence to support a causal connection between Appellees' products, gasoline and/or Liquid Wrench, and the disease from which Mr. Andrews died.

B. The District Court Applied the Correct Standard In Determining That Appellant's Experts' Testimony Should Be Excluded

Appellees agree with Appellant that *State of New Mexico v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993), is the seminal case in New Mexico addressing the

admissibility of expert opinion testimony. Alberico states:

When scientific evidence is employed as a means of *obtaining or analyzing data*, the trial court must determine whether the scientific technique is based on world-recognized scientific principle and whether it is capable of supporting opinions based upon *reasonable probability rather than conjecture* [emphasis added].

116 N.M. at 167, 861 P.2d at 203. Indeed, Alberico was decided the same year as, and looked to the landmark case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which wrestled with the admissibility of expert testimony in a toxic tort case. A passage quoted in Daubert illuminates the “gatekeeping role for the judge” in determining the admissibility of expert testimony:

The work of a judge is in one sense enduring and in another ephemeral . . . In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine.

(quoting from B. Cardozo, *The Nature of the Judicial Process* 178-179 (1921)).

Daubert, 509 U. S. at 597. The Tenth Circuit in Mitchell, following Daubert, itself a toxic tort case involving benzene, stated:

We recognize that “trained experts commonly extrapolate from existing data. But nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” [citation omitted]

Under *Daubert*, “any step that renders the analysis unreliable . . . renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.” [citation omitted]. **Without scientific data supporting their conclusions that chemicals similar to benzene caused the same problems as benzene**, the analytical gap in the expert’s testimony is simply too wide for the opinions to establish causation. The district court reached this conclusion and did not abuse its discretion in doing so [emphasis added].

165 F.3d at 782. In *Mitchell*, the Court found that an expert’s methodology is suspect where the experts “reach their ultimate conclusions before studying the available literature,” or “aver under oath that it is correct prior to performing the necessary validating tests,” and, in such a case, the court “did not abuse its discretion by discounting the testimony.” 165 F. 3d at 784.

Appellant is correct in suggesting that *Daubert’s* reliability requirement is focused on the principles and methodology, and not the conclusions that stem from that methodology. However, as pointed out in the most recent Tenth Circuit case following *Mitchell*, being *Tyson Foods*, 565 F.3d at 780, the Supreme Court made it clear in *Joiner* that “conclusions and methodology are not entirely distinct from one another,” quoting *Joiner*, 522 U.S. at 146. The other case cited by *Mitchell* and *Tyson Foods* on this point, *In Re Paoli Yard P.C. Litigation*, 35 F3d 717, 745 (3rd Cir. 1994), adopts a similar view:

When a judge disagrees with the conclusions of an expert, it will generally

be because he or she **thinks that there is a mistake at some step in the investigative reasoning process of that expert.** If the judge thinks that the conclusions of some other expert are correct, it will likely be because the judge thinks that the methodology and reasoning process of the other expert are superior to those of the first expert [emphasis added].

Id. at 746.

The above analysis from the federal courts for determining the admissibility of expert evidence is followed by and similar to that enunciated in New Mexico's state courts, as recently articulated in Downey:

The primary inquiry is whether the scientific methodology "fits" the facts of the case and thereby proves what it purports to prove. Accordingly, for scientific evidence to be admissible under Rule 11-702, "the reasoning or methodology underlying the testimony [must not only be] scientifically valid," it also must be "*properly ...applied to the facts in issue.*" [quoting Daubert] [emphasis in original].

* * *

"Expert testimony may be received if, and only if, the expert possesses such facts as would enable him to express a reasonably accurate conclusion as distinguished from mere conjecture."

Downey, supra, at ¶¶ 30-32.

The Court's FOFs entered in this case clearly demonstrate that the Court followed the above standards in excluding the testimony of Dr. Gardner and Dr. Nicas, as will be illustrated below.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE TESTIMONY OF DR. GARDNER

A. Dr. Gardner's Rejection of RARS As A Diagnosis From The Beginning Was Fatally Flawed Where He Had Not Reviewed The Bone Marrow Slides, and His Later Review of the Slides Was Found Unreliable.

Mr. Andrews' treating hematologist-oncologist, Dr. Barbara L. McAneny, a founder of the New Mexico Hematology-Oncology Consultants in Albuquerque, New Mexico, reviewed Mr. Andrews' bone marrow slides and diagnosed Mr. Andrews with refractory anemia with ringed sideroblasts ("RARS") by November 2004. **RP 1895, 1939; Tr.50-51.** When Dr. Gardner's deposition was taken on May 8, 2008, he rejected Dr. McAneny's diagnosis of RARS prior to following, what even Dr. Gardner acknowledged is the accepted methodology of reviewing the bone marrow slides before reaching such a conclusion. **RP 4968, 4974.** Dr. Gardner agreed that under the WHO standard, in order to diagnose a condition such as RARS, at least 15% of the bone marrow erythroblasts . . . must be ringed sideroblasts. **RP 4974.** Dr. Gardner conceded that there was no reliable scientific literature to support the theory that exposure to benzene had been demonstrated to cause RARS. **RP 4969, 4971.** Dr. Gardner acknowledged that the diagnosis of RARS, a very specific type of myelodysplastic syndrome ("MDS"), cannot be made without reviewing bone marrow slides. (**RP4967-4968**), yet he himself had not reviewed the bone marrow slides. **RP**

4968. Dr. Gardner's deposition testimony was equivocal regarding whether or not Mr. Andrews had RARS. At first he testified that Mr. Andrews "absolutely" did not have RARS (**RP 4968**), but later acknowledged that he could not say one way or the other because he had not reviewed Mr. Andrews' bone marrow slides. **RP 4975-4976.**

In a July 24, 2008 Affidavit, made after his deposition, Dr. Gardner did not claim that he counted ringed sideroblasts from reviewing the slides, but merely stated that he saw no indication that Mr. Andrews' treating doctors or defense experts, had "counted and verified the number and percentage of ringed sideroblasts." **RP 4620-4622.** Nor did Dr. Gardner's July 24, 2008 Affidavit state that Mr. Andrews did not have RARS. It merely claimed that, in Dr. Gardner's opinion, any assertion that Mr. Andrews had RARS is based on speculation and unsupported by accepted methodology. **RP 4622.** Four days later, Appellant tendered yet another Affidavit of Dr. Gardner, dated July 28, 2008, in which for the first time, he states that he reviewed certain of Mr. Andrews' bone marrow pathology slides. **RP 4709-4710.** Dr. Gardner vaguely describes his "count" of ringed sideroblasts and then reaches the conclusory opinion that Mr. Andrews' treating hematologist-oncologists and the defense experts were all incorrect in diagnosing Mr. Andrews with RARS. Specifically, Dr. Gardner states that he counted ringed sideroblasts on Mr. Andrews' 7/14/99 and 10/22/04 bone marrow slides and that he counted 2% ringed sideroblasts on the 7/13/99 slide and 6% ringed sideroblasts on the 10/22/04 slide. **RP 4710.**

