Supreme Court, Appellate Division, Second Department, New York.
Eric **PARKER**, respondent,
v.
MOBIL OIL CORPORATION, defendant third-party defendant-appellant,
Island Transportation Corporation, defendant second and fifth third-party plaintiff-appellant,
Getty Petroleum Marketing, Inc., defendant third-party plaintiff-appellant-respondent;
Exxon Mobil Corporation, third-party defendant-appellant;
New York Oil Products, Inc., third-party defendant/fourth third-party plaintiff-appellant.

March 28, 2005.

Background: Plaintiff diagnosed with acute myelogenous leukemia (AML) brought personal injury action against oil corporations, alleging that he contracted AML as result of his 17-year occupational **exposure** to gasoline containing benzene. Defendants and third-party defendants filed motion in limine to preclude the plaintiff from introducing expert testimony regarding medical causation. The Supreme Court, Nassau County, Lally, J., denied motion. Appeal was taken.

Holdings: The Supreme Court, Appellate Division, held that:
(1) order was appealable, and
(2) expert testimony was not admissible.
Reversed.

West Headnotes

[1] Appeal and Error 104
30k104 Most Cited Cases
Generally, an order deciding a motion in limine is not appealable, since an order, made in advance of trial which merely determined the admissibility of evidence, is an unappealable advisory ruling; however, an order which limits the scope of issues to be tried is appealable.

[2] Appeal and Error 104
30k104 Most Cited Cases
Order denying defendant oil companies' motions in limine to preclude expert testimony regarding medical causation, in personal injury action alleging that plaintiff contracted acute myelogenous leukemia (AML) as result of his 17-year occupational **exposure** to gasoline containing benzene, was appealable; motions went to very merits of the controversy and, if granted, would render the plaintiff's case meritless.

[3] Evidence 555.2
157k555.2 Most Cited Cases
Expert testimony is admissible provided that the principles and methodology relied upon by the expert have gained general acceptance as being reliable within the scientific community.

[4] Evidence 555.2
157k555.2 Most Cited Cases
Generally accepted reliability of proffered expert testimony can be demonstrated through scientific or legal writings, judicial opinions, or expert opinion other than that of the proffered expert.

[5] Evidence 555.10
157k555.10 Most Cited Cases
Expert testimony proffered by plaintiff diagnosed with acute myelogenous leukemia (AML), to show that AML was caused by plaintiff's **exposure** as a gasoline station attendant to benzene in gasoline, was not admissible to establish causation in personal injury action; testimony did not establish **level** of plaintiff's

exposure to benzene, and experts failed to make a causal connection, based upon a scientifically-reliable methodology, between the plaintiff's specific **level** of **exposure** to benzene in gasoline and his AML.
****435** Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, N.Y. (Robert J. Kelly, Richard E. Lerner, and Robert P. Scott of counsel), for defendant third-party defendant-appellant and third-party defendant-appellant (one brief filed).

Rivkin Radler, LLP, Uniondale, N.Y. (Harris Zakarin, Jay D. Kenigsberg, and James Quinn of counsel), for defendant third-party plaintiff-appellant-respondent.

Smith, Mazure, Director, Wilkins, Young, Yagerman & Tarallo, P.C., New York, N.Y. (Peter Graber of counsel), for defendant second and fifth third-party plaintiff-appellant.

Kreindler & Kreindler, LLP, New York, N.Y. (Marc S. Moller of counsel), and Baggett McCall Burgess & Watson, for respondent (one brief filed).

ANITA R. FLORIO, J.P., ROBERT W. SCHMIDT, REINALDO E. RIVERA, and ROBERT A. LIFSON, JJ.

***648** In an action to recover damages for personal injuries, (1) the defendant third-party defendant Mobil Oil Corporation and the third-party defendant Exxon Mobil Corporation appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Lally, J.), dated August 20, 2003, as denied their motion in limine to preclude the plaintiff from introducing expert testimony regarding medical causation and for summary judgment dismissing the complaint and all third-party claims and cross claims insofar as asserted against them, (2) the defendant third-party plaintiff, Getty Petroleum Marketing, Inc., appeals from so much of the same order as denied its motion in limine to preclude the plaintiff from introducing ***649** expert testimony regarding medical causation and for summary judgment dismissing the complaint insofar as asserted against it, (3) the defendant second and fifth third-party plaintiff, Island Transportation Corporation, appeals from so much of the same order as denied its cross motion in limine to preclude the plaintiff from introducing expert testimony regarding medical causation and for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and (4) the third-party defendant/fourth third-party plaintiff New York Oil Products, Inc., appeals from the same order.

