SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2006-CA-01128

MILTON WATTS,
Appellant,

vs.

RADIATOR SPECIALTY COMPANY and
UNITED STATES STEEL CORPORATION,
Appellees.

Appeal from Smith County Circuit Court
Case No. 2002-364

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

TO THE HONORABLE COURT:

Appellant, Milton Watts, files this reply brief, pursuant to Mississippi Rule of Appellate Procedure 28(c), in support of his appeal of the trial court's judgment. For clarity, Appellant will be referred to as "Plaintiff," or "Mr. Watts"; and Appellees will be referred to collectively as Defendants, or individually as "Radiator Specialty" and "U.S. Steel," in accordance with MISS.R.APP.P. 28(d).

Appellant files this combined reply brief to Radiator Specialty's and U.S. Steel's individual Appellees' briefs.

REPLY POINTS

I. Because neither Radiator Specialty nor U.S. Steel objected to Dr. Levy's pancytopenia testimony at trial, or challenged the jury's finding of pancytopenia, Mr. Watts is entitled to judgment on that unchallenged finding.

II. All of Defendants' complaints about Dr. Levy's testimony go to the weight, not the admissibility, of his opinions.

III. Mr. Watts's claims are not barred by limitations.

IV. Mr. Watts's claims are not preempted.

V. Mr. Watts met his burden on his product-defect claim.

SUMMARY OF THE ARGUMENT

Dr. Levy testified that Milton Watts suffered from pancytopenia as a result of his exposure to benzene. Neither Defendant objected to that trial testimony. The jury found that Defendants caused Mr. Watts's "illness or disease," which includes his diagnosis of pancytopenia. Neither Defendant challenged that finding.

In their briefs, Defendants simply ignore the fact that Dr. Levy's pancytopenia conclusions were adduced at trial *without objection*. And, they gloss over their failure to challenge the jury's broad finding that their conduct caused Mr. Watts's "illness or injury." Because Defendants failed to properly challenge the jury's finding and the evidence that supports it, the trial court erred in granting judgment NOV.

With regard to Dr. Levy's testimony about Mr. Watts's non-Hodgkins lymphoma, all of Defendants' complaints go to the weight, not the admissibility, of Dr. Levy's opinions. Thus, the trial court erred in its adoption of Defendants' complaints, in its post-judgment striking of Dr. Levy's testimony, and in its entering judgment NOV in Defendants' favor.

Finally, Mr. Watts's claims are not barred by limitations, and they are not preempted. As demonstrated below, reversal of the trial court's judgment NOV is proper.

ARGUMENT

I. Because neither Radiator Specialty nor U.S. Steel objected to Dr. Levy's pancytopenia testimony at trial, or challenged the jury's finding of pancytopenia, Mr. Watts is entitled to judgment on that unchallenged finding.

As demonstrated in Appellant's Brief, the jury was instructed to answer a broad question: Did Defendants cause Mr. Watts's "illness or disease"? APPELLANTS' BRIEF at p. 10. The jury was not narrowly instructed to answer only whether Defendants caused Mr. Watts's non-Hodgkins lymphoma. The jury found for Mr. Watts, and answered that Defendants had caused his "illness or disease."

Neither Defendant disputes that Mr. Watts suffered from both lymphoma and pancytopenia. PEX 62 (Clay 00000060, Bone Marrow Interpretation; Clay 00000030, Progress Note of 7/25/2000). Thus, the "illness or disease" found by the jury included both lymphoma and pancytopenia.

Pancytopenia is the depression of the red blood cells, the white blood cells, and the platelets. TR. 564. While the depression of all three is collectively referred to as "pancytopenia," the individual depression of each is referred to as thrombocytopenia, leukopenia, and anemia. *Id.*

Dr. Levy testified at trial that there is no "debate within the medical and scientific community as to whether or not benzene exposures can cause pancytopenia." TR. 565. And, he testified that "the depression of all three elements of the blood [pancytopenia] was caused by his exposure to benzene." *Id.*

Perhaps it is because it is undisputed within the medical and scientific community that benzene causes pancytopenia that neither Radiator Specialty nor U.S. Steel timely objected to Dr. Levy's testimony when it was offered at trial. *See* TR. 565-66 (Dr. Levy's pancytopenia conclusion offered without objection by Radiator Specialty or U.S. Steel). Likewise, because the relationship between pancytopenia and benzene exposure is undisputed within the medical and scientific community, neither Defendant offered any evidence to the contrary.

