IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

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

vs.

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

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

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

BRIEF IN CHIEF

Lance H. Lubel
J. Robert Black
Heard, Robins, Cloud,
Black & Lubel, LLP
3800 Buffalo Speedway,
Suite 550
Houston, TX 77098
(713) 650-1200

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

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

Attorneys for Plaintiff-Appellant

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STATEMENT OF COMPLIANCE

By his signature at the end of this document, Steven L. Tucker states that, based on the word-count feature of WordPerfect X4, version 14.0.0.667, the body of this brief contains 11,000 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 herein. 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 with Tr. 1/5/09" with the page number of that transcript. (*e.g.* Tr. 1/5/09, p. 17").

TABLE OF AUTHORITIES

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

OTHER AUTHORITIES

Plaintiff-Appellant Connie Lea Gibson Andrews, Individually and as Personal Representative of Tommy Lindell Andrews, Deceased ("Plaintiff") files this Brief in Chief.

SUMMARY OF PROCEEDINGS

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Plaintiff brings this wrongful death action against the Defendants-Appellees, United States Steel Corporation, Chevron U.S.A., Inc., ConocoPhillips Company, and Radiator Specialty Company ("the Defendants"). Plaintiff alleges that her decedent, Tommy Lindell Andews ("Lindell") became afflicted with a form of myelodysplastic syndrome ("MDS") known as "refractory anemia with excess blasts in transformation ("RAEBt") or acute mylegenous leukemia ("AML")[1] as a result of his exposure to benzene-containing products, specifically Liquid Wrench, and gasoline supplied and/or manufactured by Defendants. RP372.

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[1]According to Plaintiff's expert, Frank Gardner, M.D., the disease from which Lindell died was "refractory anemia with excess blasts in transformation (RAEBt) as defined by the French-American-British (FAB) classification system or acute myeloid leukemia as defined by the World Health Organization (WHO) system." RP2495. The terms "RAEBt" and "AML" are, therefore, considered synonymous and are used interchangeably in the record and in this brief.

Defendants moved to exclude the testimony of two expert witnesses Plaintiff intended to call at trial: Dr. Gardner, a hematologist, and Dr. Mark Nicas, an industrial hygienist. RP1612, 1713. Defendants also moved for summary judgment. RP1068. After an evidentiary hearing, the trial court granted the motions to exclude the testimony of these witnesses and granted Defendants' motion for summary judgment. RP5328. The Order granting summary judgment was entered on October 2, 2008. *Id.* Plaintiff timely filed a Motion to Amend and Motion for New Trial. RP5331. The court entered its Order denying that motion on November 3, 2008. RP5527. Plaintiff timely filed her Notice of Appeal on December 2, 2008. RP5663. That appeal was assigned Docket No. 29,136.

Defendants filed a Cost Bill to which Plaintiff objected. RP5517. After a hearing, the court ruled in favor of Defendants. The Award of Costs was entered on January 30, 2009. RP5609. Plaintiff filed her Notice of Appeal from the Award of Costs on February 27, 2009. RP5617. That appeal was assigned Docket No. 29,336. This Court consolidated both appeals under Docket No. 29,136.

B. SUMMARY OF MATERIAL FACTS

Plaintiff's medical expert (Dr. Gardner) and Defendant's medical expert (Dr. Ethan A. Natelson) agree that, at the time of Lindell's death on January 15, 2005, he had AML RP2495, 2538; Tr. 100, 264. Both experts also agree that,

given sufficient exposure, benzene can cause AML; that fact is not even controversial. RP2538; Tr. 77. The issue here is whether Lindell's AML was caused by benzene exposure.

Lindell was born in 1933 and engaged in the farming industry from approximately 1947 until 1971. RP2663, 2754. His occupation required him to work with and around farm equipment and machinery and various products associated with the use, operation, cleaning and maintenance of that equipment and machinery. RP2651. Among the products with which he was frequently in contact were gasoline and a product known as "Liquid Wrench"containing benzene. *Id.*, RP1665. Defendants allegedly manufacture and distribute one or more of the products with which Lindell came into contact as a farmer. RP379. Plaintiff contends that Lindell's contact with the products manufactured and distributed by the Defendants caused AML which ultimately led to his death. RP372, *et seq.*

1. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants moved for summary judgment on essentially the following grounds:

(1) there was no genuine issue of material fact as to Lindell's diagnosis; he had refractory anemia with ringed sideroblasts (RARS);

(2) there was no genuine issue of material fact that RARS is not causally related to benzene exposure;

(3) Dr. Nicas's testimony on the precise level of Lindell's benzene exposure should be excluded because the data he relied on to make his calculations (the affidavit of Terry Andrews) was inherently unreliable;

(4) Dr. Nicas's opinions should be excluded on the grounds that they are based on flawed methodology;

(5) Dr. Nicas's opinions should be excluded on the grounds that they are not plausible.

RP1852-54.

Plaintiff responded by offering evidence in opposition to paragraphs 1, 3, 4, and 5. RP2483, *et seq.* Among other evidence, she offered the testimony of Dr. Gardner who testified that (a) the diagnosis of RARS by Defendants' experts was flawed in that they did not follow scientifically and medically accepted protocol (b) the correct diagnosis is AML, and (c) exposure to benzene caused Lindell's AML and his death. RP2494-96, 2538.

Significantly, Defendants did not mention Dr. Gardner's opinions or testimony in their "Statement of Material Undisputed Facts" submitted pursuant to the final paragraph of Rule 1-056(D)(2), NMRA. RP1852-54. Defendants did not

move for summary judgment on the grounds that the amount of benzene Lindell was exposed to was not sufficient to cause AML. *Id.* Rather, Defendants' theory was simply that Lindell had RARS, and benzene exposure cannot cause RARS or, alternatively, Dr. Nicas's precise exposure estimates should be excluded. *Id.* Defendants' theory was that, without Dr. Nicas's precise exposure estimates, Dr. Gardner's testimony as to causation should be stricken.

2. DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF DR. GARDNER AND DR. NICAS

The Defendants also moved to exclude the testimony of both Dr. Gardner and Dr. Nicas under Rule 11-702, NMRA 1978, and *State v. Alberico,* 116 N.M. 156, 861 P.2d 192 (1993). RP1612, 1713.

A. DR. GARDNER

The Defendants did not challenge the qualifications of Dr. Gardner as a hematologist, and the court did not find Dr. Gardner to be unqualified in his field. Indeed, one would be hard-pressed to challenge Dr. Gardner's qualifications as he is a medical doctor with more than fifty years experience in clinical hematology. RP4432.

Rather, Defendants contended, and the court found, that Dr. Gardner's methodology was flawed because he diagnosed Lindell with AML. RP5318-21. The Defendants contended that Lindell had RARS. The court did not expressly

find that Lindell had RARS – only that he had been diagnosed with RARS (RP5304, 5317), just as he had been diagnosed with AML. RP5318. The court also found that Dr. Gardner is unable to identify medical literature that supports the position that benzene exposure can cause RARS. RP5321. Third, the court found that Dr. Gardner failed to rule out all other potential causes of Lindell's fatal condition, namely, lupoid hepatitis and Plaquenil use. RP5320. Finally, the Court ruled that summary judgment should be granted because, without Dr. Nicas's report, there was insufficient exposure testimony. Tr. 296.

Dr. Gardner used the universally-accepted WHO classification system to diagnose Lindell with AML. RP2495. Defendants' expert, Dr. Natelson, acknowledged that the WHO classification system is used to diagnose individuals with MDS or AML. Tr. 61-64. It is also important to note that other physicians diagnosed Lindell with AML, shortly before his death. Plaintiff's Natelson Ex. 6; RP1817; Tr. 56-57.