ORDERED that the appeal of the third-party defendant fourth third-party plaintiff New York Oil Products, Inc., is dismissed as abandoned (*see* 22 NYCRR 670.8[c], [e]); and it is further,

ORDERED that the order is reversed insofar as appealed from by Mobil Oil Corporation, Exxon Mobil Corporation, Getty Petroleum Marketing, Inc., and Island Transportation Corporation, on the law, the motions and cross motion are granted, the complaint is dismissed in its entirety, and the third-party complaint is dismissed insofar as asserted against Mobil Oil Corporation and Exxon Mobil Corporation; and it is further,

ORDERED that one bill of costs is awarded to Mobil Oil Corporation, Exxon Mobil Corporation, Getty Petroleum Marketing, Inc., and Island Transportation Corporation, appearing separately and filing separate briefs.

The plaintiff was diagnosed with acute myelogenous leukemia (hereinafter AML) in September 1998. He commenced this action against the defendants Mobil Oil Corporation, Island Transportation Corporation, and Getty Petroleum Marketing, Inc., alleging that he contracted AML as a result of his 17-year occupational **exposure** to gasoline containing benzene, a known human carcinogen. The plaintiff alleged that, during his employment as a gasoline station attendant, he inhaled gasoline vapors ****436** and had dermal contact with gasoline containing benzene on a daily basis. Various third-party claims and cross claims arose out of the instant action.

The defendant third-party defendant, Mobil Oil Corporation, and the third-party defendant, Exxon Mobil Corporation (hereinafter Mobil/Exxon), moved in limine to preclude the plaintiff from introducing expert testimony at trial regarding medical causation alleging that the theory of causality of the plaintiff's experts

was inadmissible as unreliable and not generally accepted in the relevant scientific community, and for summary judgment dismissing the complaint and all third-party claims and cross claims insofar as asserted against them, arguing that, in the event their motion in limine was granted and the expert's ***650** testimony was precluded, the plaintiff's would be unable to establish medical causation. The defendant third-party plaintiff, Getty Petroleum Marketing, Inc., moved and the defendant second and fifth third-party plaintiff, Island Transportation Corporation, and the third-party defendant fourth third-party plaintiff, New York Oil Products, Inc., separately cross-moved for similar relief. The Supreme Court denied the motions and cross motions. We reverse insofar as appealed from by Mobil Oil Corporation, Exxon Mobil Corporation, Getty Petroleum Marketing, Inc., and Island Transportation Corporation.

[1] We note that this matter raises a preliminary issue regarding appealability, as the appellants, with the exception of New York Oil Products, Inc. (hereafter collectively the appellants), whose appeal has been dismissed as abandoned, appeal from so much of an order as denied their separate motions in limine. Generally, an order deciding a motion in limine is not appealable, since an order, made in advance of trial which merely determined the admissibility of evidence is an unappealable advisory ruling (*see* *Rondout Elec. v. Dover Union Free School Dist.*, 304 A.D.2d 808, 810, 758 N.Y.S.2d 394; *Chateau Rive Corp. v. Enclave Dev. Assoc.*, 283 A.D.2d 537, 725 N.Y.S.2d 215; *Savarese v. City of New York Hous. Auth.*, 172 A.D.2d 506, 509, 567 N.Y.S.2d 855). However, an order which limits the scope of issues to be tried is appealable (*see* *Rondout Elec. v. Dover Union Free School Dist., supra).*

[2] In the instant matter, the appellants moved and cross-moved to preclude expert testimony regarding medical causation and for summary judgment, since, if the motions in limine were granted, the plaintiff would be unable to prove causation and would not be able to prevail on his claims. Thus, the appellants did not improperly seek the relief of dismissal only through motions in limine (*cf.* *Downtown Art Co. v. Zimmerman*, 232 A.D.2d 270, 648 N.Y.S.2d 101). Such motions go to the very merits of the controversy and, if granted, would render the plaintiff's case meritless. Under these circumstances, the resulting order, whether granting the motions and cross motion and rendering the plaintiff's case meritless, or denying them, affected a substantial right of the parties. Thus, they are appealable (*see* *City of New York v. Mobil Oil Corp.*, 12 A.D.3d 77, 783 N.Y.S.2d 75; *Scalp & Blade v. Advest, Inc.*, 309 A.D.2d 219, 223-225, 765 N.Y.S.2d 92).

