CASE No. 32,549

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ARTHUR FIRSTENBERG,

Plaintiff-Appellant/Cross-Appellee,

vs.

ORAL ARGUMENT REQUESTED

RAPHAELA MONRIBOT,

Defendant-Appellee/Cross-Appellant.

On appeal from the First Judicial District Court, Division II,
County of Santa Fe, State of New Mexico,
The Hon. Sarah M. Singleton, Case No. D-101-CV-2010-29

APPELLANT'S BRIEF IN CHIEF

Arthur Firstenberg
P.O. Box 6216
Santa Fe, NM 87502
(505) 471-0129

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Statement About Audio Transcripts

All hearings not stenographically transcribed are recorded on a single audio (FTR) disk. References to the audio transcripts are to the exact time indicated by the FTR software.

Statement of Compliance

This brief complies with the limitations of Rule 12-213(F) NMRA. It is proportionally spaced and contains 11,000 words. The word count was obtained from a word processing program which is Microsoft Office Word 2003.

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INTRODUCTION

In colonial Salem, if you were accused of witchcraft, there was only one way to prove your innocence to a court: let yourself be dunked in the river; if you drowned, you were not a witch.

In the present case Plaintiff, Arthur Firstenberg, found himself subject to a surprisingly similar order by the district court, which did not believe that a human being can suffer life-threatening injury from cellphones and their chargers. He was ordered to submit to "provocation testing," during which he would be deliberately exposed to such devices while being monitored for signs of permanent injury. If he was injured or killed he would win his case. The case was dismissed on summary judgment because he refused.

SUMMARY OF PROCEEDINGS

Plaintiff met Defendant, Raphaela Monribot, in May 2008 when he placed an ad on craiglist.org seeking a personal cook, and she answered it. (RP[1] 2106).

Plaintiff has collected disability benefits from the Social Security Administration since 1992 (RP 185) on the basis of "chemical and electromagnetic sensitivities" (RP 188). He has been diagnosed with electromagnetic hypersensitivity ("EHS") by nine doctors over three decades (RP 22-58, 87-126). He is subject to life-threatening effects when exposed to electromagnetic radiation

[1] "RP" indicates pages of the record proper.

(RP 1-2)—effects that include tachycardia (RP 4884-85), cardiac arrhythmia (RP 89-90), severe muscle damage (RP 4361-64), and laryngospasm (blocking Plaintiff's airway) (RP 1, 111). Exposure also causes Plaintiff dizziness, nausea, joint pains, insomnia, and difficulty concentrating. (RP 111, 2088-89). The Department of Education forgave his medical student loans in 1995 because of "total and permanent disability" (RP 1846). Because of his need to avoid wireless technology, Plaintiff cannot sleep in hotels or motels. (RP 2112).

In May 2008, unable to find a house that could accommodate his disability, Plaintiff had been living in his car in Santa Fe for three continuous years. (RP 2106). Having nowhere to cook, he had lost considerable weight and was emaciated. (RP 4396). Defendant, a renter at 247 Barela Street ("Barela Street house"), quoted her fee for cooking meals and told Plaintiff he could eat them in her home (*Id.*). Plaintiff gave Defendant literature about his disability (RP 4397), and said he would need her to turn off her cellphone and computer in order for him to be in her house. (RP 2106, 4398). With this agreement Plaintiff ate meals cooked by Defendant for the next three weeks, and they became friends. (RP 2106-07).

On June 6, 2008, Defendant sublet her house to Plaintiff during her planned four-month visit to France (*Id.*).

In August 2008, Defendant's landlady, Yolette Catanach, informed Plaintiff that Defendant had failed to pay rent for two months and that she was selling the house. (RP 2107, 2647). Seeing that Plaintiff had finally found a house he could tolerate, Plaintiff's mother bought it for him to live in. (RP 6094). Defendant gave Plaintiff her blessing:

> [Y]ou are certainly cleverer then [sic] me in assessing value of a structure and knowing the flaws... Especially with your sensitivities.
>
> ***
>
> I am truly happy for you if you have arrived at a situation where your life can move forward more smoothly and purposfully [sic].
>
> Love
>
> Raphaela

(RP 73-74).

For the next year, Plaintiff cared for Defendant's car (RP 79) and furniture (RP 84), rented a storage locker for her (RP 80), and loaned her money (RP 77, 2108). During most of the year he was in good health, while the adjoining property at 246 Casados Street ("Casados Street house") was vacant and advertised for sale. When Defendant returned to Santa Fe in September 2009 needing a place to live, Plaintiff put her in touch with the owner of the neighboring house (RP 81) and she rented it and moved in. (RP 2108).

The next morning, Plaintiff woke up extremely weak, with pressure in his chest, and a feeling like he was going to die. (RP 2108). His doctor, Erica Elliott, heard a life-threatening tachycardia (March 15, 2010 hearing, 4:24:59-4:25:46) and an extra heart sound (RP 89-90). When he walked around the corner to talk with his friend, expecting sympathy, he received the opposite. Plaintiff was forced to vacate his home. (RP 2108-09).

The situation of the two houses is relevant to this case. Barela Street, being a dead-end lane, one car-width wide, has no utilities. Hence, all utilities in the Barela Street house are supplied through an easement on the Casados Street property. (RP 2678). Both electric meters are located together on the Casados Street house. (RP 2647-48). Further, the water, gas and telephone lines for the two houses are all buried in conductive conduit running underneath the Casados Street property and they too are electrically coupled; whenever electromagnetic fields are generated within the Casados Street house they enter the Barela Street house via these four conduits. (RP 2800-01).

Despite knowing she was harming him, Defendant would not consider turning off her cellphone or computer at any time, not even at night so Plaintiff could sleep. (RP 2109). She even refused his offer of $10,000 to compensate her for the inconvenience of accommodating him. (RP 2109; 4415; TR-19 (July 19, 2012)). She soon also installed two wireless routers and an AT&T microcell—a

mini-cell tower available to those who live where cellphone reception is poor. (RP 2109). The dimmer switches in the Casados Street house, which produce a kind of high frequency pollution known as dirty electricity, were also an issue. (RP 3, 2800).

Electromagnetic fields originating from these devices in the Casados Street house were measured by Plaintiff's engineering expert inside Plaintiff's house, where they predominated over fields originating from any other source. (RP 2984; court's findings: RP 4995).

After being homeless during autumn 2009, Plaintiff filed claims for nuisance and prima facie tort, requesting injunctive relief and damages. (RP 1). His request for preliminary injunction (RP 11) was denied (RP 1690) after a March 15, 2010 hearing at which Drs. Grace Ziem (Audio Transcript, 3:33:29) and Erica Elliott (4:23:09), both of whom had long experience treating patients with EHS, testified. Dr. Elliott has been Plaintiff's family physician since 2006. (RP 2088). Dr. Ziem first examined him in 1994. (RP 1533).

The court granted Defendant's motion to dismiss with respect to Defendant's cellphone for reasons of federal preemption. (RP 1824). The court required Plaintiff to amend his complaint to add the property owner, Robin Leith, as a defendant, and to include an allegation of intent to injure. (RP 1825, 1792).

During the next three years, in an attempt to escape continuous torture and homelessness, Plaintiff renewed his motion for temporary relief five times (RP 1740; 1924; 2084; 2747; 3180), supporting each new request with new evidence. Each time the court denied the motion. (RP 1913; 1995; 2395; 3083; 3508). For the first year and a half, a friend who has the same disability allowed him to sleep in her tiny apartment with her. (RP 2805). After that, he had to alternate between his house and his car (*Id.*) and was severely injured. (RP 4361-64). In April 2012 he finally obtained relief, not from the court but because Defendant moved to California. (RP 3342).

