

2000

# Leslie Alder & Jackie Jones v. Miles, Inc., AGFA Corporation, and Bayer Corporation : Brief of Appellee

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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LESLIE ALDER and JACKIE JONES,	)	
	)	
Plaintiffs-Appellants,	)	<b>BRIEF OF APPELLEES BAYER</b>
	)	<b>CORPORATION AND AGFA</b>
vs.	)	<b>CORPORATION</b>
	)	
MILES, INC., a corporation, AGFA	)	Appeal No. 200000937-SC
CORPORATION, a corporation, and	)	District Court No. 95-090-7675
BAYER CORPORATION, a corporation,	)	
	)	
Defendants-Appellees.	)	Oral Argument Priority No. 15
	)	

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**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE STEPHEN L. HENROID, DISTRICT JUDGE**

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**OCT 03 2001**

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October 3, 2001

Ms. Pat Bartholomew  
Clerk of the Court  
Utah Supreme Court  
450 South State Street  
P.O. Box 140210  
Salt Lake City, UT 84114-0210

**Re: Alder, et al. v. AGFA Corporation, et al.  
Case No. 20000937-SC**

Dear Ms. Bartholomew:

This firm represents Defendants/Appellees Bayer Corporation (formerly known as named Defendant Miles, Inc.) and Agfa Corporation (collectively "AGFA") in the above-referenced matter. AGFA writes pursuant to Rule 24(i) of the *Utah Rules of Appellate Procedure* to advise the Court of two new cases that are pertinent to this matter and, AGFA respectfully submits, should be reviewed by the Court prior to oral argument.

Both cases address the admissibility of expert testimony on causation based upon a purported "differential diagnosis" performed by a physician. In the first case, *Glastetter v. Novartis Pharmaceuticals, Corp.*, 252 F.3d 986, 989 (8<sup>th</sup> Cir. 2001), the Court excluded expert testimony based upon a "differential diagnosis" where there was no basis for "ruling in" an agent as a potential cause of the plaintiff's alleged injury, before "ruling it out" by means of a proper differential diagnosis. In the second case, *Holstine v. Texaco*, No. CJ-97-221, 2001 WL 605137, at \*3 (D. Okl. April 16, 2001), the Court excluded plaintiff's physician's "differential diagnosis," reasoning that "[t]he underlying predicate for any cause-and-effect medical testimony is that medical science understands the physiological process by which a particular disease or syndrome develops and knows what factors cause the process to occur," and without such evidence a differential diagnosis is "without support, flawed and not relevant."

These recent cases support the trial court's ruling below that appellants' experts' proffered "differential diagnosis" testimony is inadmissible and insufficient to prove exposure and medical causation. Appellees respectfully request that these citations be added to the Brief of Appellees Bayer Corporation and AGFA Corporation at page 33.

Ms. Pat Bartholomew  
October 3, 2001  
Page Two

Thank you for the Court's consideration of this request.

Respectfully submitted,

  
David M. Bennion

DMB/rlk

cc: Peter Collins, Esq.

## LESLIE ALDER and JACKIE JONES,

Plaintiffs-Appellants,

**VS.**

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

Defendants-Appellees.

**BRIEF OF APPELLEES BAYER  
CORPORATION AND AGFA  
CORPORATION**

Appeal No. 200000937-SC  
District Court No. 95-090-7675

## Oral Argument Priority No. 15

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OF SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE STEPHEN L. HENROID, DISTRICT JUDGE**

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## **LIST OF PARTIES**

Appellants Leslie Alder (now known as Leslie Roberts) (“Ms. Alder”) and Jackie Jones (“Ms. Jones”) filed their Complaint naming three Defendants: (1) Miles, Inc.; (2) Agfa Corporation; and (3) Bayer Corporation. However, by mutual stipulation, the parties agreed after commencement of suit that the case would proceed against Bayer Corporation, Agfa Division as the sole Defendant. Since that time, Agfa Corporation was formed and succeeded in interest to Bayer Corporation, Agfa Division. Therefore, the motion below for summary judgment was filed on behalf of Bayer Corporation, Agfa Division and Agfa Corporation. Both entities (referred to hereinafter collectively as “AGFA”) are Appellees on this appeal.

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## STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1996).

## ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

**Issue #1:** Whether the District Court soundly exercised its discretion in applying Utah Rule of Evidence 702 and *State v. Rimmasch*, 775 P.2d 388 (Utah 1989), to exclude plaintiffs’ proffered expert testimony on Multiple Chemical Sensitivity (“MCS”) for lack of reliable scientific techniques and principles.

The trial court has broad discretion in determining the admissibility of expert testimony and decisions to exclude expert testimony are reviewed under an abuse of discretion standard. *State v. Brown*, 948 P.2d 337, 340 (Utah 1997). An appellate court can properly find such abuse of discretion only if no reasonable person would take the view adopted by the lower court. *Id.*

**Issue #2:** Whether the District Court correctly granted summary judgment in favor of defendants based upon the absence of evidence that plaintiffs were exposed to chemicals at levels known to cause injury in general, or MCS in particular.

On appeal from a summary judgment, an appellate court will review the trial court’s conclusions of law for correctness and will affirm summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *AMS Salt Indus. v. Magnesium Corp.*, 942 P.2d 315, 319 (Utah 1997).

**Issue #3:** Whether the District Court correctly ruled that defendants owed no duty to plaintiffs to control the operation or installation of the ventilation system at LDS Hospital.

On appeal from a summary judgment, an appellate court will review the trial court's conclusions of law for correctness and will affirm summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *AMS Salt*, 942 P.2d at 319. Whether a duty exists is a question of law that the Court reviews for correctness. *Id.*

**Issue #4:** Whether the District Court's ruling should be affirmed on the alternative ground (raised below on defendants' prior motion for summary judgment) that all of plaintiffs' claims are barred by the two-year statute of limitations set forth in Utah's Product Liability Act.

This Court may affirm the District Court's summary judgment order on any ground appearing in the record, whether relied upon by the District Court or not. *Salt Lake County v. Bangerter*, 928 P.2d 384, 386 (Utah 1996). Whether a statute of limitations has expired is a question of law that the Court reviews for correctness. *Kessimakis v. Kessimakis*, 977 P.2d 1226, 1228 (Utah 1999).

#### **DETERMINITIVE PROVISIONS ON APPEAL**

This appeal turns primarily upon issues of common law, rather than upon the interpretation of constitutional provisions, statutes, and ordinances. However, the determination of this appeal could involve interpretation of Utah Rule of Evidence 702, which provides verbatim as follows:

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

Utah R. Evid. 702.

### **COUNTER-STATEMENT OF THE CASE**

On November 3, 1995, Leslie Alder and Jackie Jones filed a Complaint in the Third Judicial District for the State of Utah. (R. 1.) In the Complaint, Ms. Jones and Ms. Alder allege that while they were employed by LDS Hospital as radiographic technologists, they worked with a Curix Compact, which was sold by Bayer Corporation, Agfa Division (now known as Agfa Corporation) (“AGFA”), to process mammography films. (R. 2.) They allege that following the relocation of the Curix Compact to a room designed to perform mammographies (the “Mammography Suite”), they “began experiencing increased symptoms associated with their exposure to the processing chemicals.” (*Id.*) According to Ms. Jones and Ms. Alder, “it was determined that the room [where the Curix Compact was located] had no negative ventilation.” (R. 3.) As a result, they claim to have been “exposed to extremely high concentrations of the processor chemicals and have become permanently disabled and further have developed heightened sensitivity to a variety of chemicals.” (*Id.*) Further, Ms. Jones and Ms. Alder allege that they could not continue to work in any capacity at LDS Hospital because of their heightened sensitivity to various chemicals. (*Id.*)

Ms. Jones and Ms. Alder allege that AGFA had a duty to determine whether the building ventilation in LDS Hospital’s Mammography Suite was functioning properly

and that AGFA breached this duty. (R. 4.) They further allege that AGFA was negligent in its attempt to correct the building ventilation problem by installing a diversion unit on the Curix Compact. (*Id.*)

On March 3, 1997, Appellants filed an Amended Complaint (the “Amended Complaint”) in which they revised their theories of liability to assert product liability claims against AGFA. (R. 249.)

On June 23, 1999, AGFA moved for summary judgment to dismiss the Amended Complaint based upon the two-year statute of limitations in Utah’s Products Liability Act (the “Act”). (R. 2336.) The District Court granted AGFA’s motion in part and held that Appellants’ product liability claims were time-barred. (R. 1197—copy attached at Addendum A.) The District Court also determined, however, that the Act did not apply to Appellants’ negligence claims and denied AGFA’s motion to the extent that it sought dismissal of the negligence claims. (*Id.*)

On September 7, 1999, AGFA filed a Petition for Permission to Appeal Interlocutory Order with the Utah Supreme Court. (R. 1219.) On October 25, 1999, the Supreme Court of Utah entered an Order denying the Petition. (R. 1234.)