[3][4] Turning to the merits, this matter raises the issue of when certain scientific expert testimony is admissible. Expert testimony is admissible provided that the principles and methodology relied upon by the expert have gained general acceptance as being reliable within the scientific community (*see* *Frye v. United States*, 293 F. 1013; ***651***People v. Wesley*, 83 N.Y.2d 417, 422-423, 611 N.Y.S.2d 97, 633 N.E.2d 451). ****437** Generally accepted reliability of the proffered testimony can be demonstrated through scientific or legal writings, judicial opinions, or expert opinion other than that of the proffered expert (*see* *Tavares v. New York City Health and Hosps., Corp.*, 2003 N.Y. Slip Op. 51278 [U], 2003 WL 22231534; *Zafran v. Zafran*, 191 Misc.2d 60, 63, 740 N.Y.S.2d 596; *Cameron v. Knapp*, 137 Misc.2d 373, 375, 520 N.Y.S.2d 917). The burden is on the proponent to demonstrate the generally accepted reliability of the proffered testimony (*see* *Zafran v. Zafran, supra;* *Selig v. Pfizer, Inc.*, 185 Misc.2d 600, 605, 713 N.Y.S.2d 898, *affd.* 290 A.D.2d 319, 735 N.Y.S.2d 549).

[5] At issue in the instant matter is to what extent the plaintiff was required to establish the precise **level** of his **exposure** to benzene in order to establish that his AML was caused by it through a scientifically-reliable methodology. A scientifically-reliable methodology that is recommended by the World Health Organization and the National Academy of Sciences for drawing a sound conclusion as to the relationship between an individual's disease and a specific factor suspected of causing that disease entails a three-step process. This three-step process includes: (1) a determination of the plaintiff's **level** of **exposure** to the toxin in question, (2) from a review of the scientific literature, proof that the toxin is capable of producing the illness, or general causation, and the **level** of **exposure** to the toxin which will produce that illness (*i.e.*, the dose-response relationship) must be ascertained, and (3) establishment of specific causation by demonstrating the probability that the toxin caused the particular plaintiff's illness, which involves weighing the possibility of other causes of the illness. This three-step process has been acknowledged in numerous cases as generally accepted and reliable (*see e.g.* *Mancuso v. Consolidated Edison Co. of N.Y.*, 56 F.Supp.2d 391, 399; *Matter of Joint Eastern and Southern Dist. Asbestos Lit.*, 52 F.3d 1124, 1131;

Wills v. Amerada Hess Corp., 2002 WL 140542, 2002 U.S. Dist. LEXIS 1546 [S.D.N.Y. Jan. 31, 2002], *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 268; *Castellow v. Chevron*, 97 F.Supp.2d 780, 795- 798; *Frias v. Atlantic Richfield Co.*, 104 S.W.3d 925, 928). We note that although federal courts use the broader *Daubert* test (*see Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469) instead of the *Frye* standard (*see Frye v. United States, supra)* in connection with determining the admissibility of scientific expert testimony, it is instructive to examine federal authority for purposes of discussion of accepted scientific methodology.

In support of his contention that his AML was caused by **exposure** to gasoline containing benzene, the plaintiff relied ***652** upon the expert testimony of two witnesses, Drs. Phillip Landrigan and Bernard Goldstein. In their reports submitted in connection with the plaintiff's opposition to the appellants' motions, neither doctor articulated with any specificity the **level** of benzene to which the plaintiff was exposed. Dr. Landrigan, based upon the plaintiff's recitation to him regarding his daily occupational activities, merely described his **exposure** to gasoline as "extensive" and concluded that he had "abundant opportunity for **exposure** to benzene" and "ample opportunity for percutaneous **exposure** to benzene." Dr. Goldstein made even less of an attempt to quantify the plaintiff's **exposure,** merely stating in conclusory fashion that the plaintiff had "far more **exposure** to benzene" than did the subjects of a study of oil refinery workers, in which it was concluded that there was a link between increased **levels** of benzene **exposure** and leukemia.

****438** The plaintiff presented no evidence of the concentration **level** of benzene in the gasoline to which he was exposed. His experts failed to quantify his **exposure** in the typically utilized unit of measurement of parts per million factored against the duration of time to which the plaintiff was exposed, commonly referred to as a time-weighted average. Without any quantification of the plaintiff's **level** of **exposure** to benzene, required by the first part of the above described three-step process, the second part of that process, i.e., ascertaining the threshold **level** of benzene **exposure** which has been proven to cause AML (the parties do not dispute that a certain **level** of benzene **exposure** has been proven to cause AML) loses any significance. Even if the plaintiff quantified this threshold **level** of **exposure,** he failed to quantify his own **level** of **exposure,** rendering it impossible to determine whether he exceeded the threshold. Various courts have rejected expert opinions that also failed to quantify the alleged **level** of **exposure** to the toxin in question or failed to account for the dose-response relationship (*see e.g. Wills v. Amerada Hess Corp, supra; Whiting v. Boston Edison Co.*, 891 F.Supp. 12, 25; *Sutera v. Perrier Group of America Inc.*, 986 F.Supp. 655; *Frias v. Atlantic Richfield Co., supra* at 930).

