

2000

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

Utah Supreme Court

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LESLIE ALDER nka LESLIE)
ROBERTS, and JACKIE JONES,)
)
Plaintiffs-Appellants,)
)
vs.)
)
BAYER CORPORATION, AGFA)
DIVISION,)
)
Defendant-Appellee.)

OPENING BRIEF OF
PLAINTIFFS-APPELLANTS

Oral Argument Priority No. 15

Case No. 20000937-SC

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COMPLETE LIST OF ALL PARTIES

Leslie Alder (now known as Leslie Roberts, but referred to throughout this Brief at “Leslie Alder” or “Ms. Alder”) and Jackie Jones originally sued the following named defendants: Miles, Inc., a corporation, AGFA Corporation, a corporation, and Bayer Corporation, a corporation.

Counsel for Ms. Alder and Ms. Jones, on the one hand, and for the originally named defendants, on the other hand, agreed that, for all purposes, including but not limited to tort liability of any and all of the originally named entities, and for simplicity’s sake, the case could proceed against one named entity only. That entity is the currently named defendant: Bayer Corporation, AGFA Division (hereinafter “AGFA”).

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I. STATEMENT OF JURISDICTION

This case is on appeal from a final Order of the Third Judicial District Court of Salt Lake County (the Honorable Stephen L. Henriod). This Court has jurisdiction over this Appeal pursuant to Utah Code Ann., Section 78-2-2(3)(j).

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the District Court committed reversible error when it determined (1) that AGFA owed Ms. Jones and Ms. Alder no duty of care; (2) that Ms. Jones and Ms. Alder cannot establish causation of any of their damages without proving the precise level of their chemical exposure; and (3) that Ms. Jones and Ms. Alder cannot establish that they were damaged because the medical evidence regarding their illnesses is not based upon inherently reliable scientific or medical foundation and is therefore inadmissible; and when it, accordingly, ordered summary judgment in AGFA's favor.

APPLICABLE STANDARD OF APPELLATE REVIEW

The applicable standard of appellate review of summary judgments has been stated, by this Court, in Andreini v. Hultgren, 860 P.2d 916, 918 (Utah 1993), as follows:

In reviewing a summary judgment, we affirm only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. E.g., Estate Landscape and Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 844 P.2d 322, 324 (Utah 1992); Hill v. Seattle First Nat'l Bank, 827 P.2d 241, 242 (Utah 1992); Brower v. Brown, 744 P.2d 1337, 1338 (Utah 1987). In reviewing a ruling on a motion for summary judgment, we review the trial court's legal conclusions for correctness. E.g., Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988).

The issue was preserved in the trial court by the filing of Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment [R 1721-2229], at oral argument on that Motion, by the post-hearing submission of Ms. Jones and Ms. Alder [R 2342-2358], and by the filing of the Notice of Appeal dated October 27, 2000 [R 2370-2371].

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN TRIAL COURT.

This case involves the claims of Jackie Jones and Leslie Alder for compensation for the illnesses and damages they allegedly sustained during their employment as radiography technologists at LDS Hospital. Ms. Jones and Ms. Alder allegedly developed serious and permanent illnesses over the course of a two-year period following the relocation and reinstallation of AGFA's Curix Compact Daylight Processing machine in a new, improperly ventilated work area. AGFA participated in the relocation of its machine and was responsible for its installation. AGFA is alleged, among other things, to have been negligent with respect to the installation of its Curix machine in the Mammography Department at LDS Hospital, and with respect to its failure to warn Ms. Jones and Ms. Alder of the dangers involved in working near the machine without adequate ventilation.

AGFA filed a motion for summary judgment contending that it owed Ms. Alder and Ms. Jones no duty of care; that all of the illnesses complained of by Ms. Alder and Ms. Jones were Multiple Chemical Sensitivity; that Multiple

Chemical Sensitivity is not a valid illness or disease entity; and that Ms. Alder and Ms. Jones could not prove that they had been subjected to toxic “doses” of harmful chemicals. That Motion was vigorously contested, on all fronts, by Ms. Jones and Ms. Alder. Oral argument was held on that Motion. The Third District Court (the Honorable Stephen L. Henriod) took the matter under advisement and ultimately granted that Motion. The District Court’s Order Granting Summary Judgment is dated October 4, 2000. The Notice of Appeal was filed in the District Court on October 27, 2000, and in this Court on October 30, 2000.

B. STATEMENT OF FACTS

BACKGROUND

In 1991, Tim Murray went to work for AGFA as a Field Service Engineer for the state of Utah and was responsible for servicing AGFA products at LDS Hospital in Salt Lake City. When Mr. Murray started working for AGFA, he was required to study a series of Chemical Safety Modules and was tested on the information contained in the Modules. The Modules repeatedly stressed the danger of the inhalation of fumes from the chemicals used in the subject processor. [R 1887] Mr. Murray acknowledged that he was aware of the necessity of adequate ventilation in rooms where the processor was used. [R 1889-90] AGFA’s installation guidelines specify a minimum air exchange rate of 10 or 15 times the room volume per hour. Mr. Murray acknowledged that one of the reasons why adequate ventilation is stressed is that it is important

that chemical vapors put off by the processor be removed from the room. [R 1891]

Mr. Murray acknowledged that AGFA participated in the installation of the processor in its new location. [R 1893-94] Mr. Murray testified that he connected the processor to a possible exhaust vent in the ceiling of the new room. [R 1870-71]¹ Notwithstanding Mr. Murray's participation in the installation of the processor, and his serious doubts regarding a possible "exhaust vent's" ability to exhaust fumes from the new room, Mr. Murray admitted that he did not test the ventilation in the room. [R 1894]

Sometime subsequent to the installation of the processor in its new location, Mr. Murray received complaints from Ms. Jones that she had lost her voice and had tightness in her chest. [R 1892] After learning that Ms. Jones was getting sick from the fumes in the room, Mr. Murray became aware that the ceiling vent was not working properly and "wasn't exhausting a lot of air." [R 1872] Mr. Murray acknowledged that AGFA installation guidelines apply to him, as a technician and installer, and require him to be concerned with the ventilation of the rooms where processors are installed. [R 1873] When Ms. Jones and Ms. Alder became sick, Mr. Murray talked to other AGFA representatives, including George Cervenka. [R 1874-77] Mr. Cervenka was AGFA's product specialist at that time and told Mr. Murray "to have the room

¹ Pages 1870-1883 of the Record are out of order as they were inadvertently placed under Exhibit B (excerpts from William Patrick Bendall's deposition) to Plaintiffs' Memorandum in Opposition to AGFA's Motion for Summary Judgment. In fact, pages 1870-1883 of the Record are pages from Tim Murray's deposition (excerpts of that deposition constitute Exhibit C to that Memorandum in Opposition) and those pages should, as parts of the Murray deposition, be read as falling between pages 1894 and 1895 of the Record.

checked." Mr. Murray did not check the ventilation in the room, in spite of Mr. Cervenka's directive that he do so. [R 1877] Mr. Cervenka wanted Mr. Murray to have the room checked to determine whether the ventilation was sufficient to get the fumes out of the room. [R 1878]

Sometime in March 1995, Mr. Murray, at the Hospital's request, installed an AGFA "vent kit" to try to improve the fume problems. The vent kit consisted of internal PVC piping that connected with the machine's hose and ran up to the ceiling vent. [R 1879] Mr. Murray had by then become concerned that the lack of ventilation was causing Ms. Jones' health problems. [R 1883] Notwithstanding his concern, Mr. Murray never inquired whether the hospital conducted any tests on the ventilation of the new room. [R 1895] Mr. Murray does not recall ever suggesting better venting to anyone at the hospital. [R 1896]

LDS Hospital's Pat Bendall has testified that AGFA was "in the loop" from the beginning when Ms. Jones and Ms. Alder made their first complaints regarding the ventilation problem in the room and, eventually, regarding their health problems. [R 1854] Mr. Bendall relied on the expertise of the AGFA people with respect to safely ventilating the workplace. [R 1855] AGFA never conducted any tests to determine the ventilation or air-exchange rates in the new room. [R 1865]

At the Hospital's request, Utah Occupational Safety and Health (UOSH) inspected the subject Mammography processing area after an outside wall vent was finally installed and reported that it at that time had a satisfactory air-

exchange rate of twenty five air changes per hour. UOSH also confirmed that the mammography room initially had only two air changes per hour. UOSH noted that AGFA's Curix machine used a developer containing the chemicals glutaraldehyde and hydroquinone, stating "[e]mployees may have been sensitized to the chemicals in the fixer and the developer before the ventilation system was changed."

Ms. Jones and Ms. Alder were employed by Intermountain Health Care ("IHC") at L.D.S. Hospital in Salt Lake City, Utah as Radiography Technologists for 17 and 15 years respectively. Ms. Jones and Ms. Alder were, by reason of their subject illnesses, required to discontinue their employment, and careers, as radiography technologists in June 1995.

From February 1993 through June 1995, Ms. Jones and Ms. Alder worked as full-time radiography technologists with the processor in the new location. [R 1899] Prior to February 1993, Ms. Alder was in generally good health and had not experienced any symptoms that she attributes to her work as an x-ray technologist. [R 1900-04] Prior to February 1993, with the exception of a lower back problem and diabetes, Ms. Jones was also in generally good health and had not experienced any symptoms that she attributes to her work as an x-ray technologist. [R 1920-22, 1935]

After the processor was relocated to the new area in February 1993, Ms. Jones complained that the air in her workplace seemed hot and stagnant. [R 1920-22] Ms. Jones' initial illness symptoms included hoarseness, difficulty breathing and chest pains. Ms. Jones' symptoms eventually included watery

eyes, red skin, nausea, muscle aches, dizziness, joint pain, ear-aches, runny nose, confusion, memory loss, slow-healing and severe fatigue. Ms. Jones testified that she did not begin to experience the full gamut of these symptoms until sometime towards the very end of her career in 1995. [R 1938-41, 1944-46] Ms. Alder and Ms. Jones believe that they first connected their symptoms to chemical exposure when another technician began complaining of the same symptoms sometime in late 1994 or early 1995. [R 1910-11, 1942]

MEDICAL TESTIMONY/RECORDS

a. Anthony Suruda, M.D., M.P.H.

