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 BRIEF

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APPELLANT REQUESTS ORAL ARGUMENT

No. 2006-CA-01128

Milton Watts vs.
Radiator Specialty Company and United States Steel Corporation

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Milton Watts, Appellant.

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5. Radiator Specialty Company, Appellee.

6. United States Steel Corporation, Appellee.

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This 18th day of July, 2007.

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APPELLANT'S BRIEF

TO THE HONORABLE COURT:

Appellant, Milton Watts, files this brief 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). For brevity, references to the Clerk's Record will be "volume CR page"; and references to the Reporter's Transcript will be "TR. page."

STATEMENT OF ISSUES

I. Whether the trial court erred in granting judgment NOV after excluding the causation testimony regarding Mr. Watts's non-Hodgkins lymphoma when an alternative, unchallenged finding that Defendants caused his pancytopenia supports the jury's verdict and judgment in plaintiff's favor.

II. Whether the trial court erred in its post-verdict striking of the plaintiff's expert's causation testimony regarding Mr. Watts's non-Hodgkins lymphoma, and in granting judgment NOV in defendants' favor, based on that post-verdict striking of the expert's testimony.

III. Whether reversal and rendition of judgment on the jury verdict is proper since the trial court erred in granting judgment NOV and there is no alternative basis for affirming the trial court's take-nothing judgment.

STATEMENT REGARDING ORAL ARGUMENT

This appeal turns on whether the trial court improperly invaded the province of the jury when it disregarded the plaintiff's expert's causation testimony after the jury had returned a verdict in the plaintiff's favor. This case involves the disputed issue of whether benzene exposure can cause non-Hodgkins lymphoma. Because the issue in this appeal involves construing complex scientific testimony that was initially accepted by the trial court and was then excluded after the verdict, appellant believes that oral argument would assist the Court in its disposition of this appeal.

STATEMENT OF THE CASE

Plaintiff filed this suit to recover for injuries that he suffered as a result of his exposure to benzene. Defendants sought summary judgment and sought to strike Plaintiff's causation expert, Dr. Levy. The trial court denied Defendants' motions for summary judgment and denied their motions to strike Dr. Levy.

The case was tried to a jury. At trial, Defendants sought a directed verdict, again challenging Dr. Levy's testimony. The trial court denied Defendants' requests and submitted the case to the jury.

The jury returned a verdict in Plaintiff's favor and the trial court entered judgment on the verdict, awarding plaintiff $1,700,000.[1] Defendants filed a motion for judgment NOV and, alternatively, requested a new trial. The trial court granted Defendants' request for judgment NOV, adopting their arguments regarding Dr. Levy's causation testimony.[2] The trial court then signed a separate judgment, denying Plaintiff any relief and dismissing his suit with prejudice.[3]

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1 RECORD EXCERPT 2.

2 RECORD EXCERPT 3.

3 RECORD EXCERPT 4.

STATEMENT OF FACTS

The Plaintiff, Milton Watts

The plaintiff, Milton Watts, was born in Decalb, Mississippi. TR. 1012. At the time of trial, Mr. Watts was 72 years old, and had been married to his wife, Lea, for 34 years. *Id.* Mr. Watts worked various jobs in his work career. He served in the military from 1949-1953. TR. 1017. He attended vocational school and trained to become a mechanic. TR. 1014. From 1953-1961, he worked various jobs at service stations, a packing company, and as an exterminator. TR. 1019. He consistently worked as a mechanic from 1953-1961. TR. 1020. In 1970, Mr. Watts began working at Masonite. TR. 1030. He worked at Masonite for 26 years, until 1996, when he retired. TR. 1044.

The Product – Liquid Wrench – and Mr. Watts's Use of the Product

Throughout his work career, Mr. Watts used a solvent called Liquid Wrench. Liquid Wrench was used to clean up – it was the solvent of choice – and was the only product on the market when Mr. Watts started using it. TR. 1021. Mr. Watts first used Liquid Wrench in 1947, during his vocational training to become a mechanic. TR. 1016.

Mr. Watts used Liquid Wrench several times a day for years. TR. 1022, 1023, 1042. He used it at Masonite when he worked on locomotives. TR. 1040. He cleaned parts with it, sometimes for hours at a time. TR. 1042, 1057. He used it in small, contained spaces. TR. 1041. And, he used it on hot surfaces. TR. 1095. As a result, when he used Liquid Wrench, he would get it on his skin. TR. 1117. When Mr. Watts used Liquid Wrench, he

did not wear gloves or a respirator because no one told him he should. TR. 1123. Had he been warned that Liquid Wrench could harm him, he would have worn gloves and a respirator. TR. 1125.

The Defendants, Radiator Specialty and U.S. Steel

Radiator Specialty manufactured Liquid Wrench, which was made with a solvent – raffinate – that contained benzene. JW Depo. 49.[4] Radiator Specialty purchased the benzene-containing raffinate from U.S. Steel.[5] *Id.* at 50. Specifically, U.S. Steel produced rafinnate at its Clairton Works plant, and Radiator Specialty purchased the raffinate from U.S. Steel the mid-1950s. TR 188, 235; JG Depo. 38.[6] From 1967-1978, virtually all of the benzene-containing raffinate that U.S. Steel sold it sold to Radiator Specialty. TR. 236.

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[4] Mr. Wells's deposition was offered into evidence during trial. TR. 99. The offers will be referred to as JW Depo. page number.

[5] U.S. Steel may have been another legal entity at the time of the purchase of the raffinate, but it stipulated pretrial that it is the proper party defendant. TR. 2.

[6] Mr. Graeber's deposition was offered into evidence during trial. TR. 274. The offers will be referred to as JG Depo. page number.

