

2000

Leslie Alder nka Leslie Roberts, and Jackie Jones v. Bayer Corporation, AFGA Division : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

LESLIE ALDER nka LESLIE)	
ROBERTS, and JACKIE JONES,)	
)	REPLY BRIEF OF
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)	
vs.)	
)	
BAYER CORPORATION, AGFA)	Oral Argument Priority No. 15
DIVISION,)	
)	Case No. 20000937-SC
Defendant-Appellee.)	

APPEAL FROM FINAL ORDER (SUMMARY JUDGMENT)
OF THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
(HONORABLE STEPHEN L. HENRIOD)

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I. INTRODUCTION

Ms. Jones and Ms. Alder submit this Brief in reply to the Brief submitted by AGFA. Ms. Jones and Ms. Alder stand by their legal analysis, and its application to the instant dispute, that is set forth in their Opening Brief. Ms. Jones and Ms. Alder seek to refrain from unnecessarily repeating the arguments, regarding the correctness of which they remain confident, that appear in that Brief.

II. ARGUMENT

A. OVERVIEW

In its Brief, AGFA attacks the long-established and well-accepted scientific method of differential diagnosis and asks this Court to disregard, as a matter of law, the opinions of Ms. Jones' and Ms. Alder's treating physicians and a nationally renowned medical expert, in favor of the unreliable and arguably irrelevant test results obtained by AGFA's retained expert John Spencer. Any supposed shortcomings or discrepancies in the opinions of Ms. Jones' and Ms. Alder's medical experts go to the weight of those opinions, not to their admissibility, and Mr. Spencer should not be allowed to play the role of judge and jury.

AGFA also seeks to "pass the buck" of responsibility, for its failure to properly equip and install (or refrain from installing it if it was not safe for the environment in which it would be used, or removing it, if people were getting sick while working around it) and modify, in a timely fashion, its own equipment. The claims advanced by Ms. Jones and Ms. Alder do not, contrary

to AGFA's characterizations, concern themselves with the hospital ventilation system itself. The claims deal with the things suggested in the first sentence of this paragraph and with AGFA's failure, after it undertook the responsibility of installing its equipment in the subject workplace, and the responsibility of servicing that equipment, to properly install the machine, to test what was happening with the ventilation (for the purpose of ensuring that its machine was safe for use in the environment in which it was being operated), and to give proper warnings to Ms. Jones and Ms. Alder and their employer regarding the dangers of operating the machine in conditions of inadequate ventilation.

In what appears to be a somewhat desperate effort to defeat this Appeal, AGFA advances the argument that the claims of Ms. Jones and Ms. Alder are premised upon theories of product liability and are barred by a statute of limitations. In support of this argument, AGFA makes the intellectually dishonest assertion that the District Court granted AGFA's first Motion for Summary Judgment on the limitations issue "in part" and dismissed Ms. Jones' and Ms. Alder's supposed product liability claims. The District Court, in fact, denied AGFA's initial Motion for Summary Judgment and agreed with Ms. Jones and Ms. Alder that none of the claims advanced by them should be considered "product defect" claims.¹ None of the claims brought by Ms. Jones and Ms. Alder in their First Amended Complaint has been dismissed, and AGFA's assertion to the contrary is patently erroneous and may, along with its

¹ As the court may recall, the Court denied AGFA's Petition to appeal the interlocutory order of the District Court denying that initial effort by AGFA to throw Ms. Alder and Ms. Jones out of court.

argument that Ms. Jones' and Ms. Alder's claims are barred by the Utah Code Ann., §78-15-3 statute of limitations, fairly be viewed as an index of the weakness of AGFA's overall position in this appeal.

B. THE TESTIMONY OF AGFA EXPERT JOHN SPENCER DOES NOT INVALIDATE THE SCIENTIFICALLY RELIABLE METHOD OF DIFFERENTIAL DIAGNOSIS NOR DOES IT RENDER INADMISSIBLE THE OPINIONS OF PLAINTIFFS' EXPERTS.

AGFA criticizes the differential diagnosis method and claims that the subjective complaints of Ms. Jones and Ms. Alder, and the temporal relationship between their chemical exposure and resulting symptoms, are invalid and inadmissible as evidence of causation and damages. AGFA argues that these long-established and well-recognized methods of diagnosis are not reliable substitutes for the toxicological methods employed by its hired expert, John Spencer. AGFA's criticisms are self-serving and disingenuous, as established by the case authority cited and arguments made by Ms. Jones and Ms. Alder in their Opening Brief. For the sake of brevity, Ms. Jones and Ms. Alder refer the Court to the arguments advanced in their Opening Brief, at pages 33-49, regarding the validity and admissibility of the differential diagnosis method, as well as the validity of utilizing a patient's subjective complaints and the temporal relationship between a patient's exposure and symptoms as bases for making a differential diagnosis.