Defendants would have been hard pressed to come up with any evidence challenging Dr. Levy's pancytopenia testimony, as their own documents reflect the relationship between benzene exposure and pancytopenia. Indeed, a document from U.S. Steel's own medical library reflects that, as early as 1939, benzene exposure was known to cause "hematologic findings" of "anemia, leukopenia, thrombocytopenia," *e.g.*, pancytopenia. USS EX-4 at p. 28.[1] The same document reveals that, in 1956, a clinical study revealed that 21% (31/147) of workers exposed to benzene for more than 10 years developed pancytopenia. *Id.* at p. 33. Moreover, U.S. Steel's "Safety Data Sheet for Raffinate" acknowledges that benzene exposure may "produce blood cell deficiencies that can result in death." PEX 4 at p. 6.

Having wholly failed to object to Dr. Levy's testimony about pancytopenia when he offered it, and having failed to offer any evidence to controvert it, Defendants now maintain they adequately challenged Dr. Levy's testimony "pretrial, during trial, and post-trial." U.S.

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[1] "Criteria for a Recommended Standard . . . . Occupation Exposure to Benzene," U.S. Department of Health, Education, and Welfare.

STEEL'S BRIEF at p. 11; RADIATOR SPECIALTY'S BRIEF at p. 40-41. A review of the record demonstrates otherwise.

It is undisputed that neither Defendant objected during trial when Dr. Levy was asked about Mr. Watts's pancytopenia and what caused it. TR. 565-66. Unable to point to a proper trial objection to Dr. Levy's pancytopenia testimony, Defendants cite instead to: (1) their pretrial motions to strike Dr. Levy's non-Hodgkins lymphoma testimony; (2) their trial objection to Dr. Levy's non-Hodgkins lymphoma testimony; and (3) their post-trial attempts to resurrect a trial objection about pancytopenia that neither Defendant made. R. 1521, 1530; TR. 557-58, 734; R. 2256, 2425.

The problem for Defendants is that neither specifically objected to Dr. Levy's conclusion that Mr. Watts's exposure to Defendants' products caused his pancytopenia.[2] By failing to specifically object to Dr. Levy's pancytopenia testimony, Defendants waived their complaints regarding his methodology and the reliability of his conclusions. MISS.R.EVID. 103(a); *Canadian Nat'l/Illinois Central R.R. Co.*, 953 So.2d 1084, 1096-97 (Miss. 2007). *See also Univ. Of Miss. Med. Center v. Peacock*, 2006 WL 3199492 at ¶ 14 (majority op.), at ¶ 58 (dissenting op.) (Miss.Ct.App. 2006).

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[2] U.S. Steel even acknowledges in its brief that it did not "specifically mention Dr. Levy's opinion regarding pancytopenia" in its pretrial motion to strike. U.S. STEEL'S BRIEF at p. 11 n. 8.

Moreover, contrary to Defendants' assertions, when the trial court struck Dr. Levy's testimony post-trial, it did not strike his unobjected-to conclusions regarding pancytopenia. Rather, it expressly struck only the conclusions to which Defendants had specifically objected – those relating to whether Mr. Watts's benzene exposure caused his non-Hodgkins lymphoma. R. 2487 (concluding only that Dr. Levy's opinions regarding a causal connection between benzene and non-Hodgkin's lymphoma failed to satisfy *Daubert*); R. 2489 (concluding, "particularly," that "neither the cohort studies nor the case control studies relied upon by Dr. Levy at trial supported his opinion that a causal connection exists between benzene exposure and non-Hodgkin's lymphoma.") As Defendants have conceded that they never specifically mentioned pancytopenia in their objections to Dr. Levy's testimony, they cannot seriously assert that the trial court struck Dr. Levy's testimony based upon those "unmentioned" objections.