Radiator Specialty began producing benzene-containing Liquid Wrench with U.S. Steel's raffinate in 1941.[7] *Id.* at 47. The benzene concentration in Liquid Wrench varied from 7-30%. TR. 813.

The Dangers Associated With Radiator Specialty's Benzene-Containing Liquid Wrench

Neither Radiator Specialty nor U.S. Steel disputes that benzene exposure can cause serious problems that may result in death, TR. 192 (Johh Masaitis, U.S. Steel's corporate representative); damage to blood-forming organs, like bone barrow, TR. 202, 227 (Masaitis); anemia, TR. 252 (Masaitis); cancer, TR. 250 (Masaitis); leukemia, TR. 1199 (Dr. Phillip Cole, Defendants' expert epidemiologist). And, no one disputes that benzene exposure causes pancytopenia, which is a forerunner of lymphoma, and which Mr. Watts suffered from in addition to his non-Hodgkins lymphoma.[8] TR. 565 (Dr. Barry Levy, plaintiff's expert epidemiologist; TR. 1290 (Dr. Cole, Defendants' epidemiologist). Indeed, the API Toxicological Review of 1948 confirmed that benzene exposure could result in "a reduction

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[7] James Wells, a former employee of and trial consultant for Radiator Specialty testified that Liquid Wrench contained benzene beginning in 1941, and also testified that it contained benzene beginning in 1951. JW Depo. at 47, 60. Later, he testified that Radiator Specialty did not begin using Raffinate in its products until 1960. TR. 1345. Construing this evidence in the plaintiff's favor, as the standard of review requires, then 1941 is the year in which Liquid Wrench is construed to have begun containing benzene. *See Medley v. Carter*, 234 So.2d 334, 335 (Miss. 1970).

[8] As set forth below, defendants challenged Dr. Levy's opinions and conclusions that Mr. Watts's non-Hodgkins lymphoma was caused by his exposure to benzene. They did not challenge his assertion that benzene exposure causes pancytopenia.

in red-cell, white-cell, or platelet levels – in any two of these, or in all three" – pancytopenia. PEX 1 at p. 3-4 (API Toxicological Review, Benzene, 1948).

What the parties contested was whether Mr. Watts's non-Hodgkins lymphoma was caused by his benzene-containing Liquid Wrench exposure. Plaintiff's expert epidemiologist, Dr. Levy, testified that Mr. Watts's benzene exposure caused *both* his non-Hodgkins lymphoma and his pancytopenia. TR. 563, 565 (Dr. Levy). Defendants' expert epidemiologist, Dr. Cole, testified to the contrary, asserting that there was no relationship between Liquid Wrench or benzene and non-Hodgkins lymphoma. TR. 1210. Dr. Cole, however, did not controvert Dr. Levy's opinion that benzene exposure causes pancytopenia. *See* TR. 1290.

After hearing the testimony of Drs. Levy and Cole, the jury found that Defendants' conduct caused Mr. Watts's "illness or disease." 16 CR 2253 *et seq.*; "Jury Instruction No. ___," at RECORD EXCERPT 5. The jury thus determined that the following parties were liable for Mr. Watts's "illness or disease":

Watts's former employers:	15%
Radiator Specialty Co.:	40%
U.S. Steel:	45%
Total:	**100%**

16 CR 2254-55.

After initially entering judgment on the jury verdict, the trial court granted Defendants' request for judgment NOV, based *solely* on their challenges to Dr. Levy's conclusions that Mr. Watts's exposure to benzene caused his non-Hodgkins lymphoma. 17 CR 2487-88. The trial court then entered a take-nothing judgment against plaintiff. Plaintiff prosecutes this appeal of the trial court's take-nothing judgment following its granting of judgment NOV in Defendants' favor.

STANDARD OF REVIEW

In determining whether the trial court erred in granting a judgment NOV, this Court considers the evidence in the light most favorable to the non-moving party – the plaintiff – and gives them the benefit of all favorable inferences that may be reasonably drawn from the evidence. *General American Life Ins. Co. v. McCraw*, 2007 WL 1631053 *1 (Miss. 2007). The Court considers the evidence offered by the plaintiff and any uncontradicted evidence offered by the defendants. *Smith v. Parkerson Lumber, Inc.*, 888 So.2d 1197, 1202 (Miss. 2004) (citing *Corley v. Evans*, 835 So.2d 30 (Miss. 2003)). If the considered evidence is sufficient to support a verdict for the plaintiff, reversal of the judgment NOV is proper. *See id.*

The Court reviews the trial court's decision to allow or disallow evidence, including expert testimony, by applying an abuse of discretion standard. *Webb v. Braswell*, 930 So.2d 387, 396-97 (Miss. 2006).

SUMMARY OF THE ARGUMENT

It is undisputed that Milton Watts was diagnosed with: (1) pancytopenia; and (2) non-Hodgkins lymphoma. The jury was broadly instructed to find whether Defendants caused Mr. Watts's "illness or disease." The jury found Defendants did and returned a verdict in Mr. Watts's favor.

After initially entering judgment on the verdict, the trial court granted Defendants' request for judgment NOV *solely* on the ground that plaintiff's expert's causation testimony regarding his non-Hodgkins lymphoma did not meet *Daubert* and should have been excluded. Defendants did not challenge, and the trial court did not exclude, the expert testimony that benzene exposure caused Mr. Watts's pancytopenia. Because pancytopenia is an "illness or disease" that the jury found was caused by Defendants' conduct, and because Defendants did not challenge that finding, that unchallenged finding supports a judgment in Mr. Watts's favor. Thus, reversal and rendition of judgment on the jury verdict is proper.