With respect to the "toxicological" methods employed by Mr. Spencer, Ms. Jones and Ms. Alder submit that Mr. Spencer's test results are essentially meaningless in the context of the present case. Mr. Spencer's test results are, at a minimum, not dispositive of any significant issue and should certainly not

be considered fatal to the claims of Ms. Jones and Ms. Alder. Ms. Jones and Ms. Alder take issue with AGFA's assertion that Mr. Spencer's "worst-case scenario" air sampling results have gone uncontested. Ms. Jones and Ms. Alder have vigorously disputed and continue to dispute the validity of Mr. Spencer's methods and test results.

Mr. Spencer is perhaps being facetious when he says that he replicated a "worst case scenario" for Ms. Jones' and Ms. Alder's exposure. It is impossible for Mr. Spencer to have any idea regarding the extent of the exposure that would have been sustained by **anyone** (let alone that to which Ms. Alder and Ms. Jones, women who may have been more susceptible than others, were subjected) without measuring the chemical build-up in the subject room that accumulated day after day after day for a period in excess of two years. Mr. Spencer does not suggest that he kept his machinery for testing chemical levels going day after day after day for two years to determine the cumulative effect of chemical buildup in the subject room during the two years that Ms. Jones and Ms. Alder worked in what AGFA acknowledges to have been the inadequately ventilated room in question.² Especially given his failure to conduct a lengthier experiment to determine the chemical levels permeating the room after weeks, months, and years of inadequate ventilation, Mr. Spencer's statement that his experiment replicates a "worst case scenario" for Ms. Jones' and Ms. Alder's

² It is interesting that Mr. Spencer does not give any information about the actual length of his testing, although he indicates that 74 films were processed during the testing period. Ms. Jones and Ms. Alder surmise that Mr. Spencer's experiment did not last longer than a day or two.

exposure should not be accorded outcome-determinative significance, if any. Mr. Spencer's testimony, if admitted, would go only to the weight to be given other testimony, including that of Dr. Gray, Dr. Cullen and Dr. Lipsey. It would not go to the admissibility of that testimony.

1. Dr. Lipsey Has Training and Expertise in Toxicology and Has Employed Scientifically Accepted and Admissible Methods in Arriving at his Opinions in this Case.

As previously discussed at length in Ms. Jones' and Ms. Alder's Opening Brief, many jurisdictions have allowed expert testimony in cases where the expert has been unable to determine the exact level of chemical exposure;³ and, in Curtis v. M&S Petroleum, 174 F.3d 661 (5th Cir. 1999), the court found that the plaintiffs' symptoms constituted a valid basis for an expert's conclusion that the plaintiffs were exposed to harmful levels of benzene and allowed him to so testify. 174 F.3d at 671.

In the present case, one of the experts retained by Ms. Jones and Ms. Alder, Dr. Richard Lipsey⁴, has found (similar to what the plaintiffs' expert in Curtis found) that the symptoms of Ms. Jones and Ms. Alder are of paramount

³ See, e.g., Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999) (holding that the plaintiff's own subjective reporting provided a valid basis for determining that chemical exposure had occurred); McCulloch v. H.B. Fuller Co., 61 F.3d 1038 (2nd Cir. 1995) (medical expert's testimony, based upon differential diagnosis, was reliable and admissible even in the absence of evidence pertaining to specific exposure levels); Kannankeril v. Terminix International, Inc., 128 F.3d 804 (3rd Cir. 1997) (any claimed shortcoming pertaining to evidence regarding exposure suffered in this case goes to the credibility of the evidence, not to its admissibility); and Curtis v. M&S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999) (the law does not require the plaintiffs to show the precise level of chemicals to which they were exposed).

⁴ In the event that the Court determines, for whatever reason and contrary to Ms. Jones' and Ms. Alder's position, that Dr. Lipsey's opinions ought, as a matter of law, not be considered, the Court should keep it squarely in mind that the success or failure of this Appeal does not depend on Dr. Lipsey. For, as is explained in the Opening Brief, the position of Ms. Jones and Ms. Alder is satisfactorily supported by other clearly competent evidence.

importance in his determination that they were exposed to harmful levels of chemical fumes in their workplace. Contrary to the Fifth Circuit's holding in Curtis, AGFA asserts that such reasoning is "circular" and does not provide a proper basis for a conclusion that Ms. Alder and Ms. Jones were exposed to harmful levels of chemicals. AGFA's refusal to accord any significance to the symptoms these women developed after the Curix machine was moved to the badly ventilated room is contrary to the law cited herein.

Dr. Lipsey is a toxicologist and obtained his Ph.D. from the University of Illinois in 1972. [R 1783] His degree was obtained from the Department of Entomology, but his studies and focus was in toxicology. [R 1783] He is on the faculty of the American Academy of Environmental Medicine, and is a member of the Environmental Protection Board, the University of Florida Medical Center, Toxicology Committee, and the University of North Florida Adjunct Faculty for Hazardous Chemicals. [R 1784] Dr. Lipsey was a Professor at the University of North Florida where he taught toxicology. Now Dr. Lipsey is an adjunct Professor at the University of North Florida. [R 1784] Clearly, Dr. Lipsey is well qualified to give opinions regarding Ms. Jones' and Ms. Alder's exposure to toxic chemicals in their workplace.