After this ruling, AGFA moved for summary judgment to dismiss the remaining negligence claims. (R. 1294.) AGFA argued below that Appellants could not meet their burden of proof on any of the essential elements of their negligence claims because the expert testimony proffered to meet the elements failed to meet the requirements of reliability and fit under Utah Rule of Evidence 702 and *State v. Rimmasch*, 775 P.2d 388 (Utah 1989), and was therefore inadmissible. (R. 1295.) AGFA argued that Ms. Jones



and Ms. Alder could not establish that their alleged MCS condition is a legitimate disease entity, based on any accepted or reliable medical test or diagnostic criteria. (*Id.*) AGFA also argued that the undisputed evidence is that Ms. Jones and Ms. Alder were not exposed to chemicals at any level known to cause harm, and that they could not prove as a matter of law that their alleged MCS was caused by exposure to chemicals emitted from the Curix Processor. (*Id.*) Finally, AGFA also argued that it had no duty with respect to the condition of the ventilation system at LDS Hospital, and that Ms. Jones and Ms. Alder had not articulated a legally cognizable duty on AGFA's part to install, operate or otherwise ensure that the Hospital's ventilation system was working properly. (*Id.*) Without proof of the existence of such a duty, and in view of the fact that Appellants' product liability claims were dismissed as untimely, AGFA was entitled to summary judgment. (*Id.*)

On October 4, 2000, the District Court entered an Order on Defendants' Motion for Summary Judgment, granting AGFA's motion on each ground raised by AGFA. (R. 2366—copy attached at Addendum B.) Noting that an essential element of proof is damage, the Court held that "plaintiff's evidence and testimony offered in support of MCS is not admissible [because it] was not based upon inherently reliable scientific or medical foundation as required under *Rimmasch* and Utah Rule of Evidence 702." (R. 2368.) The District Court also held that Appellants failed to meet their burden of proof on causation because they "are unable to prove exposure to any chemicals, let alone levels known to cause toxic effects." (R. 2367). Finally, the District Court found that "Appellants fail[ed] to prove that defendants had a duty to control the operation or

installation of the ventilation system [or] persuade [the] Court that any legally cognizable duty, sufficient to support a claim of negligence, exists between the plaintiffs and defendant.” (*Id.*)

### **COUNTER-STATEMENT OF FACTS**

AGFA offers the following Counter-Statement of Facts because Appellants’ “Statement of Facts” contains material inaccuracies, mischaracterizations, and statements that are not supported by the record.

In 1988, LDS Hospital purchased a Curix Compact from AGFA for use in processing mammography films. (R. 251.) LDS Hospital purchased the fixer and developer chemistry for use in the Curix Compact from Kodak. (R. 1391.) Kodak is not a party to this case. LDS Hospital’s chief technologist, William Patrick Bendall, testified that Kodak supplied LDS Hospital with Material Safety Data Sheets (“MSDS”) (R. 1393) to LDS Hospital, which contain toxicity and safe handling information regarding the x-ray developer and fixer chemistry. (R. 1410, 1470-71.)

Appellants Leslie Alder and Jackie Jones were both employed by LDS Hospital as radiographic technologists. (R. 250.) When they first began their employment with LDS Hospital, both Appellants rotated among several different departments, taking and developing x-rays. (R. 1410, 1470-71.)

Sometime prior to February or March 1993, some five years after AGFA’s sale of the Curix Compact, LDS Hospital was remodeling a major portion of the second floor, and it decided to move the mammography department to the second floor into an area (the Mammography Suite) that would be remodeled specifically for mammographies. (R.

1422.) While constructing the Mammography Suite, LDS Hospital did not rely upon AGFA to ensure that the new ventilation system was adequate. (*Id.*)

LDS Hospital provided the contractor constructing the Mammography Suite with specific instructions that there must be ten air exchanges per hour in the room where the Curix Compact was to be located. (*Id.*) LDS Hospital determined that ten air exchanges per hour were necessary by referring to a manual for the Curix Compact that had been provided by AGFA. (*Id.*) In addition to advising the contractor that ten air exchanges per hour were required, an LDS Hospital representative requested that the contractor install an external vent with negative pressure in the processing room where the Curix Compact would be located to minimize the presence of vapors. (R. 1423.)

After construction had begun, but before the move to the Mammography Suite was completed, Tim Murray, AGFA's service representative, again gave LDS Hospital the AGFA specifications, which state that ten air exchanges per hour are recommended for ventilation of x-ray processing rooms. (R. 1422.) Sometime after the move to the Mammography Suite, Tim Murray asked Pat Bendall if the ventilation had been tested and was told that LDS Hospital's maintenance department had checked the room and the ventilation was adequate. (*Id.*)

Ms. Jones claims that she developed chest tightness within three or four months after the move to the Mammography Suite and complained about these problems to Mr. Bendall. (R. 1411-14.) Appellants also claim that during the course of work in the Mammography Suite they developed a host of physical symptoms including: "[h]eadaches, shortness of breath, chest pain, loss of voice, running nose, nausea,

vomiting, light-headedness, constriction of throat, extreme fatigue, painful joints, burning and itching skin and eyes, chemical taste in mouth, sinus pressure, earaches, tremors/shaking, delayed healing of sores and cuts, achy muscles, ringing in the ears, popping and cracking of joints, abnormal pap smears and fibromyalgia symptoms.” (R. 1431-32, 1440-41.)

In response to the complaints made by Ms. Jones and Ms. Alder, LDS Hospital ultimately tested the ventilation in the Mammography Suite and discovered that the building ventilation was not working properly. Subsequently, LDS Hospital corrected the ventilation system. (R. 1447-48.) After LDS Hospital corrected the building ventilation, air samples were taken in the Mammography Suite and no airborne chemicals were detected. (R. 1407.) Appellants argue that OSHA determined that there were only two air exchanges in the Mammography Suite before the Hospital fixed the ventilation (Opening Brief of Plaintiffs-Appellants (“Appellants’ Brief”) at 6), but cite no evidence to support this contention.

AGFA did not participate in any way with LDS Hospital’s installation, testing or modification of the ventilation system. (R. 1423.) However, AGFA did install a collector and a vent hose on the Curix Compact in March 1995. (R. 1452.)

Despite the improvements by the Hospital to the ventilation in the Mammography Suite, in or about May 1995, both Appellants left LDS Hospital, stating that they could not continue to work in any capacity at the Hospital. (R. 1368-72.) According to Appellants, both had developed a hypersensitivity to all chemicals and could no longer be exposed to the many chemicals allegedly found in a hospital environment. (*Id.*)

Despite numerous diagnostic tests performed by multiple medical providers, there is no objective evidence that Appellants are sensitive to any chemicals, other than allergy tests that indicate that Ms. Alder is allergic to latex. (R. 1458, 1464.) Neither Appellant suffers from immunologic disease. (R. 1457, 1519.) Ms. Jones suffers from no respiratory impairment. (R. 1457.) Ms. Alder suffers from no permanent respiratory impairment. (R. 1519.)

Nonetheless, Appellants' experts have diagnosed their self-reported hypersensitivity to chemicals as Multiple Chemical Sensitivities ("MCS") or "immune toxicity." (R. 1456, 1534, 1538, 1541-42, 1562-63, 1577-78, 1583, 1590.) According to Appellants' expert Dr. Mark Cullen, who originally coined the term MCS, the manifestations of MCS are: (1) a demonstrable environmental exposure, which causes a symptomatic response in an individual; (2) the recurrence or persistence of these symptoms at lower doses of chemicals; and (3) the development of more symptoms to different chemicals; (4) which cause complaints involving more organ systems. (R. 1595, 1607-08.)

Although Appellants' expert Dr. Michael Gray has diagnosed Appellants with "immune toxicity," the crux of his opinion is that they suffer from a hypersensitivity to a wide spectrum of chemicals as a result of low-level exposure to some chemicals, the same symptom complex that has been called MCS by others. (R. 1465.) In fact, Dr. Gray says he does not use MCS as a diagnostic term because of the "legal implications" of using that term. (R. 1626.) He also states that patients colloquially refer to themselves as suffering from MCS, and that these people "are most often found to have conditions

that reflect immune toxic states.” (R. 1628-32.) Indeed, Dr. Gray also states that the lay public generally refers to immune toxicity by many different names, including MCS. (R. 1530.)

In reaching their diagnosis of Appellants as suffering from MCS or “immune toxicity,” Appellants’ experts relied on the subjective complaints of the Appellants, because there are no diagnostic techniques or biological markers to verify a diagnosis of MCS. (R. 1595-96, 1605-06, 1639-40, 1534-35, 1547, 1556, 1582-83, 1591-92.) Yet these experts did not separately validate or confirm that Appellants were in fact exposed to x-ray processing chemicals, but instead relied upon Appellants’ self-reporting (which was not based on scientific data or analysis). (R. 1636-38, 1549, 1568-69, 1589-90.)

None of Appellants’ experts can identify a known cause of MCS. (R. 1599-1600, 1539, 1565, 1531-32, 1534.) The following testimony from Dr. Cullen is illustrative:

Q. Do we know what specific chemicals cause MCS symptoms?

A. No. In fact, not only do we not know it in that form, what we know to be true is that an incredibly diverse array of odors, irritants and intoxicants may precipitate what appears to be virtually the identical clinical patterns. So that I think everything we know suggests that some unique chemical attribute is not at play.

(R. 1617-18.) Indeed, according to Dr. Cullen, “distinguishing which chemical quote caused unquote the MCS is extraordinarily—it’s impossible and of no value.” (R. 1619.)

Appellants’ experts concede that MCS is not considered a valid diagnosis and is not generally accepted in the scientific community. (R. 1624-25, 1627, 1635, 1554). Appellants’ expert Dr. Cullen referred to MCS as “infant science.” (R.1602.) Even

among MCS proponents, there is no single accepted diagnostic definition of MCS. (R. 1696.)

Despite the utter lack of proof that MCS is a valid medical diagnosis, Appellants' toxicologist/entomologist, Richard Lipsey, Ph.D., proposed to testify that Appellants developed MCS as a result of exposure to unspecified levels of x-ray processing chemicals. (R. 1379-80.) According to Dr. Lipsey, the best way to perform an exposure assessment is to conduct air sampling, using a worst-case scenario approach. (R. 1658.) However, Dr. Lipsey did not do any air sampling at LDS Hospital to arrive at his opinions, because Appellants did not ask him to do so. (*Id.*) Instead, Dr. Lipsey has assumed exposure based on the theory that Appellants' symptoms are consistent with exposure. (R. 1655-56.) Similarly, Dr. Lipsey makes the circular conclusion that it is unnecessary to know the dose of each chemical to which Appellants were exposed, because their symptomology purportedly demonstrates that they were necessarily exposed to chemicals in sufficient dose to cause injury. (R. 1651-52.)

