

2014 WL 10987753 (N.M. Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of New Mexico,
Second Judicial District.
Bernalillo County

Vangie NEPHEW, individually and as Personal Representative of the Estate of
Mervyn G. Nephew, Deceased, Mark Nephew, individually, and Darlene Acosta,
as parent and next friend of minor child, Ariana Monique Acosta, Plaintiffs,

v.

Alexander FEUCHTER, M.D., Albuquerque New Mexico Physicians, LLC,
Edcare Management Inc. and Lovelace Health System, Inc., Defendants.

No. D-202-CV-2013-05178.
June 5, 2014.

**Plaintiffs' Response to Defendants Alexander Feuchter, M.D., Albuquerque New Mexiso Physicians, LLC, and
Edcare Management, Inc.' Salberico/Daubert Challenge to Plaintiffs' Expert Neurosurgeon Jordan Davis, M.D.**

Jaramillo | Touchet, LLC, [David J. Jaramillo](#), [Maria E. Touchet](#), 505 Roma Avenue NW, Albuquerque, NM 87102, Telephone:
(505) 200-9454, Facsimile: (505) 717-1502, David@JTLawyers.com, Mia@JTLawyers.com.

Plaintiffs request the Court deny Defendants' motion to strike the testimony of Dr. Jordan Davis. Dr. Davis is a neurosurgeon who has been designated to provide opinions regarding injury causation and the cause of Mervyn Nephew's death. Defendants have moved to strike this expert under [Rule 11-702, NMRA](#). Plaintiffs request the Court deny Defendants' motion to exclude Dr. Davis.

On November 19, 2011, Mervyn Nephew was taken to the Emergency Department by Ambulance from his home. He was 70 years old, had a history of at least three falls, was disoriented, confused and on two blood-thinning medications, Coumadin and aspirin. This medical history is not in dispute. The central dispute in this case is whether the ordering of a CT in the Emergency Department would have revealed the [intracranial bleeding](#) that was found on a CT ordered on November 21, 2011 and that ultimately caused Mr. Nephew's death. Defendants and Plaintiffs have both identified experts on the cause and presence of the bleed. That issue of causation should be determined by the jury. Instead, Defendants want to challenge the scientific basis of Plaintiffs' expert opinion by applying inapplicable standards, exploiting concessions in a deposition, and ignoring other testimony and opinions. For the reasons, below the Court should deny this Motion and let the jury decided this important issue of causation consistent with the well-established law of New Mexico.

I. APPLICATION OF THE ADMISSIBILITY STANDARDS OF [RULE 11-702](#)

[Rule 11-702 NMRA](#) states that expert witnesses may testify to scientific, technical, or other specialized knowledge that, “will assist the trier of fact to understand the evidence or to determine a fact in issue.” [Rule 11-702 NMRA](#). The New Mexico Supreme Court interpreted this rule, in [State v. Alberico, 116 N.M. 156, 861 P.2d 192 \(1993\)](#), to contain three prerequisites for admission of expert testimony: (1) the expert must be qualified; (2) the expert testimony must assist the trier of fact; and (3) the expert may only testify to scientific, technical, or other specialized knowledge. [Alberico, 116 N.M. at 166, 861 P.2d at 202](#).

Since [Alberico](#), the Supreme Court has clarified that its decision should be considered in light of the liberal construction intended by the rules of evidence. Consequently, the Court has held, “[g]iven the capabilities of jurors and the liberal thrust of the rules

of evidence, we believe *any doubt* regarding the admissibility of scientific evidence *should be resolved in favor of admission*, rather than exclusion. *Lee v. Martinez*, 2004-NMSC-027, ¶16, 136 N.M. 166, 96 P.3d 291 (emphasis added).

In this case, Defendants do not challenge the qualifications of Dr. Jordan Davis. Consequently, the first prerequisite is not at issue. Defendants' challenge is directed only at the last two prerequisites - that the testimony will assist the trier of fact and that the testimony is scientific, technical, or other specialized knowledge.

In *Alberico*, the Court explained that the relevant inquiry on the second prerequisite for expert testimony is “[o]n *this subject* can a jury from *this person* receive appreciable help.” *State v. Alberico*, 116 N.M. 156, 166, 861 P.2d 192, 202 (1993) (quoting 7 Wigmore *Evidence* § 1923, at 21 (3d ed. 1940) (emphasis in original)). The Court recently reiterated its liberal application of [Rule 11-702 and the rules of evidence](#), holding that because an expert's testimony, “could have provided assistance to the trier of fact, *the trial court should have erred on the side of admitting the evidence.*” *State v. Hughey*, 2007-NMSC-036, ¶17, 2007 WL 2031622, 163 P.3d 470 (emphasis added).