Based, among other things, on his review of the symptoms that Ms. Alder and Ms. Jones developed, Dr. Lipsey is able to determine that they were exposed to toxic chemical fumes of levels significant enough to cause their illnesses. According to Dr. Lipsey, the symptoms experienced by Ms. Jones and Ms. Alder are identical to the symptoms listed in the scientific literature as

potential health consequences from exposure to the chemicals utilized in film processing and are the same types of symptoms that one would expect to result from being in a small, poorly ventilated room for an extended period of time with chronic exposure. [R 1786] Dr. Lipsey has visited the subject workplace and is familiar with the internal documents of the employer of Ms. Jones and Ms. Alder that refer to the lack of proper ventilation, the stale, warm air, the strong chemical odor every day, the lack of proper air exchanges and all of the modifications that had to be made to the Curix machine to achieve better ventilation. [R 1786] According to Dr. Lipsey, there is a strong correlation between Ms. Jones' and Ms. Alder's symptoms and the illnesses caused by significant exposure to photo-processing chemicals. [R 1786].

Furthermore, it is important to understand that serious injuries can occur from exposure to chemicals at levels below "regulated" standards. [R 1784] Consequently, the standards, themselves, are not dispositive of the question of whether Ms. Jones and Ms. Alder became ill by reason of exposure to toxic chemical fumes in their workplace. According to Dr. Lipsey, serious injuries can occur from exposure to chemicals at levels below the standards prescribed by organizations such as OSHA, NIOSH and/or ACGIH. [R 1784] He further testified that such standards should always, at a minimum, be observed but that **compliance with such standards will not guarantee that all individuals will be safe from chemical exposure that would become harmful to them.** [R 1784] A "toxic" dose to one individual will be different than a "toxic" dose to another individual. [R 1785]

In Dr. Lipsey's opinion, one does not have to be able to prove the level of exposure in order to determine that an individual has suffered a harmful chemical exposure. Dr. Lipsey testified that a temporal relationship between an exposure and resulting symptomatology is evidence of a harmful exposure [R 1784-85] and that the symptoms experienced by Ms. Jones and Ms. Alder are consistent with chemical exposure. [R 1786]

An expert's level of expertise goes to the weight of the testimony, not to its admissibility. AGFA has gone to great lengths to discredit Dr. Lipsey. It is well established that a court may not exclude the testimony of a proposed expert "simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization the court considers most appropriate." U.S. v. Van Wyk, 83 F.Supp.2d 515 (D.N.J. 2000) (quoting: Holbrook v. Lykes Bros. S.S. Co., Inc., 80 F.3d 777, 782 (3rd Cir. 1996) In support of its holding, the court stated as follows:

The expert need not have complete knowledge about the field in question, need not be certain, and need not be unbiased. The expert must only be able to aid the jury in resolving a relevant issue. While the level of expertise may affect the weight to be accorded the expert's opinion, **it does not affect admissibility.**

Van Wyk, 83 F.Supp.2d at 518 (Emphasis added); See also: DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941, 956 (3rd Cir. 1990) (the rules regarding the admissibility of expert testimony **provide for the admission of evidence with any marginal utility** absent a substantial countervailing concern). Consequently, AGFA's attempts to discredit Dr. Lipsey on the basis

of his qualifications, knowledge, and experience should not be a basis for determining the admissibility of his testimony; rather, those types of issues are for the jury to consider in assessing the weight to be given to Dr. Lipsey's testimony.

2. Any Shortcomings or Discrepancies in a Differential Diagnosis Go To the Weight and Credibility, Not the Admissibility, of the Testimony.

AGFA's argument that the differential diagnosis method is not a reliable substitute for the toxicological methods employed by its expert, Mr. Spencer, and is therefore inadmissible, is without merit. As previously discussed at length in the Opening Brief of Ms. Jones and Ms. Alder, differential diagnosis is a long-established, well-accepted, scientific method of diagnosing disease. Any perceived shortcomings in the experts' opinions based upon a differential diagnosis go to the weight and credibility, not the admissibility, of those opinions. It is well established that in order to be a valid differential diagnosis, the physician need not rule out every other possible cause for the condition in question. Westberry v. Gislaved Gummi AB, 178 F.3d 257, 265-66 (4th Cir. 1999).

In Westberry, the defendant argued that Dr. Isenhower's differential diagnosis was unreliable because he failed to "rule out" all other potential causes. 178 F.3d at 265. In rejecting the defendant's argument, the court held that "[a] medical expert's causation conclusion should not be excluded because he or she has failed to rule out every possible alternative cause of Plaintiff's illness." 178 F.3d at 265 (quoting Heller, 167 F.3d at 156). Rather, the

alternative causes suggested by a defendant “affect the weight that the jury should give the expert’s testimony and not the admissibility of that testimony.” Id. Perceived faults in a physician’s differential diagnosis “are matters for cross-examination that do not affect admissibility.” McCulloch, 61 F.3d at 1044.