Alternatively, the trial court erred in determining *after* the jury had returned a verdict, and *after* the trial court had entered judgment on the verdict, that the plaintiff's expert's testimony should have been excluded under *Daubert*. Because the trial court erroneously excluded plaintiff's expert's testimony after the verdict, reversal and rendition of judgment on the jury verdict is proper for that reason, too. No other ground asserted by Defendants supports their request for judgment NOV. Thus, this Court should reverse and render judgment on the jury verdict.

ARGUMENT I

Whether the trial court erred in granting judgment NOV after excluding the causation testimony regarding Mr. Watts's non-Hodgkins lymphoma when an alternative, unchallenged finding that Defendants caused his pancytopenia supports the jury's verdict and judgment in plaintiff's favor.

Findings of fact that are supported by credible evidence may not be set aside. *Allgood v. Allgood*, 473 So.2d 416, 421 (Miss. 1985); *see also Herrington v. Spell*, 692 So.2d 93, 99 (Miss. 1997), *overruled on other grounds*, *Whittington v. Mason*, 905 So.2d 1261, 1266 (Miss. 2005). When a jury has returned a verdict in a civil case, the court is not at liberty to direct that judgment be entered contrary to the jury's verdict unless no reasonable, hypothetical juror could have found as the jury did. *Busick v. St. John*, 856 So.2d 304, 307 (Miss. 2003). Moreover, the issue of causation is generally one that is determined by the jury, not by the court as a matter of law. *Id.*

Here, the jury was instructed to answer a broad question: Did Defendants cause Mr. Watts's "illness or disease"? The jury was not instructed to answer 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.

The evidence reflects that Mr. Watts had a dual diagnoses. Specifically, the notes of his treating physician, Dr. Clay, reflect that Mr. Watts suffered from both lymphoma and pancytopenia. PEX 62 (Clay 00000060, Bone Marrow Interpretation; Clay 00000030, Progress Note of 7/25/2000). His multiple diagnoses made the treatment of his lymphoma

more difficult. Indeed, his persistent pancytopenia delayed his chemotherapy. PEX 62 (Clay 00000052, Letter of 5/3/99). In short, it is undisputed that Mr. Watts suffered from both lymphoma and pancytopenia.

Dr. Levy, plaintiff's expert epidemiologist, reviewed Mr. Watts's medical records and the depositions of his treating physicians. TR. 561. Dr. Levy confirmed from his review that Mr. Watts had both non-Hodgkins lymphoma and pancytopenia. TR. 563-64. Dr. Levy described both. He explained that non-Hodgkins lymphoma is a "type of cancer," which is part of a number of "blood cancers." TR. 563. Pancytopenia, on the other hand, is a "disease or condition where the elements of the blood, the red blood cells, the white blood cells, the platelets which help the blood to clot are depressed, are lower in number." TR. 564. Those three depressed counts of platelets, white, and red bloods cells are collectively referred to as pancytopenia.[9] *Id.*; PEX 1 at p. 3-4 (API Toxicological Review, Benzene, 1948).

With regard to what caused Mr. Watts's pancytopenia, Dr. Levy testified as follows:

Q. You formed any opinion as to what role, if any, Mr. Watts' benzene exposure had on his development of pancytopenia?

A. Yes.

Q. What is your opinion?

A. That – again to a reasonable degree of medical and scientific probability, Mr. Watts' pancytopenia, the depression of all three elements of the blood was caused by his exposure to benzene.

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[9] Individually, they are referred to as thrombocytopenia, leukopenia, and anemia. *Id.* Dr. Levy's testimony regarding the three is confirmed by Mr. Watts's medical records. PEX 62 (Clay 00000030, Progress Note of 7/25/2000).

Q. Is there any debate within the medical and scientific community as to whether or not benzene exposures can cause pancytopenia?

A. No, there's not.

TR. 565.

Neither Radiator Specialty nor U.S. Steel challenged Dr. Levy's conclusion that Mr. Watts's pancytopenia was caused by his exposure to benzene. And, neither party offered any evidence to the contrary. Thus, that Mr. Watts was diagnosed with a "disease" – pancytopenia, and that his disease was caused by benzene exposure was undisputed.

After considering this undisputed evidence that Mr. Watts had pancytopenia, which was caused by his benzene exposure, the jury properly found that Defendants' conduct caused Mr. Watts's "illness or disease." In their motions for judgment NOV, 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*, 473 So.2d at 421; *Herrington*, 692 So.2d at 99. 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).

ARGUMENT II

Whether the trial court erred in its post-verdict striking of the plaintiff's expert's causation testimony regarding Mr. Watts's non-Hodgkins lymphoma, and in granting judgment NOV in defendants' favor based on that post-verdict striking of the expert's testimony.

1. The Modified *Daubert* Standard.

This Court adopted the modified *Daubert*[10] standard in *Mississippi Transp. Comm'n v. McLemore*, 863 So.2d 31, 35 (Miss. 2003). Applying this standard, the Court reviews the trial court's post-trial decision to exclude Dr. Levy's causation testimony regarding Mr. Watts's non-Hodgkins lymphoma for an abuse of discretion. Rule 702 addresses the admissibility of expert testimony:

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MISS. R. EVID. 702.

Under Rule 702, expert testimony is admissible if it withstands a two-pronged inquiry. First, the witness must be qualified by virtue of his knowledge, skill, experience or education.

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[10] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), as modified in *Kumho Tire Co. v. Carmichael*, 526 U.S.137 (1999).