Dr. Gardner's Affidavits are evasive and incomplete in that they: (a) do not specifically state that Mr. Andrews did not have RARS; (b) do not address the question of whether RARS sometimes evolves into RAEB, RAEBt or AML, or whether it did in Mr. Andrews' case; and (c) **do not state that Dr. Gardner evaluated representative fields** on Mr. Andrews' bone marrow slides in reaching his opinions or in counting ringed sideroblasts.

During Dr. Natelson's testimony at the Alberico/Daubert hearing, the deficiencies in Dr. Gardner's affidavit were obvious. Dr. Natelson showed the Court photographs which he took of Mr. Andrews' bone marrow slides through the microscope and literally counted well over 15% ringed sideroblasts **on representative fields** of Mr. Andrews' 10/22/04 bone marrow slides for the Court. He also pointed out how important it is to make sure that **a representative area** of a slide is being used, as you might come up with a different count "if you counted a different hundred cells." **Tr. 93-94.**

Similarly, Dr. Irons, another of Appellees' experts, observed 60% to 70% ringed sideroblasts in representative fields on Mr. Andrews' bone marrow slides, and concurred with the diagnosis of RARS made by Mr. Andrews' treating oncologist. **RP 5007-5008.** Dr. Iron's Affidavit was submitted in support of the summary judgment (**RP 1888**), and his deposition was also taken and was used in support of Appellees' motion for summary judgment. **RP 5005.**

The crux of Appellant's argument regarding the 15% ringed sideroblasts required to support a diagnosis of RARS is that the valid and accepted methodology to determine whether a person has RARS, according to WHO, is to **perform a count** and determine whether the subject has 15% ringed sideroblasts, and that Dr. Gardner was the only person who did that count, and he found that Mr. Andrews did not have 15% ringed sideroblasts, thus negating the diagnosis of RARS (**BIC 10-11**). Again, Dr. Gardner had rejected the RARS diagnosis long before he reviewed the bone marrow slides. **RP 4967-4968**. Appellant argues that "none of the doctors who reached the diagnosis of RARS followed the WHO valid and accepted methodology "by performing that count." (**BIC 11**). That claim is belied by Dr. Natelson's testimony and the following deposition testimony of Dr. Irons that **in representative fields** on the bone marrow slides, he saw 60% to 70% ringed sideroblasts:

Q. Now, do you have any evidence with you today that reflects that from the slides you looked at for Mr. Andrews, that he had 15 percent greater of ringed sideroblasts?

A. I didn't perform a specific count, but I evaluated representative areas. **And some of the representative areas had in excess of 60 percent. Some areas had maybe 70 percent. Other areas had less. But overall, my impression of the number of ringed sideroblast present and the severity of the morphology was that it certainly met the criteria for a sideroblastic anemia.**

Q. Without regard to a count?

A. **Yeah. If there's a question, you do a count. If there's no question, there's no need to do a count. As I said, there are areas that had an**

them, because I don't think you're going to be able to count the sum total of representative areas on those slides and come up with a number that's under 15 percent. And if you did, it would, I think, not be representative of what the slide demonstrates as a whole.

* * *

Q. And you're saying it shows prominent numbers of ringed sideroblast?

A. Prominent ringed sideroblast in prominent numbers. The ringed sideroblast -- **the morphology is just as important, if not more so, than the absolute number in terms of characterizing the abnormality that's associated with ringed sideroblasts.** And ringed sideroblasts are very prominent.

(RP 5007-5011)

* * *

Q. When you looked at, observed and evaluated the slides for Mr. Andrews, how did you select representative fields?

A. I went through the process that I just described, looking at the slide overall, looking at what areas -- identifying where the tissues were, what was representative, what wasn't representative, and then looking for areas where there were basically single cells that were appropriately stained and where the stain was adequate such that you could make a meaningful interpretation of the morphology.

Q. And having gone through that process, **is there any doubt in your mind that the representative fields which you examined of Mr. Andrews' bone marrow had 15 percent or greater ringed sideroblasts among the erythroid cells you were looking at?**

A. As I sit here today, **there's no doubt in my mind with respect to the 2004 October aspirate and biopsy.**

RP 5018.

Appellant is intentionally playing fast and loose with what it means to "perform

a count.” The WHO classification does not even use the term, or allude to the phrase “performing a count.” Specifically it states:

Refractory anaemia with ringed sideroblasts (RARS) is a myelodysplastic syndrome **characterized** by an anaemia in which 15% or more of the erythroid precursors in the marrow smears are ringed sideroblasts.

* * *

An increased number of ringed sideroblasts, occasionally > than 15%, **may be observed** in other types of myelodysplastic syndromes, including RAEB [emphasis added].

Plaintiff’s Ex. 1 at p.69. Indeed, there is no description in the WHO classification of the proper methodology for “performing a count.” The review of photographs of the same slides at the *Daubert/Alberico* hearing made this apparent. **Tr. 29-43.** Dr. Gardner’s Affidavit could easily have described his review of the slides in the same detail and manner set out in Dr. Iron’s deposition and Dr. Natelson’s testimony. By failing to show that he had reviewed representative areas of the slide as a whole, there was no indication that he had utilized scientifically valid methodology.

In neither his deposition or two subsequent Affidavits, does Dr. Gardner’s acknowledge that RARS can be a precursor to AML, and that a diagnosis of AML is not mutually exclusive of an earlier diagnosis of RARS. Rather, Appellant suggests, with no supporting expert or other evidence, that Mr. Andrews could not have had both RARS and RAEB and eventually and ultimately AML (**BIC 23–24**).