The WHO classification system defines RARS as "a myelodysplastic syndrome characterised by an anemia in which 15% or more of the erythroid precursors in the marrow smears are ringed sideroblasts." Plaintiff's Natelson Ex. 1, p. 69. The ringed sideroblast is defined as "an erythroid precursor in which one third or more of the nucleus is encircled by ten or more siderotic granules as demonstrated in an iron stained smear." *Id.* Dr. Gardner actually counted the

ringed sideroblasts on slides prepared from Lindell's bone marrow taken on July 14, 1999 and from samples taken on October 22, 2004. RP5318. Dr Gardner counted only 2% ringed sideroblasts on the 1999 slide and 6% on the 2004 slide. *Id.* Accordingly, Dr. Gardner concluded that Lindell did not meet the classification for RARS because Lindell did not have 15% ringed sideroblasts. *Id.* In his review of Lindell's medical records, Dr. Gardner was unable to find a single record where the ringed sideroblasts were counted by any doctor other than himself. RP2496. Lindell's treating hematologist, Dr. Barbara L. McAneny, admitted that she did not do a count. RP3106; Tr. 103.

AML is "a myelodysplastic syndrome with 5-19% myeloblasts in the bone marrow." Plaintiff's Natelson Ex. 1, p. 71; RP2517. Dr. Gardner's review of slides taken on October 22, 2004, demonstrated that Lindell's condition was consistent with AML.

> The five (5) biopsy bone marrow slides of 10/22/04 I reviewed has a slide of bone aspirate spicules that had many areas of myeloblast cell clusters to make a diagnosis of acute myelogenous leukemia. In the peripheral blood, I observed 6% myeloblast. My clinical review of Mr. Andrews' hematological disease confirms my previous opinion that Mr. Andrews had refractory with excess blasts in transformation (RAEBt) as defined by the French-American-British (FAB) classification and acute myeloid leukemia defined by the World Health Organization (WHO).

RP2495, 2517.

Dr. Gardner's diagnosis was the result of the proper application of the methodology and classification system universally accepted in the field of hematology. The fact that Defendants' other doctors disagree with Dr. Gardner's diagnosis does not make his testimony unreliable or inadmissible. One of Defendants' experts, Dr. Natelson, agreed that it is "not uncommon for two qualified hematologists to look at essentially the same material – the slides, and the medical records – and disagree about a diagnosis, ..." Tr. 60.

The court found that there is no reliable scientific evidence or literature that exposure to gasoline, Liquid Wrench, mixed solvents similar to Liquid Wrench or even benzene exposure has been demonstrated to cause RARS. RP5321. The finding is irrelevant. Dr. Gardner properly diagnosed Lindel with AML, not RARS. Even Defendants' experts agreed that benzene exposure can cause AML. For example, Dr. Natelson, Defendants' expert, testified that the issue was not even controversial

> A. [by Dr. Natelson]: Yes, benzene can cause MDS.
>
> Q. [by Mr. Lubel]: That's not controversial, is it?
>
> A. No, I don't think that's controversial.
>
> Q. Generally accepted in the medical and scientific community that benzene exposures can cause MDS, correct?
>
> A. Yes.

Q. And, in fact, it's not controversial and it's generally accepted in your community of scientist and medical doctors that benzene can cause RAEB, correct?

A. Yes.

Q. And it's not controversial that benzene exposures can cause a form of leukemia called acute myeloid or acute myelogenous leukemia.

A. Correct.

Tr. 76-77.

Defendants did not contend, and the court did not find, that benzene cannot cause AML.

The court found that Dr. Gardner failed to rule out lupoid hepatitis and Plaquenil use as potential causes of Lindell's fatal condition. RP5320. Defendants failed to establish that either contributed to or could have caused Lindell's AML. There was nothing to "rule out." Indeed, both Dr. Gardner and Dr. McAneny denied that Lindell had lupoid hepatitis. RP2503, 3106. Neither Dr. Gardner nor Dr. McAneny believe that Plaquenil can cause MDS. RP2532, 3106. Moreover, Dr. Natelson, Defendants' expert, testified that as of July 1999, prior to Lindell being prescribed Plaquenil, Lindell's bone marrow was already abnormal. Tr. 35. Plaquenil cannot be the cause of Lindell's AML if he was showing signs of MDS before taking that drug. Finally, Dr. Natelson opined that the relationship

between hydrosychloroquine (of which Plaquenil is form) and MDS cannot be proven. Tr. 2561.

Finally, the court made a number of findings of fact in relation to Dr. Gardner which are not supported by the evidence.

The court found that Dr. Gardner testified that he "couldn't say one way or the other whether Mr. Andrews had RARS or not because he had not reviewed Mr. Andrews' bone marrow slides." RP5318. Dr. Gardner's deposition testimony, however, is that Lindell cannot be accurately diagnosed with RARS without an actual count of the ringed sideroblasts. RP2496.

The court found that Dr. Gardner failed to "specifically state that Mr. Andrews did not have RARS." RP5319. Dr. Gardner, however, specifically stated in his affidavit that "these values do not allow a diagnosis" of RARS (RP4433), which is tantamount to opining that Lindell did not have RARS.

The court found that Dr. Gardner's opinion that Lindell did not have RARS was flawed and unreliable in that he did not follow the proper medical and scientific methodology which he and the defense expert witnesses have testified is necessary to determine whether a person has RARS before reaching that opinion. RP5320. The exact opposite is true. The undisputed evidence 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. RP2496. Dr. Gardner was the only person who did that count, and he found that Lindell did not have 15% ringed sideroblasts, thus negating the diagnosis of RARS. RP2495, 5318. None of the doctors who reached the diagnosis of RARS followed the WHO "valid and accepted methodology" by performing that count. RP2496.

At the end of the day, the court went far beyond the 4 paragraphs in Defendants' Statement of Undisputed Facts that were controverted in the parties' filings (paragraphs 1, 4, 5, and 6). RP1852-54. It entered 90 findings of fact and 20 conclusions of law on a wide-ranging number of issues, some very far afield from the issues raised by the motions and responses. RP5304. For example, the court found as follows:

> 77. Plaintiff has offered no scientific or medical studies, literature or expert testimony in which the development of RARS, RAEB, 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. ...
>
> 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.

RP5319.

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, has 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. If Plaintiff had any reason to believe that the court was going to make a finding on this issue, Plaintiff would have addressed it in her submissions.

Secondly, all of the evidence, from both Plaintiff's and Defendants' experts, established that benzene can cause MDS and AML. Likewise, the court improperly made a finding and conclusion that Plaintiff failed to establish that benzene can cause "a hemapoietic" [sic] disease 33 years since a person's last exposure, even though Defendants made no such contention in their motions. RP5322, 5325.

B. DR. NICAS

The Defendants also did not challenge the qualifications of Dr. Nicas as an industrial hygienist, and the court did not find Dr. Nicas to be unqualified in his field. Dr. Nicas has been a practicing industrial hygienist since 1993 and has authored or co-authored approximately fifty peer-reviewed research publications in his field of study. RP2579. Nevertheless, Defendants contended, and the trial

court found, that the opinions and testimony of Dr. Nicas should be excluded because: (1) Dr. Nicas ignored relevant evidence and relied on the "sham affidavit" of Lindell's son, Terry Andrews, (2) Dr. Nicas ignored evidence that some Liquid Wrench does not contain benzene, and (3) the methodology Dr. Nicas used to quantify Lindell's dermal exposure is unreliable. RP1615-16, 5305-24. The court made no express finding on Defendants' alternative argument that Dr. Nicas's dermal exposure estimates and analysis were not "plausible." *Id.*

First, Dr. Nicas did not ignore fact-witness testimony. To prepare his opinions and report, it was necessary for Dr. Nicas to obtain evidence from those closest to Lindell to determine the decedent's manner and frequency of use of the products in question. RP1653-60. In fact, in his report, Dr. Nicas summarized the testimony of the six most knowledgeable fact witnesses and stated that the testimony of those witnesses "differed widely." RP1653. Defendants focus on only one of those witnesses, Lindell's son Terry Andrews ("Terry"). Terry gave his deposition on December 13, 2007 (RP2658), gave his first affidavit on May 8, 2008 (RP2651), and a short second affidavit on July 22, 2008. RP2653. Dr. Nicas used the information from the depositions and affidavits to prepare his opinions and report. RP1653-54, 2580-81.