In contrast, AGFA's expert, John Spencer, CIH, CSP, conducted actual air sampling at LDS Hospital's Mammography Suite on December 7, 1999. (R. 1663.) Based upon his review of Kodak's MSDS for the fixer and developer used in the Curix Compact, Mr. Spencer included the following chemicals in his air sampling analysis: hydroquinone, acetic acid, ammonia and sulfur dioxide. (R. 1665.) In view of Appellants' specific allegations that they were exposed to glutaraldehyde, this chemical was also included in Mr. Spencer's analysis, despite the fact that glutaraldehyde is not listed by Kodak as one of the chemical constituents of its processing mixture. (*Id.*)

The air samples were collected in the Mammography Suite under worst-case exposure conditions. The building ventilation (air supply and return vents) was blocked off, along with all external exhaust lines. (R. 1666.) These samples were taken and analyzed in accordance with National Institute for Occupational Safety and Health (“NIOSH”) methods. (*Id.*) Results of the air sampling indicate that levels of glutaraldehyde, hydroquinone, ammonia and acetic acid were below the limits of detection. (*Id.*) Sulfur dioxide was found at concentrations of 0.019 to 0.064 parts per million (“ppm”), well below the OSHA Permissible Exposure Limit (“PEL”) of 5 ppm over an 8-hour workday. (R. 1666-67.)

These worst-case scenario air sampling results, the accuracy of which have not been contested, negate Appellants’ hypothesis that they were exposed to x-ray processing chemicals at levels that may cause harm. In fact, any potential exposure would have been well below current PELs set by OSHA, as well as the Threshold Limit Values (“TLVs”) established by the American Conference of Governmental Industrial Hygienists (“ACGIH”). PELs and TLVs are derived from well-controlled epidemiological and animal studies and set the generally accepted parameters of safe exposure. (R. 1664, 1667.) The results of Mr. Spencer’s sampling are consistent with the sampling performed in the Mammography Suite by LDS Hospital after the building ventilation was remodeled, which did not detect the presence of airborne chemicals. (R. 1405-06.)

In light of the lack of evidence of exposure to x-ray processing chemicals even under a worst-case scenario, Appellants’ theory of causation is an unproven hypothesis



based upon utter speculation. The following testimony from Appellants' expert Dr. Cullen makes the point succinctly:

Q. Is it correct to say, in terms of a standard of medical or scientific probability, if you will, that we do not have sufficient information of either glutaraldehyde or hydroquinone exposure in these two plaintiffs?

A. That's correct.

Q. Is it also true, therefore, that we cannot conclude to a reasonable degree of medical or scientific probability that glutaraldehyde or hydroquinone molecules caused their MCS?

A. Per se, those two specific things, yes. I think our knowledge of that is inadequate to draw that degree of a causal link, yes.

(R. 1522-23.)

### SUMMARY OF ARGUMENTS

**ARGUMENT #1:** Appellants did not and cannot establish through reliable scientific techniques or principles that "Multiple Chemical Sensitivity" ("MCS") is a real disease entity, and that their constellation of symptoms equate with MCS. Appellants' own experts concede that there are no accepted diagnostic criteria for, and no known cause of, MCS. The lack of credible medical support for this diagnosis has led numerous medical organizations, including the American Medical Association, to reject MCS as a valid disease entity. Similarly, all the numerous courts that have addressed the issue have excluded expert testimony on MCS because it fails the test of reliability under *Federal Rule of Evidence* 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or under various state equivalents of the Federal Rule. Thus, Appellants cannot

prove that they were damaged. The District Court properly excluded Appellants' proffered expert testimony in support of MCS, and Appellants have not demonstrated that the District Court abused its discretion in doing so. In light of the District Court's evidentiary ruling, summary judgment in favor of AGFA is proper.

**ARGUMENT #2:** Appellants did not and cannot prove that their alleged MCS was caused by exposure to x-ray processing chemicals at LDS Hospital. Appellants lack any evidence that chemicals used in AGFA's Curix Compact can cause MCS at any exposure level, or that Ms. Alder and Ms. Jones contracted MCS as a proximate result of exposure to chemicals at levels sufficient to cause the alleged harm. Appellants' exclusive reliance on the *post hoc ergo propter hoc* reasoning of their testifying experts is insufficient as a matter of law to prove causation. In view of the undisputed evidence that MCS is not associated with exposure to x-ray processing chemicals (or to any other chemical exposure) and the uncontradicted data that Ms. Alder and Ms. Jones were not exposed to any chemicals at levels known to cause harm, the District Court correctly ruled that Ms. Alder and Ms. Jones cannot prove medical causation as a matter of law.

**ARGUMENT #3:** Appellants cannot establish the existence of any legally cognizable duty that AGFA owed to Appellants with respect to the condition of the ventilation system at LDS Hospital. Appellants maintain that the Hospital's ventilation in the Mammography Suite was below the levels AGFA recommended to LDS Hospital (ten air exchanges per hour), and yet seek to impose liability on AGFA for this condition, despite the undisputed fact that AGFA did not design, install, test or maintain the ventilation system. AGFA's sale of the Curix Compact to LDS Hospital does not as a matter of law

give rise to a common law duty to inspect or test the Hospital's ventilation system many years after the sale of the Curix Compact and following structural renovations of the Hospital's Mammography Suite. To the contrary, AGFA, as seller of the Curix Compact, is entitled to assume that its recommended actions would be read and heeded by LDS Hospital. There is simply no basis in law or reason for imposing such an unprecedented duty on a product manufacturer such as AGFA. Therefore, the District Court properly entered summary judgment in favor of AGFA.

**ARGUMENT #4:** An Appellate Court may affirm a District Court's summary judgment ruling on any grounds appearing in the record, whether relied upon by the District Court or not. *Bangerter*, 928 P.2d at 386. Here, this Court should affirm the District Court's grant of summary judgment in favor of AGFA on the alternative ground (raised below by AGFA on its motion for summary judgment on the statute of limitations) that each of the claims asserted in the Amended Complaint is a product liability claim that is barred by the two-year statute of limitations set forth in Utah's Product Liability Act. The Product Liability Act applies to all claims alleging a product defect and should be interpreted to apply to such claims even when they are artfully pled as negligence claims or otherwise. Appellants have not challenged the District Court's finding that Ms. Alder and Ms. Jones were aware of their injury and the alleged cause of their injury more than two years before filing the Complaint. Therefore, the application of the Product Liability Act to the facts of this case is a strictly legal issue, which can and should be resolved in favor of AGFA, and for the benefit of other litigants called upon to defend claims that are deemed stale by the Product Liability Act.

## LEGAL ARGUMENT

### **I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE SPECULATIVE AND UNRELIABLE TESTIMONY FROM PLAINTIFFS' EXPERTS THAT MS. JONES AND MS. ALDER HAVE "MULTIPLE CHEMICAL SENSITIVITY." PLAINTIFFS FAILED TO PROVE A LEGALLY COGNIZABLE INJURY.**

Relying upon the standard for admissibility of expert opinions under *State v. Rimmasch*, 775 P.2d 388, 396 (Utah 1989) and Utah Rule of Evidence 702, the District Court correctly ruled that the Appellants' proffered expert testimony on Multiple Chemical Sensitivity ("MCS") was inadmissible because it was not based upon reliable scientific or medical methodology. (R. 2368.) The District Court's exclusion of plaintiffs' expert testimony was a sound exercise of its discretion, and was fully consistent with the treatment of this controversial diagnosis by other courts throughout the country and every major medical association that has formally addressed the issue. In short, there is simply no scientific basis for an MCS diagnosis, and there is surely no scientific or medical support for the proposition that chemicals in general, or x-ray processing chemicals in particular, can cause this highly subjective constellation of symptoms. While invoking the language of "differential diagnosis" to falsely validate their speculative and novel MCS hypothesis, Appellants' testifying experts still admit that they have discovered nothing new to contradict the overwhelming body of medical evidence that rejects the premise of Appellants' damage claim. Specifically, it is undisputed, and unchallenged on this appeal, that there is no accepted diagnostic criteria for, and no known cause of, MCS. The District Court properly exercised its gatekeeping responsibility and its broad discretion over the admissibility of expert testimony by

refusing to allow Appellants' experts to speculate, with no scientific reasoning or evidence to substantiate their *ipse dixit* opinion, that Ms. Jones's and Ms. Alder's subjective complaints equate with MCS.

**A. The District Court Properly Excluded the Proffered Expert Testimony that Ms. Jones and Ms. Alder Suffer from MCS, Because the Testimony Was Not Supported by Reliable Scientific Principles or Techniques.**

The admission of expert testimony is governed by *Utah Rule of Evidence* 702, which provides:

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

In *Rimmasch*, 775 P.2d at 396, the Utah Supreme Court instructed trial courts to act as gatekeepers and carefully scrutinize proffered expert testimony before admitting such testimony into evidence. Under *Rimmasch*, a trial court must apply a three-part test, and it is the party offering the expert testimony that bears the burden of establishing each element. *State v. Brown*, 948 P.2d 337, 341 (Utah 1997). First, the Court must determine whether the scientific principles and techniques underlying the expert's testimony are inherently reliable. *Id.*; *State v. Crosby*, 927 P.2d 638, 641 (Utah 1996). The Court may do so by judicial notice "if the scientific principles and techniques at issue have been generally recognized and accepted by the legal and scientific communities." *Crosby*, 927 P.2d at 641. If judicial notice is not appropriate, however, the party seeking to introduce the expert testimony must "request that the trial court determine that these principles or

techniques are inherently reliable after an evidentiary hearing addressing the issue.” *Rimmasch*, 775 P.2d at 398. Appellants did not request an evidentiary hearing on this issue. Second, if the testimony is found to be inherently reliable, the trial court must next determine whether the scientific principles or techniques have been properly applied to the facts of the particular case by sufficiently qualified experts. Third, if the first two prongs are satisfied, the court must assess whether the proffered scientific evidence will be more probative than prejudicial, as required by *Utah Rule of Evidence* 403. See *Crosby*, 927 P.2d at 641; *Rimmasch*, 775 P.2d at 398, n.7-8, 400.<sup>1</sup> Here, the District Court correctly found that Ms. Jones and Ms. Alder had failed to satisfy the first prong (reliability) of the *Rimmasch* test. Accordingly, it was unnecessary for the District Court to address the second and third prongs of the test (fit<sup>2</sup> and probative value<sup>3</sup>).