It is undisputed that RARS, RAEB, RAEBt are each subtypes of MDS, and that

RARS can often evolve into RAEB, RAEBt and AML. In some cases, RAEB evolves from RARS, and in other cases, RAEB is the initial diagnosis and does not evolve from RARS. **Tr. 231-235.** Appellees' experts, Dr. Natelson and Dr. Irons, each testified that Mr. Andrews had RARS which evolved to RAEB and RAEBt, and at that the time of his death, either had evolved or was evolving into AML. **RP1867-1869, 1891-1892, 1895-1896; Tr. 239.** Appellant, on the other hand, fails to explain the relationship or connection between RARS and AML, and incorrectly assumes that a diagnosis of AML excludes a prior diagnosis of RARS (**BIC 23-24**).

In a 2007 article entitled "Benzene Exposure and Refractory Sideroblastic Erythropoiesis: Is There an Association?" published in the American Journal of the Medical Sciences, Dr. Natelson, Appellees' expert, addresses RARS and the lack of evidence that benzene exposure is associated with that form of MDS that can ultimately evolve into RAEB and AML. **Defendants' Exhibit 3; Tr. 44-45.** That article demonstrates the misleading nature of Appellant's argument that Mr. Andrews could not have had RARS and RAEB (or AML):

[I]f the bone marrow blast cell count increases about 5%, and even if large numbers of ringed sideroblasts are retained, under these classification schemes individuals are now moved from an RARS syndrome into another MDS category, refractory anemia with excess blasts (RAEB)

MDS is not a final illness designation, and individuals frequently move within the MDS classification over time. This is particularly true with respect to RARS syndromes. Thus, it would be expected that as the often

slow progression to AML from the 3 refractory sideroblastic variants described here occurs, the percentage of blast cells in the bone marrow may increase gradually from its initially normal values. As previously mentioned, ringed sideroblasts are often still present when the bone marrow blast percentage reaches 5% to 10%, but the MDS diagnosis now moves to RAEB.

Id. Similarly, Dr. Natelson's affidavit submitted in support of Appellees' motion for summary judgment stated:

The transition from RARS/AISA to AML, and passing through an RAEB phase (*by WHO criteria, for example*), with preservation of the extensive sideroblastic marrow findings, is well-described. This finding was evident in Mr. Andrews' final bone marrow so his pathologic designation of RAEB does not denote a separate diagnosis from sideroblastic anemia – just a classification anomaly.

RP 1869. Dr. Gardner acknowledged in his deposition that he was well aware of Dr. Natelson's 2007 article, but failed to read it. **RP 4972-4973.** Dr. Gardner appears to disagree with critical conclusions in it, but never explains his reasons, and did not appear to testify at the Alberico/Daubert hearing. An additional ground in Mitchell on which the district court relied in excluding two of the plaintiffs' experts was that the experts "reached their ultimate conclusions before studying the available literature." 165 F.3d at 784. Dr. Gardner also reached his conclusions before reviewing the available literature. **FOF 87; RP 2506-2513.**

At the Alberico/Daubert hearing, the disingenuous nature of Dr. Gardner's claim that neither Mr. Andrews' treating doctors or the defense experts had performed

a “proper count” of ringed sideroblasts on Mr. Andrews bone marrow slides, was made apparent. Dr. Natelson, Appellees’ expert, showed actual photographs of those bone marrow slides to the Court, **actually performed a count** at the hearing, and illustrated definitively for the Court and all present that more than 15% of ringed sideroblasts were present on the bone marrow slides, the same slides Dr. Gardner had reviewed. Dr. Natelson illustrated that when the ringed sideroblasts are “prominent,” recognizing that more than 15% exists is obvious from a visual inspection, without an actual count, which is typically how a clinical hematologist makes such a determination. **Tr. 39-42.** The review of the actual photographs of the slides at the hearing showed that if Dr. Gardner made a count, it could not have been on representative slides or a reliable count, because ringed sideroblasts were prominent and obviously in excess of 15%. Indeed, “seeing was believing.”

B. Dr. Gardner Failed To Make A Causal Connection, Based On A Scientifically Reliable Methodology, Between Mr. Andrews’ Exposure To Benzene In Gasoline And/Or Liquid Wrench And His AML.

Appellant engages in the pretense that exposure to gasoline, Liquid Wrench or mixed solvents similar to Liquid Wrench, the products at issue in this case, is the same as exposure to pure benzene. (**BIC 23-29**). In fact, Appellant discounts the following significant **FOFs** of the Court which support the exclusion of Dr. Gardner’s testimony, namely that Dr. Gardner offered no scientific or medical studies or literature to support

his claim that the disease from which Mr. Andrews died has been causally associated with exposure to gasoline, Liquid Wrench, or even similar mixed solvents:

77. Plaintiff has offered no scientific or medical studies, literature or expert testimony in which the development of RARS, RAEB, RAEBt and/or any type of MDS or AML has been causally associated with exposure to gasoline, Liquid Wrench or mixed solvents similar to Liquid Wrench. In fact, Dr. Gardner was not aware of any scientific study in which a worker population exposed to gasoline developed MDS of any kind at a statistically significant excess.

78. Dr. Irons and Dr. Natelson have testified that the reliable medical and scientific literature does not demonstrate that exposure to gasoline, Liquid Wrench or mixed solvents similar to Liquid Wrench causes RARS, RAEB, RAEBt and/or any type of MDS or AML.

RP 5319. Dr. Gardner acknowledged that he was not familiar with any studies where the persons exposed to benzene as a constituent in gasoline, as opposed to pure benzene, developed MDS at a statistically significant excess rate. **RP 2538.** In *Mitchell*, supra, the experts' testimony was excluded because the experts had no reliable data connecting chronic myelogenous leukemia ("CML") with benzene exposure. 165 F.3d at 782-783. Likewise, *Mitchell* supports the exclusion of Gardner's testimony, for analogous reasons, i. e., there is no reliable data connecting AML with exposure to gasoline and/or Liquid Wrench, nor is there any reliable data connecting RARS with benzene exposure at all.

As stated in *Farris v. Intel Corp.*, 493 F. Supp. 2d 1174 (D.N.M. 2007), "In a

toxic tort lawsuit, a plaintiff must show both general and specific causation.” Id. at

1180. Farris describes the difference between the two types of causation as follows:

General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual’s injury. Plaintiff must first demonstrate general causation because without general causation, there can be no specific causation.

Id. The Court in Farris held that, “general causation and specific causation are essential elements of plaintiff’s *prima facie* case,” and “expert testimony is necessary to make this showing since this is a toxic tort lawsuit.” Id. at 1186, citing Mitchell, 165 F.3d at 784 (“without the benefit of their experts, Plaintiffs cannot prove causation,” so “the district court correctly granted Defendant’s motion for summary judgment”).