McLemore, 863 So.2d at 35. Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. *Id.* In other words, the witness must be qualified, and his testimony must be both relevant and reliable. *Id.*; *Webb v. Braswell*, 930 So.2d 387, 397 (Miss. 2006).

The proponent of the testimony must show that the expert did not base his conclusions on opinions or speculation, but on scientific methods and procedures. *Webb*, 930 So.2d at *id.* To be relevant[11] and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue. *Id.*

This Court has noted that, in *Daubert*, the United States Supreme Court adopted a non-exhaustive, illustrative list of reliability factors for determining admissibility of expert testimony. *McLemore*, 863 So.2d at 36. Those factors include: (1) whether the theory or technique can and has been tested; (2) whether it has been subjected to peer review and publication; (3) whether, in a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community. *Id.* at 37. The focus of those factors is on the principles and methodology, not on the conclusions they generate. *Id.* at 37. The reliability inquiry contemplated by Rule 702 is a flexible one. *Id.*

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[11] As Dr. Levy's testimony goes to general and specific causation, it is undisputed that it is relevant. MISS. R. EVID. 402.

2. The Application of the Modified *Daubert* Standard To Dr. Levy's Testimony.

A. Dr. Levy is well-qualified.[12]

Dr. Levy is a medical doctor who graduated from Cornell Medical School. TR. 530. Dr. Levy also received a Master's Degree in Public Health from Harvard. *Id.* He is board certified in internal medicine and preventive and occupational medicine. Tr. 531. He is the former President of the American Public Health Association. TR. 559.

Dr. Levy's first job was as an epidemiologist for the Centers for Disease Control (CDC). TR. 532. He was at the CDC from 1973-1976. TR. 533. He joined the faculty of the University of Massachusetts after leaving the CDC and began teaching, doing research, and clinical work. TR. 539. He has worked for the United States government in Kenya. TR. 540-41.

Since 1992, he has been a faculty member of Tufts Medical School in Boston. TR. 541. He divides his time between teaching at Tufts, writing articles and editing books, and serving as a consultant. TR. 542-43. Dr. Levy has edited 16 books and monographs, roughly half of which have dealt with occupational and environmental health. TR. 543. Additionally, Dr. Levy has published more than 100 articles in journals and book chapters. TR. 543. Dr. Levy's latest book, of which he was Senior Editor, is called "Preventing

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[12] Unable to challenge Dr. Levy's qualifications to testify, Defendants repeatedly attempted to persuade the Court that his testimony in this case should be excluded because other courts had excluded his testimony in other, unrelated matters. Of course, whether Dr. Levy's testimony in other cases had been permitted is not relevant to the only issue ruled upon by the trial court in this case – whether his methodology was sound and his conclusions reliable.

Occupational Disease and Injury." *Id.* It contains a chapter on both non-Hodgkins lymphoma and Hodgkins lymphoma. *Id.*

Defendants objected to Dr. Levy's qualifications. The trial court, however, rejected their complaints and stated, "clearly he meets the qualifications, in my mind anyway, to be declared as an expert in, quote, epidemiology." TR. 536. The trial court then accepted Dr. Levy as "an expert in the fields of occupational medicine and epidemiology. . . ." TR. 538.

Dr. Levy is well qualified. Defendants' objections to his qualifications were baseless. And, the trial court correctly accepted Dr. Levy's qualifications to render causation opinions. *See Rushing v. Kansas City S. Ry.*, 185 F.3d 496, 507 (5th Cir. 1999) (holding that so long as some reasonable indication of qualification is offered, the testimony can be admitted and the expert's qualifications become an issue for the trier of fact, not the court); *see also Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3rd Cir. 1996) (holding that it would be an abuse of discretion to exclude testimony simply because court does not believe proposed expert is best qualified or has the most appropriate specialization). Plaintiff met the first prong of the modified *Daubert* standard.[13]

B. Dr. Levy's methodology is reliable and his opinions on general and specific causation were improperly excluded after the jury returned its verdict.

Dr. Levy offered opinions as to both general and specific causation. With regard to his causation testimony, Dr. Levy testified that he used two methodologies that "are standard

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[13] Even though the trial court later held that Dr. Levy's conclusions should have been excluded, the court did not hold that Dr. Levy was not qualified to render his opinions. 17 CR 2488-89.

methodologies that all doctors and epidemiologists use." TR. 560. To make his assessment of general causation, *i.e.*, whether benzene causes non-Hodgkins lymphoma, Dr. Levy reviewed research studies and reports of research studies in the medical and scientific literature. TR. 560-61. He considered the studies both individually and as a group, by considering the pattern of findings from the studies. TR. 561. The information Dr. Levy relied upon to make his assessment on general causation was "the type reasonably relied upon by experts in [his] field." TR. 562.

In reaching his conclusions regarding specific causation, Dr. Levy considered Mr. Watts's medical records. TR. 561. He read Mr. Watts's deposition testimony, as well as the deposition testimony of two of Mr. Watts's treating physicians. *Id.* He reviewed the report and deposition of Mr. Frank Parker, the plaintiff's exposure expert. *Id.* He reviewed the pertinent and scientific literature. *Id.* And, he considered and referenced Mr. Watts's medical records. *Id.* Again, the information Dr. Levy relied upon to make his assessment on specific causation was "the type reasonably relied upon by experts in [his] field." TR. 562.