In sum, having heard Dr. Levy's unobjected-to and uncontroverted testimony, the jury found that Mr. Watts's benzene exposure caused his "illness or disease." Neither Defendant challenged that finding. *See* RADIATOR SPECIALTY'S MOTION FOR JUDGMENT NOV at p. 2 ¶¶ 6-8; U.S. STEEL'S MOTION FOR JUDGMENT NOV at p. 1-3; 16 CR 2256-58.

Because neither defendant challenged the jury's finding that Defendants caused Mr. Watts's "illness or disease," pancytopenia, and because the undisputed evidence supports the jury's finding that Defendants did cause his pancytopenia, the trial court could not set aside the jury's finding. *Allgood v. Allgood*, 473 So.2d 416, 421 (Miss. 1985); *Herrington v. Spell*,

692 So.2d 93, 99 (Miss. 1997). Likewise, the trial court could not properly enter judgment NOV, contrary to the jury's verdict. *See Busick v. St. John*, 856 So.2d 304, 307 (Miss. 2003). Thus, reversal and rendition on the jury's verdict is proper. *See Amsouth Bank v. Gupta*, 838 So.2d 205, 222 (Miss. 2003) (reversing and remanding for new trial on compensatory damages only because of unappealed liability finding).

II. All of Defendants' complaints about Dr. Levy's testimony go to the weight, not the admissibility, of his opinions.

As they did in the trial Court, Defendants continue their attacks on Dr. Levy and his testimony regarding whether benzene exposure causes non-Hodgkins lymphoma. They rely heavily on other cases in which Dr. Levy's testimony was excluded. RADIATOR SPECIALTY'S BRIEF at p. 19. They note that his opinions contradict those of others. *Id.* at p. 20. And, they complain about Dr. Levy's methodology, alleging that his conclusions are not based on sufficient data because they relate to benzene generally, not benzene-containing Liquid Wrench, specifically. *Id.* at 20.

While Defendants' complaints about Dr. Levy and his methodology may or may not be legitimate, they are the appropriate subject of cross-examination. They do not support the trial court's initial admission of and then post-judgment striking of Dr. Levy's testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) ("Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Primrose Oper. Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004) (questions

relating to bases of expert's opinion generally affect weight to be assigned to that opinion, rather than its admissibility and should be left for jury's consideration); *Slaughter v. Southern Talc Co.*, 919 F..2d 304, 306 (5th Cir. 1990) (same).

Evidentiary reliability is demonstrated by a showing that the knowledge offered is "more than speculative belief or unsupported speculation." *Daubert*, 509 U.S. at 590. Certainty, however, is not required. *Id.*

Here, Dr. Levy relied upon peer-reviewed literature and studies that are generally accepted by the scientific community. He reviewed the relevant data and compared his conclusions to both a control group and a cohort group. The trial court properly considered Dr. Levy's methodology and conclusions, found that he passed *Daubert* muster, and allowed his testimony. TR. 741-43.

The trial court's initial admission of Dr. Levy's testimony was proper. *Whitfield* v. *Tronox Worldwide LLC*, 2007 WL 2127298 *4 (N.D.Miss. July 23, 2007) (denying defendant's motion to strike and holding that the defendants' objections to the proffered expert's assumptions and to studies relied upon by the expert are "more appropriately the subject of cross-examination" and does not render the "analysis or testimony unreliable or invalid," but simply provides an issue "for the jury to weigh"). When the trial court reconsidered its decision post-trial, endorsed Defendants' challenges that go to the weight – not the admissibility of Dr. Levy's opinion – and struck Dr. Levy's testimony, the trial

court improperly invaded the province of the jury. *See Weathersby Chevrolet Co., Inc. v. Redd Pest Control Co., Inc.*, 778 So.2d 130, 136 (Miss 2001).