Defendants argued that the two affidavits should be disregarded on the grounds that they were "sham" affidavits which contradicted testimony in his

earlier deposition and were created to avoid summary judgment. RP1627. Defendants did not file their motion for summary judgment until July 2, 2008 – nearly two months after the first affidavit. RP1608. Thus, the first affidavit was not prepared to avoid a motion for summary judgment which did not exist at that time; rather it was prepared to provide Dr. Nicas with the information he needed to prepare his opinions and report.

Moreover, the May 8th affidavit does not contradict the earlier deposition testimony. In some instances, Terry's affidavit elaborates on his deposition testimony. For example, in his deposition testimony he says:

> Before you would start your day, you would prepare gas and oil the tractor and grease whatever piece of equipment you were using; fix whatever might have been broken the day before that needed to be fixed and we would use the gasoline for cleaning.

RP2686.

In his affidavit he said that his father used gas to clean farm equipment for 10 minutes in the morning, six days per week. RP2651. In other instances, his testimony was perhaps stated differently in the deposition than in the affidavit, but the two pieces of testimony were not inconsistent with each other. For example, in his deposition he testified that they poured a quarter to half a cup (2 to 4 ounces) onto rags, then had to rewet the rags, and that they used about a half-pint (8 ounces) when soaking rags. RP2689, 2701. In his affidavit he said that "at least 8

ounces" were used to wet the rags with gasoline. RP2651. The initial use of 2 to 4 ounces combined with the required "rewetting" is not inconsistent with the use of "at least 8 ounces." In other instances, the question during the deposition could have been misunderstood or misinterpreted by Terry. For example, Terry was asked if he knew whether Lindell "ever had a drip [of Liquid Wrench] on his skin or face." RP2692. Terry replied, "I can't think of a specific instance but I would be very surprised if it didn't because he was under things working on things." *Id.* Defendants claimed (RP1624), and the court found (RP5315-16), that this testimony was inconsistent Terry's affidavit statement to the effect that Lindell would get Liquid Wrench all over the palm side of both 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. RP1654. In the deposition, however, Terry obviously understood the phrase "skin or face" to refer to the face or some part of the body other than the hands. ("... because he was under things working on things.") He was certainly not saying that Lindell never got Liquid Wrench on his hands.

The trial court erred in disallowing Dr. Nicas's testimony to the extent that he relied on the sworn testimony of Lindell's son, Terry.

Second, Dr. Nicas had evidentiary support for his assumption that Lindell used only Liquid Wrench made with benzene. Liquid Wrench comes in two forms: regular Liquid Wrench and "deodorized" Liquid Wrench. RP1665-66.

Defendants argued that deodorized Liquid Wrench does not contain benzene and that Dr. Nicas improperly assumed that all the benzene to which Lindell was exposed was the regular, and not deodorized, version. RP1630. For one thing, Defendants failed to establish the absence of a genuine factual issue as to whether deodorized Liquid Wrench does or does not contain benzene. The only evidence they offered was the affidavit of James D. Wells, who went to work for Radiator Specialty Company ("Radiator") (the maker of Liquid Wrench) in 1972. RP1665. Lindell was exposed to Liquid Wrench between 1947 and 1971. RP1653, 2663, 2754, Therefore, Wells did not work for Radiator during the period in which Lindell used Liquid Wrench. Mr. Wells had no personal knowledge of the product when Lindell was using it. Although Wells stated in his affidavit that deodorized Liquid Wrench does not contain raffinate or benzene (RP1668), he had no personal knowledge of what either regular or deodorized Liquid Wrench contained before he went to work for Radiator. For another thing, there was evidence that Lindell used only the regular version of the product, not the deodorized version. In his deposition, Terry Andrews testified that he could not recall the writing on the can. RP2665, 2692. He was not asked in his deposition if the writing on the can contained the word "deodorized." RP2653. In his later affidavit he testified that the writing on the can did not say "deodorized." Being unable to recall in his deposition what it did say is not inconsistent with recalling in his affidavit what it

did not say. Dr. Nicas validly relied on Terry's affidavit testimony to the effect that the Liquid Wrench used by Lindell did not have the word "Deodorized" on the label and, therefore, contained benzene.

Finally, the Court improperly excluded Dr. Nicas's testimony on the ground that the methodology he utilized to arrive at his exposure estimates was not "scientifically valid, or reliable ..." RP5324. The rejection of Dr. Nicas's methodology was based on the incorrect assumptions that (a) there are no validated or accepted methods for modeling dermal exposure estimates for solvent mixtures and (b) it is not valid to compare dermal exposures to inhalation standards or risk estimates. RP5308-14.

The dermal exposure model that Dr. Nicas used to estimate Lindell's dermal exposure has been published widely in the peer-reviewed literature, is generally accepted and is used by other industrial hygienists. Many of the exhibits Defendants proffered at the hearing show that dermal exposure modeling is accepted as good science by industrial hygienists. For example, the Occupational Safety & Health Administration ("OSHA") has acknowledged that "[s]ince the 1977 OSHA benzene rulemaking, at least nine studies have become available which demonstrate the dermal absorption of benzene in both experimental animals and humans." Defendants' Ex. Spencer 4, p. 34489.

Plaintiff presented evidence to demonstrate that dermal exposure estimates are routinely done in the industry. There are many articles where dermal exposure is included in the exposure assessment. RP2585-87. One such article is published by a Dr. D. Paustenbach who is an expert hired frequently by defendants. RP5489. As Dr. Nicas testified, "there is no toxicological reason not to add the dermal dose to the inhalation dose for assessing health risk, unless one invokes the nonsensical argument that benzene absorbed through the skin is harmless." RP2585.

The court also found that the dermal flux model used by Dr. Nicas has not been validated and that peer-reviewed literature has not been published which establishes that the modeled results will consistently match the results under actual test conditions. RP5311. Again, this finding is contrary to the evidence. The two articles by Dr. Paustenbach used the same dermal absorption model and flux rate used by Dr. Nicas. RP2586. Both of Dr. Paustenbach's articles were published and peer reviewed. *Id.* Dr. Paustenbach concluded that "prior estimates of the rate of benzene absorption appear to be reasonable based upon a re-review of the literature." Defendants' Ex. Spencer 13, p. 739.

The court found that calculating dermal exposures and then adding them to inhalation exposures as Dr. Nicas has done is not a generally accepted practice in the industrial hygiene community. RP5312. However, Plaintiff has cited above to

a number of published, peer-reviewed publications where dermal exposures are added to inhalation exposures.

The court also found that calculating dermal exposures using a dermal flux model is also not generally accepted in the industrial hygiene community. RP5313. But, again, Plaintiff has previously cited to a number of published peer-reviewed publications where the dermal flux model used by Dr. Nicas is used by other industrial hygienists.