Although Defendant produced no witnesses at the first hearing, the court relied on an affidavit of psychologist Herman Staudenmayer (RP 1584), to deny the preliminary injunction and require Plaintiff to "rule out" psychological causation. Dr. Leah Morton, another of Plaintiff's doctors, referred him (RP 1990) to Dr. Raymond Singer, a forensic psychologist and neurotoxicologist (curriculum vitae at RP 2457-77) who was knowledgeable about EHS and had previously been consulted by several such patients. (RP 3730-31). Dr. Singer's neuropsychological testing and observations of Plaintiff (RP 3207-51) showed the absence of any psychological disorder and the presence of a toxic influence that he concluded was probably "EMF [electromagnetic field] toxicity." (RP 3223). Dr. Morton also did "before" and "after" examinations of Plaintiff, observing normal pulse, blood

pressure, reflexes and appearance when she examined him in her office and then, after instructing him to spend three hours in his house, a pale appearance, bloodshot eyes, elevated pulse rate and blood pressure, and abnormal neurological exam when she examined him at home. (RP 112, 196).

But the court required more. Dr. Staudenmayer's later testing of Plaintiff also showed the absence of any psychological disorder. (Staudenmayer Deposition at 148-50 (Binder #1)). Dr. Staudenmayer's interview of Plaintiff also showed the absence of any psychological disorder. (July 17, 2012, TR-37, lines 10-12). But Dr. Staudenmayer disagreed with his own methodology, which he was thoroughly trained in, and proposed to conduct blind "provocation testing" of Plaintiff with electromagnetic fields, something he had never done in his life (*Id.,* TR-56, lines 12-15). Plaintiff would be required to remain in his house while all Defendant's electronic devices were turned on and off, many times for a few minutes at a time, and each time Plaintiff would be required to guess correctly whether they were on or off, in order to prove his symptoms were really caused by the devices and not by his own mind. (RP 4891). Plaintiff opposed this plan, on the grounds, (a) that such a test was irrelevant, since Plaintiff alleged only injury, not that he could tell minute by minute whether the source of his injury was on or off, and (b) that such a test, by the same injurious equipment that spawned this lawsuit, would obviously injure him. (RP 2570-79).

The court, ordering that a provocation test should take place, appointed psychologist Ned Siegel under Rule 11-706 to mediate between the sides, determine a protocol, and report to the court. (RP 2609). The protocol he came up with was as follow: Plaintiff was to be confined to his house for six months, during which time all Defendant's devices were to be turned on and off under Dr. Staudenmayer's supervision, while Plaintiff was supposed to do nothing but record his symptoms every eight minutes, while being monitored for *harmful physical effects* such as elevated cardiac enzymes, cardiac arrhythmias, and laryngospasm (RP 4952, 4954)—effects that Dr. Elliott stated were life-threatening and likely to cause permanent injury.

> Q. So, Dr. Siegel, it's your impression that the Court has directed you to work out a program under which there would be a physical manifestation of radiation that's tested and reported upon? Is this an essential part of the program as far as you're concerned?
>
> A. That there would be harm.
>
> Q. That there would be harm?
>
> A. That there would be harm. Some physical manifestation that would denote or indicate harm.

(Questioning of Dr. Siegel by counsel for Plaintiff, August 15, 2012, TR-9).

> Q. So would it be your intent that he would keep a log at eight-minute intervals?
>
> A. If that's what it would take, sure. Why not?
>
> Q. For months?

A. Sure.

(*Id*., TR-16).

Dr. Singer, meanwhile, under direction from Dr. Siegel, and to comply with the court's order, worked with Plaintiff to try to devise a stimulus that would (a) cause enough pain that Plaintiff could detect it, and (b) *not cause injury*. On July 18, 2012, Dr. Singer presented his protocol, and the results of his preliminary testing of Plaintiff—which did in fact cause injury (RP 4884)—to Dr. Siegel. (RP 4941-47). These test results were statistically significant, confirming numerous previous observations of Plaintiff by Drs. Singer and Elliott in which unexpected, unknowing exposure to electromagnetic radiation had caused both subjective symptoms and observable, documented illness in Plaintiff (RP 3213-17, 3655; July 20, 2012, TR-9 to TR-10).

But because Dr. Singer had designed a test to minimize injury, Dr. Siegel reported to the court that Plaintiff had failed to cooperate. (RP 4714). The court set a hearing "to discuss the Expert's conclusions regarding the testing protocol" (RP 4713), and at that hearing, without warning, imposed sanctions on Plaintiff for allegedly violating court orders regarding the provocation testing. As sanctions the court (a) disallowed any testimony that related any deliberate or accidental exposure of Plaintiff to electromagnetic radiation to reported or observed symptoms; (b) adopted a finding that Plaintiff cannot distinguish electromagnetic

exposure from anxiety; and (c) adopted a finding that Plaintiff cannot reliably detect the presence or absence of electromagnetic stimulus. (RP 4856-57).

Dr. Singer, shocked, wrote to the court: "[W]hat is also known from Dr. Elliott's affidavit dated March 8, 2012, is that the enzyme elevations reflect serious muscle damage, and that the best scientific information states that repeated occurrence of such damage is irreversible. *To propose to employ such data as part of a testing regimen applicable to a human subject, and in a situation that is in some sense involuntary, conjures up the nightmarish human experiments of Josef Mengele, M.D. designing Nazi medical experiments. It is absolutely unethical.*" (RP 4980) (emphasis added).

Dr. Elliott wrote: "[C]ontinued attempts to deliberately expose Mr. Firstenberg to subjectively detectable, and therefore injurious, sources of radiation could permanently injure Mr. Firstenberg and also could be life-threatening." Extremely concerned, she consulted three of Plaintiff's previous physicians. "They all share my concern," she stated, "and are adamant that continued, deliberate provocation of Mr. Firstenberg's illness by known sources of electromagnetic fields should under no circumstances be done" (RP 4886). Dr. Peter Wittreich was Plaintiff's primary physician for five years. (Binder #1, Exhibit 8). "[H]e concurs that such exposure can be life-threatening and that any further attempts at deliberate provocation should not be done on this patient." (RP 4887). Dr.

William Morton, Professor Emeritus at Oregon Health Sciences University in the Deptartment of Public Health and Preventive Medicine, has taught epidemiology for 35 years and occupational medicine for 25 years. "He stated that a small proportion of people with such marked sensitivity as Mr. Firstenberg has could run the risk of a fatal outcome if the exposure is continued or repeated enough times." (RP 4886-87). Dr. Grace Ziem "stated that conducting EMF challenge testing typically creates long lasting heightened adverse responses and further patient deterioration." (RP 4886).

Meanwhile, *in limine* hearings were held on the admissibility of testimony by Drs. Elliott, Singer, and Staudenmayer. (Transcripts, July 17, 19, and 20, 2012).

On August 30, 2012, the court granted partial summary judgment to Defendant on the prima facie tort claim, ruling that Defendant did not intend to harm Plaintiff. (RP 4859). And the court granted summary judgment to Defendant on the nuisance claim, ruling, under *Restatement (Second) of Torts*, § 821F, that Plaintiff's hypersensitivity precluded any remedy under a nuisance theory. (RP 4861).

On September 18, 2012, the court disqualified both of Plaintiff's experts (RP 5001), while stating "it is unnecessary to consider Plaintiff's motion to exclude Dr.

Staudenmayer" (RP 5010 n. 25). Having disqualified Plaintiff's experts, the court granted Defendant summary judgment, dismissing the case. (RP 5953).

ARGUMENT

Wireless technology has recently become ubiquitous and unavoidable, giving rise to new conflicts and new legal issues. The issues in this case all revolve around these fundamental questions: (a) Is Plaintiff's disability caused by electromagnetic radiation, or by psychological factors? (b) Does a person who for medical reasons cannot be exposed to wireless technology have a right to live in this world?

I. The District Court Erred in Excluding Plaintiff's Witnesses While Failing to Rule on the Motion to Exclude Defendant's Witness.

Plaintiff argued the motions to exclude Plaintiff's and Defendant's witnesses at RP 3537-58, 4032-55, 4532-45, and 4744-72.