The jury considered all of the Defendants' complaints. Indeed, Defendants vigorously cross examined Dr. Levy, attacked his methodology, and attempted to undermine his credibility. The jury may have been persuaded by Defendants' challenges to Dr. Levy's testimony. The jury may have believed Defendants' assertions that Dr. Levy "mischaracterized the data in one of the studies." RADIATOR SPECIALTY'S BRIEF at p. 45. And, the jury may have believed Defendants' assertions that Dr. Levy is "plainly and simply, a medical gun-for-hire." RADIATOR SPECIALTY'S BRIEF at p. 44. Indeed, the jury may have rejected Dr. Levy's challenged testimony regarding the cause of Mr. Watts's non-Hodgkins lymphoma and properly found - based on his unchallenged testimony – that Defendants caused Mr. Watts's other "illness or disease," pancytopenia.

The point is, however, that Defendants' attacks on Dr. Levy's credibility and his characterization of peer-reviewed studies go only to the weight, not the admissibility of his opinions. Put simply, the trial court erred in deciding – post-judgment – that because it was not ultimately persuaded by Dr. Levy's testimony, the jury was precluded from considering it. The trial court's substituting of its judgment for that of the jury's was improper. *Weathersby*, 778 So.2d at 136.

III. Mr. Watts's claims are not barred by limitations.

MISS. CODE ANN. § 15-1-49(2) (Rev. 2002) provides for a special exception to the standard three-year statute of limitations for "latent injury or disease." *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47, 50 (Miss. 2005). "Knowledge that there exists a causal relationship between the negligent act and the injury or disease complained of *is essential* because 'it is well-established that prescription does not run against one who has neither actual nor constructive notice of the facts that would entitle him to bring an action." *Id.* (quoting *Sweeney v. Preston*, 642 So.2d 332, 334 (Miss. 1994)).

Defendants argue that, under the discovery rule, the 3-year limitations period of §15-1-49 began to run when Mr. Watts was diagnosed, even if he did not know of the causal connection between his injury until the 3-year limitation period had passed. U.S. STEEL'S BRIEF at p. 15-16. Thus, according to Defendants, Mr. Watts's limitation period began to run when he was diagnosed with non-Hodgkins lymphoma in 1999, even though he did not discover that his lymphoma may have been caused by his exposure to Liquid Wrench until 2001. *Id.* In support of their argument, Defendants rely on *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 709 (Miss. 1990).[3]

In *Edwards*, the Court held that an asbestos plaintiff's limitations period began to run on the date of his diagnosis of asbestosis. The Court stated, *in dicta*, that "though the cause of the injury and the causative relationship between the injury and the injurious act may also

[3] Defendants also cite two federal cases that construe *Edwards*'s holding. *Id.* at p. 16-17. As explained below, those cases are unpersuasive and are not controlling.

be ascertainable on this date, these factors are not applicable under § 15-1-49(2) as they are under MISS. CODE. ANN. § 15-1-36." *Id.* at 709.

Relying on the dicta in *Edwards*, Defendants argue that, after Mr. Watts's injury was diagnosed in 1999, he bore the burden to investigate and file his claim within the three-year statutory period immediately following his diagnosis. U.S. STEEL'S BRIEF at p. 18. Defendants' reliance upon the dicta in *Edwards* is misplaced and is not controlling.

Specifically, in relying upon a single sentence of dicta in *Edwards*, Defendants ignore this Court's repeated holdings that, under the discovery rule, "the focus is on the time that the patient discovers, or should have discovered by the exercise of reasonable diligence, that he probably has an actionable injury." *Neglen v. Breazeale*, 945 So.2d 988, 991 (Miss. 2006) (emphasis added.); *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47, 51 (Miss. 2005); *Wright v. Quesnel*, 876 So.2d 362, 366 (Miss. 2004). In other words, the plaintiff must have knowledge of the injury itself and the cause of the injury. *Williams v. Kilgore*, 618 So.2d 51, 54 (Miss. 1992). Indeed, knowledge of the causal relationship between the negligent act and the injury or disease complained of is essential because "it is well established that prescription does not run against one who has neither actual nor constructive notice of facts that would entitle him to bring an action." *Id.* at 55.