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<sup>1</sup> Following *Rimmasch*, the United States Supreme Court set forth its standard for admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Utah Supreme Court has refused to adopt *Daubert*, which it perceives as a more flexible and liberal standard. *Crosby*, 927 P.2d at 640 (quoting *Rimmasch*, 775 P.2d at 397). As the *Crosby* Court held, unlike *Daubert*, “*Rimmasch* provides a detailed and rigorous outline for trial courts to follow when making determinations concerning the admissibility of scientific evidence,” and the *Rimmasch* standard continues to govern admissibility in Utah courts. 927 P.2d at 642.

<sup>2</sup> Fundamentally, Appellants’ experts concede that there is no accepted procedure or objective testing that can be utilized to determine and confirm the existence of MCS. They further concede that there are no generally accepted diagnostic criteria for placing a patient into the category of MCS. Thus, it follows logically and inexorably that there can be no showing under the “fit” prong that an established scientific methodology was applied properly to the facts of this case, because no such methodology exists.

<sup>3</sup> Appellants’ MCS theory also fails the last prong of the *Rimmasch* test, which requires the trial court to balance the probative weight of the testimony against the prejudice that could result. Here, even if admissible under the first two prongs of the *Rimmasch* test, the proffered expert testimony on MCS is highly dubious and entitled to little weight. On the other hand, such testimony is highly prejudicial because jurors may

The record is clear that Appellants utterly failed to meet their burden to demonstrate the “inherent reliability” of the principles and techniques underlying their experts’ theory that Ms. Jones and Ms. Alder have contracted MCS. Because they acknowledged that there is no accepted diagnostic criteria or objective testing to confirm an MCS diagnosis (R. 1595-96, 1605-06, 1639-40, 1534-35, 1547, 1556, 1582-83, 1591-92), Appellants’ experts can offer no proof that their MCS diagnosis is based upon “reliable” principles and techniques. Their unscientific pronouncement that Ms. Jones and Ms. Alder now suffer from this purported disease is inherently unprovable and untestable. Further, their essential premise that MCS is a real disease has been overwhelmingly rejected by the relevant medical and scientific communities. (R. 1465.) Among the prestigious medical societies and organizations that have rejected the MCS hypothesis are the American Medical Association, the American College of Physicians, the American Academy of Allergy and Immunology, the American College of Occupational Medicine, the California Medical Association, the Ministry of Health of the Province of Ontario, the General Medical Council of Great Britain and the International Society of Regulatory Toxicology and Pharmacology. (R. 1466.) Numerous peer-reviewed journals addressing the MCS theory have also rejected it. (R. 1467.) None of Appellants’ experts applied, or even articulated, a reliable technique or principle to reject the view of these authoritative medical institutions that MCS simply does not exist as a

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place undue weight on testimony from an “expert” regardless of the theory’s lack of reliability or fit. *See State v. Pearson*, 943 P.2d 1347, 1353 (Utah 1997) (risks of admitting expert’s testimony exceeded testimony’s probative value where expert’s simulation bore only limited resemblance to facts of case). Therefore, Appellant cannot satisfy any of the three prongs of the *Rimmasch* criteria.

real disease. The District Court correctly reached the inescapable conclusion that plaintiffs did not and could not meet their burden to prove “inherent reliability,” and therefore properly excluded the proposed expert testimony.

**B. The District Court Correctly Applied the *Rimmasch* Standard of Admissibility.**

Appellants misconstrue the basis for the District Court’s evidentiary ruling in arguing that the Court limited its inquiry to the reliability of the proposed experts’ “opinions and conclusions,” rather than their “methods and techniques.” (Appellants’ Brief at 32.) Nothing in the record below or in the District Court’s opinion supports this limited view of the District Court’s rulings. Specifically, the District Court ruled that the evidence offered by Appellants was not based on “reliable scientific or medical foundation as required under *Rimmasch* and Utah Rule of Evidence 702.” (R. 2368.) The fact that the District Court correctly applied *Rimmasch* and focused on the “methods and techniques” underlying the challenged expert testimony is confirmed by the District Court’s express recognition of the holdings in other MCS cases in which similar testimony was excluded “for lack of sound scientific reasoning and methodology.” (R. 2367.) Further, the lack of sound scientific methods and techniques supporting the Appellants’ MCS claim was the focus of AGFA’s challenge under *Rimmasch*. AGFA established without contradiction that scientists and judges have rejected MCS because the existence of MCS as a disease category has never been adequately demonstrated through tests, and a physician must rely solely on a patient’s subjective description of his or her symptoms in relation to various environmental exposures. *See, e.g., Zwilling v.*



*Garfield Slope Housing Corp.*, 1998 WL 623589 at \*10 (E.D.N.Y.);<sup>4</sup> see *Greenspan v. Shalala*, 38 F.3d 232, 238 (5<sup>th</sup> Cir. 1994), *cert. denied*, 514 U.S. 1120 (1995); *Sterling v. Vesicol Chem. Corp.*, 855 F.2d 1188, 1207 (6<sup>th</sup> Cir. 1988). Yet the “symptoms” of MCS are legion and can be as simple as the urge to sneeze. (R. 1465-66, ¶17.) Similarly, the chemicals that are said to cause MCS cannot be limited to any recognizable class of chemicals. (R. 1466, ¶18.) Thus, MCS violates a fundamental rule of medicine: that a disease must have a definition in relation to cause and effect. (R. 1467, ¶19.)

In addition, MCS patients have no biochemical abnormalities that can be tested directly or indirectly by any diagnostic tool, including hematological, biochemical, physiological and immunological tests. *Zwillinger, supra*, at \*15-16, \*18. See *Greenspan*, 38 F.3d at 239; *Frank v. State of New York*, 972 F. Supp. 130, 136-37 (S.D.N.Y. 1997); *Carlin v. RFE Indus. Inc.*, 1995 WL 760739 at \*4 (N.D.N.Y.). Nor can toxicological testing techniques confirm the existence of MCS. *Zwillinger, supra*, at \*19. See *Greenspan*, 38 F.3d at 237; *Sterling*, 855 F.2d at 1209. Nonetheless, MCS adherents posit that a patient can exhibit symptoms as a result of doses that are so small that they are thought by mainstream scientists to be incapable of producing illness or symptoms. *Zwillinger, supra*, at \*19.

In fact, MCS proponents cannot identify the mechanism whereby exposure to chemicals can result in MCS. *Zwillinger, supra*, at \*16. See *Sterling*, 855 F.2d at 1208. While there are numerous theories as to the biological mechanism causing MCS, none

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<sup>4</sup> In the *Zwillinger* case, the Court excluded the testimony of Dr. Michael Gray, one of Appellants’ proffered experts.

has gained acceptance, even among adherents of MCS, and there are no peer-reviewed epidemiological data or animal studies that confirm the existence of MCS, let alone its cause. *Zwillinger, supra*, at \*15. See *Sterling*, 855 F.2d at 1208; *Sanderson v. International Flavors and Fragrances*, 950 F. Supp. 981, 994 (C.D. Cal. 1996).

For reasons similar to those articulated by the District Court, MCS has been rejected by Courts throughout the country, even when applying the more flexible federal standard under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See, e.g., *Bradley v. Brown*, 42 F.3d 434, 438 (7<sup>th</sup> Cir. 1994) (MCS hypothetical and of no assistance to the trier of fact); *Greenspan v. Shalala*, 38 F.3d at 238 (5<sup>th</sup> Cir. 1994) (diagnosis of ecological illness and multiple allergies not generally accepted); *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 381 (7<sup>th</sup> Cir. 1994) (hypersensitivity to chemicals based on clinical ecology not recognized by medical organizations and not accepted ground for disability); *Brown v. Shalala*, 15 F.3d 97, 99 (8<sup>th</sup> Cir. 1994) (finding substantial evidence that environmental illness was not based upon medically accepted techniques); *Sterling*, 855 F.2d at 1208-09 (experts' opinions on immune system impairment not widely accepted and inadmissible); *Coffey v. County of Hennepin*, 23 F. Supp.2d 1081, 1086 (D. Minn. 1998) (MCS not scientific knowledge and expert testimony on MCS inadmissible); *Coffin v. Orkin Exterminating Co.*, 20 F. Supp.2d 107, 111 (D. Maine 1998) (MCS has not progressed to scientific knowledge and cannot assist trier of fact); *Treadwell v. Dow-United Technologies, Inc.*, 970 F. Supp. 974, 984 (M.D. Ala. 1997) (MCS etiology and clinical ecology not reliable); *Frank*, 972 F. Supp. at 136-37) (MCS too speculative to meet requirements of scientific knowledge); *Sanderson*, 950

F. Supp. at 1001-02) (given present state of knowledge, MCS remains scientific controversy and does not represent reliable scientific knowledge which *Daubert* and *Federal Rule of Evidence* 702 require); *Summers v. Missouri Pacific R.R. System*, 897 F. Supp. 533, 538 (E.D. Okla. 1995) (MCS hypothesis has not progressed to point where it could assist trier of fact), *aff'd*, 132 F.3d 39 (10th Cir. 1997); *Collins v. Welch*, 178 Misc. 2d 107, 109 (Sup. Ct. New York County 1998) (granting motion to exclude expert testimony on MCS); *Zwillinger*, 1998 WL 623589 (rejecting testimony on MCS because the diagnosis is too speculative to qualify as scientific knowledge under *Daubert*); *Carlin*, 1995 WL 760739 (expressing serious doubt that there is any scientific validity to MCS).<sup>5</sup> Given the complete rejection of MCS in the relevant scientific and legal communities, and in the absence of any reliable medical techniques or diagnostic criteria to validate their MCS hypothesis, it is clear that Appellants' medical proofs lack the requisite reliability required under *Rimmasch*.

Despite this universal rejection of MCS as a disease entity and the scientific community's acknowledgement that the cause of MCS symptoms is unknown, Appellants propose to offer expert testimony that, they hope, would lead a jury of eight lay people to declare just the opposite. However, as Judge Posner aptly declared in a non-MCS case, "the courtroom is not the place for scientific guess work, even of the

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<sup>5</sup> Appellants' own experts concede that MCS is controversial and is not generally accepted in the scientific community. (R. 1624-25, 1627, 1635, 1554.) It is Dr. Gray's awareness of this fact that prompts him to avoid use of the term MCS in favor of the term "immune toxicity." (R. 1626.) In acknowledging the controversy surrounding MCS, Dr. Cullen refers to this symptom-complex as "infant science." (R. 1602.)

inspired sort. Law lags science; it does not lead it.” *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7<sup>th</sup> Cir. 1996) (physician’s opinion that nicotine patch caused heart attack was not valid scientific evidence).