In addition, it is well established that if two or more of a party’s experts disagree with one another or have contrary or differing opinions, that does not affect the admissibility of those opinions. Walker v. Soo Line Railroad Company, 208 F.3d 581 (7th Cir. 2000). In Walker, the court held that the fact that “two different experts reach opposing conclusions from the same information does not render their opinions inadmissible” 208 F.3d at 589 (citing Allapattah Servs., Inc. v. Exxon Corp., 61 F.Supp.2d 1335, 1341 (S.D. Fla. 1999) (“merely because two qualified experts reach directly opposite conclusions using similar, if not identical, data bases . . . does not necessarily mean that, under Daubert, one opinion is per se unreliable.”) Thus, in the present case, the fact that the medical experts and treating physicians of Ms. Jones and Ms. Alder may offer opinions that differ in some respects does not render their opinions inadmissible or unreliable, and AGFA’s argument to the contrary should be disregarded.

In addition, an expert physician may rely upon the reports and examinations performed by other doctors in making their differential diagnoses and is not required to perform a separate examination of a patient. Kannankeril v. Terminix International, Inc., 128 F.3d 802 (3rd Cir. 1997). In

Kannankeril, the plaintiff entered into a contract with Terminix for the control of carpenter ants through the application of pesticides to certain interior and exterior portions of the plaintiff's residence. After four months of Dursban applications, the plaintiff began experiencing symptoms that caused her to fear that the pesticide applications were adversely affecting her health and terminated the applications. Thereafter, in the months and years following the application of the pesticides, plaintiff developed additional health problems including "chronic toxicity," "cognitive deficits," and "sensitization to multiple other chemicals." Dr. Kannankeril had been employed as a physician and had to terminate her practice as a result of her poor health.

At trial, the plaintiff's medical expert testified that:

The temporal relationship and the nature of her complaints lead me to conclude that, with reasonable medical certainty, the cause of Dr. Kannankeril's Central Nervous System manifestations of toxicity is exposure to Dursban in 1989 to 1990.

128 F.3d at 806. The medical expert never actually examined Dr. Kannankeril. Instead, he reviewed the records of her medical history and relied upon reports prepared by other physicians. The expert's findings were based on (1) Dr. Kannankeril's account of her cognitive symptoms; (2) the report prepared by Dr. Ellen Grober, a neuropsychologist who examined Dr. Kannankeril; (3) a summary report regarding the Dursban applications to the Kannankeril home; and (4) his general experience and knowledge.

In holding that the medical expert's testimony was admissible, the Court of Appeals recognized the widely accepted method of differential diagnosis and stated that "the elements of a differential diagnosis may consist of the

performance of physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests.” 128 F.3d at 807. However, the court held that a “doctor does not have to employ all of these techniques in order for the doctor’s diagnosis to be reliable.” *Id.* Indeed, the court stated as follows:

Depending on the medical condition at issue and on the clinical information already available, a physician may reach a reliable differential diagnosis without himself performing a physical examination, particularly if there are other examination results available. In fact, it is perfectly acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners.

128 F.3d at 807 (emphasis added). *See also: Sementilli v. Trinidad Corp.*, No. 96-16034, 1998 WL 614654 (9th Cir. 1998) (where the court held that a doctor could testify as an expert on the cause of a seaman’s injury based solely on his professional background and his review of the seaman’s medical records).

Furthermore, the court in *Kannankeril* held that the medical expert’s testimony was admissible even though he was aware of a test result that produced normal results. The court recognized that “the blood test for cholinesterase levels is the most accepted test method for determining exposure to Dursban.” *Id.* However, the court went on to explain as follows:

. . . the cholinesterase test result is but one of the factors considered by Dr. Gerson. Despite the negative results from this test, Dr. Gerson still opined that, as a matter of reasonable medical certainty, Dursban had caused Dr. Kannankeril’s cognitive impairment. **It is for the jury to decide whether a single cholinesterase test, yielding results within normal limits, outweighs the other factors relied upon by Dr. Gerson and undermines his opinion. This is an issue of credibility, not of admissibility.**

128 F.3d at 807 (emphasis added).

Similarly, in the present case, the fact that Ms. Jones and Ms. Alder had normal test results to a glutaraldehyde patch test is of no consequence to the admissibility of the medical testimony in this case. It is clear, based upon the well-reasoned case law cited herein, and in their Opening Brief, that the differential diagnosis method employed by Ms. Jones' and Ms. Alder's treating physicians and other experts is a well-accepted, standard, and scientifically reliable technique upon which to base a medical opinion.

The case law cited clearly demonstrates that any claimed shortcomings in the differential diagnosis process become the subject matter for cross-examination and go to the question of credibility and weight to be given to the testimony not to its admissibility.

The testimony of Ms. Jones' and Ms. Alder's medical experts, based on the differential diagnosis method, should be admitted.