Defendants argue that these cited cases do not apply simply because they are medical malpractice cases. However, this Court's holding in *Schiro v. American Tobacco Co.*, 611

So.2d 962 (Miss. 1992), reflects that Defendants' attempt to distinguish the Court's medical malpractice cases from latent disease cases is unfounded.

In *Schiro*, the plaintiff – a smoker – was given multiple diagnoses in 1981. But, she was not actually diagnosed with cancer until 1982. When plaintiff sued, Defendants argued that all of the plaintiff's prior (pre-cancer) diagnoses demonstrated that plaintiff had an injury and a cause of action and, thus, limitations had begun to run with the pre-cancer diagnoses. This Court rejected that argument and held that the statute of limitations did not begin to run until the plaintiff "actually knew that she had cancer .... an injury connected with smoking." *Id.* at 965. Thus, even though *Schiro* was not a medical malpractice case, the Court fairly reasoned that, before limitations would begin to run, the plaintiff was required to know of both the injury (cancer) and its cause (smoking).

After *Edwards* and *Schiro*, the Mississippi Court of Appeals reached the same conclusion as the *Schiro* court in *Cannon v. Mid-South X-Ray Co.*, 738 So.2d 274 (Miss.Ct.App. 1999). In *Cannon*, a darkroom technician brought a personal-injury action against darkroom-chemical manufacturers. The tech began experiencing health problems within months of beginning her employment in 1976, but did not initially suspect that her health problems were related to her employment. 738 So. 2d at 275.

In 1983, the tech began having severe health problems. *Id.* Not until 1993, however, did she learn that her illness was associated with her exposure to workplace chemicals. *Id.*

When she learned of the association, the tech filed suit and the defendants sought and obtained summary judgment on limitations under § 15-1-49. *Id.*

The Court of Appeals reversed, holding "although [plaintiff] was aware that she was suffering from numerous illnesses and later thought that her problems might be connected with her employment, no doctor had definitively diagnosed her condition until February 9, 1993" and, thus, her injury did not accrue until that date, when her doctor diagnosed her problems "and the cause." *Id.* at. 277. Thus, in *Cannon*, the Court fairly reasoned that the limitations period did not begin to run until the plaintiff learned of her injury and its cause.

Like *Cannon*, the Fifth Circuit confirmed the holding in *Schiro* and relied upon it in *Kemp v. G.D. Searle & Co.*, 103 F.3d 405 (5th Cir. 1997). *Kemp* involved a claim relating to an intrauterine device (IUD). The trial court granted summary judgment on limitations and the Fifth Circuit affirmed. But, although the Fifth Circuit affirmed, in affirming it expressly noted that the limitations began to run when the plaintiff "knew of her injury and its cause. . . ." *Id.* at 409.

In a thorough opinion in which he considered and rejected the same arguments that Defendants make here, Judge Pickering confirmed the validity of the holdings in *Schiro*, *Cannon*, and *Kemp,* in *Jackson v. Phillips Building Supply of Laurel*, 246 F.Supp. 538 (S.D. Miss. 2003). In *Jackson*, Judge Pickering rejected expressly the very argument defendants make here, that the lone statement of dicta in *Edwards* supports their claim for summary judgment. 246 F.Supp. At 545-46. Judge Pickering's opinion and its holding – "that the

statute of limitations began to run when the plaintiff knew of her injury and its cause" – were most recently cited and adopted in *Beck v. Koppers, Inc.*, 2005 WL 2715910 (N.D. Miss. 2005). In *Beck*, Judge Pepper also rejected the same arguments that Defendants make here and held that "§ 15-1-49(2)'s discovery rule begins to run at the discovery of the injury and its cause." 2005 WL 2715910 *1 (emphasis added).[4]

The holdings in each of these opinions are consistent with the Court's repeated pronouncement that the focus in a limitations inquiry is when the plaintiff becomes aware that he has an "actionable injury." Here, the plaintiff discovered he had an actionable injury in 2001, when he learned that his exposure to Liquid Wrench may have caused him lymphoma. TR. 1047.