**C. Because the District Court Correctly Excluded Evidence of MCS, Appellants’ Claims Against AGFA Fail for Lack of Proof of Damage.**

It is axiomatic that a plaintiff in a negligence suit must establish, among other essential elements, that she has sustained a legally cognizable injury. *Weber v. Springville City*, 725 P.2d 1360, 1366 (Utah 1986). Here, Appellants’ self-reported symptomology cannot, without a legitimate diagnosis from a qualified expert, sustain their burden of proof on damages. *Preston & Chambers v. Koller*, 943 P.2d 260, 263 (Utah 1997) (expert testimony required when average person has little or no understanding of issues). Accordingly, the District Court’s exclusion of Appellants’ unfounded expert testimony that Ms. Jones and Ms. Alder have MCS must result in the entry of judgment in favor of AGFA.

Implicitly acknowledging that they cannot demonstrate that the proffered expert testimony on MCS meets the *Rimmasch* requirements, Appellants argue that they are suffering from a host of physical symptoms in addition to MCS, including sinus problems, respiratory problems, chronic fatigue syndrome, fibromyalgia and cognitive deficits and that they can therefore prove they have been damaged. (Appellants’ Brief at 32.) Appellants’ argument is specious for several reasons. First, as in every MCS case, plaintiffs’ controversial diagnosis involves disparate subjective symptoms spanning multiple organ systems. It is the hallmark of MCS that patients allegedly experience

these symptoms (sinus problems, respiratory problems, fatigue syndrome, cognitive deficits) when exposed to low-level exposure to chemicals that are safe to the rest of the population. The “disease,” whether identified as MCS by some practitioners or “immune toxicity” by Dr. Gray, is the array of symptoms that result from such low-level exposures. It is illogical and unavailing, therefore, for Appellants to argue that their damage claim survives in the form of their isolated symptoms, even if the MCS diagnosis is unreliable and inadmissible.

Second, Appellants’ own experts acknowledge that the classification of Ms. Jones and Ms. Alder as MCS patients results from the inability of other diagnoses to fit their symptom profile—in particular their unexplainable hypersensitive reaction to safe levels of diverse chemical compounds. For example, while acknowledging a partial “overlap” between MCS and chronic fatigue and fibromyalgia, Appellants’ expert Dr. Robinson explains that the basis for placing a patient into the category MCS is the “onset or exacerbation of their disease with a chemical exposure.” (R. 2631.) Similarly, Dr. Cullen explains that Ms. Alder’s “fibromyalgia” is actually a part of the MCS diagnosis: “[I]t’s a partial diagnosis. It describes some of her problem but it doesn’t get all the way around the picture.” (*Id.*)

Most importantly, Appellants cannot now argue that this is something other than an MCS case, when their position below was precisely the opposite. In their Statement of Material Facts below, Appellants cited to Dr. Cullen for the proposition that fibromyalgia and chronic fatigue syndrome have been appropriately “ruled out in favor of MCS.” (R. 1771.) Appellants also sought to validate the MCS label by citing to Dr. Cullen’s finding

that the central nervous system complaints (cognitive deficits) and fatigue are triggered by low-level environmental irritants. (R. 1772.) They also referred approvingly in their brief below to Dr. Cullen's finding that "the association between exposures at low level and the triggering of symptoms is the *sine qua non* of MCS." (*Id.*)

In sum, the label Appellants now attempt to put on their physical ailment to distance themselves from the junk science of MCS cannot affect in any way the analysis of its reliability and validity under *Rimmasch. Zwillinger*, 1998 WL 623589. Thus, the District Court properly exercised its discretion in excluding Appellants' proffered expert testimony on MCS as based upon an entirely unreliable and widely discredited foundation, and correctly granted summary judgment to AGFA for lack of proof of a legally cognizable injury.

**II. THE DISTRICT COURT CORRECTLY RULED THAT MS. JONES AND MS. ALDER FAILED AS A MATTER OF LAW TO PROVE THAT THEIR ALLEGED MCS WAS CAUSED BY EXPOSURE TO X-RAY PROCESSING CHEMICALS FROM THE CURIX COMPACT.**

To prevail on their negligence claims against AGFA, Appellants must affirmatively prove: (1) that Ms. Jones and Ms. Alder were exposed to x-ray processing chemicals at a level sufficient to cause injury (general causation); and (2) that these chemicals were the cause in fact of such injury in this case (specific causation). *See, e.g., Wade-Greaux v. Whitehall Laboratories, Inc.*, 874 F. Supp. 1441, 1448 (D.V.I. 1994), *aff'd*, 46 F.3d 1120 (3d Cir. 1994). These are two separate and necessary inquiries, drawing upon different scientific disciplines. *See In re Joint E. & S. Asbestos Litig.*, 52 F.3d 1124, 1131 (2d Cir. 1995). Any expert testimony proffered to prove general or

specific causation must meet the standards of reliability set forth in *State v. Rimmasch*. Here, Appellants' arguments in opposition to AGFA's motion for summary judgment were woefully insufficient as a matter of law to create a triable issue of fact as to either general or specific causation. *See Schafir v. Harrigan*, 879 P.2d 1384, 1391 (Utah 1986). Therefore, the Amended Complaint was correctly dismissed as a matter of law for lack of proof of an essential element of Appellants' negligence claim against AGFA.

**A. Ms. Jones and Ms. Alder Cannot Prove that They Were Exposed to X-Ray Processing Chemicals at Levels Known to Cause Injury.**

The branch of science in which qualified experts determine whether a chemical agent can biologically cause a given illness is toxicology. *Mancuso v. Consolidated Edison*, 967 F. Supp. 1437, 1445 (S.D.N.Y. 1997). Courts have consistently held that a toxicologist (or someone purporting to draw conclusions as to general causation) must properly employ the principles and methods of toxicology to prove general causation. *Cavallo v. Star Enterprise*, 892 F. Supp. 756, 771 (E.D. Va.), *aff'd in part*, 100 F.3d 1150 (4<sup>th</sup> Cir. 1996), *cert. denied*, 522 U.S. 1044 (1996).<sup>6</sup>

Among other central tenets, the science of toxicology posits that "the dose makes the poison" and all chemicals may be harmful if consumed in large quantities. *Mancuso*, 967 F. Supp. at 1445; *Cavallo*, 892 F Supp. at 769; *Sutera v. The Perrier Group of America, Inc.*, 986 F. Supp. 655, 667 (D. Mass. 1997); *National Bank of Commerce v.*

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<sup>6</sup> None of the Appellants' experts are toxicologists. Although Appellants argue that Dr. Lipsey will opine that Appellants were exposed to x-ray processing chemicals at levels known to cause injury, Dr. Lipsey is qualified as an entomologist, not a toxicologist. Similarly, Dr. Gray was not trained as a toxicologist, although he claims to have experience in toxicology. Moreover, none of the treating physicians are qualified in toxicology.

*Dow Chemical Co.*, 965 F. Supp. 1490, 1501 (E.D. Ark. 1996), *aff'd*, 133 F.3d 1132 (8<sup>th</sup> Cir. 1998). Therefore, courts have held that a plaintiff claiming a chemical injury must prove that he was exposed to levels of chemicals known to cause toxic effects. *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1106-08 (8<sup>th</sup> Cir. 1996) (in order to carry burden of proving causation, plaintiff must demonstrate “levels of exposure that are hazardous to human beings generally as well as the plaintiff’s level of exposure”); *Allen v. Pennsylvania Eng’g Corp.*, 102 F.3d 194, 199 (5<sup>th</sup> Cir. 1996) (“[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiff’s burden in a toxic tort case”); *Abuan v. General Electric Co.*, 3 F.3d 329, 333 (9<sup>th</sup> Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994); *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10<sup>th</sup> Cir. 1999); *National Bank of Commerce*, 965 F. Supp. at 1501; *see also Reference Manual on Scientific Evidence*, Chapter IV, pp. 206-9 (Federal Judicial Center 1994) (evidence of exposure is essential; causation cannot be established unless it is shown that the level of exposure was above the “no observable effect or threshold level”).<sup>7</sup> (R. 2328.)

Appellants concede that they cannot prove exposure to chemicals above any levels known to cause harm and they make no attempt to do so. (Appellant’s Brief at 42.) Rather, they argue against the great weight of legal authority that this “inability to

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<sup>7</sup> The *Reference Manual on Scientific Evidence* has been widely cited for the proper methodology for determining causation under *Daubert*. *See, e.g., Wright*, 91 F.3d at 1108; *In re Breast Implant Litigation*, 11 F. Supp.2d 1217, 1229 (D. Colo. 1998); *Mancuso*, 967 F. Supp. at 1445; *National Bank of Commerce*, 965 F. Supp. at 1503; *Zwilling*, 1998 WL 623589 at \* 19.



establish the exact levels of chemicals to which they were exposed . . . is not fatal to their claims.” (*Id.* at 42-43.) However, proof of exposure is essential in any toxic tort case. The absence of such proof is particularly glaring here, because AGFA has affirmatively proven, and submitted uncontroverted evidence below, that the chemicals emitted from its Curix Compact processor could not have accumulated, even in a worst-case (no ventilation) scenario, to levels that were harmful in any way. (R. 1663.) Appellants’ toxicology expert, Richard Lipsey, Ph.D., agreed that a valid technique to perform an exposure assessment was to conduct air sampling in the Mammography Suite, using a worst-case exposure scenario. (R. 1658.) Dr. Lipsey, however, failed to perform any exposure analysis (including worst-case air sampling), simply because he was not asked to do so. (*Id.*) Likewise, he has never submitted an analysis or critique of AGFA’s exposure assessment, which shows that even under worst-case conditions airborne chemistry from the Curix Compact could not have produced concentrations high enough to cause harm.