3. MCS is a Valid Diagnosis.

Ms. Jones and Ms. Alder contest many of the statements made by AGFA in its Brief. For example, Ms. Jones' and Ms. Alder's experts have never conceded that MCS is not considered a valid diagnosis and is not generally accepted in the scientific community, as claimed by AGFA at page 10 of its Brief. On the contrary, Drs. Cullen, Suruda, Robinson and Bateman all testified that MCS is a valid disease entity. [R 1748, 1752-54, 1767, 1768 and 1783]. Furthermore, according to Dr. Cullen, this illness is the subject of at least 200 peer scientific literature publications written within the last decade. [R 1782]. Dr. Cullen testified that "there is a preponderance of scientific

observation and scientific literature suggesting that this pattern of illness is well described and describable.” [R 1782]

Ms. Jones and Ms. Alder also contest AGFA’s claim that “[n]one of Appellant’s experts can identify a known cause for MCS” made at page 10 of AGFA’s Brief. Dr. Cullen specifically testified that chemicals play a role in causing MCS, and that the cause of MCS, “chemical exposure”, is known, and that what is not yet understood in the medical community is the exact pathway between the first set of events [the chemical exposure] and the latter syndrome that develops. Dr. Cullen does not believe that the actual condition of MCS is in dispute. [R 1768, 1783] It is perhaps essential that the Court understand this precise point of Dr. Cullen’s testimony.

Ms. Jones and Ms. Alder also contest AGFA’s statements that “it is undisputed and unchallenged on this appeal, that there is no accepted diagnostic criteria for, and no known cause of MCS” and that there is “no objective testing to confirm an MCS diagnosis” alleged at pages 16 and 19 of AGFA’s Brief. Again, Dr. Cullen testified that chemical exposure causes MCS. [R 1783]. He also testified that MCS is a distinct clinical syndrome that has reasonable criteria for diagnosis. [R 1783], and he identified the accepted diagnostic criteria of MCS during his deposition testimony. [R 1767]⁵ Finally, Dr. Cullen identified several objective tests to verify or confirm an MCS

⁵ Dr. Cullen identified the following diagnostic criteria for MCS: (1) that the patient has been in stable, generally good health prior to some environmental exposure; and (2) that there was some symptomatic response to the environmental exposure which reoccurs at lower levels of exposure. [R 1767]. Dr. Cullen testified that the next two diagnostic criteria for MCS have to do with what is known as “generalization of the process” so that additional chemicals begin to bother the individual and the pattern of symptoms expand. [R Id.]

diagnosis, including (without limitation) the temporal relationship of the patient's reported symptoms to his/her exposure (which would provide objective data in support of the patient's subjective complaints); the patient's behavior (which would provide objective evidence of the patient's subjective complaints); and the patient's past medical history (which would provide objective evidence and validation that the patient's subjective complaints arise out of the exposure event). [R 1768]

Ms. Jones and Ms. Alder also contest AGFA's claim, set forth at page 14 of its Brief, that there is "undisputed evidence that MCS is not associated with exposure to x-ray processing chemicals or to any other chemical exposure and [there is] uncontradicted data that Ms. Alder and Ms. Jones were not exposed to any chemicals at levels known to cause harm." These statements by AGFA are also wrong and are contradicted by the testimony of Drs. Cullen, Gray and Lipsey.

Specifically, Dr. Cullen testified that MCS is caused by chemical exposure. [R 1783]. He also testified that glutaraldehyde and hydroquinone are irritating materials and that, in his opinion, there is significant circumstantial evidence that Ms. Alder and Ms. Jones were exposed to levels of one or both of these chemicals well in excess of their irritation thresholds.⁶ [R 1772] Dr. Cullen also testified that there is good evidence that the ventilation

⁶ As support, if the Court needs any, for the proposition that circumstantial evidence is as good as direct evidence, for the purpose of defeating motions, on causation issues, for summary judgment, and for the proposition that the drawing of reasonable inferences can and should be allowed to defeat such motions, see, e.g., Lindsay v. Gibbons and Reed, 479 P.2d 23, 31 (Utah 1972); Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 624-25 (Utah App. 1991).

in Plaintiffs' workplace was woefully inadequate and that . . . "one of the chemicals involved in development, or all of them together, were important contributing features here." [R 1775] There is no reason, on the facts of this case, for the Court to conclude, as a matter of law, that the conclusions of Ms. Jones' and Ms. Alder's experts must be any more specific than that. For it is unquestionably true that all of these chemicals were processed through the machine that AGFA provided and serviced. Dr. Cullen also testified that Plaintiffs' transitory symptoms, such as headache, difficulty concentrating, upper respiratory symptoms, and hoarseness are "toxicologically well explained epidemiologically highly consistent human responses to exposure to a very large class of chemicals called irritants." [R 1778]. In Dr. Cullen's opinion, there is no doubt that the onset of illnesses suffered by Ms. Jones and Ms. Alder was the result of the chemical exposure they suffered in their workplace. [R 1782]