A court's decision to admit or exclude expert testimony under the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156 is reviewed for abuse of discretion. However, "the threshold question of whether *Daubert* applies in a given situation" is reviewed *de novo*. *State v. Torres*, 1999-NMSC-010, ¶¶ 27-28, 127 N.M. 20. Factual findings underlying the decision are reviewed for clear error.

In relying on the testimony of Defendants' sole expert, psychologist Herman Staudenmayer, to disqualify Plaintiff's psychologist and his treating physician,

without first ruling on the challenge to the admissibility of Dr. Staudenmayer's testimony, the court committed six types of reversible error:

A. The district court failed to perform its gatekeeper function under Rule 11-702 with respect to Dr. Staudenmayer.

"'The district court... has no discretion to avoid performing the gatekeeper function.'" *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222-23 (10th Cir. 2003), *cert. denied*, 540 U.S. 1003 (2003) (*internal citation omitted*). "It is error to admit expert testimony involving scientific knowledge unless the party offering such testimony first establishes the evidentiary reliability of the scientific knowledge." *State v. Torres*, 1999-NMSC-010, ¶ 24. Yet in the January 8, 2013 hearing on Defendant's request for court costs, the court admitted it could not have excluded Plaintiff's experts without relying on Dr. Staudenmayer's testimony:

> 11:09:16 COURT: I thought I referenced Dr. Staudenmayer's testimony when I ruled that your experts should be excluded... I don't think I could just call in some man off the street and rely on his testimony in support of that ruling...
>
> 11:10:13 COURT: Suppose I say it right now? I determined that he was an expert.

But the court explicitly did *not* qualify him as an expert: "[I]t is unnecesary to consider Plaintiff's motion to exclude Dr. Staudenmayer." (Order on Motions to Exclude Expert Testimony under Daubert/Alberico, RP 5010 n. 25). The failure to apply the *Daubert* standard is reviewed *de novo.*

"The district court 'must adequately demonstrate by specific findings on the record that it has performed its duty as a gatekeeper' when faced with a party's objection." *U.S. v. MacKay*, 715 F.3d 807, 834-35 (10th Cir. 2013), quoting *Daubert*, 509 U.S. at 589. And Plaintiff objected (RP 3537-58). He challenged Dr. Staudenmayer's facts, expertise, and methodology. He also challenged Dr. Staudenmayer's ethics (RP 3549-53). Dr. Staudenmayer had expressed conclusions about Plaintiff's psychological health long before meeting him. "These considerations apply to the plaintiff in this case... [S]ymptoms are associated with psychiatric conditions or are a manifestation of the stress-response and cognitive styles." (Staudenmayer Affidavit, March 8, 2010 (RP 1595)). In so stating, Dr. Staudenmayer violated Standard 9.01b of the *Ethical Principles of Psychologists and Code of Conduct*, American Psychological Association, as amended 2010: "Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals." 9.01c requires that if an exam is not necessary for the opinion, that "psychologists explain this." Staudenmayer neither examined Mr. Firstenberg nor explained that an exam was not necessary, yet drew conclusory opinions about him. This made Dr. Staudenmayer's opinions unreliable and therefore inadmissible under Rule 11-702.

As in *State v. Torres*, failure to perform the gatekeeping function is reversible error. 1999-NMSC-010, ¶ 35.

B. The district court ruled on the proffered experts' conclusions and not their methodologies.

"A trial court 'may not make winners and losers through its choice of which side's experts to admit.'" *Dodge v. Cotter Corp.*, 328 F.3d at 1226.

The failure to apply the correct standard is reviewed *de novo*.

Plaintiff's and Defendant's experts, each relying on scientific studies that they had analyzed and applied to the facts, disagreed as to their conclusions. The district court, failing to apply the correct standard, chose sides, ruling on the experts' conclusions and not their methodologies: "Based on the literature provided, the Court is of the opinion that the better scientific *opinion* is that found by the WHO, Rubin, and others." (RP 5006). (*emphasis added*)

"We are only looking at whether the scientific technique has been subjected to peer review and publication, not the validity of the scientific research or the scientific community's response to the research," which "'is a question of weight and not admissibility.'" *Lee v. Martinez*, 2004-NMSC-027, ¶ 27, 136 N.M. 166 (*citation omitted*). "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. "'[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology.'" *Primiano v. Cook*, 598 F.3d 558, 564 (9th

Cir. 2010) (*citation omitted*). As in *Primiano*, focusing on conclusions and not methodology is reversible error.

If the court had made specific findings about any of the 93 studies placed into the record by Plaintiff's experts (RP 204-1511; 1770-90; 2772-97; 4592-4602; 4668-75; Binders 1-2, Elliott Exhibits a-d, f-j, r-t, v, w, y-dd; Plaintiff's Exhibits 14, 19; Supplemental Record, Staudenmayer Deposition Exhibits 23a, e, m, t), this Court might be justified in deferring to the lower court's opinion of their methodologies. *In re Paoli Railroad R.R. Yard PCB Litigation*, 35 F.3d 717, 746 (3d Cir. 1994). However, not only did the court not analyze those studies, during the three years of the case it made specific reference to *only one* of them—the 2011 McCarty study. And the statements it made about that study should be disregarded because they are erroneous.

C. The district court's findings were clearly erroneous.

In the paragraph in which the court mentioned the McCarty study (RP 5006), the district court managed to make eight factual errors and one legal error in only seven sentences:

(i) "The contrary evidence to which Plaintiff cites and on which his witnesses rely is not generally accepted..." One of the prongs of the *Daubert* standard is general acceptance *of techniques*, not conclusions. "[W]e hold that a particular degree of acceptance of a scientific *technique* within the scientific

community is... one factor that a district court normally should consider in deciding whether to admit evidence based upon the technique." *Alberico*, 1993-NMSC-047, ¶ 47. (*emphasis added*). This is legal error.

(ii) "... and is not reported in journals that have received recognition as prestigious, accepted scientific journals." *All 93 studies?* The list of 73 studies reviewed by Dr. Elliott (RP 4241-47) reveals journal titles that include *International Journal of Radiation Biology*, *Pathophysiology*, *Neurotoxicology*, *Occupational Medicine*, *Environmental Health Perspectives*, *Bulletin of the New York Academy of Medicine, American Journal of Epidemiology, Neuropsychology, Annals of the New York Academy of Sciences*, *Journal of Applied Physiology*, and other well-known, peer-reviewed journals. Additional titles such as the *Journal of Sleep, Neuroscience Research*, and *Experimental Dermatology* are among the stack of studies filed with the court by Dr. Leah Morton. (RP 198-203).

(iii) "The main article cited, which post-dates the Rubin studies, is the McCarthy study which involved a single subject." The correct spelling is "McCarty." Also:

(iv) Far from being the "main article" cited, the McCarty article was offered to the court on August 17, 2011 (RP 2772) in support of Plaintiff's fifth motion for temporary relief, long after 61 other studies had been submitted.

(v) "In this study McCarthy was self-diagnosed with EMS." McCarty was the lead *author* of the study, not its subject. Also:

(vi) The subject, Erica Mallery-Blythe, may have been self-diagnosed, but she is herself a physician, which the court fails to note, although her affidavit and curriculum vitae are in the record (RP 2765-71).

(vii) "The Court is not persuaded by this article because of the fact that the percentage of correct responses was much lower than one would expect if she were accurately appraising when she was experiencing electromagnetic radiation." Table 3 (RP 2792-93), enumerating all Mallery-Blythe's responses, reveals a strong response to *every* real exposure, and either no symptoms or a mild response to *every* sham exposure. A 100% rate of correct responses is the *highest possible* accuracy.

(viii) "The authors of the McCarthy study did nothing to try to replicate their findings." A researcher does not "replicate" his own work. "Replication" is something other laboratories do, once a study has been published somewhere.