In its Opening Brief on this appeal, Appellants completely ignore the findings of John Spencer, CIH, CSP, who conducted actual air sampling at LDS Hospital’s Mammography Suite. (R. 1663.) His testing reveals that glutaraldehyde, hydroquinone, acetic acid and ammonia were well below levels that could be quantified, *even when all ventilation was blocked*, resulting in a worst-case exposure scenario. (R. 1666.) Moreover, sulfur dioxide was found at concentrations well below OSHA’s PEL of 5 ppm over an 8-hour workday. (R. 1666-67.)

Without coming forward with any contradictory evidence, Appellants merely argued below that Mr. Spencer's tests are not dispositive. However, the lack of contrary evidence is fatal under Utah R. Civ. P. 56 because Appellants bear the burden of proof on the essential elements of general causation. *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 339 (Utah 1997) (once challenged, the party opposing summary judgment must come forward with sufficient proof to support his or her claim); *Schafir*, 879 P.2d at 1391 ("the complete failure of proof on an essential element on the nonmoving party's case necessarily renders all other facts immaterial"). See also, *Weiss v. Mechanical Associated Services, Inc.*, 989 S.W.2d 120, 124-25 (Texas App. 1999) (in case alleging exposure to x-ray processing chemicals, expert's diagnosis found to be unreliable in the "absence of sampling data" for glutaraldehyde).

Appellants argue that the testimony of their "treating physicians and other experts" establishes that their alleged exposure to x-ray processing chemicals caused them to develop MCS because these physicians purportedly conducted a "differential diagnosis," supported by an alleged temporal relationship between the alleged exposure and onset of injury. As discussed below, this mere lip service to scientific methodology is no substitute as a matter of law for reliable toxicological principles and techniques. The differential diagnosis is also plainly insufficient to refute Mr. Spencer's unchallenged findings that a worst-case exposure scenario would have been insufficient to cause harm to Ms. Jones and Ms. Alder.

**B. Appellants' Experts' Purported "Differential Diagnosis" Cannot Prove Exposure or Medical Causation.**

Differential diagnosis is a technique used by clinicians to treat patients, and it is not a reliable substitute for the toxicological methods that must be employed to demonstrate general causation. *In re Breast Implant Litigation*, 11 F. Supp.2d 1217, 1230 (D.Colo. 1998). Differential diagnosis, as used in the medical profession, is a clinical process whereby doctors determine from what disease a patient suffers.<sup>8</sup> By comparing the patient's symptoms to symptoms associated with known diseases, the physician attempts to identify the disease or diseases that best explain the facts of the patient's case. *Whiting v. Boston Edison Co.*, 891 F.Supp. 12, 21, n.41 (D.Mass. 1995). Identification takes place through a process of elimination, with the physician applying diagnostic tests and collecting data to systematically "rule out" possible diseases, until a final diagnosis is reached, permitting appropriate medication and treatment. *See In re Breast Implant Litig.*, 11 F.Supp.2d at 1229. Clearly, this diagnostic methodology lacks the requisite "fit" under *Rimmasch* to determine the cause of MCS generally, or the cause of Appellants' alleged MCS in particular.

Indeed, in most of the cases cited by Appellants for the proposition that differential diagnosis alone is enough to prove causation, the courts admitted testimony on differential diagnosis because it found that the expert had first demonstrated general causation. *See, e.g. Heller v. Shaw*, 167 F.3d 146, 153 (3d Cir. 1999) (testimony of

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<sup>8</sup> According to Stedman's Medical Dictionary, differential diagnosis is "the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings." *Stedman's Medical Dictionary* at 428 (25<sup>th</sup> ed. 1990).

expert performing differential diagnosis was admissible because the testimony of an industrial hygienist established evidence of exposure at levels sufficient to cause injury); *Westberry v. Gislaved Gummi*, 178 F.3d 257, 264 (4<sup>th</sup> Cir. 1999) (expert opinion admitted when “it was undisputed that inhalation of high levels of talc irritated mucous membranes” and “there was evidence of substantial exposure where talc settled from the air around [plaintiff’s] work area was so thick that one could see footprints in it on the floor”); *Curtis v. M&S Petroleum*, 174 F.3d 661, 668, 671 (5<sup>th</sup> Cir. 1999) (expert demonstrated general causation by relying upon MSDS); *Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248, 253 (1<sup>st</sup> Cir. 1998) (expert’s opinion that chlamydia is a common cause of PID was undisputed); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228 (9<sup>th</sup> Cir. 1998) (admitting expert testimony that product caused lupus where expert relied upon objective, verifiable evidence, including peer-reviewed publications, clinical studies and product studies by the defendant, showing that product could cause autoimmune disorders); *Kannankeril v. Terminix Int’l, Inc.*, 128 F.3d 802 (3d Cir. 1997) (expert presented scientific literature showing the toxic effects of the pesticide and Terminix’s application records showed how much of the pesticide had been applied); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 777 (3<sup>rd</sup> Cir. 1994) (court found that testing results, epidemiological studies and animal studies sufficed to show exposure at levels known to cause injury without looking to testimony of medical experts employing differential

diagnosis). Thus, the cited case law belies Appellants' argument that a differential diagnosis alone suffices to prove general causation.<sup>9</sup>

Further, Appellants must demonstrate specific as well as general causation to prevail on their claims. However, to show that a particular chemical caused an injury in a particular plaintiff (specific causation), the chemical must first be "ruled in" as a potential cause by conducting a general causation analysis before it can be "ruled out" by a differential diagnosis. Therefore, while differential diagnosis may in certain instances be admissible to show specific causation, if a plaintiff cannot prove "general causation" he cannot prove specific causation *a fortiori*. See *Raynor v. Merrell Pharmaceuticals, Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997) (specific causation evidence is irrelevant in absence of general causation analysis); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1413 (D. Ore. 1996) ("[t]estimony regarding specific causation in a given patient is irrelevant unless general causation is established").

Appellants' testifying physicians violate this basic principle by concluding that Appellants' MCS was specifically caused by exposure to x-ray chemicals, while at the same time admitting that there is no known cause of MCS. (R. 1548, 1571.) Indeed, Dr. Cullen has stated that scientists do not know what specific chemicals cause MCS let alone the levels of such chemicals that would produce the alleged illness. (R. 1617-18.) Without evidence that exposure to x-ray processing chemicals at some level can cause

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<sup>9</sup> Nor can a differential diagnosis refute actual air sampling data that demonstrates that any alleged chemical exposures were not harmful.

MCS, Appellants cannot demonstrate that their alleged exposure caused them to develop MCS here.

**C. Purported Temporal Relationship Between Exposure and Injury Is Insufficient To Prove Exposure or Medical Causation.**

Numerous courts have also rejected Appellants' argument that they can avoid the need to conduct traditional, "meticulous and objective" toxicological analysis by simply inferring causation from the alleged temporal relationship between exposure and illness as unreliable. *Moore v. Ashland Chemicals*, 151 F.3d 269, 278 (5<sup>th</sup> Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 611-12 (7<sup>th</sup> Cir. 1993); *In re Breast Implant Litigation*, 11 F. Supp.2d at 1232, *Cavallo*, 892 F. Supp. at 773; *Hannan v. Pest Control Services, Inc.*, 2000 WL 1231152. \*8 (Ind. App. Aug. 31, 2000) (R. 2230) (rejecting diagnosis of MCS without knowledge of dose). If temporal relationship were sufficient to prove that a chemical or drug is capable of causing a given disease, then in every case of a birth defect following ingestion of Bendectin, for example, the plaintiff would necessarily prevail, and there would be no reason for courts to conduct the type of evidentiary scrutiny that led to the *Daubert* case.

Here, the Appellants' proffered experts have not even attempted to confirm a temporal relationship between their alleged exposure and illness. In particular, they did not consider evidence that the Appellants had exhibited many of the same physical symptoms before the installation of the Curix Compact in the Mammography Suite. (R. 1595-96, 1605-06, 1639-40, 1534-35, 1547, 1556, 1582-83, 1591-92.) Thus, even if a temporal relationship between an exposure and an illness were an appropriate

methodology to prove general causation—which it is not—Appellants’ cannot even proffer evidence that there is an alleged temporal relationship between Appellants’ alleged exposure and the onset of symptoms. In sum, Appellants cannot satisfy their burden of proof on causation by invoking magic words such as “differential diagnosis” and “temporal relationship.” Fundamentally, they cannot avoid the requirement that they demonstrate exposure to chemicals at levels known to cause the alleged harm. Accordingly, the District Court correctly dismissed Appellants’ claims against AGFA for lack of proof of causation, because “plaintiffs are unable to prove exposure to any chemicals, let alone levels known to cause known toxic effects.” (R. 2367.)

### **III. THE DISTRICT COURT CORRECTLY RULED AS A MATTER OF LAW THAT AGFA OWED NO DUTY TO APPELLANTS WITH RESPECT TO THE CONDITION OF LDS HOSPITAL’S VENTILATION SYSTEM.**

Appellants do not contest the District Court’s prior ruling that all product liability claims in this case are barred under the two-year Product Liability Act statute of limitations, Utah Code Ann. § 78-15-3 (1996). (See Order dated June 23, 1999; R. 1196—Addendum A.) Accordingly, the claims at issue on this appeal must necessarily be separate and distinct from any time-barred product liability claims that might otherwise be alleged against a product manufacturer or supplier under Utah law—*i.e.*, design defect, manufacturing defect or failure to warn. *House v. Armour of America, Inc.*, 886 P.2d 542, 547 (Utah App. 1994), *aff’d*, 929 P.2d 340 (1996).

In a transparent effort to avoid application of the Product Liability Act statute of limitations (see Section IV, *infra*), appellants seek to create a new duty on the part of AGFA to ensure the safety of workplace environments and systems over which AGFA

had no control or right of control. In addressing the issue of duty as a matter of law, the District Court correctly ruled that there was no basis upon which to impose a duty upon AGFA “to control the operation or installation of [the Hospital’s] ventilation system.” (R. 2367, 1196.) Appellants’ attack on the District Court’s duty ruling cannot withstand close scrutiny of the factual and legal citations set forth in their Opening Brief.