Eventually, Ms. Jones and Ms. Alder were referred by their employer to Anthony Suruda, M.D., M.P.H. for an examination to determine if they had suffered from occupational exposure to chemicals. Dr. Suruda is employed at the Rocky Mountain Center for Occupational and Environmental Health, University of Utah, and diagnosed Ms. Alder as having Multiple Chemical Sensitivity (MCS), possible asthma and a history of depression. Dr. Suruda recommended that Ms. Alder not work in departments where glutaraldehyde is used or where air from those departments is recirculated into the building. [R 1958-68] Dr. Suruda diagnosed Ms. Jones as having MCS, diabetes and hypertension. Dr. Suruda recommended that Ms. Jones not work in departments where glutaraldehyde is used or where air from those departments is recirculated into the building. [R 1958-68] Dr. Suruda testified that glutaraldehyde is a known irritant, and that he believes he smelled

glutaraldehyde over the processor when he visited the workplace of Ms. Jones and Ms. Alder. [R 1974]

b. Deborah Robinson, M.D.

Dr. Robinson, a medical doctor and Ms. Alder's primary care physician, conducted a differential diagnosis of Ms. Alder. Dr. Robinson explained that in order to perform a differential diagnosis, a physician must get a history from the patient and rule out (to the physician's satisfaction) other potential explanations for the patient's specific problem. [R 1986-88] Dr. Robinson diagnosed Ms. Alder with Chronic Fatigue Syndrome and MCS in association with Fibromyalgia. [R 1977]

According to Dr. Robinson, Chronic Fatigue Syndrome is a compilation of various symptoms that together constitute a diagnosis. She states that "there have been reports dating back over a hundred years of this syndrome, but it hasn't been formally recognized perhaps until the last five to ten years." CFS is now, however, a recognized diagnosis. [R 1978] Dr. Robinson also testified that Fibromyalgia is a rheumatological diagnosis, consisting of another constellation of symptoms, without serological or a laboratory abnormality for diagnosis. In spite of the lack of objective "laboratory" evidence of this syndrome, she testified that it is a recognized diagnosis. [R 1979]

In Dr. Robinson's opinion, Ms. Alder has a problem in neurocognitive function and has some dysfunction in her ability to think. Dr. Robinson has independently analyzed the result of neuropsychological tests administered to 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 1980-82] Dr. Robinson did not see anything in Ms. Alder's neuropsychological test results that indicate she is malingering. [R 1983] In Dr. Robinson's opinion, Ms. Alder's test results indicate to a reasonable degree of medical probability that Ms. Alder suffered some form of chemical insult. [R 1984] Dr. Robinson further opined, to a degree of medical probability, that there is a part of Ms. Alder's brain that has been damaged. [R 1985]

In Dr. Robinson's opinion, Ms. Alder is disabled in terms of her ability to function in the job she previously held because she cannot be exposed to chemicals and that she is unable, by reason of the inconsistency of day-to-day pain and fatigue, to report every day to a job from eight to five. [R 1989] Dr. Robinson has opined that Ms. Alder's CFS was caused by chemical exposure in her workplace and that MCS and Fibromyalgia co-exist with Ms. Alder's CFS. Dr. Robinson testified that "[c]ertainly the chemical smell sensitivity and the basic symptoms of Ms. Alder's Chronic Fatigue had an onset at the time of her exposure." [R 1991-92]

The fact that the constellation of Ms. Alder's medical problems and illnesses has been referred to as "MCS" does not alter Dr. Robinson's opinion that Ms. Alder suffers from real illnesses and is disabled as a result thereof. [R 1994] Dr. Robinson testified that even though science has not yet defined the pathway of the CFS or MCS disease processes, one can still conclude to a reasonable degree of medical probability that those syndromes occur in

association with certain exposures, and that, based upon Ms. Alder's history of being exposed to chemicals in the workplace and then having an onset of symptoms that meet the definition of CFS and MCS, one can reasonably conclude to a degree of medical probability that Ms. Alder's conditions were brought on by her exposure to chemicals in the workplace in which the AGFA Curix machine was relocated. [R 1995]

c. Lucinda Bateman, M.D.²

Dr. Lucinda Bateman, Ms. Jones' primary care physician, has opined that Ms. Jones was disabled from performing her regular job because of chemical exposure. [R 1951-56] Dr. Bateman believes that Multiple Chemical Sensitivity is a valid disease entity. [R 2003] In treating and diagnosing Ms. Jones, Dr. Bateman reviewed medical records and reports prepared by Ms. Jones' other physicians. [R 2004]

According to Dr. Bateman, Chronic Fatigue Syndrome and Fibromyalgia can be caused by a chemical exposure. [R 2005] Dr. Bateman testified that she saw no evidence of malingering on the part of Ms. Jones. [R 2006] Dr. Bateman diagnosed Ms. Jones with MCS. Specifically, Dr. Bateman stated that she believes Ms. Jones "is ill, and her symptoms fit under Multiple Chemical Sensitivity the best." [R 2007] Dr. Bateman believes the most likely cause of Ms. Jones' MCS is her chemical exposure in the workplace. [R 2008-09] Dr.

² Dr. Bateman is a board certified general internist. She attended medical school at Johns Hopkins and completed her residency at the University of Utah. Dr. Bateman describes herself as a general internist with an interest in Chronic Fatigue Syndrome, Multiple Chemical Sensitivity, Fibromyalgia and atypical neurologic illness. [R 2000-01] She specializes in ill-defined chronic illnesses and has published on the subject of Chronic Fatigue Syndrome. [R 2002]

Bateman has opined that the proposition that the cause of Ms. Jones' symptoms is her occupational exposure to chemicals is provable from the standpoint that Ms. Jones was in her work environment for many years without problems and then, when the Curix machine was relocated into the new area with inadequate ventilation, she began to develop her current health problems. [R 2010] Dr. Bateman has correlated Ms. Jones' symptoms to her workplace exposure by reviewing Ms. Jones' history and the temporal relationship that exists between the onset of her illness and the ventilation problems in her workplace. [R 2011]

d. Janiece Pompa, Ph.D.³

Dr. Pompa administered a series of neuropsychological tests to Ms. Jones and prepared an evaluation based upon Ms. Jones' test results. Dr. Pompa's findings and conclusions are as follows:

In summary, Ms. Jones displays significant cognitive deficits, which she ascribes to exposure to toxic chemicals. There is no literature with regard to the neuropsychological effects of exposure to hydroquinone and glutaraldehyde, or x-ray processing fluid. In the case of solvent exposure, neurological examination is usually normal, except in the most severe cases. However, subclinical neuropsychological effects are often seen earlier in the exposure history. These include headache, dizziness, fatigue, parasthesias, pain, weakness, and memory disturbance. Severe exposure is capable of causing dementia, involving deficits in memory, judgment, abstract thought and other cortical functions, as well as changes in personality and behavior. Since Ms. Jones does complain of many of these symptoms, there is sufficient evidence to conclude that her neuropsychological deficits could have been caused by chemical exposure. It is unlikely that her complaints constitute a pre-existing condition, as her memory and attentional deficits are so pronounced that

³ Dr. Pompa is a licensed psychologist and specializes in the fields of Child Psychology and Neuropsychology. She completed a minor in Neuropsychology in graduate school, a predoctoral internship with a neuropsychology rotation and one year post-doctoral residency in child neuropsychology at Primary Children's Medical Center. [R 2014]

she would not have been able to keep a job, much less a supervisory position.

[R 2022-36] The medical literature relied upon by Dr. Pompa provides a general description of many of the common neuropsychological consequences of chemical exposure in general. Based upon this literature, and on her background, training, education, experience, and her work with Ms. Jones, Dr. Pompa determined that Ms. Jones' pattern of cognitive deficits seemed to be reasonably related to her chemical exposure. [R 2015] Dr. Pompa has 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 2016-18]

e. Michael Gray, M.D., M.P.H.⁴

Dr. Gray has been a treating physician for Ms. Jones and Ms. Alder. He utilized the differential diagnosis method in evaluating and diagnosing the health conditions of Ms. Jones and Ms. Alder. [R 2063] Dr. Gray diagnosed Ms. Alder as having (1) glutaraldehyde exposure and toxicity; (2) activated

⁴ Dr. Gray, San Pedro Valley Medical Association, Benson, Arizona, completed his medical degree in 1974 at the University of Cincinnati College of Medicine. He then completed a three-year residency in Internal Medicine at the Cook County Hospital in Chicago, Illinois. He also obtained a Master's degree in Public Health and in 1978 was appointed the Director of Occupational Medicine at the Arizona Center for Occupational Medicine. He also served as an assistant professor of Internal Medicine and has published numerous articles. [R 2038-49] Dr. Gray participated in the authorship of 13 monographs that were eventually distributed to various medical schools nationwide for use in their curricula. One of the monographs identified glutaraldehyde as a chemical that was hazardous to hospital workers. [R 2052-58] Although he is not certified, Dr. Gray has training in Industrial Hygiene; he also has training and experience in the field of Neurology. [R 2059-60] A summary of some of the data Dr. Gray has collected and that factored into his clinical assessment of Ms. Jones and Ms. Alder was published in the proceedings of a conference sponsored by the Agency of Toxic Substances Disease Registry in May, 1994. This publication was also peer-reviewed and edited. [R 2061].

cellular immunity (immune toxicity), (3) toxic encephalopathy (mild to moderate), (4) reactive airways disease, and (5) latex sensitivity (health care related). Dr. Gray concluded that Ms. Alder was temporarily totally disabled. [R 2103-09] Dr. Gray diagnosed Ms. Jones as having glutaraldehyde exposure, immune toxicity with evidence of excessive auto immunity and toxic encephalopathy by history. He advised Ms. Jones to stay off work and opined that her condition constituted a total disability. He reviewed Ms. Jones' past medical records and opined that "her symptoms and overall condition are directly related to the exposures which she sustained to glutaraldehyde in the workplace." [R 2096-2102]

Dr. Gray concluded that because of the temporal relationship between the onset of Ms. Jones' illnesses and her relocation to a work area with inadequate ventilation substantiates, the clinical correlation, and the differential diagnostic process results "in a diagnosis of x-ray developer reagent induced immune toxicity with associated toxic encephalopathy." [R 2081] The laboratory tests Dr. Gray performed on Ms. Jones confirm, to his satisfaction, that she is reactive to the chemical fumes in her workplace. [R 2083]

With respect to identifying the chemicals that have caused the illnesses of Ms. Jones and Ms. Alder, Dr. Gray testified as follows:

It is my considered medical opinion, based on the differential diagnosis and general clinical assessment of these two individuals, that their exposure in the context in question to a mixture of chemicals emanating from the developer were sufficient to do the job. Now we can speculate on which of the components might have been more or less likely to contribute to the reaction, but the bottom line is that the reality of the situation was that they were exposed to a mixture, not to just one compound.