With respect to these issues, Dr. Gray testified that the laboratory tests he performed on Ms. Jones confirm to him that she is reactive to the chemicals that she worked with. [R 1764] He also testified that "the mixture of chemicals, which included hydroquinone, glutaraldehyde and sulfur dioxide and some amounts of ammonia, created conditions necessary and sufficient to induce immunotoxicity in [Ms. Jones and Ms. Alder] . . . I believe we can say that the aggregate impact of the exposure to the combination of compounds in the manner in which the ingestions occurred did indeed induce toxic encephalopathy." [R 1765]

According to Dr. Lipsey, the symptoms experienced by Ms. Jones and Ms. Alder are the symptoms listed in the scientific literature as potential health consequences from exposure to the chemicals utilized in film processing and are the same types of symptoms that one would expect to result from being in a small, poorly ventilated room for an extended period of time with chronic exposure. [R 1786]. Dr. Lipsey testified that the symptoms experienced by Ms. Jones and Ms. Alder are consistent with chemical exposure, and that there is a strong correlation between their symptoms and photo-processing chemicals. [R Id.] Dr. Lipsey also testified that injuries can still occur even if the chemical exposure levels are below standards, particularly with repeated and prolonged exposures as occurred in the case of Ms. Jones and Ms. Alder. [R 1786-87]

In short, many of the statements made by AGFA in its Brief pertaining to the “undisputed” or “uncontested” nature of certain facts are false; and there are, indeed, disputed questions of material fact that should have caused the District Court to deny AGFA’s Motion for Summary Judgment.

4. Notwithstanding the Validity of MCS, the Illnesses Sustained By Ms. Jones and Ms. Alder are Not Limited to MCS, as They Suffer From Several Recognized Disease Entities.

AGFA argues that if the Court rejects the MCS diagnosis, Ms. Jones and Ms. Alder cannot establish damages. This contention is false. The medical testimony in this case establishes that Ms. Jones and Ms. Alder suffer from many commonly recognized disease entities as a result of their chemical exposures, including neurological and cognitive deficits, brain damage, respiratory problems, headaches, chronic fatigue syndrome, and fibromyalgia,

to name a few. Even if this Court for some reason rejects the evidence regarding MCS, that determination should go only to the question of what specific evidence Ms. Jones and Ms. Alder may introduce at trial, and to the amounts of their damages. It should by no means be outcome-determinative.

Dr. Robinson testified, for example, that in her opinion, Ms. Alder's test results indicate, to a reasonable degree of medical probability, that Ms. Alder has suffered some form of chemical insult, and she opined, to a reasonable degree of medical probability, that there is a part of Ms. Alder's brain that has been damaged. [R 1751] In Dr. Robinson's opinion, Ms. Alder has a problem in neurocognitive function and has some dysfunction in her ability to think. Dr. Robinson independently analyzed the result of neuropsychological tests taken by Ms. Alder. According to Dr. Robinson, "there are demonstrable abnormalities in Ms. Alder's neuropsychometric testing that would suggest that she would have difficulty in performing tasks she could previously do." [R 1750] Furthermore, in Dr. Robinson's opinion, Ms. Alder's Chronic Fatigue Syndrome was caused by chemical exposure in her workplace, and her pre-existing depression was exacerbated by the symptomatology that she experienced as an immediate result of the exposure in the workplace. [R 1752]

Similarly, and as merely another example, Dr. Janiece Pompa diagnosed Ms. Jones with cognitive deficits and testified that she believes, to a reasonable degree of medical probability, that Ms. Jones' cognitive deficits observed in Dr. Pompa's testing were caused by the chemical exposure she suffered in her workplace. [R 1757]

Dr. Gray diagnosed Ms. Alder as having (1) glutaraldehyde exposure and toxicity; (2) immune toxicity; (3) toxic encephalopathy; (4) reactive airways disease; and (5) latex sensitivity and attributed these problems to the chemical exposure she suffered in her workplace. [R 1762-64] He also diagnosed Ms. Jones as having (1) glutaraldehyde exposure; (2) immune toxicity; and (3) toxic encephalopathy, and he attributed these conditions to the chemical exposure she suffered in her workplace. [R Id.]

Dr. Lipsey testified that the symptoms experienced by Ms. Jones and Ms. Alder are the symptoms listed in the scientific literature as potential health consequences from exposure to chemicals utilized in film processing and are the same types of symptoms that one would expect to result from a person's being in a small, poorly ventilated room for an extended period of time with chronic exposure. [R 1786] Based on the foregoing, it is clear that Ms. Jones and Ms. Alder suffer from a variety of illnesses and problems as a result of their chemical exposure.