General Causation

Dr. Levy prepared two different summaries to demonstrate how he reached his general causation conclusions. TR. 567. Those summaries took the form of two charts, a "cohort" chart and a "control" chart. *Id.* Dr. Levy explained that a "cohort" study is one that follows a group of people to see what they get, what diseases they get and die from. *Id.* A case

"control" study is an epidemiologic study that starts out with people who are already sick and works backwards to see what they were exposed to. *Id.* at 567-68. Dr. Levy testified that he relied on both cohort and control studies in forming his opinions; that those studies are contained within the published literature; and that the studies he relied upon are the type typically relied upon by people that have expertise in his area. *Id.* at 568-69. Those studies are also relied upon by epidemiologists in assessing whether a particular substance can cause a particular outcome or disease. TR. 569.

The studies Dr. Levy relied upon addressed benzene specifically, and benzene-containing solvents. TR. 570. Experts in the field of occupational medicine and epidemiology reasonably rely upon the same studies upon which Dr. Levy relied in forming his opinions. *Id.*

Of the studies Dr. Levy relied upon, 17 showed "an association between either solvents or benzene or work in occupations in which there is benzene exposure or at least organic solvent exposure containing benzene." TR. 571. Of the 17 studies that showed an elevation, nine showed a statistically significant[14] elevation in risk. *Id.* Dr. Levy explained that he looked at all of the studies he could find because that is "standard methodology," and because no single study demonstrates causation. TR. 575-76.

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[14] Dr. Levy explained that when he used the term "statistically significant," he was considering "relative risk" ratios, *i.e.*, a 1.0 would indicate no increased risk and a 2.0 would indicate a doubling of the risk. TR. 571-73. He also explained that the purpose of the studies would be to insure that the results were not due to "just pure chance," but that they were indeed "statistically significant." *Id.* at 574-75.

Dr. Levy then focused on the "cohort" studies, the nine that were statistically significant, and discussed them separately. TR. 579, PEX 11. First, he discussed the "Vianna" study, which covered workers in a variety of benzene-related occupations that involved benzene exposure. The "Viaana" study reflected more than a doubling of the risk of one type of non-Hodgkins lymphoma called lymphosarcoma (relative risk of 2.1), and almost a doubling of the risk (1.7) for the other type of non-Hodgkins lymphoma. TR. 579-80. Next, he discussed the "Wong" study, which addressed chemical workers exposed to benzene for 15 or more years. TR. 581. That study also revealed more than a doubling of the relative risk (2.2).[15] TR. 581.

Dr. Levy then discussed the "Hayes" study. TR. 583. The "Hayes" study was particularly significant for a number of reasons: It was done by the National Cancer Institute; and it was done in cooperation with experts in China. TR. 584. One of the virtues of the "Hayes" study is that because it was done in China, it involved a very large number of people working in certain industries. TR. 584. That study involved a population of almost 75,000 people exposed to benzene. TR. 584. The "Hayes" study of 75,000 also had a control group of approximately 30,000-35,000. TR. 585. The size of the study resulted in its having more breadth than other studies. *Id.* That study revealed that workers exposed to benzene for 10 or more years had more than a four-fold, quadrupling of the occurrence of non-Hodgkins

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[15] Dr. Levy explained that even though the "Wong" study showed more than a doubling of the risk, it was not noted as statistically significant for one reason or another, but was properly considered with the other studies, like the "Lagorio" study, which showed almost a double of the risk (1.7). TR. 582-83.

lymphoma, which was statistically significant. Indeed, the "Hayes" study revealed a relative risk of 4.2. TR. 597.

Dr. Levy then discussed the other five studies on his list: (1) the "Pukkala" study in Finland; (2) the "Raabe" study; (3) the "Consonni" study; (4) the "Wong" study of 2000; and (5) the "Bloemen" study. TR. 586. Some of these were borderline statistically significant (a doubling of the risk, 2.0); some were not (1.4 - 1.9), and one was (2.15). TR. 586-87.

After discussing the "cohort" studies, Dr. Levy explained the significance of the "control" studies. TR. 587. Again, there were nine studies. TR. 588. And again, the results varied, some showing a doubling or more of the risk, and some not. TR. 589; PEX 12. Dr. Levy explained that the results from the studies were different because they involved different investigators, different kinds of jobs, and different types of exposures. TR. 590-91. While the results of the studies ranged from relative risk findings of 1.5 - 4.6, six of the nine studies showed a statistically significant increase in the relative risk. TR. 590. Dr. Levy took all of these studies and applied the "Bradford Hill" principles[16] in making his assessment on general causation. TR. 594. The studies demonstrated a significant excess risk in people exposed to benzene in the work place and to those exposed to benzene beyond background levels,[17] *i.e.*, revealed that benzene exposure causes non-Hodgkins lymphoma. TR. 598, 602,

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[16] As Dr. Levy described, there are seven Bradford Hill principles applied to the studies to determine causation. TR. 592-93.

[17] "Background levels" simply means those who are considered "unexposed" even though they are minimally exposed, *e.g.*, by breathing in second-hand smoke or eating strawberries.

650 ("The results of these studies taken as a group indicate to me and to many others that benzene causes non-Hodgkins lymphoma.").

Specific Causation

To determine whether Mr. Watts's exposure to benzene-containing Liquid Wrench specifically caused his non-Hodgkins lymphoma, Dr. Levy testified that he reviewed Mr. Watts's exposures, his family history, and other factors that may have accounted for his lymphoma. TR. 562. He employed standard methodology, much like treating physicians do, of going through a systematic process of considering and excluding all other potential causes of Mr. Watts's lymphoma. *Id.*

Dr. Levy read Mr. Watts's deposition and reviewed the quantitative estimates of Frank Parker to assess Mr. Watts's exposure to benzene resulting from his use of Liquid Wrench. TR. 629, 631. He reviewed Mr. Parker's deposition. TR. 686. After reviewing those materials, he explained that Mr. Watts's substantial exposure to benzene resulted in a substantial increase in his risk of contracting non-Hodgkins lymphoma. TR. 634.