[R 2085] (Emphasis added). He further testified:

After reviewing the materials in my files relating to Leslie Alder and Jackie Jones in this matter and the environmental circumstances, I believe 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 both of these patients as they are manifesting and exhibiting, both in the context of the symptoms they are describing and the neuropsych profiles that have been generated regarding them. The deficits of which, I think, related to those exposures. From that standpoint, I believe that 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 2086] (Emphasis added).

Dr. Gray believes it is highly significant that these two patients were able to work for so many years in their field without problem and then, with the relocation of their workplace to a room with inadequate ventilation, their illnesses and problems began to arise. [R 2089]

f. Mark R. Cullen, M.D.⁵

Dr. Cullen testified that the diagnostic criteria for MCS are (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

⁵ Dr. Cullen is a Professor of Medicine in Public Health at Yale University School of Medicine and the Director of the Yale New Haven Occupational and Environmental Medicine Program. [R 2127] Dr. Cullen is also a medical consultant for the International Chemical Workers Union and a member of the Scientific Advisory Committee to the University of Iowa Persian Gulf Veterans Study, a former member of the NIOSH Board of Scientific Counselors and a member of the DuPont Epidemiology Review Board. [R 2128] Dr. Cullen is board certified in Internal Medicine and Preventive Medicine in the Occupational Medicine Subspecialty. [R 2126] Dr. Cullen is a member of the American College of Physicians, American Public Health Association, American College of Occupational and Environmental Medicine, and Association of occupational and Environmental Clinics. [R 2129] Dr. Cullen has performed studies and published articles on Multiple Chemical Sensitivity and, in fact, “coined” that term. [R 2130, 2133]

environmental exposure which reoccurs at lower levels of exposure. Dr. Cullen further testified that the exposure does not have to be a sudden, acute event and 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. According to Dr. Cullen:

One of the things that always happens during this period is the development of some central nervous system type complaints, lack of concentration, confusion, dizziness, persistent headache. That’s kind of a hallmark. So it’s not just respiratory or skin, it’s now something more systemic.

[R 2132]

According to Dr. Cullen, MCS patients “are not making the symptoms up, [they] are very real, often extremely intense, life ruining symptoms, and therefore they have an underlying pathophysiologic basis.” [R 2134] Dr. Cullen testified that there are objective ways to verify or confirm patients’ subjective report of their symptoms. For example, the temporal relationship of their reported symptoms to their exposure are objective data in support of their subjective complaints. In addition, their behavior can provide objective evidence of their subjective complaints, and their past medical histories can provide objective evidence and validation that their subjective complaints arise out of the exposure event. [R 2135-36] According to Dr. Cullen, chemicals clearly play a role in causing MCS. [R 2137]

Dr. Cullen testified that just because the medical community may not know everything there is to know about a disease entity doesn’t make the disease any less real. One example given by Dr. Cullen is multiple sclerosis.

Similar to MCS, the medical community does not know enough about Multiple Sclerosis to know what causes the disease or to know how to effectively intervene to treat and/or prevent the disease. This lack of knowledge does not, however, make the disease any less real. [R 2138] Dr. Cullen testified that when treating MCS patients, it is important to perform a differential diagnosis. He further testified that a differential diagnosis does not involve distinguishing among exposures to different irritants to determine which irritant was the causative factor. In fact, he indicates that this is a singularly unrewarding task and is of no value. [R 2140-41]

According to Dr. Cullen, glutaraldehyde and hydroquinone are irritating materials. 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. [R 2157]

Dr. Cullen testified that Ms. Alder's respiratory complaints, central nervous system complaints, and severe fatigue, triggered by intermittent periodic exposures to low level environmental irritants, make it appropriate to call her an MCS patient. Dr. Cullen believes that Ms. Alder's Fibromyalgia diagnosis is related to her MCS and is part of that disease entity. [R 2158-60] In Dr. Cullen's opinion, the record makes clear that Ms. Alder was working for more than a year in a problematic environment, and "the association between environmental exposures at low level and the triggering of symptoms is the sine qua non of MCS." [R 2161-62]

In formulating his opinions regarding Ms. Jones and Ms. Alder, Dr. Cullen reviewed extensive medical records and spoke with each of them. [R 2168-69] He testified that one of the hallmarks of MCS is that the patient does not improve once the initial exposure is remedied. It is of no surprise to him that Ms. Jones' and Ms. Alder's symptoms and medical conditions did not improve once the ventilation problem was corrected. Once a person develops MCS, any improvement in the ventilation is too little, too late:

The problems that MCS patients have are not dose related. In the normal scheme of things the triggers vastly exceed their thresholds for response . . .they react to such relatively low levels of things that improving ten or a hundredfold the air quality is not important to them. It's not enough. It doesn't make much difference.

[R 2173-74]

Dr. Cullen testified that Ms. Alder could not possibly return to work as a radiographer and that there is good evidence that the ventilation in the subject workplace was woefully inadequate and he feels confident that "one of the chemicals involved in development, or all of them together, were important contributing features here". [R 2176] Dr. Cullen opined that Ms. Alder suffered functional neuropsychological impairments as a result of her MCS. [R 2179]

Dr. Cullen also performed a differential diagnosis of Ms. Jones. [R 2181] He concluded, from that diagnosis, that she suffers from MCS, [R 2181], and that her major chronic symptoms are muscle pain, impaired memory and fatigue [R 2182], and that her respiratory and voice symptoms and loss of balance occur with exposure to irritants. [R 2182]

Dr. Cullen testified that the onset of MCS is always associated with some chemical irritation or other chemical exposure or reaction. [R 2187] Ms. Jones' positive reaction to a non-blind challenge test using glutaraldehyde supports Dr. Cullen's diagnosis that Ms. Jones suffers from MCS. [R 2188] He further testified that Ms. Jones' negative test result for classic allergens on a skin and lung test is also supportive of his diagnosis because it rules out the possibility that Ms. Jones' symptoms are the result of an allergy or asthma condition [R 2188], and that Ms. Jones' neuropsychological test results indicate a pattern that is commonly seen in patients with MCS. [R 2190]

Dr. Cullen wrote:

It appears virtually unquestionable from the contemporaneous record of complaints acknowledging the environment that the workplace environment of Ms. Alder resulted in significant respiratory and dermal irritation on a daily basis resulting in headache, severe upper respiratory congestion and discomfort, intermittent skin burning and fatigue. This constellation would fall at the extreme end of the condition now most commonly known as "Non Specific Building Related Illness" resulting from work in a poorly ventilated environment with multiple irritating substances present.

It also appears evident from the clinical record . . . that the patient developed depression, likely reactive and in response to physical illness.

. . . although most individuals suffering from repeat insults from upper respiratory irritants and suffering from the syndrome of "Non Specific Building Related Illness" do improve coincident with environmental improvements . . . Ms. Alder's illness appears to have been complicated prior to her removal from the work environment by the syndrome of "Multiple Chemical Sensitivities." Although the underlying basis for this complication remains uncertain in the scientific literature, it is overwhelmingly the best explanation for the exacerbation of symptoms through 1995, the development of symptomatic responses around environments

outside her work are and the development of more chronic and persistent problems such as fatigue and musculoskeletal pain.

[R 2204-07] Dr. Cullen also opined that:

. . . based on my experience with a very large number of similarly affected [patients], subjected throughout my clinical practice and research over the past decade and half at Yale, it would be my impression that Ms. Alder will not tolerate significant periods of time in environments that are characterized by significant chemical use and poor air quality. This may largely preclude her ability to work at her chosen profession and may even preclude working in any hospital environment, again based on my experience.

[R 2204-07]

With respect to Jackie Jones, Dr. Cullen made conclusions, after he completed her differential diagnosis, similar to those he made regarding Ms. Alder. Specifically, Dr. Cullen found:

Based on the evidence regarding air quality between 1993 when Ms. Jones' unit moved and 1995 when she discontinued work, it appears evident that Ms. Jones was exposed repeatedly to irritating industrial chemicals at levels substantially above those able to cause mucosal irritation and associated symptoms. The headache, difficulty concentrating, and upper respiratory symptoms particularly the hoarseness which she experienced during this time period, I believe can be directly attributable to those exposures as was suggested by almost all of the contemporaneous evaluations and supported by physical examination done at the time.

[R 2200-03] Dr. Cullen also opined that Ms. Jones' increasing symptomatology, including a severe systemic component of fatigue, difficulties with concentration, muscle aches and depressive symptoms, occurred even after the remediation at her work area and persisted even after she was removed altogether from the work environment and:

This pattern of intensifying symptoms occurring around and triggered by a range of environmental odors and low level chemical irritants in

an individual who has suffered from a two year occupational illness . . . is most consistent with a complication known as Multiple Chemical Sensitivities (MCS).