The court also found that Dr. Nicas's dermal exposure calculation is also flawed as it relies on a paper by Dr. Maibach and Terry Andrews's affidavit to increase Lindell's exposure by 500%. *Id.* The court had no basis for discarding the Maibach article. OSHA relied on it in recognizing that:

> "[w]orkers building tires are known to have cracked and fissured skin on their hands as a result of daily contact with tire building solvents. Thus the evaluation of benzene absorption through skin that is not intact may have a bearing on the actual benzene skin penetration of workers building tires.

RP2585.

Additionally, the author of an article attached to John Spencer's hearing testimony entitled Dermal Exposure Assessments stated "it is noted that absorption was increased through damaged skin by about 5-fold, which is likely to be the case among these workers." Defendants' Ex. Spencer 8, p. 323.

Furthermore, the court had no justifiable reason to discard the affidavit of Terry Andrews on this point. Finally, the court could even take judicial notice that the hands of one engaged in farming for decades in southeastern New Mexico are at least as likely to have fissures in the skin of their hands as great as those of tire builders.

3. DEFENDANTS' COST BILL

After the court's ruling on their motion for summary judgment was entered, Defendants filed a cost bill seeking the recovery of the following costs, among others:

Expert Witness Fees	Ethan A. Natelson, M.D.	$11,325.00
	John Spencer	11,922.50
	Richard D. Irons, M.D.	36,410.00
Deposition Costs	Richard D. Irons, M.D.	2,232.10
Total		$61,889.60

RP5520.

Plaintiff objected to these costs on the grounds that they were not authorized by the applicable statute, NMSA 1978, § 38-6-4(B) (1983), and were therefore beyond the authority of the court to award. RP5521 *et seq.* Plaintiff objected to the expert witness fees for Dr. Natelson and Mr. Spencer on the grounds that those experts did not testify at trial or by deposition, as required by the statute. Tr.

1/5/09, pp. 14-16. Plaintiff objected to the expert witness fee for Dr. Irons because he did not testify at trial. Tr. 1/5/09, pp. 17-18 His deposition was taken, but Defendants did not offer it into evidence at the *Daubert* hearing or otherwise. Therefore, expert witness fees for Dr. Irons should not have been allowed. Plaintiff objected to the deposition costs for Dr. Irons for the same reason. RP5571.

The court overruled Plaintiff's objections to these costs and granted them, in full, as requested by the Defendants. RP5609.

ARGUMENT

STANDARD OF REVIEW FOR POINTS I AND II

The standard of review for Points I and II has several facets. To the extent this appeal is a review of the court's grant of summary judgment, the standard of review is de novo.

> An appeal from an order granting a motion for summary judgment presents a question of law subject to de novo review. Under this standard of review, we step into the shoes of the district court, reviewing the motion, the supporting papers, and the non-movant's response as if we were ruling on the motion in the first instance.

Farmington Police Officers Ass'n v. City of Farmington, 2006-NMCA-077, ¶ 13, 139 N.M. 750, 137 P.3d 1204. The grant of summary judgment is not a

discretionary act. *Sierra Club v. Tennessee Valley Authority,* 430 F.3d 1337, 1346 (11th Cir. 2005).

Here, the trial court made numerous findings of fact. These findings are not to be accorded the deference which accompanies findings of fact made by the court pursuant to Rule 1-052, NMRA, after a bench trial on the merits. Here, the court used them to support the order granting summary judgment.

> "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Id. Because resolution on the merits is favored, a reviewing court "view[s] the facts in a light most favorable to the party opposing the motion and draw[s] all reasonable inferences in support of a trial on the merits."

Gushwa v. Hunt, 2008-NMSC–64, ¶ 9, 145 N.M. 286, 197 P.3d 1. (Citations omitted).

Therefore, on this appeal, the issue is not whether the court's findings are supported by the evidence and reasonable inferences but, on the contrary, whether the evidence and reasonable inferences, viewed in the light most favorable to the Plaintiff demonstrate genuine issues of material fact foreclosing summary judgment and supporting a trial on the merits.

To the extent this appeal is a review of the court's order excluding the testimony of expert witnesses, the standard of review is abuse of discretion.

> As we observed in [*State v.*] *Alberico,* [116 N.M. 156, 861 P.2d 192 (1993)],
>
> > [a]n appellate court should be wary of substituting its judgments for that of the trial court. An abuse of discretion standard of review, however, is not tantamount to rubber-stamping the trial judge's decision. It should not prevent an appellate court from conducting a meaningful analysis of the admission [of] scientific testimony to ensure that the trial judge's decision was in accordance with the Rules of Evidence and the evidence in the case.
>
> 116 N.M. at 170, 861 P.2d at 206 (citation omitted).

State v. Downey, 2008-NMSC-061, ¶ 24, 145 N.M. 232, 195 P.3d 1244. (Citations omitted).

POINT I

GENUINE ISSUES OF MATERIAL FACT BASED ON DR. GARDNER'S ADMISSIBLE DIAGNOSIS AND CAUSATION TESTIMONY PRECLUDED SUMMARY JUDGMENT

As noted, Plaintiff and Defendants agreed that the cause of Lindell's death was AML. Defendants also took the position that Lindell had RARS and further contended that benzene has not been shown to cause RARS. However, Plaintiff and Defendants agreed that benzene exposure can cause the disease from which Lindell died, namely, AML.

First, there is at least a genuine issue of material fact as to the diagnosis. The very fact that Defendants admit that Lindell had AML while simultaneously contending that he had RARS raises a factual issue as to diagnosis. Moreover, Dr. Gardner's testimony and analysis as to how and why he came to the opinion that Lindell did not have RARS are more than sufficient to meet *Alberico* standards.

Second, as to causation, the court's ruling is erroneous for three reasons. For one thing, Defendants have failed to meet their burden on a motion for summary judgment. They contended that Plaintiff has no evidence that benzene can cause RARS. However, there is at least a factual dispute as to diagnosis – RARS or AML. Defendants have neither alleged nor demonstrated that there is no genuine issue of material fact that benzene cannot cause AML or that Lindell was not exposed to benzene in sufficient quantities to cause AML. Therefore, the burden never shifted to Plaintiff on causation.

For another thing, the court's determination that Dr. Gardner failed to consider other possible causes for Lindell's AML (RP5320) is not supported by the record.

Finally, the exclusion of Dr. Gardner's testimony on causation cannot be justified on the grounds that he relied on Dr. Nicas's report – even if the precise exposure estimates from that report are deemed inadmissible. Dr. Gardner did not need the precise exposure estimates in Dr. Nicas's report in order to render an

opinion on causation. New Mexico law does not require that degree of precision. Even if the testimony of Dr. Nicas as to the model he used and the calculations he employed are disregarded, Dr. Gardner's review of the affidavits, depositions and documents produced in this case as well as the underlying historical data and gross information about the degree of exposure suffered by Lindell from Dr. Nicas's report is more than sufficient to support Dr. Gardner's opinion on causation.

A. THE COURT ABUSED ITS DISCRETION IN STRIKING THE DIAGNOSIS TESTIMONY OF DR. GARDNER WHERE IT MET THE REQUIREMENTS FOR THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE

The admissibility of scientific or technical evidence is governed by Rule 11-702, NMRA and the Supreme Court's opinion in *Alberico*.

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Rule 11-702, NMRA.

The Court has summarized its holding in *Alberico* as follows:

> We laid out three prerequisites that had to be met under Rule 702 before expert opinion testimony could be admissible. 'The first requirement is that the expert be qualified.' 'The second consideration for the admissibility of scientific evidence in the form of expert testimony is whether it will assist the trier of fact.' According to the Supreme Court of the United States,

> this condition is primarily one of relevance. In order to satisfy the precondition that the testimony assist, or be 'helpful' to the jury, the proponent of the testimony must demonstrate that the evidence bears 'a valid scientific connection to the pertinent inquiry. Likewise, the third requirement set out by this Court, 'which is closely related to assisting the trier of fact, is that an expert may testify only as to "scientific, technical or other specialized knowledge"' with a reliable basis. In short, 'under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.'"). (Citations omitted).