Other courts have dealt with the issue of causation in analogous cases. For example, in Parker v. Mobil Oil Corp., 793 N.Y. S. 2d 434 (2005), the plaintiff alleged that, during his employment as a gasoline station attendant for seventeen years, he inhaled gasoline vapors and had dermal contact with gasoline containing benzene on a daily basis. Id. at 435-436. The Court in Parker reversed the trial court’s refusal to exclude plaintiff’s expert testimony because he “failed to make a causal connection, based upon a scientifically-reliable methodology, between the plaintiff’s specific level of exposure to benzene in gasoline and his AML.” Id. at 439. This was the case, even though the parties did not dispute the fact that the studies upon which the plaintiff’s

experts ultimately reached the conclusion that increased levels of exposure to benzene have been shown to cause leukemia. *Id.* at 438. The Court in *Parker* made it clear that an expert cannot mix apples and oranges, and rely on studies where the “plaintiff was exposed to, in addition to gasoline containing benzene, pure benzene and other benzene-containing products, many of which had a higher concentration of benzene than does gasoline.” *Id.* at 439. The Court in *Parker* found that the lower court should have precluded the expert’s testimony, and that summary judgment in favor of the defendants should have been granted. *Id.* Similarly, Dr. Gardner’s opinions in this case should be excluded because they are totally lacking in any scientifically reliable foundation associating Mr. Andrew’s use of gasoline and/or Liquid Wrench to his disease.

Dr. Gardner’s expert testimony was excluded in *Castellow v. Chevron U.S.A.*, 97 F. Supp. 2d 780 (S. D. Tex. 2000), on a similar issue as in this case. The claim in *Castellow* was that plaintiffs’ decedent died from AML allegedly caused by exposure as a fulltime service station attendant to benzene in gasoline. *Id.* at 782. In *Castellow*, Dr. Gardner’s testimony was excluded because he “was unable to name any medical text which posits that gasoline exposure causes AML, nor was he able to cite any cohort mortality study in which individuals exposed to gasoline, including service station attendants, were found to have a statistically significant excess of AML, or leukemia cases, in general.” *Id.* at 794. The *Castellow* Court also found that the data

of exposure level was unreliable, as Dr. Gardner agreed that the amount of exposure claimed would have been lethal almost immediately. Id. at 794.

Castellow supports the exclusion of Gardner's testimony in this case, as Dr. Gardner makes no attempt to set out the level of benzene exposure necessary to cause Mr. Andrews' disease, nor does he refer to any scientific literature supporting any causal association between the disease and the use of gasoline and/or Liquid Wrench. Likewise, the testimony of Dr. Irons, who submitted an Affidavit in support of Appellees' motion for summary judgment, shows the implausible nature of Appellant's claimed levels of exposure based on the Report of Dr. Nicas, Appellant's other expert, which supported the Court's **FOF 29 (5309-5310); RP1897-1900**. Dr. Gardner reviewed Dr. Irons' Affidavit but did not refute the implausible nature of Appellant's claimed exposure levels. **RP 4621-4622**.

Appellant cites to McClain v. Metabolife Int'l, Inc. 401 F. 3d 1233 (11th Cir. 2005), which acknowledges that an individual must have been exposed to a sufficient amount of the substance in question, but suggests that the precise exposure data is not required. (**BIC 33**). While precise data is not required, Appellant does not mention that McClain discusses what is called the "**dose-response relationship**":

When analyzing an expert's methodology in toxic tort cases, the court should pay careful attention to the expert's testimony about the dose-response relationship. The dose-response relationship is "[a] relationship in which a change in amount, intensity, or duration of exposure to an agent is

associated with a change -- either an increase or decrease -- in risk of disease." The expert who avoids or neglects this principle of toxic torts without justification *casts suspicion on the reliability of his methodology*.

McClain, 401 F.3d at 1242. McClain also discusses a 2003 article entitled "Scientific Judgment and Toxic Torts -- A Primer in Toxicology for Judges and Lawyers," by Dr.

David Eaton. The article explains:

"[T]he relationship between dose and effect (**dose-response relationship**) is the hallmark of basic toxicology" . . . "Dose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect." . . . Often "low dose exposures -- even for many years -- will have no consequence at all, since the body is often able to completely detoxify low doses before they do any damage." . . . Furthermore, "for most types of dose-response relationships following chronic (repeated) exposure, thresholds exist, such that there is some dose below which even repeated, long-term exposure would not cause an effect in any individual" [emphasis added; citations omitted].

Id. Dr. Gardner's testimony regarding causation is not reliable if it did not adhere to the following criteria: (1) The **substance in question** has been demonstrated to cause the type of illness at issue; (2) the plaintiff was exposed to a *sufficient* amount of the substance to elicit the particular health effect (proof of exposure alone is not enough); (3) the chronological relationship between exposure and effect is **biologically plausible**; (4) the likelihood that the substance caused the disease taken in context with **other possible causes**. Id. at 1142-1143.

As Appellant suggests, exact exposure data is not required. However, the methodology for dealing with exposure data is unreliable if not based on sufficient information. The Advisory Committee's Note to the 2000 amendments of Federal Rule of Evidence 702 provides additional factors in considering reliability, which include:

- (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." [citing *Daubert*].
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
- (3) Whether the expert has adequately accounted for obvious alternative explanations.
- (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." [citation omitted].
- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. . . .

Fed. R. Evid. 702, Advisory Committee's Note (2000). Although the Court may not require precise exposure estimates, the Court may—and should—scrutinize the methodology utilized to the highest degree, in accordance with these additional factors. **Certainly, in a case such as this, where the Plaintiff-Appellant's expert has attempted to provide a mathematical dose calculation, it is axiomatic that such**

calculation must be reliable in order for Dr. Gardner to rely on it. Here, the Court determined that Dr. Nicas (the Appellant's own dose expert) gave an unreliable opinion. Appellant should not be allowed to avoid the inevitable results of this ruling by allowing Dr. Gardner to testify about causation in the absence of any reliable dose/response information in the case. The Court in this case clearly scrutinized Dr. Gardner's testimony under the Alberico/Daubert standards, and found it to be unreliable.

C. The Burden of Showing a Causal Link between Andrews' Exposure to Gasoline and/or Liquid Wrench and the Disease He Had Remained With Plaintiff.

The Tenth Circuit in Mitchell affirmed that the plaintiff bears the burden of proving that he or she was exposed to a harmful substance manufactured by the defendant. Plaintiff also bears the burden of proving "the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover." Mitchell, 165 F.3d at 781. Mitchell requires the following proof for admissible testimony: "Scientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case." Id. at 781, quoting Allen, 102 F.3d at 199 (discusses the "limited usefulness of animal studies when confronted with questions of toxicity").