[R 2200-03]

Dr. Cullen acknowledged that there is considerable debate in the medical literature as to “the path of physiologic base for this complication”—not as to its existence. Based upon his review of the records and all the information available to him, Ms. Jones meets, in Dr. Cullen’s opinion, the clinical criteria for the MCS disorder. [R 2200-03]

Dr. Cullen also opined that “Ms. Jones will not likely succeed in returning to her prior occupation based both on her neuropsychological impairments as well as her reactivity to the chemical environment” and that it is “unlikely that she will succeed in returning to work in a hospital environment, again because the frequent nature of environmental irritants in that environment.” [R 2200-03] Dr. Cullen testified that he holds the opinions expressed in his reports on Leslie Alder and Jackie Jones to a reasonable degree of medical certainty. [R 2194]

Dr. Cullen does not consider the subject of MCS to be “new science” in the scientific community. Indeed, according to Dr. Cullen this illness is the subject of at least 200 peer scientific literature publications written within the last decade. [R 2194] 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 2195] Dr. Cullen has no doubt that the onset of illnesses suffered by Ms. Jones and Ms. Alder resulted from

the chemical exposure they suffered in their workplace. Based upon his review of the records, it is his opinion that the chemical exposure in this case is well documented. [R 2197]

Dr. Cullen testified that the cause of MCS, “chemical exposure”, is known, and that what is not yet understood in the medical community is what the exact pathway is between the first set of events [the chemical exposure] and the latter syndrome that develops. He does not, however, believe that the actual condition of MCS is in dispute, and it is his opinion that these women have the condition. [R 2195-97] Dr. Cullen testified that MCS is a distinct clinical syndrome that has reasonable criteria for diagnosis. [R 2198]

IV. SUMMARY OF ARGUMENTS

AGFA owed Ms. Jones and Ms. Alder several duties of care. AGFA had a duty to use reasonable care in the installation of the Curix machine in its new location, including the obligation to determine whether adequate ventilation was being provided. AGFA undertook the duty of installing the Curix machine in its new location in February 1993. It had a duty to exercise reasonable care in completing the task.

AGFA also had a duty to provide safe equipment. At least as a matter of triable fact, AGFA knew or should have known that its machine was not safe for use in the new, inadequately ventilated, mammography room and owed Ms. Jones and Ms. Alder a duty of care not to provide the equipment without first making it safe for its intended use. This duty, at least as a matter of triable fact, required AGFA to refrain from installing its machine in the badly

ventilated workplace; promptly to place an available, AGFA-made “vent kit” on the machine to assist in venting the toxic fumes; and/or to advise the hospital that the AGFA machine could be used only in an area with better ventilation.

AGFA had a duty to see that its machine was not operated in unsafe conditions. AGFA used and allowed its Curix machine to be used when it knew or should have known that the machine was inappropriate to be operated in areas that lacked adequate ventilation, and that operation under those conditions would involve an unreasonable risk of harm to Ms. Jones and Ms. Alder.

AGFA owed a duty to Ms. Jones and Ms. Alder, by virtue of its contractual relationship with their employer, regarding the installation and servicing of the Curix machine. The reasonable performance of its contract with IHC required AGFA to properly install and service the Curix machine for the safety of IHC’s employees who worked in the Mammography unit, including Ms. Jones and Ms. Alder.

AGFA also owed a duty to Ms. Jones and Ms. Alder to warn them of the risks of working near the Curix machine without adequate ventilation. AGFA’s unquestionable abject failure to warn Ms. Jones and Ms. Alder regarding the risks associated with their use and operation of a piece of equipment AGFA provided, installed, and serviced subject AGFA to liability.

With respect to illness causation, the inability of Ms. Jones and Ms. Alder to establish the exact levels of chemicals to which they were exposed over the course of the two-year period they worked in the new Mammography

department is no fault of their own and is not fatal to their claims. Standards created by governmental and/or industrial agencies are not necessarily “scientific” in nature and do not stand for the proposition that exposure to levels lower than those established as “standards” cannot cause injury. Furthermore, Ms Jones’ and Ms. Alder’s medical experts have opined that, in addition to objective evidence of exposure to chemicals in the workplace, the temporal relationship between the inadequate ventilation of the workplace and the onset of symptoms establishes a causal connection between exposure to chemical fumes and the illnesses suffered by Ms. Jones and Ms. Alder.

The testimony of the medical experts is based upon reliable, scientific methods and is not inadmissible under this Court’s Rimmasch decision or any other controlling rule of law. In determining the admissibility of the medical testimony, the District Court could appropriately have concerned itself only with the methods upon which an expert opinions are based; it should not have judged the credibility of the opinions themselves. That task is specifically reserved for the trier of fact. In this case, the techniques and methods utilized by the witnesses in question are not “novel” or “new”.

The District Court committed reversible error when it granted AGFA’s Motion for Summary Judgment.

V. ARGUMENT

I. AGFA OWED MS. JONES AND MS. ALDER DUTIES OF CARE.

A. AGFA HAD A DUTY TO USE REASONABLE CARE IN THE INSTALLATION OF THE CURIX MACHINE IN ITS NEW LOCATION, INCLUDING THE OBLIGATION TO DETERMINE WHETHER ADEQUATE VENTILATION WAS BEING PROVIDED.

Under its contract with IHC, AGFA was responsible for the installation and servicing of the Curix machine. In February 1993, when IHC determined to relocate the machine in its new mammography department, AGFA was called in to assist with, and did assist with, the installation of the Curix machine in its new location. AGFA thus undertook the responsibility of appropriately installing the Curix machine. Section 324A of the Restatement (Second) of Torts provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, **or**
- (b) he has undertaken to perform a duty owed by the other to the third person, **or**
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts, Section 324A (emphasis added). This Restatement provision clearly applies to the facts of this case. As demonstrated by the testimony of AGFA's Service Representative, Tim Murray (see discussion and record citations set forth at pages 3-5, above), AGFA failed, in performing the undertaking of installing the Curix machine in its new location (at least as

a matter of triable fact), to use reasonable care in several respects, thereby increasing the risk of harm to Ms. Jones and Ms. Alder.⁶

Under Section 324A, when AGFA undertook to install the Curix machine in its new location, it assumed all duties attendant thereto, including the duty to see to it that there was adequate ventilation for the Curix machine to be safely operated in its new location. There is, at a minimum, a triable issue of material fact with respect to whether IHC relied upon AGFA's expertise, training and knowledge with respect to the ventilation needs in the workplace. According to IHC's William Patrick Bendall, IHC, through Mr. Bendall, **relied on the expertise of the AGFA people with respect to safely ventilating the workplace.** [R 1855]

Based upon the foregoing, it is clear that AGFA had a duty to use reasonable care in the installation of the Curix machine. That duty included, at a minimum, the duty to ascertain whether there was adequate ventilation for the safe operation of the machine in its new location.

⁶ Mr. Murray failed to act reasonably in his installation of the Curix machine. He failed to test the ventilation in the room when he initially installed the Curix machine, failed again to test the ventilation in the room when he developed concerns that the ceiling vent was not working properly, and failed once again to test the ventilation in the room after Plaintiffs began complaining about their health and he was specifically instructed to test the ventilation in the room by Agfa product specialist, George Cervenka. He admits that he became concerned that the lack of ventilation was causing Ms. Jones' health problems but did nothing to remedy the ventilation problems. In addition to the foregoing shortcomings, Mr. Murray admits that he never inquired whether the Hospital conducted any tests on the ventilation of the new room or followed up on any testing of his own.

B. AGFA HAD A DUTY TO PROVIDE SAFE EQUIPMENT.

It is well established that a supplier of a chattel must exercise reasonable care to make the chattel safe for its intended use. Section 392 of the Restatement (Second) of Torts provides:

One who supplies chattels is liable to those for whose use the chattel is supplied, or to those whom he should expect to be in the vicinity of its probable use for bodily harm caused by the use of the chattel in the manner for which and by the persons for whose use the chattel is supplied if the supplier failed to exercise reasonable care to make the chattel safe for the use for which it was supplied .

(Emphasis added.) This rule of law, like most – if not all – of the Restatement (Second) of Torts, had been accepted by this Court. See, Reynolds v. American Foundry & Mach. Co., 239 P.2d 209 (Utah 1952). In the present case, AGFA supplied the Curix daylight processor machine. In order for the Curix machine to be safely operated, there must be adequate ventilation provided to vent the processing fumes from the workplace. Mr. Murray was aware of this fact and admitted the same in his deposition. [R 1889-91] **At least as a matter of triable fact, AGFA knew or should have known that its machine was not safe for use in the new mammography area.** AGFA certainly seems to have failed to exercise reasonable care to make the Curix machine safe for the use for which it was supplied.

Another example of AGFA's probable violation of the duty referenced in Section 392 has to do with an AGFA "vent kit" – part of the AGFA product line at all times material hereto. The vent kit consisted of internal PVC piping that connected with the machine's hose and ran up to the ceiling vent. When the

Curix machine was reinstalled in its new location, it did not include this equipment. As set forth above, AGFA had a duty to make sure the Curix machine could be safely operated in its new location. AGFA did not, as a matter of triable fact, exercise reasonable care in initially installing the Curix machine without the benefit of the vent kit (something AGFA added much later, after Ms. Jones and Ms. Alder had become ill). The ventilation kit was designed to exhaust chemical fumes emitted by the Curix machine and would, at least as a matter of triable fact, have improved the ventilation conditions.

As Section 392 of the Restatement provides, AGFA's duty not only applies to those, such as IHC, to whom AGFA supplied its chattels, but also to "those whom [AGFA] should expect to be in the vicinity of the chattel's use". Consequently, it is clear that AGFA owed a duty of care to Ms. Jones and Ms. Alder, employees of IHC, under this particular Restatement provision.

C. AGFA HAD A DUTY TO REFRAIN FROM USING ITS MACHINE, AND ALLOWING ITS MACHINE TO BE USED, IN UNSAFE CONDITIONS.

Section 307 of the Restatement (Second) of Torts, provides as follows:

It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, **inappropriate** or defective that its use involves an unreasonable risk of harm to others.