However, Dr. Landrigan also reported that studies have shown there is no threshold **level** of benzene **exposure** below which leukemia cannot result. In layman's terms, this approach, referred to as a "linear non-threshold model," assumes that "if a lot of something is bad for you, a little of the same thing, while perhaps not equally bad, must be so in some degree. The model rejects the idea that there might be a threshold at which the neutral or benign effects of a substance become **toxic" *653**(*Whiting v. Boston Edison Co., supra* at 23). However, the scientific reliability of this methodology has flatly been rejected as merely a hypothesis (*see Wills v. Amerada Hess Corp, supra; Whiting v. Boston Edison Co., supra; Sutera v. Perrier Group of America Inc., supra* at 666).

Furthermore, the plaintiff's attempt to suggest that other expert opinions support this theory is misguided, as he cited studies which merely state that no **level** of benzene **exposure** can be considered "safe." Of course, stating that any **exposure** to benzene is "unsafe" is not tantamount to stating that any **exposure** to benzene causes AML. Furthermore, the plaintiff's reference to regulatory standards regarding benzene **exposure** was not compelling evidence, as such standards are not measures of causation but rather are public health **exposure levels** determined by agencies pursuant to statutory standards set by the United States Congress (*see Sutera v. Perrier Group of America, supra* at 664; *Wills v. Amerada Hess, supra).*

Thus, contrary to the plaintiff's contention, it was evident that his experts did not use the three-step process for establishing medical causation as set forth by the World Health Organization and National Academy of Sciences. Dr. Landrigan made non-specific conclusions regarding the plaintiff's **level** of **exposure** to benzene using indefinite terminology, and Dr. Goldstein merely stated, without any quantitative support, that the plaintiff's **exposure** to benzene was greater than that of the subjects of an oil refinery study. Thus, any conclusions as to the plaintiff's **level** of **exposure** to benzene and whether the **exposure** was substantial

enough to cause AML, were purely speculative (*see* *Frias v. Atlantic Richfield Co., supra* at 930).

The studies upon which the plaintiff's experts relied ultimately reached the conclusion that increased **levels** of **exposure** to benzene have been shown to cause leukemia, ****439** a fact not disputed by the parties. However, the plaintiff's experts failed to make a casual connection, based upon a scientifically-reliable methodology, between the plaintiff's specific **level** of **exposure** to benzene in gasoline and his AML.

The plaintiff relied upon *Warren v. Sabine Towing & Transp. Co.*, 831 So.2d 517 for his contention that a scientifically-reliable conclusion that an individual's AML was caused by benzene **exposure** can be based upon assertions that the individual's **exposure** to benzene was "significant." While the court in that case summarized the experts' conclusions, in effect, that the decedent's "significant" **exposure** to pure benzene and benzene containing products was a significant contributing cause to his AML, it did not discuss the methodologies ***654** the experts used in reaching such conclusions, nor explain why it accepted them. To the extent that those experts' opinions were not based upon any scientific data or methodology, the court's analysis in *Warren, id.* is flawed for the same reasons as the plaintiff's analysis is flawed here. The plaintiff's argument that his **exposure** to benzene was "far greater" than that of the *Warren, id.* decedent only demonstrated the speculative nature of the expert opinions in *Warren, id.* and in this case of categorizing the **exposure** by using indefinite terminology. In addition, the plaintiff failed to consider that the *Warren, id.* plaintiff was exposed to, in addition to gasoline containing benzene, pure benzene and other benzene-containing products, many of which had a higher concentration of benzene than does gasoline.

Accordingly, the plaintiff's expert testimony should have been precluded on the ground that it was not scientifically reliable and therefore inadmissible. We note that a *Frye* hearing (*see* *Frye v. United States, supra*) was not necessary under the circumstances here, where it was not requested by any of the parties and where the parties exhausted their arguments and authorities in their submissions (*see* *Selig v. Pfizer, Inc., supra* at 607, 713 N.Y.S.2d 898).

Since the appellants established, as a matter of law, that the plaintiff could not establish medical causation, the Supreme Court should have granted the motions and cross motion for summary judgment (*see* *Gadman v. Catalfo*, 251 A.D.2d 370, 674 N.Y.S.2d 391; *Cobb v. New York City Hous. Auth.*, 251 A.D.2d 362, 673 N.Y.S.2d 744; *Shinn v. Lefrak Org.*, 239 A.D.2d 335, 657 N.Y.S.2d 1005).

In light of our determination, the appellants' remaining contention need not be reached.