(ix) "The failings of the other studies on which Plaintiff relies are discussed at length in the Rubin articles." The two Rubin articles referred to are in the Supplemental Record, Exhibits 18 and 20 to the Staudenmayer Deposition. These articles discuss—very briefly—only *two* of the 93 studies that the court received from Plaintiff's experts: Zwamborn et al. (2003) (mentioned in Rubin 2011 at 13)

and Rea (1991) (mentioned in Rubin 2011 at 12)). The other 91 are *not* discussed in the Rubin articles.

Plainly, the court was not familiar with the Rubin articles, the literature provided by Plaintiff's experts, the McCarty article, or the scientific method.

D. The district court abused its discretion by ruling on the reliability of the scientific literature provided without analyzing any of that literature.

"A thorough review of all of the literature submitted by both parties is required." *Glaser v. Thompson Medical Co., Inc.*, 32 F.3d 969, 972 (6th Cir. 1994). *See also Acosta v. Shell Western Exploration and Production, Inc.*, 2013-NMCA-009, ¶¶ 30-31, 293 P.3d 917 (decision to exclude Plaintiff's expert upheld bccause "the district court thoroughly reviewed the various animal studies" and "also reviewed and considered the human studies relied on by" him). Here the bare conclusions and erroneous findings of the court indicate that it did not even read the relevant studies.

The court's reference to the World Health Organization (RP 5006) should be disregarded. The WHO "fact sheet" referred to (Defendants' Exhibit B) was issued in 2005 by WHO's EMF Project, whose chair at the time, Michael Repacholi, was paid $150,000 per year by cellphone companies (RP 4616). The fact sheet is unauthored, discloses no basis for its opinions, and discusses *none* of the studies proffered by Plaintiff's experts. However, WHO's International Classification of Diseases (ICD 10) has a code, W90.0, for "Exposure to

radiofrequency." And the head of WHO gave a newspaper interview in 2002 stating that she herself was hypersensitive to electromagnetic radiation and permitted no one to enter her office in Geneva with a cellphone. (RP 1864-65 in Norwegian; 1862-63 in English translation).

E. The district court excluded Plaintiff's treating physician while relying on testimony by an outside expert.

"It would be inconsistent with and run counter to the Rules' liberal policy of admissibility to allow an outside expert, hired solely for litigation purposes, to rely on and testify about [the facts in evidence], but exclude testimony by the treating physician." *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996). "The rationale for giving greater weight to a treating physician's opinion is that he is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987).

In *Kannankeril v. Terminix International, Inc*., 128 F.3d 802, 808 (3d Cir. 1997), the court reversed the decision to exclude the plaintiff's medical expert because he "was never challenged by the presentation of alternate diagnoses by other physicians." Here, too, Defendant presented no medical expert to challenge Plaintiff's diagnosis by Dr. Elliott. Defendant's only expert on causation was a psychologist, hired solely for litigation purposes, who had no expertise in medicine, electricity, or toxicology (Staudenmayer Deposition, p. 7 (Binder #1)),

had never written about EHS,[2] had never done provocation testing with electromagnetic fields, and ignored the computerized results of his own psychological tests on Plaintiff. It was an abuse of discretion for the court to disqualify Plaintiff's own family physician on the basis of his testimony.

F. The district court wrongly required Plaintiff to prove exposure to a specific level of radiation.

The court erroneously ruled that "it is admitted that there is no evidence concerning the exact minimum level of exposure that is needed to cause harm. Indeed, there seems to be no correlation between exposure and degree or certainty of harm." (RP 5009). First, the record shows that such is *not* admitted by Plaintiff and that there is a *reliable* correlation between exposure and harm. See discussion, *infra*. Second, the court judged this case by the wrong standard.

It was error to "force[] the plaintiff[] to prove that [he was] exposed to a specific level of radiation, without regard to individualized factors, such as heredity," *In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1137 (9th Cir. 2002).

Even when precise information concerning exposure levels is not available, "'a medical expert could offer an opinion that the chemical caused plaintiff's illness.'" *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1059-60 (9th Cir. 2003),

[2] Curriculum vitae, RP 2900-08. Even his contribution to the Prague EHS conference (Plaintiff's Exh. 5 at 39-53) is about chemical sensitivity.

quoting *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 157 (3d Cir. 1999). In such cases, "a differential diagnosis—supported in part by the temporal relationship between [the plaintiff's] exposure to the [toxin] and the problems he experienced" are sufficient to establish reliability under *Daubert*. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999). The Federal Judicial Center's *Reference Manual on Scientific Evidence* (1994) states that the absence of a dose-response relationship does not weaken an inference of causation, even in a conventional toxic tort case. (at 163).

But when individualized factors, such as allergy or hypersensitivity to a substance, are specifically alleged, it is error for a court to grant summary judgment on the ground that the dose necessary to cause harm to a normal person was not demonstrated.

See Glaser, 32 F.3d at 974, in which ingestion of a normally safe dose of a drug did not preclude recovery because "as many as 20% of one study population... demonstrated some blood pressure supersensitivity to recommended doses of [the drug]."

In *Hardyman v. Norfolk & Western Railway Co.*, 243 F.3d 255 (6th Cir. 2001), summary judgment was reversed where the requirement of a dose/response relationship was "contrary to the testimony of Plaintiff's experts." (at 262). "[I]t makes little sense to require a plaintiff to establish a dose/response relationship or

threshold level in a situation... where the dose/response relationship or threshold level will always vary from individual to individual." (at 265).

In *Terry v. Ottawa County Board of Mental Retardation and Developmental Delay*, 847 N.E.2d 1246 (Ohio App. 2006), aff'd in relevant part, *Terry v. Caputo*, 875 N.E.2d 72 (Ohio 2007), involving exposure to mold, the court ruled that "[t]hreshold levels should not be required as proof when no study has been or could be conducted or when the level will always vary from individual to individual." (at 1260). The basic problem, it said, is that "studies or experiments establishing a dose-response relationship... cannot be conducted due to the nature of mold exposure." The reason was given by the plaintiffs' medical expert:

> "[Y]ou can't do inhalation challenge studies on mold. They're toxins... If I'm going to give someone a bolus of mold spores in their lungs, I mean, I can get sued."

(*Id.*).

See also In re Zicam Cold Remedy Marketing, Sales Practices, and Products Liability Litigation, 797 F.Supp.2d 940, 943 (D.Ariz. 2011), involving a pharmaceutical:

> We do not require studies on "living humans with intact physiology and operative metabolic and immune function" to demonstrate "the amount needed to destroy a sufficient amount of OE [olfactory epithelium] to compromise smell function."... While this sort of study might be helpful to a trier of fact, it presents significant ethical problems.

The same ethical considerations prevent determination of the "exact minimum level" demanded by the district court here. (RP 5009). However, the epidemiological studies provided by Dr. Elliott show both a dose-response relationship and the presence of individual sensitivities within all populations. (RP 2089-91). Dr. Elliott describes methods that have been used to determine the threshold dose for any individual. In a sophisticated exposure chamber, "they could determine at what level you started getting your chest pain and dizziness." Another method was "where patients were hooked up to EKGs... [T]he patient was blind to what was happening, and then they noted when the EKG became abnormal." (RP 3653). Such testing, however, is expensive and raises ethical questions, and in Dr. Elliott's practice, "we just base it on their report about how close they can be to their computer, how long they can be on the computer before they get symptoms... how close they have to keep the cellphone away from their head so they don't get headaches and so forth." (*Id.*). In Plaintiff's case, numerous observations by his doctors and his psychologist have established the same thing: the closer he is to a cellphone, or an air purifier, the greater the harm to Plaintiff. (RP 3213-17, 3655, 3659).