Dr. Levy explained that he systematically considered other possible causes of Mr. Watts's non-Hodgkins lymphoma. TR. 692. He went though a complete assessment of alternative causes including: (1) immunosuppressant drugs, which Mr. Watts was not on; (2) immunosuppressant disease, such as HIV/AIDS, which Mr. Watts does not have; (3) whether Mr. Watts is a smoker, which he is not; and (4) whether Mr. Watts has had prior

chemotherapy, which he has not; and (5) family history, which Mr. Watts has no family history of non-Hodgkins lymphoma. TR. 692-693.

After reviewing case studies, Mr. Watts's medical, family, and personal exposure history, and after ruling out all other possible causes of Mr. Watts's non-Hodgkins lymphoma, Dr. Levy concluded that it was his opinion that "to a reasonable degree of medical and scientific probability benzene caused Mr. Watts' non-Hodgkins lymphoma."[18] TR. 565.

3. The Trial Court Admits Dr. Levy's Causation Testimony and Explains Why.

After Dr. Levy completed his testimony, Defendants moved to strike it. TR. 734. They argued that he was not qualified and that his conclusions failed *Daubert*. TR. 734-735. The trial court applied the *Daubert* factors and denied Defendants' motion to strike, explaining in detail the basis for its ruling:

(1) "I'm satisfied that his general causation methodology is acceptable and sufficient." TR. 741.

(2) "He has not reached an unfounded conclusion from the accepted premises considering the studies as accepted premises." TR. 741-42.

(3) "Whether the expert has accounted for alternative explanations. I think he satisfied that by considering family history, personal lifestyle and personal history, etc." TR. 742.

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[18] Dr. Levy testified that the only other possible cause of Mr. Watts's non-Hodgkins lymphoma may have been his exposure to pesticides while working as an exterminator, which was a contributing cause of his disease. TR. 701, 1019.

(4) "Whether the expert was careful in his pay litigation consultant role, as he would have been in his regular professional work, I've considered the questions and answers in his deposition's report and today's testimony; I've determined that it's the same degree of care in each instance." TR. 742.

(5) "And whether the field of expertise is known to reach reliable results for the type of opinion given, discipline involved, occupation medicine, epidemiology are certainly known to produce reliable results." TR. 742.

After considering all of the *Daubert* factors as applied to Dr. Levy's conclusions regarding general and specific causation, the trial court stated, "I'll deny the motion and allow the testimony." TR. 742.

4. After the jury finds for the plaintiff, and after the Court enters judgment on the verdict, it excludes Dr. Levy's testimony and enters a take-nothing judgment.

After the jury returned a verdict, and after the trial court entered judgment on the verdict, Defendants again challenged Dr. Levy's testimony in their motions for judgment NOV. Defendants asserted nothing new, but reurged the same complaints about Dr. Levy's testimony that they had before trial, 11 CR 1521, and during trial. TR. 734. Even though the trial court had carefully considered Defendants' arguments and had properly rejected them, after initially entering judgment for the plaintiff, the trial court reversed itself and held that it should have excluded Dr. Levy's testimony. 17 CR 2487. Then, based upon that post-verdict and post-judgment ruling, the trial court concluded that, without Dr. Levy's testimony, plaintiff had no other general or specific causation testimony. 17 CR 2488. Therefore, it granted Defendants' request for judgment NOV solely on that basis.[19]

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[19] Having granted Defendants' judgment NOV on causation, the trial court expressly found it unnecessary to reach their other arguments (statute of limitations, preemption, and

5. The trial court's post-verdict and post-judgment exclusion of Dr. Levy's testimony was error and prejudiced the plaintiff.

Defendants thoroughly cross examined Dr. Levy and tendered their own expert, Dr. Cole, to controvert Dr. Levy's conclusions. Still, neither Defendants' cross-examination nor their expert's testimony supports the trial court's decision to exclude Dr. Levy's conclusions regarding causation.

Under cross examination, Dr. Levy acknowledged that he first met Mr. Watts the day before Dr. Levy's trial testimony. TR. 695. He acknowledged that he reached his opinions without having first talked directly to Mr. Watts. TR. 696. And, he acknowledged that he did not talk directly with Mr. Watts's treating physician, Dr. Clay, or with Mr. Watts's wife before reaching his conclusions. TR. 697.

Defendants may have scored points with the jury by having Dr. Levy acknowledge those facts. Those points, however, go only to the weight of Dr. Levy's testimony, not to its admissibility, because Dr. Levy was not required to talk directly with Mr. Watts, his wife, or his doctor, to render causation opinions. Rather, Dr. Levy was permitted to – and properly relied upon – Mr. Watts's deposition testimony, his medical records, and the depositions of his treating physicians.[20] TR. 561.

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failure to prove defect). 17 CR 2488. As demonstrated below, none of those grounds support Defendants' request for judgment NOV.

[20] Moreover, Defendants cannot seriously contend that Dr. Levy was required to examine or talk with Mr. Watts, as Defendants' own Dr. Cole testified that he never examined Mr. Watts or talked to his treaters before forming his opinions. TR. 1242-43.

In addition to challenging Dr. Levy's methodology and opinions during his cross examination, Defendants called their own expert epidemiologist, Dr. Phillip Cole.[21] TR. 1176. Dr. Cole disagreed with Dr. Levy's conclusions, and testified that there is no recognized cause of Mr. Watts's lymphoma. TR. 1192. Dr. Cole also testified that there is no relationship demonstrated between benzene and non-Hodgkins lymphoma. TR. 1210. Dr. Cole disagreed with Dr. Levy's methodology. TR. 1216 *et. seq.* And, he expressly disagreed with Dr. Levy's conclusion that benzene causes non-Hodgkins lymphoma. TR. 1234. Dr. Cole, however, conceded that there was an association between benzene-containing products (crude oil) and non-Hodgkins lymphoma. TR. 1285.