Contrary to the Appellant's suggestion to the contrary (**BIC 30**), federal courts

have required a party's expert to eliminate other possible causes when a toxic tort is involved. See Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1209 (8th Cir. 2000) (district court did not abuse its discretion in excluding under Daubert, physicians' opinion that plaintiff's exposure to baking soda caused her hyperactive airway disorder where he did not **scientifically** eliminate other potential causes). Even in ordinary negligence cases, many courts will not allow expert testimony on causation if there is equal reasonableness supporting other causes, or there are at least two possible causes with equal probability. Ingersoll v. Liberty Bank of Buffalo, 278 N.Y. 1, 4-7 (N.Y. 1938)(cited at **BIC 30**); see also Renfro v. J.D. Coggins, 71 N.M. 310, 378 P.2d 130 (1963). The Court in Renfro stated:

While a plaintiff is not required to prove the negligence and proximate cause beyond a reasonable doubt, the circumstances shown by the evidence should be sufficiently strong that a jury, or court, as the case may be, might properly, on the grounds of probability as distinguished from certainty, exclude inferences favorable to the defendant. [citations omitted]. It is not sufficient to show that the negligence charge might fairly and reasonably have caused the injury, if the circumstances shown indicate an equal probability that it was due to some other cause [citations omitted].

771 N.M. at 315, 378 P.2d at 134. After all, the Alberico/Daubert hearing was an **evidentiary hearing** to test the sufficiency of the Appellant's evidence to move forward.

On the one hand Appellant argues that Dr. Gardner was not required to eliminate other possible causes of Mr. Andrews' disease to render his testimony admissible (**BIC**

29-30), but on the other hand, Appellant takes the position that Dr. Gardner did consider and discard other causes for Mr. Andrews' disease (**BIC 31**). Appellees have set forth numerous authorities supporting that the expert should eliminate other possible causes when a toxic tort is involved. Contrary to Appellant's representations, Dr. Gardner did not **scientifically** eliminate other potential causes. For one, Dr. Gardner stated in his deposition that he was prepared to and would testify at trial that Mr. Andrews did not have RARS, and had reached this conclusion before he had even reviewed Mr. Andrews' pathology slides. **Tr. 2504**. Dr. Gardner acknowledged that Mr. Andrews had taken Plaquenil for his treatment of lupoid hepatitis, but was not aware of the literature associating Plaquenil as a possible cause for refractory anemia (RARS), a disease for which Mr. Andrews had been diagnosed throughout his medical records. **RP 2532**. Dr. Gardner was aware that Mr. Andrews' medical records reflected treatment for lupoid hepatitis and acknowledged that he was aware that lupoid hepatitis can be a cause of AML, yet admits to not having enough information to make a determination as to whether or not Mr. Andrews indeed had lupoid hepatitis. **RP 2503**. Basically, Dr. Gardner simply concluded that Mr. Andrews' AML was caused by benzene exposure, before he made any attempt to scientifically evaluate any of the other possible causes. Moreover, Dr. Gardner testified that he was not aware of the threshold of exposure to benzene, above which that exposure would be connected with AML and admitted that was outside the realm of his expertise, because he was not a

toxicologist. **RP 2533**. Dr. Gardner admitted that he was simply relying on the report of Dr. Nicas to substantiate Mr. Andrews' level of exposure and admitted that there was no way to tell from his review of pathology slides whether Mr. Andrews' disease was caused by chemical exposure or not. **Tr. 2533**. There was nothing in Dr. Gardner's testimony, which satisfied the Plaintiff's burden of proving, as enunciated in *Mitchell*, "[t]he levels of exposure that are hazardous to human beings generally, as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover." 165 F.3d at 781. Dr. Gardner's testimony was not reliable to prove either general causation or specific causation, as required by *Mitchell* and its progeny.

Appellant contests the Finding that "[t]here are no scientifically valid studies to support the onset of a hemopoietic disease caused by benzene, gasoline and/or Liquid Wrench over 33 years since the last claimed exposure." Appellant claims that she was not required to offer any evidence to support such a causal connection after 33 years since the last claimed exposure, merely because Appellees did not move to exclude Dr. Gardner on this ground. (**BIC 12**). However, this latency question is just one more flaw in Dr. Gardner's testimony. As Dr. Natelson testified, there is no scientific literature supporting a causal association where the latency period is this long. (**Tr. 240-241, 244**). There is simply no basis to find that Dr. Gardner's testimony is reliable under *Alberico* or its progeny, or to support the "causal connection," which must be

shown between exposure to gasoline and/or Liquid Wrench with Mr. Andrews' disease. Even Dr. Gardner admits that "would be a very, very long latency, given the state of the literature." **RP 2528.**

D. Dr. Gardner's Causation Testimony Cannot Stand If Dr. Nicas' Testimony On Exposure Estimates Is Excluded

Dr. Gardner relied solely on the Report of Dr. Nicas, whose testimony was also excluded, to conclude that Mr. Andrews was exposed to benzene levels set forth in that Report, and that he himself did not reach any quantitative conclusions regarding Mr. Andrews' level of exposure to benzene. **RP 2520-2521.** Dr. Gardner states that there is no way to tell from his review of the pathology slides if the disease was caused by chemical exposure or not. **RP 2533.** Dr. Gardner acknowledges that since he is not a toxicologist, he did not have a threshold of exposure above which he would connect chemical exposure to myelodysplasia. *Id.* Clearly, without the exposure estimates in Dr. Nicas' Report, Dr. Gardner had no opinions regarding the level of Mr. Andrews benzene exposure. Appellant argues that as long as there is "some evidence" of substantial exposure to the product, proof of precise levels of exposure are not required (**BIC 32-34**). For example, Appellant cites to *McCulloch v. H. B. Fuller Co.*, 61 F.3d 1038 (2nd Cir. 1995), a case wherein the Court allowed the expert to testify as to causation, even though the expert did not know the chemical constituents of the product in question, the chemical constituents of any fume emitted by the product, or

the concentration level of the fumes. Id. at 1043. However, Appellant's reliance on McCullock is unpersuasive. As stated in Ruggiero, supra, a reliance on McCullock "is precluded by the Supreme Court's subsequent decision in Joiner":

Following Joiner, we held that "when an expert opinion is based on data, methodology, or studies that are simply inadequate to support the conclusions reached, Daubert and Rule 702 mandate the exclusion of that unreliable opinion testimony." Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2nd Cir. 2002). In light of Joiner and Amorgianos, [a] reliance on McCullock is unpersuasive [emphasis added].