State v. Anderson, 118 N.M. 284, 291, 881 P.2d 29, 36 (1994).

If there is "any doubt" as to whether the *Alberico* standard has been met in this case, the judgment below must be reversed and the matter be allowed to proceed to trial.

> [T]he trial court should have erred on the side of admitting the evidence. *See Lee v. Martinez,* 2004-NMSC-027, ¶ 16, 136 N.M. 166, 96 P.3d 291 (stating that '[g]iven the capabilities of jurors and the liberal thrust of the rules of evidence, we believe <u>any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission rather than exclusion</u>'). If Defendant takes issue with the scientific conclusions of the State's expert the remedy is not exclusion; 'the remedy is cross-examination, presentation of rebuttal evidence, and argumentation.' *Id.* (citing *Daubert* [*v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 596])").

State v. Hughey, 2007-NMSC-036, ¶ 17, 142 N.M. 83, 163 P.3d 470. (Emphasis added).

On the issue of the diagnosis, this case is perhaps unique in that there is no dispute among the experts about which standards are applicable. There are two sets of standards, both of which are well-accepted in the medical community: the WHO classification system and the FAB classification system. Under the WHO standard, in order to diagnose a condition as RARS, "15% or more of the erythroid precursors in the marrow smears [must be] ringed sideroblasts." Plaintiff's Natelson Ex. 1, p. 69. Dr. Gardner testified that, in order to make an accurate diagnosis, one must count the precursors and ringed sideroblasts in a sample to make that calculation. RP2495-96. Dr. Gardner actually made that count and determined that in the 1999 samples there were only 2% ringed sideroblasts and in the 2004 sample, there were only 6% ringed sideroblasts. *Id.* Therefore, unless there is some reason to believe Dr. Gardner did not know how to count or was lying, Dr. Gardner's testimony and diagnosis must at least meet the standards of Rule 11-702 and *Alberico*.

Dr. Natelson testified that he could make a diagnosis by "eye balling" the precursors and sideroblasts without actually counting them. Tr. 42. It is actually Dr. Natelson's testimony which was subject to exclusion, not that of Dr. Gardner.

At the very least, the disagreement between the doctors over the diagnosis is, as Dr. Natelson testified, "not uncommon" in the field of hematology. Tr. 60.

Here, the court apparently found Dr. Natelson's testimony to be more credible than that of Dr. Gardner. But the court is not the trier of fact; the issue of credibility is not for the court to decide. There is nothing in Dr. Gardner's training, education, experience, standards, analysis, or methodology which renders his opinion and diagnosis some sort of "junk science" which may not be submitted to the trier of fact. The court erred in striking Dr. Gardner's diagnosis.

B. THE COURT IMPROPERLY EXCLUDED DR. GARDNER'S TESTIMONY ON CAUSATION

1. THE BURDEN ON CAUSATION NEVER SHIFTED TO PLAINTIFF

Defendants' motion for summary judgment was based on their position that Lindell had RARS and that Plaintiff is not able to establish that benzene can cause RARS or that Lindell was exposed to benzene in quantities sufficient to cause RARS. RP1852-54. But, as demonstrated, there is a genuine issue of material fact as to the diagnosis. The fact-finder may well determine that Lindell died from AML, not RARS. Defendants have not even alleged, much less established, that Plaintiff is not able to establish that benzene can cause AML or that Lindell was exposed to benzene in quantities sufficient to cause AML. Without that showing by Defendants, the movants, the burden of showing a genuine issue of material fact never shifted to Plaintiff. *Brown v. Taylor,* 120 N.M. 302, 305, 901 P.2d 720, 723 (1995) ("[U]ntil the moving party has made a prima facie case that it is

entitled to summary judgment, the non-moving party is not required to make any showing with regard to factual issues"). By failing to establish that Plaintiffs cannot establish a causal link between benzene and AML, Defendants have failed to make a prima facie case entitling them to summary judgment. Plaintiff was not required to make any showing with regard to causation. *Brown.*

2. DR. GARDNER DID NOT FAIL TO CONSIDER OTHER POSSIBLE CAUSES FOR LINDELL'S AML

Defendants contended, and the trial court determined that Dr. Gardner failed to rule other possible causes for Lindell's condition other than exposure to benzene. Specifically, the court found that Dr. Gardner failed to consider whether Lindell's condition was caused by an autoimmune disorder (lupoid hepatitis) or use of Plaquenil. RP5320.

Defendants failed to establish that, in order to offer Dr. Gardner's testimony, Plaintiff was required under the law to establish that Dr. Gardner had excluded every other possible cause for Lindell's condition. The law in New Mexico in negligence cases generally is that plaintiff is not required to eliminate all other possible causes of his injury except the conduct of the defendant.

> It is not enough that the defendant, in an effort to break the chain of causation, should prove that plaintiff's injury *might* have resulted from other possible causes, nor it is required of the plaintiff that he eliminate by his proof all other possible causes. 'The existence of remote

> possibilities that factors other than the negligence of the defendant may have caused the accident does not require a holding that plaintiff has failed to make out a *prima facie* case. It is enough that he shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred. *Ingersoll v. Liberty Bank of Buffalo*, 278 N.Y.1, 7, 14 N.E.2d 828, 830 (Emphasis in original).

Sanders v. Atchison, T & S.F.Ry., 65 N.M. 286, 290336 P.2d 324, 327 (1959), quoting *Dunham v. Village of Canisteo*, 303 N.Y. 498, 104 N.E.2d 872, 877. *See also*, *Gayle v. City of New York*, 92 N.Y.2d 936, 703 N.E.2d 758 (1998).

Likewise, in applying the principles under *Daubert*, the federal courts have not required a party's expert to eliminate all other possible causes in order to render that testimony admissible.

> In order to be admissible on the issue of causation, an expert's testimony need not eliminate all other possible causes of the injury. *See Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C.Cir.1996). "The fact that several possible causes might remain 'uneliminated' ... only goes to the accuracy of the conclusion, not to the soundness of the methodology." *Id.*

Jahn v. Equine Services PHC, 233 F.3d 382, 390 (6th Cir. 2000). *See also*, *Nemir v. Mitsubishi Motors Corp.,* 381 F.3d 540, 553 (6th Cir. 2004) ("an expert witness' conclusion regarding all admissible evidence need not eliminate all other possible causes of injury in order to be admissible on the issue of causation." (citation omitted).

Alternatively, there is at least a genuine issue of material fact as to whether some cause other than exposure to benzene accounted for Lindell's condition and resulting death. Dr. Gardner did not pursue a connection between lupoid hepatitis, an autoimmune disorder, and Lindell's AML because he did not believe Lindell had lupoid hepatitis. RP2501. Lindell's treating physician, Barbara McAneny. M.D. reached the same conclusion as Dr. Gardner; she also believed that Lindell did not have that disorder. RP3106. Therefore, there was no causal connection to disprove.

Dr. Gardner considered and discarded the use of P;aquenil as a possible cause for Lindell's disease. In his opinion, the use of Plaquenil cannot even cause the disease Lindell had. RP2532. Moreover, the evidence linking Plaquenil to MDS is not applicable in Lindell's case because he had abnormal bone marrow findings prior to taking that drug. *Id.* Applying proper and valid scientific methodology, Dr. Gardner did not find any causal connection between the use of Paquenil and Lindell's disease. Therefore, contrary to the court's finding, Dr. Gardner did consider, and eliminate, other possible causes of Lindell's disease and death.