Dr. Cole's disagreement with Dr. Levy's methodology and his causation opinions do not support Defendants' request for judgment NOV for two reasons. First, basing judgment NOV of Dr. Cole's conflicting testimony violates the standard of review, which required the trial court to consider only the evidence offered by the plaintiff and any *uncontradicted* evidence offered by the defendants. *Smith v. Parkerson Lumber, Inc.*, 888 So.2d 1197, 1202 (Miss. 2004). Because Dr. Cole's testimony regarding causation is contradicted, it cannot be considered as a basis for affirming the judgment NOV.

Second, the issue of causation is generally one that is determined by the jury, not by the court as a matter of law. *Busick v. St. John*, 856 So.2d 304, 307 (Miss. 2003). That

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[21] Dr. Cole should not have been permitted to testify at all as Defendants did not properly designate him and provide his opinions in response to proper discovery requests. *See Blanton v. Bd. of Supervisors of Copiah County*, 720 So.2d 190, 195-96 (Miss. 1998).

defendants disagreed with and challenged the bases for Dr. Levy's opinions did not render his testimony inadmissible. *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).

Additionally, while Defendants might disagree with Dr. Levy's interpretation of the cohort and control studies that he relied upon in reaching his conclusions, Dr. Levy relied upon peer-reviewed literature and studies that are generally accepted by the scientific community. Thus, his methodology was acceptable. *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1229-30 (9th Cir. 1998) (use of peer-reviewed publications and clinical studies to form general causation opinion generally accepted).

The most that can be said of Defendants' challenge to Dr. Levy is that he reached different conclusions about causation than Defendants' expert did. However, because experts can reach different conclusions based on competing versions of the same facts, Dr. Levy's testimony should not have been excluded because his conclusions are different than Defendants' expert's. *Micro Chemical, Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003) ("Rule 702's emphasis on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."); *see also Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 249 (5th Cir.

2002) (when reviewing sufficiency of underlying facts, the court considers whether the expert considered enough facts to support the opinion).

As set forth above, the trial court repeatedly denied Defendants' requests to exclude Dr. Levy's testimony. At the close of Dr. Levy's testimony, the trial court again denied Defendants' motion to strike, accepted Dr. Levy's methodology as reliable, and correctly set forth the reasons that his testimony satisfied *Daubert.*

The trial court then excluded Dr. Levy's testimony after the verdict, with no valid basis for doing so, and granted Defendants judgment NOV. In granting judgment NOV based solely upon the exclusion of Dr. Levy's testimony, the trial court improperly invaded the province of the jury by substituting its judgment for that of the jury with regard to the issue of causation. *See Weathersby Chevrolet Co., Inc. v. Redd Pest Control Co., Inc.*, 778 So.2d 130, 136 (Miss. 2001) (reversing Court of Appeals' decision after it declared expert testimony on causation insufficient and reversed jury verdict).

As the trial court initially found, Dr. Levy's methodology was sound and his conclusions regarding general and specific causation were reliable. Therefore, the Court should reverse the trial court's judgment NOV and enter judgment on the verdict.

ARGUMENT III

Whether reversal and rendition of judgment on the jury verdict is proper since the trial court erred in granting judgment NOV, and because there is no alternative basis for affirming the trial court's take-nothing judgment.

1. Because the trial court improperly granted judgment NOV on the issue of causation, the Court should reverse and render judgment on the jury verdict.

The trial court granted Defendants' request for judgment NOV solely because of their challenges to Dr. Levy's testimony. It expressly declined to address their statute of limitations, preemption, and failure-to-prove design defect arguments. 17 CR 2489. Indeed, it conditionally granted Defendants a new trial on those same issues. *Id.* at 2490. Because the trial court expressly limited its judgment NOV to the issue of expert testimony, and conditionally granted Defendants a new trial on their remaining arguments, the Court should reverse and render judgment for plaintiff on the jury verdict. *See White v. Stewman*, 932 So.2d 27, 39 (Miss. 2006) (reversing setting aside of jury verdict, reversing granting of new trial, and reinstating jury verdict).

2. There is no alternative basis for sustaining the trial court's judgment NOV.

A. Plaintiff'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 "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)).

Mr. Watts was diagnosed with lymphoma on March 23, 1999. TR. 1144. Mr. Watts testified, however, that he did not discover that his exposure to benzene-containing Liquid Wrench may have caused his lymphoma until two years later, in 2001. TR. 1047. It is undisputed that he filed his Complaint the following year, in 2002, well within the three-year limitations period. 1 CR 1. (Plaintiff's Original Complaint, filed 10/11/2002). Thus, Mr. Watts's suit is not barred by limitations as a matter of law.[22]

B. Plaintiff's claims are not preempted.

The Federal Hazardous Substances Act (FHSA) was enacted in 1960 and mandated the labeling of certain hazardous consumer products intended for use in the household or by children. *Pollard v. Sherwin Williams Co.*, 955 So.2d 764, 774 (Miss. 2007). In 1966, the FHSA was amended. *Id.*

Defendants here contend that Plaintiff's claims are expressly preempted by the FHSA. This Court considered and rejected that very argument in *Pollard*, in February 2007 of this year. In *Pollard*, the Court held that "'if Congress had intended to preclude all common-law causes of action,' it would have done so expressly." 955 So.2d at 774 (citing *Medtronic, Inc.*

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[22] Defendants cannot seriously assert that Mr. Watts should have known that his lymphoma was caused by his benzene exposure in 1999 when he was diagnosed if they are going to also maintain that there is still no evidence that benzene causes lymphoma.

v. Lohr, 518 U.S. 470, 487 (1996)). The Court further held that "any pre-1966 FHSA amendment theories of recovery, whether founded upon negligence, failure to warn, defective design, or fraud, are not preempted." *Id.* Finally, the Court held that "any post-1966 FHSA amendment theories of recovery not based upon 'the precautionary labeling . . . or based upon a violation of the requirements, regulations, or interpretations of 15 U.S.C. §1261 (*i.e.*, a claim of noncompliance with the FHSA), are not preempted." *Id.* at 774-75.