Ms. Jones and Ms. Alder have not alleged, in their Amended complaint, that they suffer from MCS. [R 249-255] Rather, Ms. Jones and Ms. Alder have only alleged that their health has been compromised and they are ill as a result of their exposure to chemicals in their workplace. [R Id.] The illnesses they suffer include conditions that have been long-accepted and well-recognized in the medical community, including (without limitation) cognitive and neuropsychological deficits, chronic fatigue syndrome, fibromyalgia, increased depression, headaches, muscle aches, reactive airways disease and toxic

encephalopathy. [R 1749-66] Based upon the foregoing, even if this Court somehow concludes that MCS is not a valid disease entity, Ms. Jones and Ms. Alder can still prove they have been damaged and should be allowed to do so.

C. THE DUTIES OF CARE AGFA OWED TO MS. JONES AND MS. ALDER DO NOT CONCERN THE HOSPITAL VENTILATION SYSTEM, PER SE, AND ARE PREMISED ON THE LAW OF NEGLIGENCE, NOT THE LAW OF STRICT LIABILITY GOVERNING PRODUCT DEFECTS.

AGFA has misapprehended or misrepresented the bases asserted by Ms. Jones and Ms. Alder for imposing duties of care upon AGFA in this matter. AGFA claims it owed no duty of care to Ms. Jones and Ms. Alder regarding the installation, testing or maintenance of the hospital's ventilation system. This claim is irrelevant to the present case, inasmuch as Ms. Jones and Ms. Alder have never asserted that AGFA owed it a duty of care with respect to the installation, operation, and/or maintenance of the hospital's ventilation system. Ms. Jones and Ms. Alder acknowledge that AGFA did not design, install, or maintain the ventilation system in the hospital where they were employed. However, AGFA did design, install, maintain, and service its own Curix Compact Daylight Processing Machine. It is AGFA's failure to act reasonably in dealing with its own machine, not the hospital's ventilation system, that provides the basis for the claims asserted by Ms. Jones and Ms. Alder.

AGFA's argument that it owed no duty of care to Ms. Jones and Ms. Alder with respect to the hospital's ventilation system is non-responsive to the arguments advanced by Ms. Jones and Ms. Alder in their Opening Brief. Ms.

Jones and Ms. Alder refer the Court to the discussion regarding AGFA's duties of care, none of which concerns responsibility for the hospital's ventilation system, set forth at pages 24-31 of their Opening Brief.

AGFA's second line of attack on the issue of duty is to contend that the duties Ms. Jones and Ms. Alder ascribe to them fall under product liability law (presumably strict liability product liability law) instead of negligence law. This contention is without merit. Lest there be any misunderstanding, Ms. Jones and Ms. Alder have never claimed and do not now claim that the Curix machine was "defective." The claims of Ms. Jones and Ms. Alder are negligence claims only and **are not strict liability claims based upon product defects.** The duties AGFA owed to Ms. Jones and Ms. Alder arise under negligence law, not "product liability law" as that term is commonly understood.

Contrary to AGFA's contentions, the Restatement provisions relied upon by Ms. Jones and Ms. Alder, in support of their argument that AGFA owed them certain duties of care, apply to negligence claims and do not relate to the strict liability concepts of product liability. In support of its contention that it owes no duty of care to Ms. Jones and Ms. Alder under the relevant Restatement provisions, AGFA cites a different Restatement provision (402A, comment j). The provision AGFA relies upon, however, relates to strict liability claims involving product defects, not to negligence claims. It is inapplicable to the present case.

Ms. Jones and Ms. Alder explained in detail the duties of care AGFA owed to them, and the bases for imposing those duties, in their Opening Brief

and refer the Court to that discussion, at pages 24-31, the substance of which has been essentially ignored and not really contested by AGFA.

D. AGFA’S ARGUMENT THAT THE CLAIMS OF MS. JONES AND MS. ALDER ARE TIME-BARRED UNDER THE PRODUCTS LIABILITY ACT IS DESPERATE AND DEVOID OF MERIT.

AGFA’s contention that the District Court “dismissed” Ms. Jones’ and Ms. Alder’s supposed “product liability” claims as time-barred and its pursuit of the statute of limitations issue are misguided, misleading and, as suggested at the outset of this Brief, an indication of AGFA’s lack of confidence in its overall position in this Appeal. This case is a negligence case, and the claims being pursued by Ms. Jones and Ms. Alder are negligence claims, governed by the four (4) year “residuary” statute: Utah Code Ann., Section 78-12-25.

The District Court agreed with Ms. Jones and Ms. Alder that the claims set forth in their Amended Complaint deal with principles of negligence and that Utah Code Ann. Sections 78-15-1 et seq., dealing with “product defects” are not applicable to this lawsuit. [R 1197-98] The District Court denied AGFA’s Motion for Summary Judgment on the limitations issue and found that, in accordance with the position taken by Ms. Jones and Ms. Alder, none of the claims asserted by Ms. Jones and Ms. Alder were “product defect” claims or claims subject to the limitations period found in the products liability act. Id.

As the Court will observe, especially from paragraph 16 of the Amended Complaint filed by Ms. Jones and Ms. Alder in this matter, [R] this case is a negligence case, one that alleges failures of human beings, not product defects.