Defendants stringent interpretation that § 15-1-49 required Mr. Watts to file suit within three years of his diagnosis would require that Mr. Watts be charged with the knowledge of a trained scientist – that benzene may have caused his lymphoma – to trigger the limitations period.[5] 2005 WL 2715910 at *2. Not only is Defendants' construction harsh

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[4] In their briefs, Defendants do not discuss these cases but rely instead on *Wells v. Radiator Specialty Co.*, 413 F.Supp.2d 778 (S.D. Miss. 2006), and *Fowler v. First Chemical Corp.*, 2006 WL 2527317 (S.D. Miss. 2006). According to Defendants' arguments that no conclusion based on allegedly unsound methodology can be considered, then the conclusions in both of Defendants' cited cases should be rejected because their methodology is unsound, as both cases base their conclusions on misstatements of Mississippi law. *Wells* misstates the holding in *Schiro* as announcing that accrual occurs with the diagnosis of disease, irrespective of its cause. 413 F.Supp. 2d 782-8. Likewise, *Fowler* misstates the holding in *Cannon* as triggering accrual on diagnosis, irrespective of its cause. As demonstrated above, accrual under both *Schiro* and *Cannon* begins on the plaintiff's learning of the disease *and* its cause.

[5] Defendants try to impute scientific knowledge of causation to Mr. Watts while simultaneously contending there is still no scientific evidence that benzene causes lymphoma.

and contrary to the express purpose of the discovery rule, it would violate the Open-Courts provision of the Mississippi Constitution by taking away Mr. Watts's cause of action before he was aware it existed. *See Evans v. Boyle Flying Service, Inc.*, 680 So.2d 821, 827 (Miss. 1996) (concluding it would be an injustice to prevent a person's recovery "on a claim, *i.e.*, an injury for which redress is guaranteed by our Constitution and statutory law, by being barred by a limitation period . . . when they should not have reasonably known that damage had occurred); *see also* MISS. CONST. Art III, Section 24.

For all of these reasons, Mr. Watts's claim was not barred by the 3-year limitations period. Defendants' erroneous interpretation of § 15-1-49 should be rejected.

IV. Mr. Watts's claims are not preempted.

As set forth in Appellants' Brief, Mr. Watts's claims are not preempted by the FHSA and, therefore, the FHSA's labeling requirements do not apply. APPELLANTS' BRIEF at p. 29 *et seq.*. Specifically, Mr. Watts alleged that his exposure to benzene-containing Liquid Wrench occurred from 1947 until 1978. TR. 1016. This Court has expressly held that any claims arising pre-1966 are not preempted by the FHSA. *Pollard v. Sherwin Williams Co.*, 955 So.2d 764, 774 (Miss. 2007). Thus, none of Mr. Watts' claims for his pre-1966 exposure (1947-1966) are preempted, and none of his post-1966 exposure claims not based on a claim of non-compliance with the FHSA are preempted. *See Pollard*, 955 So.2d at 774-75.

Unable to distinguish *Pollard* (which is fatal to its preemption argument), U.S. Steel erroneously asserts instead that – in light of *Pollard* – Mr. Watts was required to limit his

failure-to-warn claims and his evidence to his pre-1966 exposure. Preemption, however, is an affirmative defense that Defendants bore the burden of pleading and proving. *Bank of Louisiana v. Aetna*, 468 F.3d 237, 242 (5th Cir. 2006). Thus, if Defendants wanted to avail themselves of the post-1966 protections of the FHSA, the burden was on the Defendants – not Mr. Watts – to request a limiting instruction, narrowing the jury's ability to find for Mr. Watts only for acts that occurred before 1966. MISS.R.EVID. 105 cmt.; *Freed v. Killman*, 6 So.2d 909, 910 (Miss. 1942). Having failed to object or request a limiting instruction, Defendants have waived any complaints about the admission of evidence relating to post-1966 acts, and cannot cure that waiver by attempting now to shift the burden to Mr. Watts.[6] *See Freed*, 6 So.2d at 910.