(Emphasis added.) AGFA used and allowed its Curix machine to be used when it knew or should have known that the machine was inappropriate to be operated in the subject workplace, which AGFA knew lacked adequate ventilation, when AGFA knew that operation under those conditions would involve an unreasonable risk of harm to those who worked in that workplace.

AGFA's Tim Murray had knowledge and training regarding the necessity of adequate ventilation in the machine's operation. He knew, or should have known, of the danger of adverse health effects from chemical fumes emitted from the AGFA machine, and he had concerns, when he installed the machine in the new location, regarding the adequacy of the ventilation. Based upon such things as Mr. Murray's knowledge and training, and his suspicions regarding the inadequacy of the ventilation, AGFA had a duty to refrain from using its machine, and allowing its machine to be used in the subject workplace. AGFA was, as a matter of triable fact, negligent in operating the Curix machine, and allowing it to be operated, under the circumstances.

D. AGFA OWED A DUTY TO MS. JONES AND MS. ALDER BY VIRTUE OF ITS CONTRACTUAL RELATIONSHIP WITH THEIR EMPLOYER.

In Scott & Fetzer Co. v. Montgomery Ward & Co., 473 N.E.2d 421 (Ill. 1986), tenants of a warehouse sued a security company that installed and maintained a fire alarm system for another tenant. They alleged that the defendant's negligent installation and maintenance of the system caused them to suffer damages when a small, undetected fire became a major conflagration that destroyed the warehouse. The trial court dismissed the tenants' action. The appellate court reversed, holding that "defendant should have recognized that the performance of its contractual obligations was necessary for the protection of third parties. The fact that plaintiffs were not parties to the contract did not negate the existence of a duty owed to them." 473 N.E. 2d at 427, judgment affirmed 493 N.E.2d 1022 (1986).

Here, AGFA had a contractual relationship with IHC for the installation and service of the Curix machine. The reasonable performance of its contract with IHC, including properly equipping, installing, and servicing the Curix Machine, was necessary for the protection of Ms. Jones and Ms. Alder, employees of IHC known by AGFA to be working in the subject workplace. As in Scott, the fact that Ms. Jones and Ms. Alder were not parties to the contract does not negate the existence of a duty owed to them.

Similarly, in Essex v. New Jersey Bell Telephone Company, 399 A.2d 300 (N.J.Super. 1979), the plaintiff brought an action against the telephone company when she fell over a telephone wire at the desk of her co-worker. The trial court granted summary judgment in favor of the telephone company and the plaintiff appealed. The appellate court reversed, holding as follows:

[T]he defendant did owe a duty to the plaintiff, in that its activity had its basis in a contract between the plaintiff's employer and the defendant, negligent performance of which gave rise to a right of action by third persons such as plaintiff, to exercise reasonable care in the installation of telephones on the employer's premises in order to avoid damage or injury to all within the zone of hazard created by its activity, and whether it performed that duty was a questions for resolution by the jury.

399 A.2d at 302 (Emphasis added). It is clear that Ms. Jones and Ms. Alder were directly in the “zone of hazard” in their work with and near the Curix machine. Thus, AGFA may be held liable to Plaintiffs for its negligent performance of its contractual obligations to IHC, including, without limitation, the appropriate equipping, installation of and servicing of the Curix machine.

E. AGFA HAD A DUTY TO WARN MS. JONES AND MS. ALDER OF THE DANGERS OF WORKING NEAR THE CURIX MACHINE WITHOUT ADEQUATE VENTILATION.

As stated, AGFA's agent, Tim Murray, has admitted that he received training and instruction regarding the importance of adequate ventilation to the safe operation of the Curix machine, that he participated in the installation of that machine although he had concerns regarding the adequacy of the ventilation, and that he became even more concerned when Ms. Alder and Ms. Jones began to experience health problems in the workplace. In spite of his knowledge and concerns, he gave **no warning to Ms. Jones or Ms. Alder, or their employer regarding the risks of working near the Curix machine without adequate ventilation.**

Section 388 of the Restatement (Second) of Torts provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

This Court has expressly approved, in Schneider v. Suhrmann, 327 P.2d 822, 823 (Utah 1958), Section 388 of the Restatement of Torts. It is well accepted that negligence can be founded on unsafe warning practices regarding the use to which a chattel may be put. See, e.g., Hunnings v. Texaco Inc., 29 F.3d

1480, 1483 (11th Cir. 1994); and Clarke Industries, Inc. v. Home Indem. Co., 591 So.2d 458, 460-61 (Ala. 1991) (R 2343-2358). There can be no serious dispute of the proposition that AGFA's abject failure to warn of the risks associated with Ms. Jones' and Ms. Alder's use and operation of a piece of equipment AGFA provided, installed, and serviced, when it knew the machine was being operated with inadequate ventilation, subjects AGFA to liability.

Based on one or more of the duty analyses set forth in this Part I of this Argument, the District Court erred when it concluded that AGFA owed no duty of care to Ms. Jones and Ms. Alder.

II. THE TESTIMONY OF THE HEALTH CARE PROVIDERS IS ADMISSIBLE AND CREATES GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO CAUSATION AND DAMAGES.

In its Order granting summary judgment in favor of AGFA, the District Court ruled that Ms. Jones and Ms. Alder could not establish causation because they could not prove that they were exposed to chemicals at any level, let alone at toxic levels. The District Court also ruled that Ms. Jones and Ms. Alder could not establish that they had been damaged because the medical evidence supporting their claims for damages is inadmissible. These rulings are erroneous, as explained below.

A. THE MEDICAL TESTIMONY OF MS. JONES' AND MS. ALDER'S EXPERTS IS ADMISSIBLE UNDER CONTROLLING UTAH LAW.

The District Court ruled that the testimony of Ms. Jones' and Ms. Alder's treating health care providers and non-treating medical expert (Dr. Cullen) should be excluded because some of those witnesses have referred to the host of problems experienced by Ms. Jones and Ms. Alder as "Multiple Chemical

Sensitivity.” The District Court ruled that, since MCS is not widely accepted in the medical community as a valid disease entity, it is not a “scientifically reliable”.diagnosis.⁷

In so ruling, the District Court ignored the constellation of long-recognized and well-accepted, stand-apart conditions with which Ms. Jones and Ms. Alder have been diagnosed, as well as the limitations of the holding in State v. Rimmasch, 775 P.2d 388 (Utah 1989). In Rimmasch, trial courts are limited in their gate-keeping function to reviewing the methods and techniques upon which an expert witness’s conclusions and opinions are based. It cannot examine or judge the opinions and conclusions drawn from the methods and techniques employed; **that assessment is the province of the jury.** Id.

The physicians in question have utilized the time-honored technique of “differential diagnosis” in reaching their opinions concerning these women’s illnesses. As explained hereinabove (see discussion appearing at pages 7-21), this technique is considered to be a standard, scientifically reliable technique in the medical community. It has been widely accepted by courts across the

⁷ It is important to understand that Ms. Jones and Ms. Alder have been diagnosed with a host of separate ailments (including but not limited to sinus problems, respiratory problems, fatigue, and cognitive deficits), apart from the MCS diagnosis. It is undisputed that these various conditions have long been recognized and accepted within the medical community as valid medical conditions. And the success or failure of this Appeal should (regardless of the District Court’s determination) by no means hinge on the question of whether MCS is a “valid disease entity.” A ruling that, as a matter of law, MCS is not a “valid disease entity” (which Ms. Jones and Ms. Alder contend would be an erroneous ruling) should go only to damages and not be deemed to be fatal to Ms. Jones’ and Ms. Alder’s claims.

nation as a proper and valid basis for establishing a medical opinion. The District Court erred in excluding the medical testimony of the physicians.

1. The Method of Differential Diagnosis Provides a Sound, Scientifically Established Basis for a Medical Opinion.

In State v. Adams, 5 P.3d 642 (Utah 2000), this Court made absolutely clear what it meant in Rimmasch. This Court explained that the Rimmasch analysis applies to the methods and/or techniques used by the expert in arriving at his/her opinion, not to the expert's opinion itself. In making this clarification, the Court stated:

Rimmasch simply requires that the scientific principles underlying the expert's testimony be inherently reliable, not that the expert's actual testimony be inherently reliable.

Adams, 5 P.3d at 644 (Emphasis added) (Citations omitted). See also: Kennedy v. Collagen Corp., 161 F.3d 1226 (9th Cir. 1998). In Kennedy, the court stated:

Judges in jury trials should not exclude expert testimony simply because they disagree with the conclusions of the expert. The Daubert duty is to judge the reasoning used in forming an expert conclusion. The test is whether or not the reasoning is scientific and will assist the jury. If it satisfied these two requirements, then it is a matter for the finder of fact to decide what weight to accord the expert's testimony. In arriving at a conclusion, the factfinder may be confronted with opposing experts, additional tests, experiments, and publications, all of which may increase or lessen the value of the expert's testimony. But their presence should not preclude the admission of the expert's testimony—they go to the weight, not the admissibility.

161 F.3d at 1230-31 (emphasis added).

It is also well established that the standards set forth in Rimmasch are not intended to apply to all expert testimony. In Adams, the Utah Supreme Court stated that “Rimmasch is implicated only when the expert testimony is ‘based on newly discovered principles’.” Adams, 5 P.3d at 644 (quoting

Rimmasch, 775 P.2d at 396; see also: State v. Kelley, 1 P.3d 546 (Utah 2000) (concluding Rimmasch is inapplicable where ‘there is no plausible claim that the type of expert testimony offered by the prosecution was based on novel scientific principles or techniques’); Patey v. Lainhart, 977 P.2d 1193 (Utah 1999) (refusing to even apply Rimmasch where expert’s testimony was not based on novel scientific principles or techniques). Rimmasch is inapplicable in the present case inasmuch as the health care providers in question have employed diagnostic methods and techniques that are standard and well-accepted in the medical community as being scientifically reliable. For example, Dr. Pompa administered a battery of neuropsychological tests that have been used and accepted within the medical community for decades in assessing the women’s cognitive status. Similarly, the medical opinions given by Drs. Robinson, Bateman, Suruda, Gray and Cullen are based upon the differential diagnosis method of determining the cause of a patient’s medical condition. The differential diagnosis technique is well recognized and accepted in the medical community as a standard and scientifically reliable method upon which to base an expert opinion. (See discussion of medical evidence appearing at pages 7-21, above.)

In Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999), the plaintiff worked in a plant where he was required to work with rubber gaskets that had been coated with talc for easier handling. During the course of handling these gaskets, he claimed he was brought into contact with high concentrations of airborne talc. He began to experience unrelenting sinus

problems and was eventually required to undergo several sinus surgeries in an attempt to alleviate his sinus pain. He claimed that the defendant's failure to warn him of the dangers of breathing airborne talc proximately caused the aggravation of his pre-existing sinus condition. The trial court allowed the plaintiff's expert, Dr. Isenhower, to testify that in his opinion the sinus problems experienced by the plaintiff were caused by the inhalation of airborne talc in the workplace.

On appeal, the defendant argued that Dr. Isenhower's testimony should have been ruled inadmissible because it was not based upon reliable, scientific methodology:

. . . Dr. Isenhower had no epidemiological studies, no peer-reviewed published studies, no animal studies, and no laboratory data to support a conclusion that the inhalation of talc caused [the plaintiff's] sinus disease. Further, [the defendant] continues, Dr. Isenhower did not have any tissue samples indicating that talc was found in [the plaintiff's] sinuses, nor did he have studies showing that talc, at any threshold level, causes sinus disease. Instead, Dr. Isenhower merely relied on a differential diagnosis—supported in part by the temporal relationship between [the plaintiff's] exposure to talc and the problems he experienced with his sinuses—in reaching the conclusion that [the plaintiff's] sinus problems were caused by his exposure to talc from [the defendant's] gaskets.

Westberry, 178 F.3d at 262. The defendant argued that neither a differential diagnosis nor a temporal relationship between exposure and onset or worsening of symptoms was sufficient to establish the reliability of Dr. Isenhower's opinion. The Fourth Circuit Court of Appeals disagreed.

In upholding the district court's admission of Dr. Isenhower's testimony, the appellate court held that a "[d]ifferential diagnosis, or differential etiology, is a standard, scientific technique . . ." Id., at 262 (emphasis added). The cases

that recognize differential diagnosis as a valid and reliable scientific technique upon which an expert may base an opinion are legion. See, e.g., McCulloch v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2nd Cir. 1995); Glaser v. Thompson Med. Co., 32 F.3d 969, 978 (6th Cir. 1994) (recognizing that differential diagnosis is a standard diagnostic tool used by medical professionals to diagnose the most likely cause of illness, injury and disease); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 758 (3rd Cir. 1994) (stating that the technique of differential diagnosis “has wide acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results.”); Heller v. Shaw Indus., Inc., 167 F.3d 146, 154-55 (3rd Cir. 1999) (concluding that a proper differential diagnosis is adequate to support expert medical opinion on causation and further noting that “differential diagnosis consists of a testable hypothesis, has been peer reviewed, contains standards for controlling its operation, is generally accepted, and is used outside of the judicial context”); Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1383-85 (4th Cir. 1995) (holding that expert testimony by treating physician concerning the cause of the plaintiff’s liver failure—acetaminophen combined with alcohol—was admissible despite the lack of epidemiological data); Kennedy v. Collagen Corp., 161 F.3d 1226, 1228-30 (9th Cir. 1998) (holding district court abused its discretion in excluding an expert opinion on causation based upon a differential diagnosis); Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248, 252-53 (1st Cir. 1998)(determining that a differential diagnosis rendered expert opinion on causation sufficiently reliable for admission); Zuchowicz v. United States, 140

F.3d 381, 385-87 (2nd Cir. 1998) (upholding determination that expert opinion was reliable in part based on differential diagnosis); and Ambrosini v. Labarraque, 101 F.3d 129, 140-41 (D.C. Cir. 1996) (holding that because expert opinion was based on differential diagnosis, district court abused its discretion in refusing to admit it.)

It is abundantly clear that the technique of differential diagnosis is a widely accepted, reliable, scientific method upon which medical opinions may properly be based, and the District Court erred in its implicit ruling to the contrary.

Furthermore, a physician's testimony based upon a differential diagnosis need not be supported by medical literature. In McCulloch v. H.B. Fuller Co., 61 F.3d 1038 (2nd Cir. 1995), the plaintiff developed polyps in her throat after being exposed to glue fumes in her workplace. The Second Circuit Court of Appeals held that the medical testimony of the plaintiff's physician, based upon a differential diagnosis of the plaintiff's illness, was admissible in spite of the fact that the physician could not point to a single piece of medical literature establishing that glue fumes cause throat polyps. 61 F.3d at 1043-44. In allowing the physician's testimony, the court held that "disputes as to the strength of his credentials, faults in his use of differential etiology as a methodology **or the lack of textual authority for his opinion**, go to the weight, not the admissibility, of his testimony." Id.

In Zuchowicz v. U.S., 140 F.3d 381 (2nd Cir. 1998), the plaintiff developed primary pulmonary hypertension ("PPH") eight months after taking an overdose

of a prescription drug called Danocrine and died two years later as a result of PPH. At trial the defendant attempted to exclude medical testimony that the overdose caused the plaintiff to develop the PPH that eventually resulted in her death. In support of its contention that such testimony should be excluded, the defendant argued that since Danocrine had never been previously linked to PPH, any conclusion that the Danocrine overdose more likely than not caused the plaintiff's illness was clearly erroneous. The Second Circuit disagreed.

In holding that the medical testimony was admissible, the court stated that "it is well established that causation 'may be proved by circumstantial evidence' (citations omitted) and that 'the causal relation between an injury and its later physical effects **may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency**, or by his opinion based upon a hypothetical question'." Zuchowicz v. U.S., 140 F.3d 381, 389 (quoting Shelnitz v. Greenberg, 509 A.2d 1023, 1027 (Conn. 1986)).

In Heller v. Shaw Industries, Inc., 167 F.3d 146 (3rd Cir. 1999), the court held as follows:

Given the liberal thrust of the Federal Rules of Evidence, the flexible nature of the Daubert inquiry, and the proper roles of the judge and the jury in evaluating the ultimate credibility of an expert's opinion, we do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness. Cf. McCulloch v. H.B. Fuller Co., 61 F.3d 1038, 1043 (2nd Cir. 1995) (affirming admission of treating doctor's testimony despite the fact that he "could not point to a single piece of medical literature that says glue fumes cause throat polyps"). To so hold would doom from the outset all cases in which the state of research on the specific ailment or on the alleged causal agent was in its early stages, and would effectively resurrect a Frye-like bright-line standard, not by

requiring that a methodology be “generally accepted,” but by excluding expert testimony not backed by published (and presumably peer-reviewed) studies.

167 F.3d at 155 (Emphasis added). In addition, the court explained that in the actual practice of medicine, “**physicians do not wait for conclusive, or even published and peer-reviewed, studies to make diagnoses to a reasonable degree of medical certainty.**” *Id.* (Emphasis added.) The court found those diagnoses to be valid stating as follows:

However, experience with hundreds of patients, discussions with peers, attendance at conferences and seminars, detailed review of a patient’s family, personal and medical histories, and thorough physical examinations are the tools of the trade, and should suffice for the making of a differential diagnosis **even in those cases in which peer-reviewed studies do not exist to confirm the diagnosis of the physician.**

Id. (Emphasis added).

In Kennedy v. Collagen Corp., 161 F.3d 1226 (9th Cir. 1998), the plaintiff alleged that collagen injections caused her atypical systemic lupus erythematosus (SLE). In holding that the medical expert’s testimony that collagen injections caused the plaintiff’s SLE was supported by scientific evidence, the Ninth Circuit Court of Appeals stated:

Not knowing the mechanism whereby a particular agent causes a particular effect is not always fatal to a plaintiff’s claim. Causation can be proved even when we don’t know precisely how the damage occurred, if there is sufficiently compelling proof that the agent must have caused the damage somehow.

Kennedy, 161 F.3d at 1230 (Emphasis added).

In the present case, there is compelling evidence that the illnesses suffered by Ms. Jones and Ms. Alder resulted from their exposure to chemicals

in their workplace. Compelling evidence consists of their work histories, medical histories, simultaneous onset of nearly identical symptoms, the established lack of adequate ventilation in the subject workplace, and the testimony of many of their treating physicians.

2. Ms. Jones' and Ms. Alder's Subjective Complaints and Self-Reporting Are Valid Basis for Differential Diagnosis.

It is well established that a person's own subjective complaints and self-reporting of his/her own medical history provide a valid basis for a physician's differential diagnosis. Any inconsistencies or inaccuracies in the subjective information provided by the plaintiff properly constitute a subject of cross-examination and does not affect the admissibility of an opinion based upon a differential diagnosis. See, Cooper v. Carl A. Nelson & Co., 211 F.3d 1008 (7th Cir. 1999). In Cooper, the plaintiff attempted to establish that he was suffering from chronic pain syndrome ("CPS") and that this condition was caused by his fall. The district court refused to admit the expert medical testimony concluding that because the physicians relied on the plaintiff's self-reporting about his past medical history as the basis for their diagnoses that the plaintiff's fall caused his CPS, the physicians had no scientific basis for their testimony. In addition, the defendant argued:

. . . not all CPS patients can point to a particular event as the cause of their condition and . . . emotional factors have been known to play a role in the onset of the condition . . . Dr. Richardson had not taken into account the possible effect of such other factors in [the plaintiff's] life on the onset of the condition. Indeed . . . Dr. Richardson made no critical evaluation of the cause of [the plaintiff's] CPS because it was not necessary to his treatment of the condition that he know with any certainty its cause . . . Dr. Richardson's "post hoc, propter hoc"

determination of cause, although perhaps an acceptable methodology in cases in which the mechanism of injury is understood, is not adequate in cases such as this one in which that mechanism is not understood.