3. DR. GARDNER'S CAUSATION TESTIMONY DOES NOT DEPEND ON THE ADMISSIBILITY OF DR. NICAS'S PRECISE EXPOSURE ESTIMATES

Neither the exclusion of Dr. Gardner's testimony nor summary judgment can be justified because Dr. Gardner relied on Dr. Nicas's report. As demonstrated in Point II, below, Dr. Nicas's testimony as to the precise benzene-exposure estimates more than met the standards of *Alberico*, and it was an abuse of discretion to strike that testimony. Alternatively, even if that testimony were stricken, it was error to strike Dr. Gardner's testimony because precise exposure estimates are not necessary to create a jury issue on causation. Dr. Gardner's testimony on causation can stand on his review of the affidavits, depositions and documents produced in this case as well as the underlying historical data and gross information about the degree of exposure suffered by Lindell from Dr. Nicas's report, without regard to the use of models and precise exposure estimates.

The proximate cause requirement in a products liability action is essentially the same as that in a negligence action. UJI 13-1424, NMRA, Official comment. Plaintiff must show that defendant's act or product "actually aided in producing the injury." *Barto v. Armstrong World Indus., Inc.*, 923 F.Supp. 1442 (D.N.M. 1996), quoting *Clay v. Ferrellgas, Inc.,* 114 N.M. 333, 337, 838 P.2d 487, 491, (Ct. App. 1992), *rev'd on other grounds*, 118 N.M. 266, 881 P.2d 11 (1994). In a

toxic tort case, this means that "the individual must have been exposed to a sufficient amount of the substance in question to elicit the health effect in question." *McLain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1242.8 (11th Cir. 2005) (quotation omitted). But precise exposure data is not required.

> [o]nly rarely are humans exposed to chemicals in a manner that permits a quantitative determination of adverse outcomes....Human exposure occurs most frequently in occupational settings where workers are exposed to industrial chemicals like lead or asbestos; however, even under these circumstances, it is usually difficult, if not impossible to quantify the amount of exposure.
>
> Federal Judicial Center, *Reference Manual on Scientific Evidence* 187 (1994). Consequently, while precise information concerning the exposure necessary to cause specific harm to humans and exact details pertaining the plaintiff's exposure are beneficial, such evidence is not always available, or necessary, to demonstrate that a substance is toxic to humans given substantial exposure and need not invariably provide the basis for an expert's opinion on causation.

Westberry v. Gislaved Gummi AB, 178 F.3d 257, 264 (4th Cir. 1999). *Accord, Hardyman v. Norflok & Western Rwy. Co.*, 243 F.3d 255, 265-66 (6th Cir. 2001). *See also Heller v. Shaw Indus., Inc.,* 167 F.3d 146,157 (3rd Cir. 1999) (noting that "even absent hard evidence of the level of exposure to the chemical in question, a medical expert could offer an opinion that the chemical caused plaintiff's

illness."); *Curtis v. M & S Petroelum, Inc.,* 174 F.3d 661, 671 (5th Cir. 1999) (the law does not require plaintiffs to show the precise level of benzene to which they were exposed").

In *Barto*, the court, applying New Mexico law, ruled that the plaintiff raised a fact issue precluding summary judgment by adducing "some evidence to establish the likelihood of frequent or sustained exposure " to the substance in question. *Id.* at 1448. The "likelihood of frequent or sustained exposure" standard was taken from *Menne v. Celotex Corp.,* 861 F.2d 1453, 1462-64 (10th Cir. 1989). *See Huber v. Armstrong World Indus., Inc.,* 930 F.Supp. 1463, 1465 (D.N.M. 1996). In *Westberry*, the court held that evidence of "substantial exposure ... at very high levels" was sufficient to support a finding of causation. *Id.* at 264. *See also, McCullock v. H. B. Fuller Co.*, 61 F.3d 1038, 1041 (2nd Cir. 1995) (testimony that the plaintiff worked within thirty feet of a hot glue pot and could smell the fumes for four years was sufficient evidence of exposure to support causation).

Accordingly, the court does not need to reach the issue of whether it was appropriate to strike Dr. Nicas's testimony based on the model or methodology he employed to reach his precise exposure estimates. Those precise calculations are "beneficial" but not "necessary" to support causation. *Westberry.*

For these reasons, the court erred in striking Dr. Gardner's testimony and in granting summary judgment to the Defendants.

POINT II

THE COURT ABUSED ITS DISCRETION IN STRIKING THE TESTIMONY OF DR. NICAS WHERE IT MET THE REQUIREMENTS FOR THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE

The legal authority set out for the standard of review and for the application of the principles from Rule 11-702 and *Alberico*, beginning at page 25 above, apply equally here. There is no need to repeat that legal authority – only to apply those principles to the evidence relating to Dr. Nicas's testimony.

Plaintiff submits that the testimony of Dr. Nicas met all of these requirements and that it was an abuse of discretion to exclude his testimony.

The Defendants argued, and the trial court determined, that Dr. Nicas's testimony should be excluded for three reasons: (1) he relied on the "sham affidavit" of Terry Andrews, (2) he ignored the fact that some Liquid Wrench does not contain benzene, and (3) his model was faulty and not properly applied. RP1613.

A. THE "SHAM AFFIDAVIT" DOCTRINE DOES NOT APPLY IN THE ABSENCE OF A CLEAR AND ABSOLUTE INCONSISTENCY

The court erred in tossing out Terry's affidavit, and Dr. Nicas's testimony relying on it, based on the sham affidavit doctrine. This Court adopted the sham affidavit doctrine in *Rivera v. Trujillo*, 1999-NMCA-129, 128 P.2d 106, 990 P.2d 219, *cert. denied*, 128 N.M. 148, 990 P.2d 822 (1999). In that case, one of the

plaintiffs repeatedly testified that he "blacked out" before a vehicle accident. His testimony left no doubt that he understood that the phrase meant "to lose consciousness." However, when faced with a motion for summary judgment, he filed an affidavit in which he stated that during his deposition he meant to say that he suffered a loss of memory but did not suffer a loss of consciousness; he claimed he did not understand what "black out" meant at the time of his deposition. Summary judgment was granted and affirmed on appeal. Following the lead of the federal courts, the Court adopted the sham affidavit doctrine:

> [A] nonmovant will not be allowed to defeat summary judgment by attempting to create a sham issue of fact. ... Such post-hoc efforts to nullify unambiguous admissions under oath will not create a factual dispute sufficient to evade summary judgment.

Id. at ¶s 9, 12. (Emphasis added).

First, Terry's first affidavit was prepared on May 8, 2008, (RP2651) to assist Dr. Nicas – long before Defendants filed their motion for summary judgment. RP1608. Therefore, it could not have been prepared "to defeat summary judgment. " *Rivera.*

Moreover, the federal courts apply the sham affidavit rule "sparingly." The general rule is that "[c]onflicts in the evidence, even in the testimony of a single witness, present a fact question for the [trier of fact] to decide." *Levario v. Ysidro*

Villareal Labor Agency, 120 N.M. 734, 739, 906 P.2d 266, 271 (Ct. App. 1995)

(Citation omitted). The exception of the sham affidavit rule is a narrow one.

> the law in this circuit is that a party cannot give "clear answers to unambiguous questions" in a deposition and thereafter raise an issue of material fact in a contradictory affidavit that fails to explain the contradiction. When this occurs, the court may disregard the affidavit as a sham. We apply this rule sparingly because of the harsh effect this rule may have on a party's case.