The district court's belief that Plaintiff had shown "no correlation" between exposure level and harm was based on preconceived notions that the court persisted in even after they were corrected. Specifically, the court, believing that a

cell tower exposes one to much more radiation than household appliances, stated that since Plaintiff is complaining about both, there is no correlation with dose. (RP 1694-95). The court did not understand that dose diminishes rapidly with distance. For example, Salford et al., Non-thermal Effects of EMF upon the Mammalian Brain, *Environmentalist* (2007) 27:493-500, explains that a cellphone one meter away exposes you to more radiation than a cell tower 200 meters away (at 496) (RP 216). Regel et al., UMTS Base Station-like Exposure, Well-Being, and Cognitive Performance, *Environmental Health Perspectives* (2006) 114(8):1270-1275, exposed subjects to a level of radiation equivalent to that from a typical cell tower which "was [more than] 100 times lower" than the typical exposure to the brain from a mobile phone. (at 1274) (Plaintiff's Exhibit 7). Plaintiff's counsel tried to explain this to the court on March 15, 2010:

> (4:42:39) COURT: I assume that something comes out of a cell tower is stronger than something that comes out of a WiFi in your house...
>
> MR. LOVEJOY: That's so, but of course the strength varies with the distance...
>
> (4:43:59) COURT: Does everybody agree that a cell tower transmission can cause injury? Is there any dispute about that?...
>
> MR. LOVEJOY: I've got the impression that the Defendants would disagree...
>
> (4:44:14) COURT: Is there disagreement over whether or not a router, a modem, can cause injury?

> MR. LOVEJOY: I think the Defendant disagrees. I think there's a lot of evidence that it can happen.
>
> COURT: There's also a lot of evidence and opinion that it cannot happen, isn't there?
>
> MR. LOVEJOY: I have not seen peer-reviewed scientific writing to that effect.

Yet on this erroneous notion the court denied Plaintiff's motion for preliminary injunction in 2010 (RP 1694-95), and on the same notion excluded the testimony of Plaintiff's experts in 2012 (RP 5009). It found no evidence of dose response because it believed, contrary to the evidence, that a cell tower is dangerous and WiFi is not, and that one exposes you to much more radiation than the other. This, too, is clear error, requiring remand.

II. The District Court Abused Its Discretion in Denying Plaintiff a Preliminary Injunction.

Plaintiff argued his request for temporary relief six times (RP 11; 1740; 1924; 2084; 2747; 3180).

Although Defendant no longer lives in the Casados Street house, there has been no trial and Plaintiff submits that this issue is not moot. Defendant may decide to return. Moreover, this Court's decision will be binding on Ms. Leith, who is still a defendant in the district court. If this case is remanded, Plaintiff is still at risk of injury pending trial.

Denial of a preliminary injunction is reviewed for abuse of discretion. *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314. "In determining whether to grant injunctive relief, a trial court must consider a number of factors and 'balance the equities and hardships,'" including "the relative hardship likely to result to the defendant if granted and to the plaintiff if denied." *Insure New Mexico, LLC v. McGonicle*, 2000-NMCA-018, ¶ 6, 128 N.M. 611 (*citation omitted*). Since the relative hardships in this case overwhelmingly favor Plaintiff—life-threatening injury and homelessness versus putting a wire on one's telephone and computer—the district court abused its discretion in denying relief. Moreover, as the audio transcript of the January 8, 2013 hearing shows, the court denied relief based solely on the testimony of Dr. Staudenmayer, who was never qualified as an expert:

> 11:15:36 COURT: I don't see, on what other basis could preliminary relief have been rejected? The first one could have been rejected based on lack of electrical engineering evidence. But how could the other one or ones been rejected without reference to Staudenmayer? How would that have been possible?

In the event of a remand, a preliminary injunction should issue.

III. The District Court Abused Its Discretion in Appointing a Rule 11-706 Expert to Advise It on Matters Outside His Area of Expertise.

The court assigned Dr. Siegel, a psychologist, two duties: (1) "to consult with the Court on *psychological* issues raised by the case" and (2) to "produce an independent expert report for the Court on the *psychological* issues raised by the

case." (RP 2609-10) (*emphasis added*). But to Plaintiff's surprise, Dr. Siegel did not produce an independent expert report, the court never asked him for opinions on any psychological issues, and he never offered any. It became apparent at his testimony of August 15, 2012 that his *sole* function in this case had been to design an experiment for the blind testing of Plaintiff with sources of electromagnetic radiation and measurement of the resulting harm. His function required expertise in medicine and electromagnetism, which he lacked, and did not require expertise in psychology.

> MR. LOVEJOY: So, Dr. Siegel, it's your impression that the Court has directed you to work out a program under which there would be a physical manifestation of radiation that's tested and reported upon? It this an essential part of the program as far as you're concerned?
>
> DR. SIEGEL: That there would be harm.

(TR-9).

Had Dr. Siegel been used as an expert for either party, his testimony would have been excluded under *Daubert* for the most fundamental of reasons: lack of expertise.

This issue is preserved for review because Plaintiff did not learn of the misuse of Rule 11-706 until the final hearing and had no opportunity to object to it (Rule 12-216(A)); because appointing an expert to advise a court solely in areas outside his expertise is fundamental error (Rule 12-216(B)); and because it violated Plaintiff's fundamental rights (*Id.*).

IV. *Ex Parte* Communications with Dr. Siegel Were Improper, Violating Due Process.

Neither a judge, nor "others subject to the judge's direction and control," shall "initiate, permit, or consider ex parte communications." Rules 21-209(A), (D). *See In re Salazar*, 2013-NMSC-007, ¶ 10, 299 P.3d 409. Plaintiff argued this issue at RP 5946.

The order appointing a Rule 11-706 expert did not authorize *ex parte* communications with the court or the parties (RP 2609). No other communication on the record between the court and Dr. Siegel occurred in satisfaction of Rule 11-706(B) informing him of his duties. Yet the record indicates that Dr. Siegel communicated freely and often with each party separately, with each party's expert witness separately, and with the court. (RP 4914-63). In fact, the judge grew so accustomed to her expert having unfettered access to all parties, that at one hearing she sanctioned Plaintiff for allegedly restricting Dr. Singer's *ex parte* communications with Dr. Siegel for a few days:

> 11:13:32 COURT: The fact that someone put restriction on Dr. Singer's ability to communicate with Dr. Siegel in my mind is indicative of a lack of, unequitable conduct in the determination of these issues, and I'm denying this motion [for temporary relief] on that ground.

(Dec. 9, 2011).

Ex parte communications, especially with a court, often have unfortunate consequences. See, for example, Dr. Siegel's January 12, 2012 email to Dr. Singer:

> I was speaking to Mr. Lovejoy earlier today and he related that Judge Singleton said that I reported that you were dragging your feet. What I said was that I wondered why the Defendants [sic] expert was dragging his feet. Either I mispoke or she misheard. Please be assured that you have been responsive. I hold you in the highest regard and know that you approach this in the best professional tradition. I will make sure the Judge understands this.

(RP 4937).

Eight months later, on September 7, 2012, responding to the court's unexpected sanctioning of Plaintiff for alleged failure to cooperate with Dr. Siegel, Dr. Singer stated in an affidavit: "The record does not indicate whether Dr. Siegel corrected, as he promised, the mistaken impression that had somehow been conveyed to the Judge." (RP 4973). This is precisely why *ex parte* communications are forbidden: there is no record of what occurs behind closed doors.

The Nevada Supreme Court removed a judge from office for repeated behavior similar to what occurred here. *In re Fine*, 13 P.3d 400 (Nev. 2000). Based on *ex parte* communications with a court-appointed Rule 11-706 psychologist, the judge set a hearing date *sua sponte* in a child custody case, without informing the parties of the purpose of the hearing. Testimony at the hearing by the psychologist resulted in the child's mother losing custody of her

son. Because of similar behavior in several cases, the judge was removed from the bench. (at 406-07).

In *In re Edgar*, 93 F.3d 256 (7th Cir. 1996), cert. denied sub nom. *Duff v. Governor of Illinois*, 519 U.S. 1111 (1997), a judge held an *ex parte* meeting on the merits with a panel of three court-appointed experts. "Mandatory disqualification under [28 U.S.C.] § 455(b)(1) follows," wrote the court, and the judge was removed from the case. (at 259).