V. Mr. Watts met his burden on his product-defect claim.

As demonstrated in his opening brief, Mr. Watts met his burden of proving a product defect. APPELLANTS' BRIEF at p. 30 *et seq.* Specifically, he demonstrated that the warning was inadequate and that the design was defective. *See id.*; *see also* 8 CR 1052 *et seq.*; 16 CR 2374 *et seq.* Mr. Watts does not repeat those arguments here, but stands on his prior briefing and incorporates that briefing by reference here.

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[6] Additionally, as a bulk-supplier of a product that U.S. Steel admitted contains more than 5% benzene, U.S. STEEL'S BRIEF at p. 4, U.S. Steel cannot claim FHSA preemption. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1488 (11th Cir. 1994) (holding that FHSA requirements do not apply to bulk transfers, like U.S. Steel's transfers of raffinate to Radiator Specialty). *Hunnings* also reveals that U.S. Steel cannot prevail on its no-duty argument because it supplied an inadequate warning to Radiator Specialty. *Id.* at 1484-85; TR. 78 (Radiator Specialty would have taken different measures if U.S. Steel had provided it with the appropriate information, *i.e.*, an adequate warning).

Mr. Watts does, however, direct the Court to undisputed evidence that Defendants fail to address in their no-evidence challenges:

* Radiator Specialty was aware of the hazards of its benzene containing product, but continued to sell it anyway. TR. 61-62;

* U.S. Steel knew in 1962 that benzene exposure could damage blood, and was a potential cause of leukemia in 1948. TR. 15-52;

* U.S. Steel knew in 1967 that exposure to low-concentration vapors containing benzene could cause severe damage to blood-forming structures, but that U.S. Steel's Material Safety Data Sheet (MSDS) did not adequately reflect that fact. TR. 179;

* Radiator Specialty's cans of Liquid Wrench did not warn of the effects that benzene could have on the blood, and did not warn that those effects could lead to death. TR. 192;

* Radiator Specialty's Liquid Wrench container contained no statement regarding the use of a respirator or gloves or how to avoid the hazard associated with benzene. (TR. 261, Depo. of U.S. Steel Expert Carl Blechschmidt at p. 31-32); and

* An economically-feasible, safer alternative to benzene-containing Liquid Wrench existed as early as 1951, but Radiator Specialty continued to produce benzene-containing Liquid Wrench for almost 30 years. (TR. 99, Depo. Of James Wells at pp. 55-60.)

Additionally, Mr. Watts offered evidence that Defendants controvert, but which controverting evidence cannot be considered in this appeal of a judgment NOV. *Smith v. Parkerson Lumber, Inc.*, 888 So.2d 1197, 1202 (Miss. 2004). Considering Mr. Watts's undisputed evidence about what Defendants knew but failed to adequately warn about, and considering *only* Mr. Watt's evidence in support of his warning and defect claims, there is some evidence in the record to support the jury's findings. Judgment NOV was improper.

CONCLUSION

Mr. Watts's unchallenged finding of "illness or disease," that he had pancytopenia, is supported by undisputed evidence. Because of that unchallenged finding and undisputed evidence, reversal and rendition of judgment on the jury's verdict is proper.

Additionally, the trial court erred in excluding Dr. Levy's testimony *after* the jury returned a verdict and *after* initially entering judgment in plaintiff's favor. That error requires reversal and rendition of judgment on the jury's verdict.

Finally, there is no alternative basis for the trial court's rendition of judgment NOV in Defendants' favor. Therefore, plaintiff respectfully requests that the Court reverse and render judgment on the verdict and grant him all other relief to which he may be entitled.

Respectfully submitted,

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Certificate of Service

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