**A. Appellants Attempt To Assert Time-Barred Product Liability Claims and To Introduce Evidence of Product Defect Previously Excluded by this Court.**

In casting the widest possible net over its liability claims, Appellants have included two claims that are clearly time-barred and subject to the District Court’s prior ruling excluding any evidence of “product defects” from the trial of this matter: (1) failure to provide “safe equipment” (Appellants’ Brief, at 26), and (2) failure to warn (*id.* at 30). These claims must be rejected because the District Court held on June 23, 1999 that Appellants’ product liability claims against AGFA are time-barred. Appellants did not appeal this ruling. In so ruling, the District Court declared “[w]e’re not going to hear evidence at trial about defective products. It’s a case about alleged negligence on the part of people.” (Transcript of Motion for Summary Judgment Hearing held on June 23, 1999 before the Honorable Stephen L. Henriod; R. 2336 at 10.) *See also id.* at 1-2 (“[t]he plaintiff says that it’s a negligence case. He says he’s not going to attack the product, he is only going to attack installation and operation”).

The failure to “provide safe equipment” is either a design defect or manufacturing defect claim, both of which require a plaintiff to produce proof that the subject equipment is defective. Clearly, this is a basic product liability claim. *House*, 886 P.2d at 547 (Utah



law recognizes three types of product defects: design defects, manufacturing flaws and inadequate warnings regarding use). Further, the “failure to warn of dangers” associated with the use of a product is also a claim of “product defect.” *Id.* These claims are therefore time-barred based upon the Court’s June 23, 1999 ruling. *See also, Strickland v. General Motors Corp.*, 852 F. Supp. 956, 958-59 (D. Utah 1996) (stating that legislature intended that all claims against a manufacturer based on defective product were subject to the statute of limitations set forth in the Product Liability Act); *McCollin v. Synthese*, 50 F. Supp.2d 1119, 1122 (D. Utah 1999) (following *Strickland*).

**B. The Imposition upon AGFA of a Duty To Control the Operation or Installation of the Hospital’s Ventilation System Is Unjustified by the Factual Record and Existing Tort Law.**

Appellants’ threshold burden is to demonstrate that AGFA owed a duty to the Appellants to ensure that LDS Hospital complied with AGFA’s installation guidelines. *See DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433, 434-45 (Utah 1983). The existence of a duty is a question of law for the court to decide and requires the court to assess whether the imposition of a duty is fair and appropriate. *AMS Salt Indus. v. Magnesium Corp. of America*, 942 P.2d 315, 319, 321 (Utah 1997). Among the factors to consider is whether the duty imposes an undue burden and whether the fulfillment of such a duty is feasible. *Id.*

Appellants argue that AGFA had a duty: (1) to use reasonable care in the installation of the Curix Compact; (2) to provide safe equipment; (3) to ensure that the Curix Compact was not operated in unsafe conditions; (4) to properly respond to the Plaintiffs’ complaints; (5) to meet its contractual obligations to LDS Hospital; and (6) to

warn Plaintiffs of the alleged risks of working near the Curix Compact without adequate ventilation. (Appellants' Brief at 24-31.) Appellants then distort the factual record to argue that AGFA breached these alleged duties.

First, Appellants argue that pursuant to an alleged contract between AGFA and LDS Hospital, AGFA "undertook to install the Curix Processor in the Mammography Suite and 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." (Appellant's Brief at 25.) Yet Appellants have not and cannot cite in the record to any alleged contract and cannot identify with specificity the purported obligations imposed on AGFA pursuant to this alleged contract.

Appellants also argue that LDS Hospital "relied upon the expertise of the AGFA people with respect to safely ventilating the workplace," thereby creating a duty on AGFA's part to use reasonable care in the installation of the Curix Machine, a duty that "included, at a minimum, the duty to ascertain whether there was adequate ventilation for the safe operation of the machine in its new location." (Appellants' Brief, at 25.) Yet there is absolutely no evidence that LDS Hospital abrogated its responsibility to ensure that the Hospital's ventilation system was properly designed or installed or that the Hospital relied upon AGFA to test or analyze the ventilation in the processing room. (R. 1423.) While AGFA participated in the installation of the Curix Compact in the Mammography Suite, it was LDS Hospital that provided the contractor constructing the new Mammography Suite with specific instructions that there must be ten air exchanges per hour in the room where the Curix Compact was to be located. (R. 1422.) LDS

Hospital determined that ten air exchanges per hour were necessary by referring to a manual for the Curix Compact that had been provided by AGFA. (*Id.*) Thus, LDS Hospital was well aware of the ventilation requirements and undertook to assure compliance with AGFA's guidelines. (*Id.*) Similarly, LDS Hospital did not rely upon AGFA to test the ventilation system in the Mammography Suite. (*Id.*) To the contrary, it was Tim Murray who inquired of Hospital representatives about the ventilation and was told that the room had been tested and that the ventilation was adequate. (*Id.*)

Despite the fact that Mr. Murray was assured that the ventilation was adequate, Appellants argue that AGFA knew or should have known that its machine was not safe for use in the Mammography Suite. According to Appellants, Murray "developed concerns that the ceiling vent [in the Mammography Suite] was not working" but "failed again to test the ventilation in the room." (Appellants' Brief at 25, fn. 6.) Appellants also argue that Murray was concerned that "the lack of ventilation was causing Ms. Jones' health problems" but still failed to test the ventilation, as he had been instructed to do by an AGFA product specialist, George Cervenka. (*Id.*) This recitation of the "facts" is not supported by the record.

There is absolutely no evidence that Mr. Murray thought he connected the Curix Compact to a vent that was not working properly. Although he was initially concerned that the vent in the Mammography Suite might be a cold air vent and not an exhaust vent, Murray specifically asked LDS Hospital for clarification. The Hospital confirmed that the vent was an exhaust vent, and to this day, Murray believes that the vent in the Mammography Suite is and always was an exhaust vent. (R. 2270-71.) Moreover,

Murray inquired of Hospital representatives if testing had been done and was assured that the ventilation had been tested and was adequate. (R. 1422.) Accordingly, there is absolutely no basis to infer that AGFA knew or should have known that the ventilation was not adequate.

When stripped of its unsubstantiated “facts,” the crux of Appellants’ argument is that LDS Hospital’s *ventilation system* was not properly designed or installed and the improper ventilation system caused an unsafe condition in the mammography suite. As AGFA played no role in the design or installation of the ventilation system, it cannot be charged with liability arising from the failure of that ventilation system. Similarly, the fact that Plaintiffs complained to AGFA representatives does not create a duty where none existed, particularly since AGFA had no control over the instrumentality allegedly causing Plaintiffs’ injury: the ventilation system. In sum, there is no factual rationale to support the imposition of a duty on AGFA to ensure that the ventilation system at LDS Hospital was adequate.

Just as there is no factual basis on which to impose a duty on AGFA to ensure that there was adequate ventilation in the Mammography Suite, there is no legal basis upon which to impose such a duty. Indeed, the duties that Appellants seek to impose on AGFA are unprecedented and unjustified. Appellants argue in essence that AGFA, a product seller, must ensure that its products are used properly by purchasers and product users. To support the imposition of such a duty on a product seller whose product is safe when used in accordance with its warnings and guidelines, Appellants merely point to inapplicable provisions of the RESTATEMENT (SECOND) OF TORTS. They cannot

point to one case, however, where these RESTATEMENT provisions were applied to impose a duty on a product seller to “make sure” that its product is operated safely. To the contrary, the RESTATEMENT recognizes just the opposite: “*Where warning is given, the seller may reasonably assume that it will be read and heeded*; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.” RESTATEMENT (SECOND) OF TORTS § 402A comment j (emphasis added).

In sum, the District Court correctly determined that there was no basis in fact or in law to impose a duty on AGFA “to control the operation or installation of the ventilation system.” (R. 2367.) Accordingly, this Court should affirm the District Court’s order granting summary judgment in favor of AGFA.

**IV. THE DISTRICT COURT’S GRANT OF SUMMARY JUDGMENT SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT THE CLAIMS ASSERTED BY MS. ALDER AND MS. JONES ARE TIME-BARRED UNDER THE TWO-YEAR STATUTE OF LIMITATIONS SET FORTH IN THE PRODUCT LIABILITY ACT.**

This Court may affirm the District Court’s ruling on any ground appearing in the record, whether relied upon by the District Court or not. *Salt Lake County v. Bangerter*, 928 P.2d 384, 386 (Utah 1996). Here, AGFA had initially moved before the District Court for summary judgment based on the two-year statute of limitations in Utah’s Products Liability Act, Utah Code Ann. § 78-15-1 through -6 (1996) (the “Act”). The Court’s ruling that the Appellants’ product liability claims were time-barred should have also barred as a matter of law the remaining “negligence” claims in the Amended Complaint. Based upon the District Court’s unchallenged ruling that Appellants were on

claims against AGFA more than two years prior to commencing suit, this Court should affirm the grant of summary judgment in favor of AGFA on the alternative ground that all claims asserted by Ms. Alder and Ms. Jones are time-barred under the Act.

In ruling on AGFA's prior statute of limitations motion, the District Court agreed that the Appellants had notice of their alleged injury and its alleged cause more than two years before filing the Complaint. Thus, the District Court granted AGFA's summary judgment motion to the extent that it dismissed the product liability claims in the Amended Complaint. (R. 1197.) However, the District Court also held that Appellants' negligence claims, if any, were not governed by the Act, and denied AGFA's motion to dismiss the entirety of the Amended Complaint. (*Id.*)

Although Appellants argued in opposition to AGFA's statute of limitations motion that this is not a product liability case, close scrutiny of the Record and Appellants' Opening Brief demonstrate that Appellants' claims arise from the basic allegations that AGFA's x-ray processing equipment was "unsafe" and "unreasonably dangerous" in its design and accompanying warnings. Ms. Alder and Ms. Jones contend on this appeal, and in the proceedings below, that AGFA's Curix Compact was "not safe for use" (Appellants' Brief at 26) and that liability should be imposed for AGFA's alleged failure to incorporate a ventilation system into the design of the machine (*Id.* at 27; R. 1433, 1442) or to "modify the subject equipment so as to render it safe" (Amended Complaint, at 5, ¶e) (R. 1355). Appellants further contend that the Curix Compact created an "unreasonable risk of harm to those that worked in" the Mammography Suite. (Appellants' Brief at 27.) In addition to these basic product defect contentions,

Appellants also argue that AGFA violated a duty to warn “regarding the risks of working near the Curix machine without proper ventilation” (*Id.* at 30), and more generally of the “health risks associated with working around the subject equipment” (Amended Complaint, at 5, ¶j)(R 1355).