Mr. Watts's exposure to benzene-containing Liquid Wrench occurred from 1947 until 1978, when Radiator Specialty finally quit manufacturing Liquid Wrench with benzene in it. TR. 1016. As a result of his exposure, Mr. Watts brought suit on pre-1966 theories, and for post-1966 theories not based on a claim of non-compliance with the FHSA. *See* 15 CR 2223 *et. seq.* Thus, judgment NOV on Mr. Watts's claims based on an assertion of preemption could not stand.[23]

C. Plaintiff proved his product-defect claim.

Lack of an adequate warning is a defect which makes a product unreasonably dangerous for strict-liability purposes. *Swan v. I.P., Inc.*, 613 So.2d 846, 852 (Miss. 1993). U.S. Steel supplied benzene-containing raffinate to Radiator Specialty. TR. 49, 66. And Radiator Specialty added the benzene-containing raffinate to other materials, producing benzene-containing Liquid Wrench. TR. 47, 66.

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[23] Additionally, judgment NOV could not stand for the reasons set forth in Plaintiff's responsive briefing in the trial court. 8 CR 1052 *et seq.*; 16 CR 2374 *et seq.*

U.S. Steel has been a member of the American Petroleum Institute (API) since 1948, which published in the late 1930s that benzene exposure was a suspected cause of leukemia. TR. 152-54. U.S. Steel's corporate representative, John Masaitis, acknowledged that U.S. Steel was aware of the hazards of benzene exposure, including the hazard that benzene could damage the blood of those exposed. TR. 150. U.S. Steel knew before 1962 that benzene exposure could cause blood-cell deficiencies that could result in death. TR. 192. By the mid-1970s, the National Institute for Occupation Safety and Health (NIOSH) published information that there was an association between benzene exposure and cancer. TR. 250. NIOSH concluded in 1976 that benzene is a carcinogen with the capacity to cause leukemia. TR. 433.

Although U.S. Steel was aware of the hazards of benzene, it continued to sell benzene-containing raffinate to Radiator Specialty. Indeed, virtually all of the rafinnate that U.S. Steel sold from 1967-1978 it sold to Radiator Specialty. TR. 174, 236. Moreover, although U.S. Steel was aware of the dangers of benzene and continued to sell it to Radiator Specialty, U.S. Steel did not provide an adequate warning to Radiator Specialty.

Radiator Specialty's corporate representative testified that Radiator Specialty first learned that its Liquid Wrench product had benzene it (in U.S. Steel provided rafinnate) in 1972. TR. 40, 49. U.S. Steel did not warn Radiator Specialty that benzene could cause cancer and other health problems until 1977. TR. 55. When Radiator Specialty learned about the hazards of benzene in its product, it sold the remainder of its benzene-containing

Liquid Wrench and then began producing it without benzene. TR. 56, 61. Radiator Specialty sold the remainder of its benzene-containing Liquid Wrench even though it only needed one day to convert its product to non-benzene Liquid Wrench. TR. 61. If U.S. Steel had provided Radiator Specialty an adequate warning about the dangers of benzene, Radiator Specialty claimed it would have taken steps in 1972, rather than wait until 1977, to change its product. TR. 78.

Because U.S. Steel did not adequately warn Radiator Specialty, and because Radiator Specialty did not adequately warn Mr. Watts about the dangers of benzene, Mr. Watts did not wear gloves or a respirator when he worked with the benzene-containing Liquid Wrench. TR. 1125. No one suggested to Mr. Watts that he should have worn gloves or a respirator, or suggested that he should have had his blood monitored. If they had, he would have complied.[24] TR. 1123-25. Because no one warned Mr. Watts of the dangers of benzene exposure, he used the product and developed non-Hodgkins lymphoma and pancytopenia.

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[24] Plaintiff's industrial hygienist, Frank Parker, was accepted as an expert in his field without objection. TR. 797. Mr. Parker calculated the benzene exposure that Mr. Watts suffered as a result of his work with and around Liquid Wrench during his work career. TR. 828-29, 966, 976. He also testified that before Radiator Specialty removed raffinate from its Liquid Wrench, the raffinate constituted 80% of Liquid Wrench. TR. 817; PEX 35 (percentage by weight and volume). And, the raffinate contained 7-30% benzene. TR. 813. Because U.S. Steel could manipulate the amount of benzene, it is liable for a product defect. *See Thomas v. R.J. Reynolds Tobacco Co.*, 11 F.Supp2d 850 (S.D. Miss. 1998).

As a result, the jury properly returned a verdict in his favor on his strict-liability claim, and the trial court erred in granting judgment NOV.[25]

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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[25] Additionally, judgment NOV could not stand for the reasons set forth in Plaintiff's responsive briefing in the trial court. 8 CR 1052 *et seq.*; 16 CR 2374 *et seq.*

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