Cooper, 211 F.3d at 1020. **The Seventh Circuit Court of Appeals disagreed.**

In holding that the medical testimony was admissible, the Cooper court stated that “here, a physician employed the accepted diagnostic tool of examination accompanied by physical history as related by the patient.” Id.

The Court further stated:

. . . the methodology of physical examination and self-reported medical history employed by Dr. Richardson is generally appropriate. Although [the defendant] disputes the acceptability of such an approach in the case of conditions whose etiologies are less specific, it suggests no alternative that could be employed by the conscientious clinical physician in this situation.⁸

Id. In the present case, the trial court concluded that since the etiology of MCS is not well known or established, the medical testimony in this case should be disregarded. That position was rejected by the Cooper court and should be rejected in this case as well. The Cooper court acknowledged that a patient’s subjective complaints and self-reported medical history was a sufficient basis for medical testimony regarding the patient’s chronic pain syndrome. Id.

Furthermore, the Cooper court went on to say that the possibility of the plaintiff’s CPS being attributable to factors other than the fall, as well as the accuracy and truthfulness of the plaintiff’s self-reported medical history, were both susceptible to exploration on cross-examination by opposing counsel. Id.

⁸ It may be significant that the court admitted the medical testimony in spite of the fact that CPS is not accepted by the entire medical community and has a vague and wide-ranging etiology.

Therefore, the defendant's contention that other conditions might have caused his CPS "goes to the weight of the medical testimony, not its admissibility . . . the proper method of attacking evidence that is admissible but subject to doubt is to cross-examine vigorously, to present contrary evidence, and to give careful instructions on the burden of proof." Id.

Based upon the foregoing, it is clear that differential diagnosis is a well-accepted, scientific method of treating patients and provides a valid basis for the admission of medical testimony. Consequently, the District Court erred in ruling to exclude the testimony of Ms. Jones' and Ms. Alder's treating physicians and medical experts who employed the differential diagnosis method in their treatment of these women and based their medical opinions on the same.

B. THE INABILITY OF MS. JONES AND MS. ALDER TO ESTABLISH THE EXACT LEVELS OF THEIR CHEMICAL EXPOSURE DOES NOT PRECLUDE THEM FROM ESTABLISHING CAUSATION

The District Court erred when it concluded that Ms. Jones and Ms. Alder cannot establish causation without proving the exact level of chemicals to which they were exposed. It is well established that Daubert-type opinions emphasize that "causation need not be established to a high degree of certainty for expert testimony to be admissible . . ." Kennedy, 161 F.3d at 1230 (citing Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 at 590 (1993)). Indeed, "it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science." Id. Ms. Jones' and Ms. Alder's inability to establish the exact levels

of chemicals to which they were exposed over the course of the two-year period they worked in LDS Hospital's new Mammography department is through no fault of their own and is not fatal to their claims. Standards created by governmental and/or administrative agencies are, at least arguably, the product of a political process and not "scientific" in nature. (See, e.g., Dr. Gray's testimony, R. at 2070-72). They do not even purport to stand for the proposition that exposure to levels lower than those established as "standards" cannot cause injury.

In Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999), the defendant argued that the medical expert's testimony should be excluded because he had "no means of accurately assessing what level of exposure was adequate to produce the sinus irritation [the plaintiff] experienced." 178 F.3d at 263. In holding that the medical testimony was admissible, the Fourth Circuit Court of Appeals stated the following truth:

But it must also be recognized that only rarely are humans exposed to chemicals in a manner that performs a quantitative determination of adverse outcomes. Human exposure occurs most frequently in occupational settings where workers are exposed to industrial chemicals; **however, even under these circumstances, it is usually difficult, if not impossible, to quantify the amount of exposure.**

Id., (emphasis added). In Westberry, no formal testing for levels of talc in the plaintiff's workplace was performed; nor was there any medical literature supporting the proposition that exposure to talc could result in sinus disease. Yet the court did not allow the lack of that specific evidence to defeat the plaintiff's claim.

Similarly, in McCullock v. H.B. Fuller, Co., 61 F.3d 1038 (2nd Cir. 1995, no evidence was presented with respect to the levels of chemicals from the “hot-glue” fumes that were present in the plaintiff’s workplace prior to her developing polyps in her throat; nor was there any medical literature that says glue fumes cause throat polyps. The court nonetheless held that the medical expert’s testimony, which was based upon a differential diagnosis, was reliable and admissible even in the absence of evidence pertaining to specific exposure levels. 61 F.3d at 1043-44.

There is evidence, in this case, that the subject workplace had only two air exchanges per hour from the time the Curix machine was relocated to the subject workplace in 1993 until 1995, when the ventilation problems in the workplace were finally addressed with at least some degree of efficacy. This evidence may be significant, for causation purposes, in light of AGFA’s installation specification requirements, which require at least 10-15 air exchanges per hour. In addition, there is evidence that there was a “chemical smell” in the subject workplace during the relevant time frame. [R 1974] The chemical modules studied by AGFA’s service representatives indicate that adequate ventilation is necessary to prevent negative health effects from chemical exposure. Similar to the facts in Kannankeril v. Terminix International, Inc., 128 F.3d 802 (3rd Cir. 1997), the only formal testing of the chemical levels in Ms. Jones’ and Ms. Alder’s workplace was performed after the ventilation problems were remedied and revealed only negligible amounts of chemical fumes. As the court determined in Kannankeril, any claimed

shortcoming pertaining to evidence regarding the exposure Ms. Jones and Ms. Alder experienced goes to the credibility and weight of the evidence, not to its admissibility.

In Curtis v. M& S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999), the court held that the law did not require the plaintiffs in that case to show the precise level of chemicals to which they were exposed. 174 F.3d at 671 (citing Lakie v. Smithkline Beecham, 965 F.Supp. 49, 58 (D.D.C. 1997)). In Curtis, the plaintiffs were exposed to benzene in their workplace. No measurements were taken of the benzene levels present in the workplace at the time of the plaintiffs' exposure. In spite of this fact, the court allowed the plaintiffs' medical expert to testify that the plaintiffs had been exposed to harmful levels of benzene. The plaintiffs' medical expert based this conclusion on the symptoms that the plaintiffs were experiencing:

Dr. Stevens found the symptoms experienced by the refinery workers to be extremely important. He testified that the cluster of symptoms that the refinery workers began experiencing shortly after HAD was introduced into the refinery—headache, nausea, disorientation, and fatigue—are well known symptoms of overexposure to benzene.

174 F.3d at 671. The court found that the plaintiffs' symptoms constituted a valid basis for Dr. Stevens' conclusion that the plaintiffs were exposed to harmful levels of benzene and allowed him to so testify.

Governmental and industry standards are, at least as a matter of triable fact, not scientifically based, and serious injury can result from exposure to levels below formally promulgated standards. 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.

Dr. Gray testified that threshold limit values (TLVs) for chemicals are set by the American Congress of Governmental Industrial Hygienists (ACGIH) and are not based upon a scientific process, but rather a political process; he has witnessed TLV's drop significantly over the decades of his medical practice; he testified that there have been recent allegations that the individual who chaired the committee that was endorsing threshold limit values was not doing valid science and has come under serious scrutiny. [R 2070-72] Dr. Gray further testified that Peak Exposure Levels (PELs) represent the highest level an individual should be exposed to for a short 10-15 minute time frame within an eight hour work day. Dr. Gray has witnessed the PEL for lead drop from 60 to 10 over the last twenty years. [R 2072-73] With respect to TLV and PEL levels, Dr. Gray testified as follows:

My opinion with regard to threshold limit values and PELs with respect to glutaraldehyde is that with regard to immune function, the agencies and entities which establish those standards did not adequately contemplate the interaction of these compounds with the immune system. And I do not believe that the values that we are seeing published . . . adequately protect the immune system or people's immune systems when they are exposed at those levels.

[R 2075]

According to Dr. Gray, none of the standards purporting to reflect safe exposure levels to chemicals can be relied on "because none of the agencies to date are using health-based standards when they are establishing acceptable exposure limits. [R 2076] The only way to ensure a "zero effect" from chemical

exposure is to have “zero exposure.” [R 2077-78] In Dr. Gray’s opinion, if there is any detectable level of glutaraldehyde or formaldehyde, one cannot assure a zero effect. [R 2077-78] Furthermore, Dr. Gray believes that there is no safe level for exposure to hydroquinone. [R 2074]

Dr. Gray believes it is highly significant that Ms. Jones and Ms. Alder were able to work for so many years in their field without problems and then, with the relocation of their workplace to a room with inadequate ventilation, their illnesses and problems began to arise. [R 2089]] Dr. Gray testified that “dose” data pertaining to a patient’s chemical exposure are usually not available, so a physician must rely upon information in the literature regarding what happens at various dose levels with different compounds and compare that to the patient’s symptoms. [R 2065-67] Dr. Gray further opined as follows:

If we know for a certainty that the compound is present, regardless of our ability to quantitate it, we have to be concerned about and be ready to draw causal conclusions about the impact of the presence of that compound if characteristic clinical findings are present in the subjects that we are studying. **To do less than that is to be seriously irresponsible.**

[R 2069]

In Williams v. Melby, 699 P.2d 723 (Utah 1985), this Court recognized a similar principle in holding that compliance with building codes did not necessarily indicate a lack of negligence. Specifically, the Court held:

. . . compliance with the building code does not ipso facto preclude a finding of a design defect. If a reasonably prudent person should have known, or could have learned by the exercise of reasonable care, that the design or construction of the window constituted a dangerous condition,

the landlord could be held liable for not taking adequate safety precautions.