Rollins v. TechSouth, Inc., 833 F.2d 1525, 1530 (11th Cir. 1987) (Emphasis added).

See generally, 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE, § 2726, pp. 452-53.

> [The sham affidavit rule] is not applicable when the deposition testimony is ambiguous and the affidavit assists in clarifying it. *See [Franks v. Nimmo,* 796 F.2d 1230, 1237 (10th Cir. 1986] (stating that the court should consider "whether the earlier testimony reflects confusion which the affidavit attempts to explain"); *Videon Chevrolet, Inc. v. General Motors Corp.,* 992 F.2d 482, 487 (3d Cir. 1993) (concluding that, in light of ambiguous deposition testimony, it was proper to consider an affidavit and noting that "[t]o hold that such a semantic misstep from a witness untrained in the law effectively ends his case and would only bring back the sporting theory of justice and open the door to sharp practices by counsel"); *Slowiak v. Land O'Lakes, Inc.,* 9897 F.2d 1293, 1297 (7th Cir. 1993) (noting that "[a] subsequent affidavit may be used to clarify ambiguous or confusing deposition testimony").

Selenke v. Medical Imaging of Colorado, 248 F.3d 1249, 1258 (10th Cir. 2001).

These principles are well-illustrated in a case arising under facts comparable to those of the case at bar. In *Tippens v. Celotex Corp.,* 805 F.2d 949 (11th Cir. 1986), a widow sued an asbestos manufacturer for the wrongful death of her husband who had been exposed to asbestos. During his deposition, one of the decedent's co-workers testified that he was unable to pinpoint any specific instances where he worked in close proximity to the decedent while using the defendant's product. In later affidavit, the same witness was able to recall several such instances. The district court deemed the affidavit a sham, refused to consider it, and granted summary judgment to the defendant. The Eleventh Circuit reversed.

> To allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words the witness (in this case, the affiant) was stating the truth. Variations in a witness's testimony and any failure of memory throughout the course of discovery create an issue of credibility as to which part of the testimony should be given the greatest weight if credited at all. Issues concerning the credibility of witnesses and weight of the evidence are questions of fact which require resolution by the trier of fact. An affidavit may only be disregarded as a sham "when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact ... [and that party attempts] thereafter [to] create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."

Id., at 953-54. (Citation omitted).

In the case at bar, the testimony from Terry's deposition, taken in context, is not so clear and unambiguous as to create the kind of absolute conflict with his affidavit to render the latter a sham under this doctrine. The facts of this case are simply not comparable to those of *Rivera* where the doctrine was properly applied. To the extent, if any, that the testimony in the deposition is not totally congruent with the testimony in the affidavit, the discrepancy goes to the weight of the evidence and is for the trier of fact to consider when weighing credibility. But any such discrepancy does not render the affidavit a sham. Dr. Nicas was entitled to rely on it in rendering his opinion, and the court erred in ruling otherwise.

B. DR. NICAS'S ASSUMPTION THAT LINDELL USED ONLY RAFFINATED LIQUID WRENCH WAS SUPPORTED BY THE EVIDENCE BEFORE HIM

The court also rejected Dr. Nicas's testimony on the grounds that he based his work on the assumption that the Liquid Wrench Lindell used in his work was raffinated, that is, it contained more benzene than the deodorized version.

Furthermore, Defendants have failed to establish that there is no genuine issue of material fact that deodorized benzene does not contain raffinate or benzene. Wells did not even work for Radiator during the period when Lindell used the product. *See* page 16, above. Rule 1-056(E), NMRA, provides, in pertinent part, as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Having come to work after Lindell had stopped using the product, Wells cannot have any personal knowledge as to the nature of the product during the time Lindell used it. Although Wells attached various corporate records to his affidavit to support other assertions therein, he neither attached nor identified any document supporting the assertion that, during the period from 1947 to 1971, deodorized liquid wrench contained no benzene. All we have is Wells's *ipse dixit* that such is the case. Such testimony is not on personal knowledge, would not be admissible in evidence, and does not "affirmatively show" that Wells is competent to so testify. As such, it should not have been considered. *New Mexico Tire & Battery Co. v. Ole Tires, Inc.,* 101 N.M. 357, 359, 683 P.2d 39, 41 (1984) (summary judgment reversed where "there is nothing in plaintiffs' affidavits to show that the affiants' statements were made upon personal knowledge, or that affiants were competent to testify regarding the accuracy of the records as required by the rule for summary judgment"); *Martinez v. Metzgar*, 97 N.M. 173, 637 P.2d 1228 (1981) (summary judgment upheld were opposing affidavit was not based on personal knowledge or admissible evidence.). *See also*, *Perez v. Volvo Car Corp.* 247 F.3d 303, 315-16 (1st Cir. 2001) (affiant's statements of fact as to what

happened before he started working for the company disregarded as not being based on personal knowledge); *Federal Trade Comm'n v. Direct Marketing Concepts, Inc.*, 569 F. Supp. 2d 285, 301 (D. Mass. 2008) (summary judgment affidavit disregarded because affiant "was not employed by the defendants at the time" the events occurred and "has not demonstrated the personal knowledge necessary to attest" to the facts at issue.) Therefore, Defendants have failed to establish that there is no genuine factual issue as to whether deodorized Liquid Wrench did or did not contain benzene.

In their motion to exclude the testimony of Dr. Nicas, Defendants criticized him for assuming that the product contained benzene when it could have been the non-raffinated product. In response to the motion, Plaintiff filed a second affidavit of Terry Andrews. In his second affidavit, he said:

> The container of Liquid Wrench I remember my father using did not have the word "Deodorized" on it. I am offering this as a clarification of my deposition testimony because I was never specifically asked in my deposition if the container of Liquid Wrench I remember had the word "Deodorized" on it.

RP2653.

In fact, the short testimony in the deposition concerning any writing on the container was in the context of whether there any "warnings or precautions" that

he could recall; he was simply not asked about the word "Deodorized" being on the container.

The court also struck the second affidavit as a "sham" as "not consistent with the statements made in his deposition. RP5323. That ruling was erroneous as well. *See, e.g., Selenke* ("[The sham affidavit rule] is not applicable when the deposition testimony is ambiguous and the affidavit assists in clarifying it.") at 1258.

C. DR. NICAS'S METHODOLOGY WAS SCIENTIFICALLY VALID AND RELIABLE AND MORE THAT EXCEEDED THE *ALBERICO* STANDARD

Finally, the court determined that Dr. Nicas's methodology was flawed. Plaintiff has reviewed in detail the evidence contrary to the court's findings on this point beginning at page 17 above. Briefly, and without repeating that material, the evidence was that Dr. Nicas's dermal exposure model used to estimate Lindell's dermal exposure to benzene has been published widely in the peer-reviewed literature and is generally accepted and used by other industrial hygienists. Dermal exposure estimates are routinely done in the industry. There is no toxicological reason not to add dermal dose to the inhalation dose for assessing health risk. Regulatory standards monitor inhalation exposure and prohibit dermal contact with benzene. Dr. Nicas's model is based on the work of other noted and well-respected members of this scientific community including but not limited to

Dr. Janusz Hanke, an early leader in this field; Dr. D. J. Paustenbach, an expert frequently hired by defendants in toxic tort litigation; Dr. H. Maibach; and the National Institute for Occupational Safety and Health (NIOSH).

In conclusion, the court erred excluding Dr. Nicas's testimony. That testimony should be weighed by the trier of fact.

POINT III

THE COURT AWARDED EXPERT WITNESS FEES BEYOND THE AUTHORITY CONFERRED BY NMSA 1978 , § 38-6-4(B) (1983), AND RULE 1-054, NMRA

Point III raises an issue of law which is reviewed de novo. *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.,* 2007-NMSC-051, ¶ 6, 142 N.M. 527, 168 P.3d 99 ("Interpretation of our rules of civil procedure and statutes is a question of law that we review de novo.")