The third prerequisite for admissibility under [Rule 11-702, NMRA](#) is that the expert's testimony is scientific, technical, or otherwise specialized knowledge. *Alberico*, 116 N.M. at 166, 861 P.2d at 202. In *Alberico*, the Court determined that this third prerequisite contains an implicit standard of reliability with regard to scientific expert testimony. *Alberico*, 116 N.M. at 168, 861 P.2d at 204 (“the pertinent inquiry must focus on the proof of reliability of the scientific technique or method upon which the expert testimony is premised.”). The Court held that this means, “the trial court must determine whether the scientific technique is based upon well-recognized scientific principles and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture.” *Alberico*, 116 N.M. at 167, 861 P.2d at 203. Subsequently, the Court has held that in making this determination regarding scientific evidence the court should consider: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. *Lee*, 2004-NMSC-027, ¶18.

Applying a reliability analysis to an expert's opinion, the Court is required to evaluate whether the opinion is based on the “methods and procedures of science” rather than on “subjective belief or unsupported speculation.” *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (1994) (quoting *Daubert*, 509 U.S. at 590). That is, whether the expert has “good grounds” for his belief. *Id.* at 741-42.

In *State v. Torres*, 1999-NMSC-10, 127 N.M. 20, 976, the New Mexico Supreme Court limited the requirements of *Daubert/Alberico* to testimony that requires scientific knowledge, stating that “application of the Daubert factors is unwarranted in cases where expert testimony is based solely upon experience or training.” *Torres*, 1999-NMSC-10, ¶43, 127 N.M. 20, 976 P.2d 20 (internal quotation marks and citation omitted). The language in *Torres* was adopted from *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir. 1996), which was subsequently overruled by *Kumho Tire Co.* Even though *Compton* has been overruled, New Mexico has continued to recognize *Compton's* rationale--as adopted in *Torres*--that *Alberico* does not extend to expert testimony based on non-scientific knowledge. See *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, 149 N.M. 1, 243 P.3d 440, cert quashed, 2012 N.M. LEXIS 483; *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-26, ¶19, 134 N.M. 421, 77 P.3d 1014 (stating that in *Torres* “we limited the requirements of *Daubert/Alberico* to testimony that requires scientific knowledge”); *State v. Lente*, 2005-NMCA-111, ¶4, 138 N.M. 312, 119 P.3d 737 (recognizing that “New Mexico law requires only that the trial court establish the reliability of scientific knowledge, and does not apply the *Daubert-Alberico* standard to all expert testimony”).

The expert testimony in this action is not the type of novel science contemplated by the *Daubert* court. Testimony to be presented by Dr. Davis does not involve some novel medical theory or procedure. Opinions grounded in sound medical research and experience are not “novel” science. Indeed, even Defendants' expert witnesses testified that the basis for their opinions in this case is their years of training and experience. [Richard Dashieff Deposition, p. 20:3-24, attached hereto as “Exhibit 2”; William

Spangler Deposition, pp. 17:13-18:9, attached hereto as “Exhibit 3”). Neither Dr. Dashieff nor Dr. Spangler conducted any case specific research of testing in this case. Both applied their training and experience to the facts of this case and both chose facts that supported their opinions and disregarded facts that did not. Both of these experts also, like Dr. Davis, conceded that there were other possible explanations for the brain bleed in this case. Both agreed that a 70-year-old man, with a history of falls and on Coumadin is at risk for brain bleeds. They just opined that their opinion was the more accurate opinion. Thus, the medical experts simply disagree on a complicated question of causation. That question must be resolved by the jury after weighing the medical testimony that will be offered.

Defendants' motion selects various concessions made by Dr. Davis during his deposition but ignores other opinions he gave during the deposition. Those opinions are stated again in the sworn affidavit submitted in support of this response. To the extent the Defendants think that they obtained favorable testimony during Dr. Davis' deposition, that testimony does not extinguish the presence or basis for the opinions given by Dr. Davis regarding the brain bleed in this case. Moreover, that testimony does not provide a basis for exclusion of Dr. Davis as a witness in this case. That testimony may and should only provide a basis for cross-examination and argument to the jury as to the weight it should give Dr. Davis opinion.

Assuming, for the sake of this Response, that New Mexico requires an implicit reliability standard in [Rule 11-702](#) for non-scientist testimony, a Court considering the reliability of these non-scientist experts' testimony should have broad latitude in its ultimate determination of reliability and in deciding how to determine reliability including choosing which, if any, of the factors to use in a particular case. *Kumho*, 526 U.S. at 141-42. This Court, therefore, would not be bound to strictly apply the factors created for evaluating scientists when determining whether the testimony of non-scientist experts is reliable. In fact, the Court would probably be better served by adhering to the standard set forth in *Alberico*, which did not delineate a set of factors, but rather, directed the trial courts to generally determine, “whether the scientific technique is based on well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture,” while keeping in mind that, “any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion. *Alberico*, 116 N.M. at 167, 861 P.2d at 203; *Lee*, 2004-NMSC-027, ¶16.