In *U.S. v. Craven*, 239 F.3d 91 (1st Cir. 2001), a judge had a one-hour *ex parte* conversation with a court-appointed psychologist on substantive matters. The court of appeals vacated the judgment below and remanded to a different judge: "When a judge receives information that does not enter the record, the reliability of that information may not be tested through the adversary process." (at 103).

V. The District Court Erred in Granting Partial Summary Judgment on Prima Facie Tort.

"[O]bviously, I knew about his condition, and he knew that I knew, so I don't think he had to say too much." (Deposition of Raphaela Monribot, April 24, 2012, p. 87 (RP 4407)).

Summary judgment orders are reviewed de novo. *Celaya v. Hall*, 2004-NMSC-005, ¶ 7, 135 N.M. 115.

The court ruled that a genuine issue of material fact existed as to whether Defendant "knew with certainty" that her actions were harming Plaintiff, but granted summary judgment on whether Defendant "intended" the harm.

This was error. In New Mexico's jurisprudence on prima facie tort, "intent to injure" and "malice" are synonymous and mean "'that the defendant not only intended to do that act which is ascertained to be wrongful, but that he knew it was wrong when he did it.'" *Kitchell v. Public Service Company of New Mexico*, 1998-NMSC-051, ¶ 17, 126 N.M. 525. A defendant's actions "rise to the level of intending to commit the harm" when she "has intentionally acted with the certainty that injury will necessarily result." *Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 62, 109 N.M. 386.

Defendant's emails leave no doubt that she knew about Plaintiff's disability and knew she was harming him. August 18, 2008 (RP 73):

> [Y]ou are certainly cleverer then [sic] me in assessing value of a structure and knowing the flaws... Especially with your sensitivities.

Dec. 27, 2008 (RP 76):

> [L]et me say again how much I would like to regard you as a relative too (not too tragic but with some rare and annoying affliction I am aware of and sympathetic to).

Jan. 17, 2009 (RP 78):

> I would write to you more if I knew emailing was not a torture for you.

March 16, 2009 (RP 80):

> I know its [sic] not best for you to spend time in front of a computer.

And after Defendant moved in next door, and her wireless equipment was making Plaintiff ill (October 20, 2009 (RP 85)):

> I am feeling a bit guilty...

Plaintiff argued this issue in his response to Defendants' motion for partial summary judgment on prima facie tort (RP 4193-4205).

VI. The District Court Erred in Granting Summary Judgment on Nuisance.

Plaintiff argued this issue at RP 4180-92 and 4722-30. A grant of summary judgment is reviewed *de novo*. This is an issue of first impression.

> *Hypersensitive persons or property.* When an invasion involves a detrimental change in the physical condition of land, there is seldom any doubt as to the significant character of the invasion. When, however, it involves only personal discomfort or annoyance, it is sometimes difficult to determine whether the invasion is significant... If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncracies of the particular plaintiff may make it unendurable to him.

Restatement (Second) of Torts § 821F comment d (1979).

No New Mexico court has previously found a nuisance claim invalid under comment d. Section 821F itself has never been cited in any New Mexico case except in dicta in one dissenting opinion (*Cooper v. Chevron U.S.A., Inc.*, 2002-

NMSC-020, ¶ 33, 132 N.M. 382). The plain language of comment d indicates that it applies only to "personal discomfort or annoyance," not physical injury. In *San Diego Gas and Electric Co. v. Superior Court*, 13 Cal.4th 893, 938-39 (Cal. 1996), § 821F precluded nuisance recovery because the plaintiff did not allege "actual physical harm" from electromagnetic fields but only "fear" of such harm. In *Public Service Co. of Colorado v. Van Wyk*, 27 P.3d 377, 391-95 (Colo. 2001), electromagnetic fields from a power line were a nuisance under the "ordinary person" standard of § 821F (at 391), even absent allegations of actual injury.

In *Birke v. Oakwood Worldwide*, 87 Cal.Rptr.3d 602 (Cal.App. 2009), a tenant with asthma and allergies validly claimed that secondhand tobacco smoke in outdoor common areas constituted a private nuisance under the standards of § 821F. (at 610 n. 5).

821F applies only to "fears and feelings common to most of the community." Prosser and Keeton on Torts, 5th edition, 1984, chapter 15, § 88, at 629.

A search on Westlaw reveals 86 federal or state cases that have cited § 821F. Of those 86, only 1 has barred relief to a person with an actual physical injury: *Jenkins v. CSX Transp., Inc.* 906 S.W. 2d 460, 462-63 (Tenn.App. 1995), in which the Tennessee Court of Appeals determined that allergy to creosote was an "extremely rare condition"; neither Plaintiff's treating physician nor Defendant's

expert had ever seen another case in their combined 71 years of practice. *Id.* at 461. More recently, in *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 416 (Tenn. 2013), the Tennessee Supreme Court, although not explicitly reversing *Jenkins*, clarified that "the law does not countenance anyone being driven from their home." None of the other 84 cases in any jurisdiction has applied comment d to anything but the factors actually mentioned in its language: "personal discomfort and annoyance." And no court, including the *Jenkins* court, has ever ruled that a plaintiff is precluded from recovery for an *intentional* nuisance that results in actual physical injury.

Even if New Mexico were to adopt § 821F as law in this state, and even if, contrary to its plain language, New Mexico were to adopt the logic of *Jenkins*, applying § 821F to physical rather than psychological harm, a court could not apply it in the present case where the Plaintiff has been driven from his home. A court also could not grant summary judgment where a genuine issue of material fact exists, i.e. whether, like creosote allergy, EHS is an "extremely rare condition." Dr. Erica Elliott states that she has treated patients with EHS since 1995 and that their numbers are steadily increasing (RP 2088). She testified about her own electrosensitivity. (July 20, 2012, TR-57 to TR-60). Plaintiff's other treating physician, Dr. Morton, states that 3% of her patients have EHS. (RP 2264). The U.S. Access Board has heard from "thousands" of people with

chemical and electromagnetic sensitivities (RP 2246) and estimates that 3% of the population has EHS (RA 1412, 1417). Attached to Dr. Morton's affidavit of Feb. 3, 2010 are 59 scientific articles and government documents, including 22 epidemiological studies (RP 204-1511; list at RP 198-203) that collectively indicate that a significant percentage of the population have electromagnetic sensitivities:

> 2:28:51 COURT: According to submittals that were made in this case, somewhere between three and fifteen percent of people report some sort of EMS, whatever you want to call it.

(Audio transcript, March 15, 2010).

The district court judge granted summary judgment not for lack of evidence that this is not a rare condition, but because she decided, for no articulated reason, not to believe the evidence:

> 4:01:18 COURT: I also have serious doubts about the reliability of the studies on which Plaintiff relies to show that significant numbers of people are affected by electromagnetic sensitivity.

(Audio transcript, July 24, 2012).

Moreover, the district court's holding violates Title II of the Americans with Disabilities Act ("ADA"), as argued at RP 4725-27. Plaintiff's Third Amended Complaint, ¶ 4 (RP 3149) shows he is a "qualified individual with a disability" as defined by the ADA, 42 U.S.C. § 12131(2). The court's doctrine would deny relief under nuisance law to any person who is disabled. Smoke that would not bother a

"normal" person could be a nuisance to a person with asthma. Steps that would not impede a "normal" person could be a nuisance to a person in a wheelchair. The court's doctrine would bar relief, henceforth in New Mexico, to the disabled, allowing third parties to intentionally injure their disabled neighbors and avoid both injunctive relief and liability for damages.

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. A "public entity" includes "any State or local government" (42 U.S.C § 12131(1)(A)) and "any department, agency, special purpose district, or other instrumentality of a State or States or local government" (42 U.S.C. § 12131(1)(B)), which includes a court.