Plaintiff preserved this issue for appellate review by her response to Defendants' cost bill (RP5521, *et seq.*), her surreply to Defendants' cost bill (RP5571 et seq.), at the hearing on Defendants' cost bill. Tr. 1/5/09, pp. 12-22, and in her post-hearing briefing to Defendants' cost bill. RP5576, et seq.).

Plaintiff challenges the award of the following expert witness fees and costs:

Expert Witness Fees	Ethan A. Natelson, M.D.	$11,325.00
	John Spencer	11,922.50
	Richard D. Irons, M.D.	36,410.00
Deposition Costs	Richard D. Irons, M.D.	2,232.10
Total		$61,889.60

The award of expert witness fees and costs in this case is governed by NMSA 1978, § 38-6-4 (B) (1983) and Rule 1-054(D)(2), NMRA. The statute provides, in pertinent part, as follows:

> The district judge in any civil case pending in the district court may order the payment of a reasonable fee, to be taxed as costs, in addition to the per diem and mileage as provided for in Subsection A of this section, for any witness who qualifies as an expert and who testifies in the cause in person or by deposition.

NMSA 1978, § 38-6-4 (B) (1983). Rule 1-054(D)(2)(g), NMRA, in the form effective for this case, provided that "expert witness fees for services as limited by Section 38-6-4(B) NMSA 1978; ..." are generally recoverable. *See*, *Fernandez v. Espanola Public School Dist.*, 2005-NMSC-026, ¶ 11, 138 N.M. 283, 119 P.3d 163 (quoting rule prior to the 2008 amendment).

In *Fernandez*, a party filed a cost bill seeking expert witness fees for witnesses who did not testify at a deposition or at trial. The district court denied the cost bill finding that it did not have the discretion to award them in light of the

language of the statute. *Id.* at ¶ 1. The Court of Appeals affirmed, and the Supreme Court affirmed.

First, the Court interpreted the statutory phrase "testifies in the cause" to mean "testifies at trial." The Court quoted its earlier opinion in *Jimenez v. Foundation Reserve Insurance Co.,* 107 N.M. 322, 757 P.2d 792 (1988):

> Thus, there are two hurdles the prevailing party must overcome before costs ... will be allowed for a witness. First, the witness must qualify as an expert and, second, the expert must testify either at trial or by deposition.

Fernandez, ¶ 5.

Second, the Court strictly interpreted the statute and the applicable version of Rule 1-054(D) to deny the trial court the discretion to award expert witness fees if those two hurdles have not been cleared.

> Section 38-6-4(B) authorizes the recovery of expert witness fees as costs when the witness has testified at trial or by deposition.

Conclusion

> Section 38-6-4(B) specifically authorizes a district court to award as costs the fees for expert witnesses when those witnesses testify in the cause in person or by deposition. The Court of Appeals correctly concluded that the district court did not have the discretion under Section 38-6-4(B) to award as costs the fees for expert witnesses who did not testify at trial or by deposition.

Fernandez, at ¶s 11-12.[2] (Emphasis added).

This Court's recent opinion in *Albuquerque Commons Partnership v. City Council,* Ct. App. Docket No. 24,026 (May 7, 2009), appears to be difficult to reconcile with *Fernandez*. In that case, this Court apparently upheld an award of "costs" for an expert witness (Dahlstrom) who did not testify at trial or by deposition. *Id.* at ¶ 65. The Court held that the award was in the trial court's discretion. First, it is not clear if the award of "costs" was for expert witness fees. Second, and assuming that it was, it is not clear what argument was made to the court with respect to Dahlstrom's fees – whether the argument was based on the statute, the *Fernandez* case, or the contention that the trial court abused its discretion under the circumstances. So there may or may not be a conflict between *Fernandez* and *Albuquerque Commons*.

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[2]Effective May 23, 2008, the Supreme Court modified Rule 1-054(D)(2)(g) by adding, at the end of the text, the phrase "or when the court determines that the expert witness was reasonably necessary to the litigation:" This suit was filed, and became a pending case, on December 12, 2006. RP1. Since 2008 amendment to the rule became effective long after this became a pending case, it does not apply to the case at bar. N. M. Const., Art. IV, Sec. 34 ("[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case"). This constitutional provision applies not just to acts of the legislature but also to rules promulgated by the Supreme Court. *Starko v. Cimarron Health Plan, Inc.,* 2005-NMCA-040, ¶ 7, 137 N.M. 310, 110 P.3d 526, *cert. denied,* 137 N.M. 454, 112 P.3d 1111.

Plaintiff submits that, under the expert witness fee issue presented here, *Fernandez* clearly controls. As the Supreme Court so clearly stated,

> the district court did not have the discretion under Section 38-6-4(B) to award as costs the fees for expert witnesses who did not testify at trial or by deposition.

Id. at ¶12. (Emphasis added).

If a conflict between *Fernandez* and *Albuquerque Commons* cannot be avoided, then this Court's duty is to defer to the precedent set by the Supreme Court of New Mexico. *Alexander v. Delgado*, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973).

Applying these principles to the case at bar, it is undisputed that Dr. Natelson did not testify at trial or by deposition. It is undisputed that John Spencer did not testify at trial or by deposition. Each of them did testify at the August 18, 2008, hearing on the motions to exclude the testimonies of Dr. Nicas and Dr. Gardner. However, as interpreted by the Supreme Court, the statute requires that the witness testify "at trial or by deposition." Since there was no trial, the statute did not authorize the award of expert witness fees for Dr. Natelson or Mr. Spencer.

Dr. Irons did not testify at a trial. He did not testify at the August 18, 2008 hearing or any other hearing. He did give his deposition. However, Defendants never used the deposition of their own expert. They never offered his deposition

either as an exhibit at the hearing, as part of the papers filed in connection with a motion, or in any other fashion. Dr. Irons's deposition was not referred to by any of the witnesses at the hearing. The statute does not authorize expert witness fees for a witness who gives a deposition, where the deposition is never used in the proceeding. Alternatively, if the statute does authorize the recovery of such fees in certain circumstances, it was an abuse of discretion to allow $36,410.00 in expert witness fees based on a deposition which was never used.

Accordingly, the award of costs for expert witness fees for Dr. Natelson, Mr. Spencer, and Dr. Irons and the award of costs based on Dr. Irons's deposition should be reversed.

CONCLUSION

> [A]ny doubt regarding the admissibility of scientific evidence should be resolved in favor of admission rather than exclusion'). If Defendant takes issue with the scientific conclusions of the State's expert the remedy is not exclusion; 'the remedy is cross-examination, presentation of rebuttal evidence, and argumentation.' Id. (citing Daubert [v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 596])").

Hughey, ¶ 17. (Emphasis added).

With respect to both Dr. Gardner and Dr. Nicas, there is more than considerable doubt that the trial court erred in preventing Plaintiff from presenting their testimony to the jury. The court essentially deprived Plaintiff of her right to a

jury trial and decided this as a bench trial on the basis of which experts he believed to be more credible.

The judgment should be reversed and this cause remanded for further proceedings.

Respectfully submitted,

Lance H. Lubel
J. Robert Black
Heard, Robins, Cloud & Lubel, LLP
3800 Buffalo Speedway, Suite 550
Houston, TX 77098
(713) 650-1200

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

&

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

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2009, I served a true copy of the foregoing document by mailing the same, first-class postage prepaid, to the following:

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

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

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

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

Steven L. Tucker

brief in chief final.wpd