Ruggiero, 424 F.3d at 255. Indeed all of the cases cited by Appellant on this issue were decided prior to Joiner and Amorgianos (BIC 32-34), and Menne v. Celotex Corp. 861 F.2d 1453, 1462-64 (10th Cir. 1989), was decided even prior to Daubert, which was decided in 1993, the same year Alberico was decided. Obviously, any inadequacies in Dr. Nicas' testimony regarding the levels of exposure of Mr. Andrews to benzene impact Dr. Gardner's reliance upon such inadequate data, and it was within the Court's discretion to exclude that testimony as unreliable, for the reasons set forth in Ruggiero.

III. THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE TESTIMONY OF DR. NICAS

A. Dr. Nicas' High End Exposure Data Came Solely From The Affidavit Of Terry Andrews, An Interested Party, Which Contradicted His Prior Deposition Testimony, and Ignored Deposition Testimony of Ten Other Fact Witnesses, Including Terry Andrews' Deposition

Eleven fact witnesses were deposed in this case, including Terry Andrews, Mr.

Andrews' son. The information in the depositions was insufficient to support the exposure levels needed by Dr. Nicas, so the night before issuing his report and giving his own deposition, Dr. Nicas obtained and relied on an affidavit from Terry Andrews ("Affidavit 1") in order to "estimate benzene exposure assuming high usage of gasoline" (RP 2644), and to "estimate benzene exposure assuming high usage of Liquid Wrench." RP 2648. Subsequent to the filing of Appellees' MSJ (which pointed out the lack of proof that the Liquid Wrench cans Mr. Andrews used contained benzene) (RP 1630-1631), Dr. Nicas filed an Affidavit which tried to explain certain things in his deposition, and attached a second Affidavit of Terry Andrews ("Affidavit 2"), which addressed whether the cans of Liquid Wrench he says his father used contained benzene. RP 4089.

New Mexico adopted the sham affidavit doctrine in Rivera v. Trujillo, 1999-NMCA-129, ¶9, 128 N.M. 106, 990 P.2d 219, *cert denied* 128 N.M. 148, 990 P.2d 822 (1999) (an affidavit subsequent to a deposition "will not be allowed to defeat summary judgment by attempting to create a sham fact issue"). The Tenth Circuit applies a three-part test to determine whether a contradicting affidavit seeks to create a sham fact issue such that it should be disregarded:

- (1) the affiant was cross-examined during his earlier testimony;
- (2) the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence; and

- (3) the earlier testimony reflects confusion which the affidavit attempts to explain.

Rios v. Bigler, 67 F.3d 1543, 1551 (10th Cir. 1995).

In this case, Terry Andrews was cross-examined during his deposition. Neither of his affidavits were based on newly discovered evidence. The deposition testimony does not reflect confusion. The latter affidavits are simply inconsistent. Appellant's representation that Terry Andrews did not understand "skin" (BIC 15) is no less unambiguous than the plaintiff in Rivera who claimed he didn't understand what the word "black out" meant. Id. at ¶¶11-12. The affidavits are "post-hoc efforts to nullify unambiguous admissions," which is precisely what Rivera prevents. Id. at ¶12. Terry Andrews does not clarify ambiguity; he makes new statements entirely that contradict prior testimony.

Although Affidavit 1 was prepared prior to Appellees' MSJ, Appellant surely saw it coming once the fact witness depositions were completed, and Dr. Nicas told Appellant that the depositions were inadequate to support the exposure levels he would need. RP 1944-1945. Additionally, "[w]here, as here, a party has been examined extensively at deposition and then seeks to create an issue of fact through a later, inconsistent declaration, he has the duty to provide a satisfactory explanation for the discrepancy at the time the declaration is filed." Sinskey v. Pharmacia Ophthalmics, Inc., 982 F.2d 494, 498 (Fed. Cir. 1992). Appellant did not do this, as illustrated

below. As for Affidavit 2, this was filed after Appellees filed their MSJ, which pointed out Dr. Nicas' acknowledgement that when he prepared his Report, he was without information as to whether or not Mr. Andrews used Liquid Wrench with benzene.

Appellant claims that Affidavit 1 does not contradict earlier deposition testimony, yet addresses only two instances where Appellant contends the affidavit "elaborates on his deposition testimony." **BIC 14**. Appellant makes no attempt to address the numerous other inconsistencies in Affidavit 1, as found by the Court in **FOFs 51, 54-57, 59-60 (RP 5315-5317)**. Those inconsistencies are as follows:

1. Terry Andrews' Deposition states that he did not know how many times Mr. Andrews cleaned parts in a tray of gasoline, but thought it might be 5-6 times per year. **RP 2696**. Affidavit 1 contradicts this by stating that Mr. Andrews cleaned parts by soaking them in a tray of gasoline approximately once a week (52 times per year). **RP 2651-2652**.

2. Terry Andrews' Deposition states that he cannot think of a specific instance where Mr. Andrews ever had Liquid Wrench drip on his skin or face, and that if it did drip on his skin or face it would not have been very often, but would have been wiped off immediately, because as he recalled, it irritated your skin. **RP 2691**. Affidavit 1 contradicts this by stating that Mr. Andrews would get the Liquid Wrench all over the palm side of both of his hands, and that it would remain on his hands for at least 15 minutes at a time each and every time Liquid Wrench was used. **RP 2652**.

3. Terry Andrews' Deposition states that 150 ounces of Liquid Wrench would be used per year on the farm by **all employees**. **RP 2705-2707**. Affidavit 1 contradicts this by stating that Mr. Andrews alone would use an ounce of Liquid Wrench 4 times a week, for a total of 208 ounces per year. **RP 2652**.

4. Terry Andrews' Deposition states that during times when he would use gasoline as a solvent to wash off his hands, that it would make his hands really irritated and painful, and that he would try to find a place where he could wash them off as quickly as he could. **RP 2677**. Affidavit 1 contradicts this by stating that Mr. Andrews would keep both hands covered in gasoline for 15 minutes at a time every day, sometimes twice a day. **RP 2652**.