AGFA's heroic efforts to cast this case in a manner that Ms. Alder and Ms. Jones have never cast it notwithstanding, the fact remains that this has never been a claim involving allegations of "defect in a product." (See Utah Code Ann. §78-15-6). The legislation (codified as Utah Code Ann. §§78-15-1 through -6), in which appears the statute of limitations upon which AGFA relies deals only with claims of "defect in a product." It is clear that that statute is a strict liability statute and that §78-15-3, the 2-year limitations statute, deals only with claims brought "under this chapter." (Emphasis added.) "This chapter" deals only with strict liability principles, including the meaning of "unreasonably dangerous" (a stranger to negligence law).

It has long been well established law in other jurisdictions that claims of negligence, even if they deal with negligent manufacture (and the claims in question here don't even do that), are analytically distinct from claims of strict products liability. See, e.g., Ayers v. Johnson & Johnson, 797 P.2d 529 (Wash. App. 1990); Talkington v. Atria Reclamelucifers Fabrieken BV, 152 F.3d 254 (4th Cir. 1998); Sharp v. J.I. Case Corp., 573 N.W.2d 899 (Wis. App. 1997); Brown v. Yamaha Motor Corp, 38 Wash. App. 914, 691 P.2d 577 (1984); Davis v. Globe Mach. Mfg. Co., Inc., 102 Wash.2d 68, 684 p.2d 692 (1984); and Lockwood v. A.C.& S., Inc., 109 Wash.2d 235, 251, 254, 744 P.2d 605 (1987). This Court recently, in Slisze v. Stanley Bostitch, 979 P.2d 317, 319 (Utah 1999) (mention of which is noticeably absent from AGFA's Brief, although it was brought to the District Court's and AGFA's attention by Ms. Alder and Ms. Jones), made it clear that the law of the State of Utah is the same.

There is no suggestion in the language of the “product defect” statutory scheme, or elsewhere in Utah law, that, for negligence claims, anything other than the four-year “residuary” limitations period found in Utah Code Ann. §78-12-25 should apply to claims of negligence. Furthermore, and as a review of the Amended Complaint will cause this Court to realize, there is no allegation of a “defect” in the manufacture or design of the subject AGFA-built daylight processor. The focus has been and remains on acts and omissions of AGFA personnel in dealing with that machine. AGFA’s contention that the claims of Ms. Jones and Alder are product defect claims is tantamount to a contention by General Motors, in a case in which an employee of General Motors is alleged negligently to have inspected, maintained, serviced, or driven, a Chevrolet, that such a claim is in essence a “product defect” claim.

AGFA relies on a United States District Court case, Strickland v. General Motors Corp., 852 F. Supp. 956 (D. Utah 1994). Strickland was not a decision of this Court, and was, for purposes pertinent hereto, effectively nullified by Slisze; and, in any event, the negligence claim in Strickland dealt with negligent manufacture (something that has not been alleged in this case). The former statutory language has no applicability and, in any event, Ms. Alder and Ms. Jones have never alleged a defect or failure in relation to a product. Their claims have dealt with and continue to deal with failures of persons – AGFA employees.

Ms. Alder and Ms. Jones also bring to the Court’s attention the proposition that there are serious issues of fact to consider if the Court should

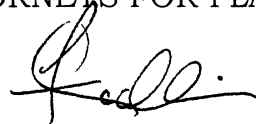
for some reason accept AGFA's contention that this is a "product defect" case subject to the two-year statute of limitations, with respect to the questions of when Ms. Alder discovered and when Ms. Jones discovered, or should in the exercise of due diligence have discovered, the "harm" to them and its "cause." Facts in support of the proposition that, at a minimum, triable questions of fact remain for determination appear in a District Court memorandum submitted by Ms. Jones and Ms. Alder [R 1743-47]; and Ms. Jones and Ms. Alder incorporate in this Brief, by this reference, the discussion of those facts there set forth.

CONCLUSION

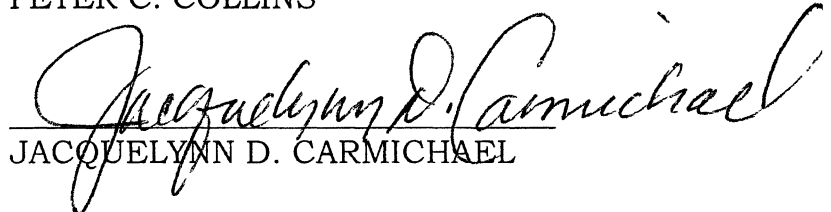
Based on the foregoing analysis and on the points and authorities set forth in their Opening Brief, Ms. Jones and Ms. Alder urge the Court to reverse the Summary Judgment and to return this case to the District Court for trial, with whatever instructions the Court deems appropriate.

RESPECTFULLY SUBMITTED this 20th day of July, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 25th day of July, 2001, I caused to be served two true and correct copies of the foregoing REPLY BRIEF OF PLAINTIFFS- APPELLANTS by the method indicated below, and addressed to the following:

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