Under *Shelley v. Kraemer*, 334 U.S. 1 (1948), state court action to enforce private discrimination by race is prohibited under the Fourteenth Amendment. The district court's action in the present case is no less heinous. Defendant asserted that Plaintiff may not assert his right to live "in a residential area in a modern city." (Defendants' Motion for Summary Judgment Regarding Plaintiff's Nuisance Claim (RP 3522)). By adopting this position as law, the district court is in violation of the ADA and the Fourteenth Amendment. The court did not just enforce a private covenant, as in *Shelley*; it adopted a new legal doctrine denying

access to the *courts* by a class of individuals. Legal rules "obviously [are] the product of state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). "Decisions of a domestic court in the United States do constitute governmental action" under the Equal Protection Clause. *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013), *citing Shelley*.

Restatement (Second) of Torts § 821F is not law in New Mexico. It does not apply to actual physical injury. It does not apply to conditions that are not rare. There is a genuine issue of material fact as to whether EHS is rare. Precedent establishes electromagnetic fields as a nuisance. The adoption of a doctrine barring relief to the disabled violates the ADA and the Fourteenth Amendment. The district court decision on nuisance must be reversed.

VII. The District Court Erred in Finding Federal Preemption with Respect to Cellphones.

Issues of law are reviewed *de novo*. The district court's decision (RP 1824-26), although relying on *Murray v. Motorola*, 982 A.2d 764 (D.C.App. 2009), differs in finding that state law tort actions for injury by cellphones are preempted *even when the injury is intentionally inflicted*. This is an issue of first impression.

Plaintiff argued this issue below at RP 1543-50, 1677-89, and 1801-07.

Even were there no allegations of intent, the decision on preemption is erroneous. Conflict preemption exists where state regulation of tort law "stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress," *English v. General Electric Company*, 496 U.S. 72, 79 (1990). The Fourth Circuit, in *Pinney v. Nokia*, 402 F.3d 430, (4th Cir. 2005), *cert. denied*, 546 U.S. 998 (2005), not finding any such Congressional language, wrote that "[t]he F[ederal C[ommunications] A[ct] provides no evidence of such an objective." (at 457). The *Pinney* court further emphasized that the "presumption against preemption is particularly strong when Congress legislates '"in a field which the States have traditionally occupied,"' such as health and safety, and where the federal regulation in question "do[es] not provide a remedy to someone injured..." (at 454) (*citations omitted*).

Additionally, the district court's ruling on preemption violates the ADA, for the same reason its ruling on nuisance violates the ADA (issue VI, *supra*): the court has adopted a legal doctrine that denies to the disabled the protections of the common law. Any interpretation of the FCC regulations that acts to deny Plaintiff the protection of the laws of nuisance and prima facie tort conflicts with the ADA, another federal law, and with the Equal Protection Clause of the Fourteenth Amendment. (RP 1686-88).

VIII. The Imposition of Rule 1-037(B) Sanctions was Erroneous, Violating Due Process.

From beginning to end, the outcome of this case centered on Defendant's proposed provocation testing of Plaintiff. The court ignored three decades of Plaintiff's medical records from nine doctors, two decisions of the Social Security

Administration, the live testimony of three of Plaintiff's doctors, the results of psychological testing by two psychologists, 93 scientific studies, and medical conclusions based on a thorough differential diagnosis—and judged this case only on whether Plaintiff was willing to undergo a hazing procedure whose outcome was based on superstition and not science. The court excluded Plaintiff's experts, based not on qualifications or methodologies, but solely because the court refused to accept any evidence of general or specific causation other than a provocation test.

The court imposed sanctions on Plaintiff on no motion and without warning, for allegedly violating an order compelling a Rule 1-035 examination. (RP 4850-4857). Plaintiff argued this issue at RP 4870-82 and 5941-48. The standard of review is abuse of discretion as to how the court applied Rule 1-037(B), and clearly erroneous as to the court's factual findings. *Lopez. v. Wal-Mart Stores, Inc.*, 1989-NMCA-013, ¶ 6, 108 N.M. 259.

A. The Court's Findings Are Erroneous

1. Anticipatory anxiety would invalidate the proposed testing.

Plaintiff's expert advised that the provocation test proposed by Defendants' expert, Dr. Staudenmayer, would cause Plaintiff "anticipatory anxiety" that would invalidate the results (Finding 18 (RP 4854)), and the court found this to be evidence of "a de facto refusal to undergo properly requested and

Court-ordered provocation testing." (Finding 30 (RP 4856)). But Dr. Staudenmayer himself, in chapter 5 of his book about chemical sensitivity, *Environmental Illness: Myth and Reality* (1999), states that "anticipatory anxiety" will invalidate any provocation test:

> In step #6, the patient is tested with the placebo under single-blind conditions (patient is not told which agent is used). If the patient responds, step #7 allows for psychological intervention to overcome testing anxiety or anticipatory anxiety.

(RP 5658). A scientific fact, known equally to Defendant's expert and Plaintiff's expert, is no basis for sanctions.

2. Dr. Staudenmayer's proposed examination is scientifically invalid.

Dr. Staudenmayer's book outlines a 10-step protocol, involving days or weeks, which includes multiple psychological interventions if necessary to eliminate anticipatory anxiety, and which is required before provocation testing can be considered valid. (RP 5658-59). Dr. Staudenmayer's proposed provocation testing of Plaintiff, to be performed with no preparation in a matter of hours (Supplemental Record, Staudenmayer Affidavit, May 4, 2011), in no way complies with his own protocol, and Dr. Singer's correct conclusion that Plaintiff cannot be tested in this way (Finding 10 (RP 4853)) is no basis for sanctions.

3. The district court's own findings preclude sanctions.

When Dr. Staudenmayer continued to propose the same objectionable testing protocol, Dr. Siegel *specifically requested* that Dr. Singer develop his own protocol and submit it for review by Dr. Siegel.

> I requested, via Mr. Lovejoy, that rather than Dr. Singer responding with piecemeal critiques of various aspects of Dr. Staudenmayer's proposal, that he offer a counterproposal by designing a protocol that would address Plaintiff's concerns.

(Siegel memorandum, Jan. 18, 2012 (RP 4939)). The fact that Plaintiff then worked diligently with Dr. Singer to design a protocol that would not permanently injure him (Findings 16, 20, 21, 22, 28, 29 (RP 4854-56)) is evidence of cooperation—the opposite of obstruction. The court's finding that "Plaintiff proceeded to avoid, delay and object to any provocation testing at all" (Finding 7 (RP 4852)) is contradicted. The court's finding that "lack of an agreed protocol for such testing" is equivalent to "de facto refusal to undergo" testing (Findings 29, 30 (RP 4856)) is clearly erroneous.

4. Dr. Singer consulted with and informed Dr. Siegel at all times.

The court's finding that, "[d]espite repeated admonitions by this court to cooperate with Defendants and with Dr. Siegel in establishing and completing a testing protocol, Plaintiff has failed to do so" (Finding 26 (RP 4856)) is clearly false. A written record of Dr. Singer's letter and email correspondence with Dr.

Siegel between June 13, 2011 and July 27, 2012, keeping him fully informed, is in the record. (Exhibits B through EE to Singer Affidavit (RP 4893-4952)). The affidavit of counsel for Plaintiff, Lindsay A. Lovejoy, Jr., reveals additional communications with Dr. Siegel about Dr. Singer's development of the protocol (RP 4888-90). Dr. Singer's protocol and the results of his preliminary testing with Plaintiff are in the record. (Exhibit Z, RP 4941-47).

5. Dr. Siegel was concerned about *Defendant's* cooperation, not Plaintiff's.

Dr. Staudenmayer proposed his protocol on May 4, 2011 and never changed it. On November 21, 2011 Dr. Siegel wrote to Dr. Singer complaining, however politely, that Dr. Staudenmayer "has commented several times" refusing to alter "his procedures [as] detailed in his 5/4/11 letter." (RP 4926). On December 16, 2012, Dr. Siegel emailed Dr. Singer saying that Dr. Staudenmayer had failed to keep a phone appointment with him. (RP 4929). On January 3, 2012, Dr. Staudenmayer sent all parties a new version of his protocol (RP 4932-33); with minor changes in wording and order of ideas it was identical to his protocol of May 4, 2011. On January 12, 2012, Dr. Siegel told Dr. Singer that *Defendant's expert* was not cooperating. (RP 4937, quoted *supra*).