5. The can of Liquid Wrench identified by Terry Andrews in Affidavit 2 as the can like the one Mr. Andrews used is stamped 1950, 4 years prior to Terry Andrews' birth. **RP 4089-4091**. This statement also ignores the lack of evidence to support the benzene content, if any, of Liquid Wrench produced prior to 1960. **RP 1665-1666**. It also ignores Terry Andrews' deposition testimony that the Liquid Wrench can he saw Mr. Andrews use did not contain a skull and crossbones, so would not have contained benzene at all. **RP 2707**.

Appellant addresses none of the above discrepancies, so the Court did not abuse its discretion in disregarding the affidavits as attempts to create sham fact issues. Also, the Court did not abuse its discretion in finding that Dr. Nicas' failure to factor into his exposure estimates all of the relevant data and information on use contained in the eleven depositions rendered his methodology unreliable. See *Kumho Tire*, *supra*, 526 U.S. at 152 (it is the Court's job to exclude expert's testimony if the expert does not "employ in the courtroom, the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

B. The Court's Rejection of Nicas' Methodology for Determining Dermal Exposure was not an Abuse of Discretion

1. Adding inhalation exposure estimates to dermal exposure estimates is inherently unreliable

Dr. Nicas estimates that Mr. Andrews' inhaled benzene exposures were 2.23 ppm years (**RP 5307**)—or over 20 times below the acceptable lifetime exposure under the current OSHA standard. To generate a higher exposure number, Dr. Nicas used a methodology in which he had never used in his entire career as a practicing industrial hygienist. **RP 2635**. Using this new method, he estimated that 52 ppm+ years of benzene was absorbed through Mr. Andrews' skin through his use of gasoline and Liquid Wrench. He then added the 52 ppm+ years of dermal exposure to the 2 ppm years of inhalation exposure for a total exposure of roughly 55 ppm years. **RP 2643**. The Court found that this method is inherently unreliable for several reasons which are discussed below. **FOFs 18-26; 29-43 (RP 5305-5313)**.

2. There Are No Standardized, Accepted Methods for Conducting Dermal Exposure Estimates

The Court did not abuse its discretion in finding that the dermal modeling Mr. Nicas used to estimate Mr. Andrews' benzene exposure has not been validated and there is no reproducible measure of the model's precision or accuracy. **FOF 20**. It remained undisputed that the dermal dose model calculations, such as the ones Dr.

Nicas used, have no known error rate for solvent mixtures such as gasoline and Liquid Wrench, that there is no standard or validated method for experimentally determining the rate at which solvent mixtures such as gasoline or Liquid Wrench travel through the skin and into a person's body (referred to as "flux") and that flux estimates for benzene have no known error rate, no known reliability, and no known reproducibility.

RP 1687.

Appellant's only attempt to refute these undisputed findings is to refer to articles where estimates of flux have been made by scientists in the peer reviewed literature, but brazenly misstates the record when she claims that the peer reviewed literature "establishes that modeled results will consistently match the results under actual test conditions." **BIC 18.** Nothing in the record supports this with respect to Dr. Nicas' model. Regarding the articles by Dr. Paustenbach to which Appellant alludes, the Court finds:

Dr. Nicas' report cites one peer reviewed published study which calculated dermal exposures using a dermal flux model. In that study which involved a retrospective exposure assessment of workers exposed to benzene in a rubber plant, reported in two separate papers: (i) no description of the error rate was provided; (ii) the total dose assessment was significantly revised between the initial publication and the subsequent publication; (iii) the authors report flux with ranges differing by **thirty fold** and (iv) after using the flux parameter of .4 in the 1992 paper, the authors selected a range of between .2 and .4 in the subsequent 2003 paper because they believed the earlier flux figure was perhaps too high (although they did not cite any new literature which caused them to use different numbers in the subsequent study).

FOF 36 (RP 5312). Clearly, the Court did not abuse its discretion in rejecting the studies as not validating Nicas' dermal model.

3. Dr. Nicas' Selection of Flux Rate Is Unsupportable

Dr. Nicas selected a flux rate of .4 for benzene in gasoline and Liquid Wrench (RP 2645, 2649), and states that the range of flux rates in the published literature **varies almost 8 fold, depending on which study is selected for reference. RP 2601.**

Dr. Nicas selected the .4 flux rate from a study by Hanke, which involved pure benzene as opposed to a benzene mixed with other solvents. **RP 2600.** Dr. Nicas acknowledged that the presence of these other solvents impacts the permeability of benzene. (RP 2594-2595), yet he makes no effort to account for these differences in reaching his conclusions. **RP 2600.**

Moreover, the Hanke paper involved the application of pure benzene to skin which was then covered by a glass crystal, which prevented any benzene from evaporating, thereby significantly increasing the absorption of the benzene. **Defendant Spencer Exhibit 2; Tr. 149-151.** Dr. Nicas made no scientifically valid effort to control or provide for the difference between the exposure conditions in the Hanke paper (the benzene being contained under glass against the skin) and Mr. Andrews' exposure conditions (primarily outdoors with nothing covering the skin to prevent evaporation). *Id.* Instead, he **assumed** that the flux rate would be the same without any evidence to support this assumption.

With respect to the flux parameter used by Dr. Nicas (the .4 figure from the Hanke paper): (i) Dr. Nicas cannot explain how the difference between the pure benzene used in the Hanke paper and the solvent mixtures in the gasoline and Liquid Wrench were accounted for in his model (in fact he testified he did not bother to research whether different flux parameters were reported in the literature for gasoline) (RP 2594-2595); (ii) Dr. Nicas cannot explain the error rate for the use of the Hanke flux parameter (RP 1692); and (iii) Dr. Nicas cannot identify a single paper since 1961 which validated the results found by Hanke in his 1961 paper. RP 129, 149, 161. The Court did not abuse its discretion in rejecting Dr. Nicas' methodology.