Since the Act clearly applies to any claim that the Curix Compact was defectively designed or accompanied by insufficient warnings, the Act’s remedial intent would be flouted if Appellants were permitted to avoid the statutory scheme through the simple expedient of alleging that AGFA “fail[ed] adequately to address the workplace ventilation needs of Appellants;” or “fail[ed] to modify the equipment so as to render it safe;” or “allow[ed] the subject equipment” to be operated in a defective condition; or “fail[ed] adequately to respond to Appellants’ complaints.” These various creative allegations derive directly from Appellants’ traditional product defect claims, and would normally be asserted as garden-variety product liability causes of action. They are asserted here as negligence for one transparent reason: to avoid application of the two-year statute of limitation in the Act.

In sum, despite Appellants’ attempts to disguise their claims, each alleged breach of duty relates directly to the Curix Compact and an alleged design defect or failure to warn in connection with chemical vapors emitted from the Curix Compact. As such, the claims are governed by the Act and must be brought within two years of the Appellants’ discovery of their injuries and the cause of those injuries. Accordingly, the District Court’s dismissal of Appellants’ claims against AGFA should be affirmed on the

additional ground that all claims asserted in the Amended Complaint are barred by the two-year statute of limitations set forth in the Act.

### **CONCLUSION**

For the foregoing reasons, AGFA respectfully submits that this Court should affirm the decision of the District Court granting summary judgment to AGFA and dismissing the Amended Complaint.

The District Court did not abuse its discretion in excluding the speculative and unreliable testimony from Appellants' experts that Ms. Jones and Ms. Alder have "multiple chemical sensitivity." The District Court properly exercised its gatekeeping responsibility under *Rimmasch*. Appellants failed to prove a legally cognizable injury. The District Court also correctly ruled that Ms. Jones and Ms. Alder failed to prove that their alleged MCS was caused by exposure to x-ray processing chemicals from the Curix Compact. In addition, the District Court correctly ruled that AGFA owed no duty to Appellants with respect to the condition of LDS Hospital's ventilation system. The District Court's grant of summary judgment can also be affirmed on the alternative ground that the claims asserted Appellants are time-barred under the two-year statute of limitations applicable to the Product Liability Act.



DATED this 22<sup>nd</sup> day of June, 2001.

A handwritten signature in black ink, reading "David M. Bennion", written over a horizontal line.

GORDON L. ROBERTS

DAVID M. BENNION

PARSONS BEHLE & LATIMER

and

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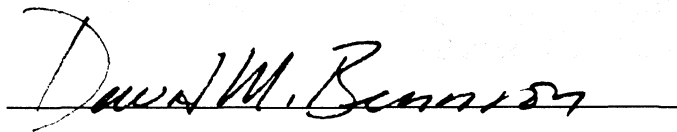
Bayer Corporation and AGFA

Corporation

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of June, 2001, I caused to be served via U.S. Mail, first class, postage prepaid, a true and correct copy of the attached **BRIEF OF APPELLEES BAYER CORPORATION AND AGFA CORPORATION** to:

PETER C. COLLINS  
JACQUELYNN D. CARMICHAEL  
BUGDEN, COLLINS & MORTON  
623 East 2100 South  
Salt Lake City, UT 84106

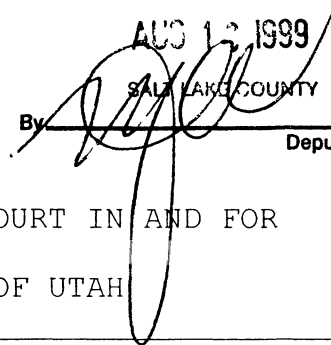
A handwritten signature in cursive script, reading "David M. Benson", is written over a horizontal line.

Tab A

PETER C. COLLINS (#0700)  
JAMES E. MORTON (#3739)  
JACQUELYNN CARMICHAEL (#6522)  
BUGDEN, COLLINS & MORTON, L.C.  
4021 South 700 East, #400  
Salt Lake City, UT 84107  
Telephone: (801) 265-1888

Attorneys for Plaintiffs

**FILED DISTRICT COURT**  
Third Judicial District

AUG 12 1999  
SALT LAKE COUNTY  
By  Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

LESLIE ALDER, nka LESLIE	:	ORDER DENYING DEFENDANT'S
ROBERTS, and JACKIE JONES,	:	MOTION FOR SUMMARY JUDGMENT,
	:	ESTABLISHING THAT THIS IS A
Plaintiffs,	:	NEGLIGENCE CASE ONLY, AND
	:	SETTING DISCOVERY AND OTHER
-v-	:	DATES
	:	
BAYER CORPORATION, AGFA	:	
DIVISION,	:	Case No. 95-090-7675
	:	Judge Stephen L. Henriod
Defendant.	:	

Defendant's Motion for Summary Judgment came before the Court (the Honorable Stephen L. Henriod) on June 23, 1999. Peter C. Collins and Jacquelynn Carmichael represented plaintiffs. Elizabeth S. Conley and Stephen G. Traflet represented defendant.

Having considered that Motion and the pertinent memoranda and other papers on file, having heard and considered the representations and arguments of counsel, and being fully advised in the premises, the Court hereby DENIES defendant's Motion for Summary Judgment to the extent that the Motion seeks dismissal of claims for negligence.

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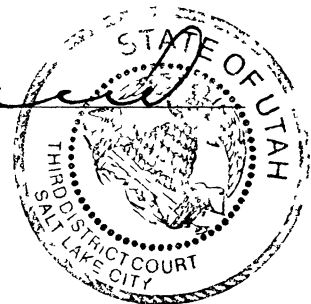
The Court also ORDERS, pursuant to plaintiffs' counsel's acknowledgment that no claim of "product defect" or strict liability is being asserted in this action, and by reason of the fact that such claims would be barred by the relevant statute of limitations set forth in Utah Code Ann. §78-15-3, that this case will deal, with respect to plaintiffs' theories of recovery, only with principles of negligence, including but not limited to those having to do with "products," and that Utah Code Ann. §§78-15-1, et seq., does not apply to this case.

The Court further ORDERS (plaintiffs having already designated retained experts and treating health care providers whom plaintiffs plan to call as expert witnesses at trial) that defendant shall designate expert witnesses whom defendant plan to call at trial no later than August 27, 1999; that all discovery shall be concluded by November 30, 1999; and that any and all dispositive motions shall be filed by or before December 15, 1999.

ENTERED this 18 day of August, 1999.

BY THE COURT:

  
STEPHEN L. HENRIOD  
District Judge



CERTIFICATE OF SERVICE

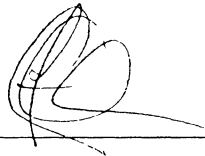
I hereby certify that, on the 30<sup>th</sup> day of July, 1999, I caused to be served a true and correct copy of the foregoing proposed Order Denying Defendant's Motion for Summary Judgment, Establishing that this is a Negligence Case Only, and Setting Discovery and Other Dates by the method indicated below, and addressed to the following:

Elizabeth S. Conley  
William J. Stilling  
PARSONS BEHLE & LATIMER  
201 South Main Street, #1800  
Post Office Box 45898  
Salt Lake City, UT 84145-0898

<input type="checkbox"/>	HAND DELIVERY
<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	OVERNIGHT MAIL
<input checked="" type="checkbox"/>	TELECOPY (FAX)
	(536-6111)

Steven G. Traflet  
TRAFLET & FABIAN  
Carriage Court Two  
264 South Street  
Morristown, NJ 07960

<input type="checkbox"/>	HAND DELIVERY
<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	OVERNIGHT MAIL
<input checked="" type="checkbox"/>	TELECOPY (FAX)
	(973-631-6226)



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Tab B

OCT 4 2000

SALT LAKE COUNTY

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

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.*



*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"<sup>1</sup>. 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

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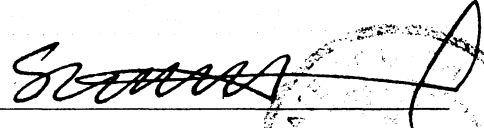
<sup>1</sup>In addition to MCS, Dr. Deborah Robinson, diagnosed both plaintiffs with chronic fatigue syndrome and fibromyalgia while Dr Janiece Pompa diagnosed plaintiff Jones with cognitive deficits. These diagnoses appear to essentially be MCS couched in different terms. Plaintiffs own experts admits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

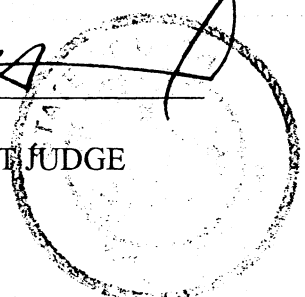
(1997), *Collins v Welch* 178 Misc.2d 107, *Treadwell v Dow-United Technologies* 970 F. Supp 974 (M.D.Ala. 1997). Furthermore, numerous medical organizations, including the American Medical Association, refuse to accept MCS as a valid and reliable diagnosis. After careful consideration, this Court concludes 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 <sup>oct.</sup> day of July, 2000.

BY THE COURT:

  
DISTRICT COURT JUDGE



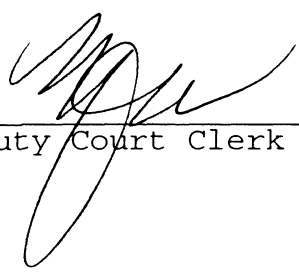
CERTIFICATE OF NOTIFICATION

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 Oct, 2000.

  
\_\_\_\_\_  
Deputy Court Clerk