The court's findings that Dr. Siegel was concerned about *Plaintiff's* cooperation (Findings 12, 13, 19 (RP 4853-54)) and that Dr. Siegel had no concern about *Dr. Staudenmayer's* cooperation (Finding 12 (RP 4853)) are erroneous.

Sanctions may not be based on false findings. "[I]f the facts essential to the trial court's judgment are not established by substantial evidence in the record, we will necessarily find an abuse of discretion." *Lopez*, 1989-NMCA-013, ¶ 6 (decision reversed and remanded).

B. A Court Cannot Order Discovery That Would Endanger Plaintiff's Life.

Although the district court found that Plaintiff's reluctance to agree to a protocol that could permanently injure him deserved sanctions (Findings 6, 9, 17, 20, 23, 25 (RP 4852-55)), the concerns of Plaintiff's doctors about such a protocol are amply supported by the relevant case law. In *Herrera v. Fluor Utah, Inc.*, 1976-NMCA-045, 89 N.M. 245, the plaintiff was allergic to a variety of chemicals including paint.

> There was, of course, one way to conclusively determine the cause of the plaintiff's allergy—to expose him to more of the same paint. [The plaintiff's doctors] agreed that the serious dangers to the plaintiff which could result from such a test were not justified... *The law should not require measures which the medical experts decline to take for fear of endangering an individual's health*.

(1976-NMCA-045, ¶ 12) (*emphasis added*). That court instead allowed testimony as to causation to be based on differential diagnosis: "one, his history, two, the

clinical course, with various things that have happened to him, three, the elimination of other possibilities or rather other probabilities and, four, taking into consideration the [other expert's] report." 1976-NMCA-045, ¶ 11.

This is exactly the method used by Plaintiff's treating physician in the present case.

See also Terry v. Ottawa County Board, 847 N.E. 2d, *supra*, which held that an expert must rely on differential diagnosis to determine specific causation where sensitivity to a toxin "var[ies] from inividual to individual" and where there are ethical concerns with deliberate provocation. The court, quoting the plaintiff's expert, said: "'It's not like studying animals. We can't lock people up in cages.'" (at 1260).

An Independent Medical Examiner has the same ethical duty to do no harm to his subject as when treating his own patients.

> [A]ll courts that have considered the issue agree, under one form of analysis or another, that a physician owes a duty of care to a nonpatient examinee to "conduct the examination in a manner not to cause harm to the person being examined."

Greenberg v. Perkins, 845 P.2d 530, 535 (Colo. 1993) (*citation omitted*). *Accord: Dyer v. Trachtman*, 679 N.W.2d 311, 315-16 (Mich. 2004); *Mero v. Sadoff*, 31 Cal.App.4th 1466, 1471-78 (Cal.App. 1995); *Ramirez v. Carreras*, 10 S.W.3d 757, 760 (Tex.App. 2000); *Rand v. Miller*, 408 S.E.2d 655, 657 (W.Va. 1991); *Ritchie*

v. Krasner, 211 P.3d 1272, 1279-80 (Ariz.App. 2009); *White v. Harris*, 36 A.3d 203, 206 (Vt. 2011).

> Although plaintiff placed her physical condition in controversy when she commenced this lawsuit... an examination *should not be required if it presents the possibility of danger to her life or health.*
>
> ***
>
> Defendants failed to meet their burden [to show safety] since they did not furnish proof in proper form demonstrating that the test would not be harmful. The conclusory statements of the county defendants' counsel are valueless because of his *lack of qualification to render a medical opinion*.

Lefkowitz v. Nassau County Medical Center, 94 A.D.2d 18, 21 (N.Y.App.Div. 1983) (*emphasis added*).

Dr. Staudenmayer not only proposed to expose Plaintiff repeatedly to the identical conditions that spawned this lawsuit, but he lacks qualifications to offer a medical opinion that such a procedure is safe. Nor does Dr. Siegel, who wanted to compel Plaintiff to be exposed to those same conditions *continuously for six months*, have such expertise. His proposal, which was *explicitly designed to detect permanent injury*, could be lethal. *See* Affidavit of Erica Elliott, M.D., RP 4883-87. This also violates his profession's Code of Conduct, Standard 3.04, requiring psychologists to avoid harm (RP 4905). Dr. Siegel should be disciplined for ethical violations, and the district judge removed from this case for imposing sanctions upon Plaintiff for opposing such a plan. Plaintiff was only repeating the allegations in his Complaint—that wireless radiation from next door causes him

injury. He was forbidden from proving these allegations at trial simply because he continued to allege them.

C. There Was No Discovery Order.

The court found that Plaintiff violated its orders of November 9, 2010 and February 3, 2011 (Findings 6, 8 (RP 4852)). However, an order compelling examination "shall specify the time, place, manner, conditions and scope of the examination." Rule 1-035(A). The orders of November 9, 2010 (RP 2077-78) and February 3, 2011 (RP 2491) specified neither the time, place, manner, nor conditions of such an examination. No party may be sanctioned for violating a non-existent order. *Bellamah Corporation v. Rio Vista Apartments*, 1982-NMSC-155, ¶ 6, 99 N.M. 188.

D. Due Process Was Violated.

> [T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action [under Rule 37] without affording a party the opportunity for a hearing on the merits of his cause.

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958).

The Notice of Hearing, calling a hearing on only eight days' notice, contained no reference to sanctions of any sort, therefore Plaintiff had no chance to study the accusations, prepare a response, or arrange for witnesses to be at the hearing to offer testimony. (RP 4964, 4965, 4984).

The judge refused to rule on Plaintiff's Motion for Reconsideration of the discovery sanctions, stating that the motion was "moot" because she was granting summary judgment on other grounds. (RP 5952). But the motion was not moot. By the time the court granted summary judgment, the sanctions had cut the heart out of Plaintiff's case. The court had barred any evidence of Plaintiff's response to electromagnetic stimulus, prohibited testimony by Plaintiff's experts that he so responded, and adopted findings that there was no correlation between Plaintiff's exposure and Plaintiff's illness. Then it granted summary judgment because the evidence and testimony that it had barred was lacking. The order on sanctions led necessarily to the order excluding Plaintiff's witnesses, and to summary judgment. These orders must be reversed, and the case remanded.

CONCLUSION AND RELIEF REQUESTED

A court's decision must be based on law, not prejudice. A decision to ignore Plaintiff's laboratory tests and entire medical history, and to exclude his experts and all of their studies entirely on the say-so of a witness that the court refused to qualify—while relying on *ex parte* communications from an unqualified Rule 11-706 expert—such a decision cannot be upheld. The district court totally disregarded the evidence before it, and required Plaintiff to prove his case by the kind of test that has not be used by a court in over 300 years.

The court's rulings on nuisance, prima facie tort, federal preemption, and the exclusion of Plaintiff's experts should be reversed. The court's award of sanctions under Rule 1-037 should be vacated. The court-appointed expert should be dismissed from this case and disciplined for violations of professional ethics. The district court judge should be disciplined for abuse of *ex parte* communications, and the case remanded to a different judge for trial. Dr. Staudenmayer's testimony should be excluded. A preliminary injunction against the operation of wireless devices and other sources of dirty electricity in the Casados Street house should issue.

ORAL ARGUMENT

This case presents both factual and legal issues of first impression, not just in New Mexico, but in the United States. The rights of people with EHS under common law are being asserted here for the first time; Plaintiff-Appellant submits that these issues are so important, and the record sufficiently complex, that the case should not be disposed of without oral argument. The parties are in controversy as to issues of fact, issues of state tort law, and issues of the intersection of potentially controlling federal law whose resolution will affect the future of an entire class of people as well as an important industry. These matters require the fullest presentation by the parties to assist the Court.

Respectfully submitted,

Arthur Firstenberg
PO Box 6216
Santa Fe, NM 87502
(505) 471-0129

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