699 P.2d at 728. The general principle stated in Williams can be applied here. AGFA knew, or should by the exercise of reasonable care have known, that Ms. Jones and Ms. Alder were getting sick as a result of their exposure to chemical fumes. Consequently, even if the chemical levels were in compliance with industry and governmental standards throughout the time of exposure (something that AGFA cannot prove), that would not relieve AGFA from liability for failing to take adequate safety precautions in ensuring that adequate ventilation was being provided in the workplace. As in the commonly and widely accepted “egg-shell skull” example (see, *e.g.*, Biswell v. Duncan, 742 P.2d 80 (Utah 1987)), a tortfeasor must take its victims as it finds them. Thus, even if Ms. Jones and/or Ms. Alder were predisposed to being particularly sensitive to chemicals, that fact does not absolve AGFA from its duty to act reasonably in addressing Ms. Jones’ and Ms. Alder’s workplace ventilation needs. Ms. Jones’ and Ms. Alder’s inability to establish the exact levels of chemicals to which they were exposed does not preclude their ability to establish causation, and the trial court’s ruling to the contrary is erroneous.

C. ADDITIONAL FACTORS ESTABLISHING CAUSATION.

The temporal relationship between the illnesses at issue and the relocation of the Curix machine to the room with inadequate ventilation is evidence of causation. It is well accepted that “a temporal relationship between exposure to a substance and the onset of a disease or a worsening of symptoms

can provide **compelling** evidence of causation.” Westberry, 178 F.3d at 265 (Emphasis added). See also: Zuchowicz, 140 F.3d at 385, 390.

Ms. Jones and Ms. Alder had worked as x-ray technologists for many years with no symptoms of significant illness related to chemical exposure. Then, after the Curix machine was relocated to the new mammography department and installed in the room with inadequate ventilation, Ms. Jones and Ms. Alder both began to experience such symptoms. At first, Ms. Jones’ and Ms. Alder’s symptoms would disappear within a few hours after leaving their workplace and would return within a few hours of returning to their workplace.⁹ As time went on, however, the symptoms became constant and did not dissipate after an extended period of time away from the workplace. The fact that both women were experiencing the same phenomenon (albeit with some variations in their exact symptoms), at the same time, and only upon the relocation of the Curix machine to the unventilated room, may fairly be considered compelling evidence of causation.

VI. CONCLUSION

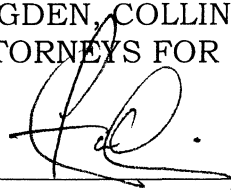
Contrary to the District Court’s ruling, AGFA owed, under one or more theories, duties of care to Ms. Alder and Ms. Jones. Contrary to the District Court’s ruling, triable questions of fact on the pertinent illness causation issues prevented the District Court from correctly granting summary judgment.

⁹ Similarly, in Westberry, (discussed at pages 34, 35 and 43, above) Dr. Isenhower experimented with keeping Mr. Westberry out of work and noticed that his sinus condition improved when he was not working but worsened when he returned. Under these circumstances, the court concluded “that the temporal relationship between Westberry’s exposure and the onset and worsening of his sinus disease provided support for Dr. Isenhower’s opinion that talc was the source of the problem. 178 F.3d at 265.

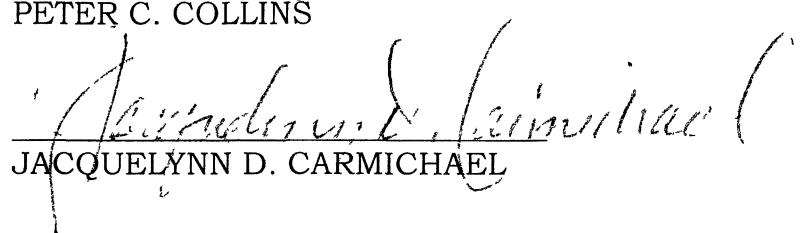
Ms. Jones' and Ms. Alder's treating health care providers (with one exception – Dr. Pompa – medical doctors), as well as their non-treating medical expert, Dr. Cullen, have scientifically valid, important, and admissible things to say about these women, whose careers were cut short and who have been gravely damaged through no fault of their own. Ms. Jones and Ms. Alder urge the Court, based on the foregoing analysis, and in the interest of justice, to reverse the District court's granting of summary judgment and to remand this case for trial.

RESPECTFULLY SUBMITTED this 23rd day of May, 2001.

BUGDEN, COLLINS & MORTON, L.C.
ATTORNEYS FOR PLAINTIFFS



PETER C. COLLINS



JACQUELYNN D. CARMICHAEL

CERTIFICATE OF SERVICE

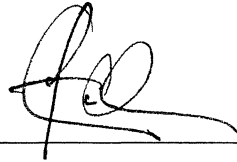
I hereby certify that, on the 23rd day of May, 2001, I caused to be served two true and correct copies of the foregoing OPENING BRIEF OF PLAINTIFFS-APPELLANTS by the method indicated below, and addressed to the following:

Steven G. Traflet
TRAFLET & FABIAN
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(536-6111)



ADDENDUM

OCT 4 2000

THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

SALT LAKE COUNTY

Deputy Clerk

LESLIE ALDER and JACKIE JONES,

Plaintiffs,

vs.

MILES, INC., a corporation, AGFA
CORPORATION, a corporation, and BAYER
CORPORATION, a corporation

Defendants.

ORDER ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

CASE NO. 950907675

JUDGE STEPHEN L. HENRIOD

On September 26, 2000 defendant's Motion for Summary Judgment came before the above entitled Court, the Honorable Stephen L. Henriod presiding. Defendants were represented by Gordon Roberts, David Bennion and Stephen Traflet and plaintiffs were represented by Peter Collins and Jackie Carmichael. Following the conclusion of the hearing, the Court took the matter under advisement.

In Utah, a plaintiff must establish four elements to state a claim of negligence: " (1) a duty of reasonable care owed by the defendant to the plaintiff; (2) a breach of that duty; (3) the causation, both actually and proximately, of the injury; and (4) the suffering of damages by the plaintiff." *Weber v Springville City*, 725 P.2d 1390 (Utah 1986). Consequently, summary judgment is appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, because the complete failure of proof on an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Schafir v Harrigan* 879 P.2d 1384 (1994)(citing, *Celotex Corp.*

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v Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265(1986)). Plaintiffs fail to establish several elements essential to their claim of negligence. Accordingly, defendant's motion for summary judgment is granted.

An essential element of a negligence claim is a duty of reasonable care. "Absent a showing of duty, [the plaintiff] cannot recover." *Slisze v Stanley-Bostich* 979 P.2d 317 (1999)(quoting, *AMS Salt Indus. V. Magnesium Corp. of Am.*, 942 P.2d 315, 319 (Utah 1997)). Plaintiffs fail to prove that defendants had a duty to control the operation or installation of the ventilation system. Furthermore, plaintiffs fail to persuade this Court that any legally cognizable duty, sufficient to support a claim of negligence, exists between the plaintiffs and defendant.

Another critical element of a negligence claim is causation. In this case, plaintiffs have the burden of proving both that they were exposed to chemicals and that the levels of exposure causes known toxic effects. At the hearing and in supporting memorandum plaintiffs fail to meet this burden. Specifically, plaintiffs are unable to prove exposure to any chemicals, let alone levels known to cause known toxic effects.

Finally, to prevail in a negligence claim, plaintiffs must prove damages. Plaintiffs assert that repeated chemical exposure caused them to develop significant health problems, primarily, Multiple Chemical Sensitivity, or "MCS"¹. MCS is a controversial diagnosis that has been excluded in numerous jurisdictions for lack of sound scientific reasoning and methodology. *See generally*, *Bradley v Brown* 42 F.3d 434 (1994), *Summers v Missouri Pacific Railroad System* 132 F.3d 599


¹In addition to MCS, Dr. Deborah Robinson, diagnosed both plaintiffs with chronic fatigue syndrome and fibromyalgia while Dr Janiece Pompa diagnosed plaintiff Jones with cognitive deficits. These diagnoses appear to essentially be MCS couched in different terms. Plaintiffs own experts admits that all of the illnesses display nearly identical symptoms and show significant overlap in numerous other respects.

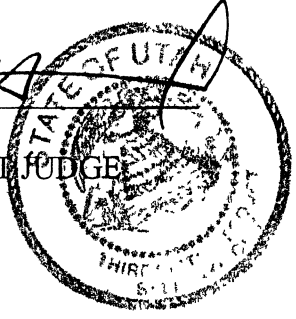
(1997), *Collins v Welch* 178 Misc.2d 107, *Treadwell v Dow-United Technologies* 970 F. Supp 974 (M.D.Ala. 1997). Furthermore, numerous medical organizations, including the American Medical Association, refuse to accept MCS as a valid and reliable diagnosis. After careful consideration, this Court concludes that plaintiff's evidence and testimony offered in support of MCS is not admissible. Plaintiffs evidence is not based upon inherently reliable scientific or medical foundation as required under *Rimmasch* and Utah Rules of Evidence 702. Accordingly, plaintiffs fail to establish the existence of damages, an element essential to their claim of negligence.

Therefore, for the above mentioned reasons, the Court having reviewed the legal memoranda, affidavits and exhibits submitted by the parties, and being fully advised, concludes that plaintiff has failed to prove a legal cause of action for negligence and accordingly defendant's Motion for Summary Judgment should be granted.

Dated this 4 ^{Oct.} day of July, 2000.

BY THE COURT:


DISTRICT COURT JUDGE



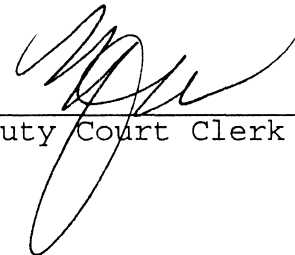
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 950907675 by the method and on the date specified.

METHOD NAME

Mail	PETER C. COLLINS ATTORNEY PLA 623 East 2100 South SALT LAKE CITY, UT 84106
Mail	GORDON L. ROBERTS ATTORNEY DEF 201 SOUTH MAIN, # 1800 P.O. BOX 45898 SALT LAKE CITY UT 841450898
Mail	STEPHEN G TRAFLET ATTORNEY DEF Carriage Court Two 264 South Street Morristown NJ 07960

Dated this 12 day of Dec, 2000.



Deputy Court Clerk