4. Dr. Nicas' Assumption About Damaged Skin Has No Relationship To This Case

In his report, Dr. Nicas determined that Mr. Andrews' dermal exposures should be increased 5-fold (500%) because of testimony regarding Mr. Andrews having "hands that were red and chapped" and that damaged skin is more permeable than skin which is not damaged, in reliance upon a paper by Maibach, in which the first layer of skin was ripped off of the palms of monkeys which were then exposed to pure benzene. RP 2645; Defendant Spencer Exhibit 3; Tr. 153-159. The Maibach paper determined that the effect of ripping off the first layer of skin increased the benzene flux rate for these monkeys by 5-fold. Id. Dr. Nicas' calculation assumes: (i) that Mr. Andrews' first layer of skin was completely torn off for the entire period of alleged

exposure in this case (1947-1971); and (ii) that the remaining skin layers and tissue of the monkeys in the Maibach paper had similar characteristics to Mr. Andrews' skin. There is no evidence to support either assumption. Even the Hanke paper states "it must be assumed that there may exist certain differences between the permeability of the skin of animals and men, linked to the differences in anatomic structure and skin function." **Defendant Spencer Exhibit 2 (p. 2).**

Dr. Nicas made no attempt to compare the level of skin damage to the monkeys in the Maibach paper to the level of skin damage of Mr. Andrews, or the differences between monkey skin and human skin. The Court's findings rejecting this reliance on the Maibach study for dermal absorption in this case was not an abuse of discretion. **FOF ¶¶41-43.**

Appellant's only response to the Court's findings regarding Nicas' reliance on this study is to site a study of tire workers with damaged skin and then ask the Court to take judicial notice of the "fact" that farmers in New Mexico would have skin conditions at least as bad as the tire workers. **BIC 20.** Dr. Nicas himself never made this comparison, nor would it be a valid comparison, as there is no evidence that the tire workers were exposed to the same concentrations of benzene, as that in gasoline and/or Liquid Wrench. Nicas himself admits that he did not consider any studies dealing with the dermal absorption of gasoline. **RP 2602.**

to refute these findings. Clearly, there is no abuse of discretion here.

IV. THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE EXPERT WITNESS FEES OF NATELSON, SPENCER AND IRONS, AND THE DEPOSITION COSTS OF IRONS

Contrary to Appellant's representation that the standard of review is *de novo*, *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, 2009-NM-0512.417 ("ACP"), makes it clear that a review of a trial court's determination of costs is for abuse of discretion. *Id.* at ¶60. Appellant's only objection to Appellees' recovering the expert witness fees of Natelson, Spencer and Irons is that they did not testify "at trial or by deposition." **BIC 45**. However, Spencer and Natelson were the only expert witnesses who testified at the *Daubert/Alberico* hearing. Dr. Irons, on the other hand, did testify "by deposition." **RP 4658-4708**. NMSA 1978, Section 38-6-4B (1983) allows recovery of an expert's fee if the expert "**testifies in the cause in person or by deposition,**" and further states that, "[t]he additional compensation shall include a reasonable fee to compensate the witness for the time required in preparation or investigation prior to the giving of the witness's testimony." The statute says nothing about the testimony having to be "at trial," and Appellant's reliance on *Jimenez v. Foundation Reserve Ins. Co.*, 107 N.M. 322, 757 P.2d 792 (1998) and *Fernandez v. Espanola Public School Dist.*, 2005-NMSC-026, 138 N.M. 283, 119 P.3d 163, for this proposition is misplaced, as those cases were trying to make the distinction between simply appearing at the courthouse ready to testify, where the

hearing was vacated, versus actually testifying. The use of the word “at trial” was merely *dicta*, and Appellant’s emphasis on the words “at trial” is not an emphasis made in *Fernandez*, which put the emphasis on whether or not the expert actually testified or not. *Id.* at ¶¶6, 7, and 8. In this case, since Dr. Irons testified **by deposition**, there is no question that he testified, regardless of whether he testified at a trial or not. Spencer and Natelson were the only experts who testified *in person* at the *Daubert/Alberico* hearing.

Furthermore, Dr. Irons’ comprehensive affidavit was the subject of his deposition (**RP 4658**), was used in support of the exclusion of Appellant’s expert witness Dr. Gardner (**RP 1721, 1724**), and in support of Appellees’ motion for summary judgment. **RP 1852-1861**. *ACP*, decided May 9, 2009, made it clear that expert witness fees could be recovered even where the expert witness did not testify in person or by deposition, where the district court affirmatively explained its reasons justifying its allowance of the costs. *Id.* at ¶63. The Court in this case also explained its reasons for awarding all of Appellees’ expert witness fees as “reasonable, necessary and not cumulative.” **SRP 5609-5610**. Contrary to Appellant’s representation that “Defendants never used the deposition of their own expert” (**BIC 47-48**), referring to Dr. Irons, this is absolutely incorrect, as Dr. Irons’ deposition was used in support of Appellees’ motion for summary judgment, both by Appellees in support of their motion for summary judgment (**RP 4955-4958**), and their motion to exclude

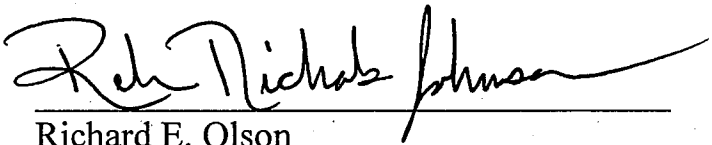
Appellant's expert, Gardner (Id.), and by Appellant, in an attempt to oppose Appellees' motions by moving to exclude Appellees' experts. **RP 4554, 4714, 4716-4717, 4736-4786.** Where depositions are so used, Rule 1-054D(e) NMRA (2000) expressly allows the recovery of the costs.

The 2008 amendment to Rule 1-054 makes explicit the ability to recover expert fees when the "expert witness was reasonably necessary to the litigation," which finding was made by this Court. **SRP 5609-5610.** Even though the 2008 Amendment is not applicable to this case, the Court's holding in ACP (where pre-2008 Rule 1-054 was applicable) supports that existing case law prior to the 2008 Amendment held that "[C]ourts have the discretion to grant a prevailing party the necessary and reasonable costs incurred in litigating a case." See ACP at ¶65, quoting from H-B-S Partnership v. Aircoa Hospitality Service, Inc., 2008- NMCA-013, ¶24, 143 N.M. 404, 176 P.3d 1136 (2007), decided September 26, 2007, prior to the 2008 Amendment. After all, even the prior version of Rule 1-054D(2), applicable prior to the 2008 Amendment, provides that costs are recoverable "as allowed by statute, Supreme Court rule, and **case law.**" Therefore, the Court did not abuse its discretion in awarding the expert witness fees and deposition costs as "reasonable, necessary and not cumulative" under existing case law.

CONCLUSION

For the foregoing reasons and for the reason set forth in the Answer Brief of United States Steel Corporation and Radiator Specialty Company, which arguments these Appellees adopt, this Court should affirm the District Court's exclusion of Appellant's experts, and the grant of summary judgment in favor of all Defendants-Appellees, and grant such other and further relief as this Court thinks is just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via United States Postal Service, with sufficient postage affixed thereto and, if so indicated, via facsimile and/or hand delivery to the following this 15th day of September, 2009:


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