II. THE TESTIMONY OF DR. DAVIS WILL ASSIST THE TRIER OF FACT

There really is no question that the testimony of Dr. Davis will assist the trier of fact in determining the issues of whether Mervyn Nephew's [intracranial hemorrhages](#) could have and should have been discovered in the Lovelace Emergency Department on November 19, 2011. Dr. Jordan Davis is Board Certified in Neurological Surgery. He has been continuously Board Certified since November 13, 1968 and has over 45 years' experience as a neurosurgeon in hospital and clinic settings. [Affidavit of Jordan Davis, M.D. ¶¶3-4, filed concurrently herewith; Curriculum Vitae, attached to the Davis Affidavit as Exhibit 1-A]. In connection with his work in this case, he reviewed Mr. Nephew's medical records, [CT scans](#), and depositions taken in the case. The opinions he reached in this case are based upon his review of those records. [Affidavit of Jordan Davis, M.D. ¶6; Davis Deposition p. 44:2-16, attached hereto as Exhibit 1]. The opinions he has reached about Mr. Nephew's [intracranial hemorrhages](#) have been gleaned in his training and experience, his knowledge of the anatomy and physiology of the brain and the blood structures that support the brain, and that information is reflected in the medical literature that exists today regarding [intracranial hemorrhage](#). [Affidavit of Jordan Davis, M.D. ¶5; Davis Deposition p. 30:19-31:2, attached hereto as Exhibit 1]. *See, e.g., Williams v. CSX Transp., Inc.*, 2002 U.S. Dist. LEXIS 22448, at * 18 (E.D. Pa. November 15, 2002) (denying a Daubert challenge where the expert's testimony was based upon a review of “medical records and depositions and was rendered based on his experience as a neurosurgeon and medical doctor”).

Dr. Davis is of the opinion that at the time Mervyn Nephew was in the Lovelace Emergency Department had neurological consultation been obtained, the neurosurgeon would have said in a man with four falls on Coumadin and aspirin, he is a set up for a subdural or an intracranial bleed and requires a [CT scan](#). [Affidavit of Jordan Davis, M.D. ¶11]. It is Dr. Davis' opinion that at the time Mervyn Nephew was treated at the Lovelace Emergency Department he had a small brain bleed (related to the falls at home) that would have been found had a [CT scan](#) been ordered. [Affidavit of Jordan Davis, M.D. ¶12]. It is Dr. Davis' opinion that the Emergency Department missed the diagnosis and enhanced the bleeding by continuing Mr. Nephew on anti-

coagulant medications. [Affidavit of Jordan Davis, M.D. ¶113]. It is Dr. Davis' opinion that it is more medically probable than not that in an **elderly** gentleman on anti-coagulants with a history of multiple falls in the hours preceding his presentation to the Emergency Department who remained in the Emergency Department for six hours, a **CT scan** taken would have revealed a small brain bleed. [Affidavit of Jordan Davis, M.D. ¶23].

It is Dr. Davis' opinion that Mr. Nephew's **intracranial hemorrhage** was most probably caused by the falls at home combined with his anti-coagulated state. [Davis Deposition pp. 23:1-11, 36:15-21, attached hereto as "Exhibit 1"]. It is Dr. Davis' opinion that Mr. Nephew's death was more likely preventable than not. [Davis Deposition, p. 23:20-23, attached hereto as "Exhibit 1"]. The treatment options available to Mr. Nephew were to stop the anticoagulants immediately and start the administration of platelets. [Davis Deposition 23:24-24:21, attached hereto as "Exhibit 1"].

One of the questions the jury will be asked is whether any negligence of the Emergency Department providers caused damage to Mr. Nephew. Dr. Davis' opinions concerning (1) the cause of decedent, Mervyn Nephew's, **intracranial hemorrhages**, (2) timing of the **intracranial hemorrhages**, (3) and treatment options that would have been available to treat the **intracranial hemorrhages** had they been discovered in the Emergency Department as they could have and should have been, combined with the testimony of Dr. Ken Williams, will assist the jury in answering the question of injury causation. Dr. Davis' expert testimony is not only helpful, but essential in the jury being able to decide this question. Consequently, Plaintiffs request the Court deny Defendants' motion to exclude Dr. Davis' testimony as not being relevant to assist the jury.

The relevance of the testimony of Dr. Davis is evident. They will clearly assist the jurors in understanding evidence and answering questions submitted to them. In fact, Defendants have failed to present any support for their arguments that would even invoke the discretion of the Court with regard to the admissibility of this expert's testimony as to the second prerequisite under **Rule 11-702**. Plaintiffs, therefore, request the Court deny Defendants motion to exclude the testimony of Dr. Davis.

III. THE TESTIMONY OF DR. DAVIS IS RELIABLE

A. Dr. Davis' Opinions are based on Reliable Scientific Principles

Defendants' criticisms of Dr. Davis' opinions is summarized by Defendants as follows:

[T]here is no scientific evidence that establishes within reasonable medical probability that there was blood in Mr. Nephew's skull which could have been detected by a **CT scan** on November 19th.

See Defendants' Motion at p. 3. This criticism is not accurate and is not the opinion to which Dr. Davis testified. To be sure, Dr. Davis did testify that since a **CT scan** was not ordered, he could not testify with certainty how much blood would have been seen on a **CT scan** had it been ordered. [Affidavit of Jordan Davis, M.D. ¶25]. Dr. Davis stated:

I testified in my deposition that I cannot testify with certainty as to what a **CT scan** taken in the Emergency Department would have shown because none was ordered. I acknowledge that I told defense counsel that he was correct in his statement that what the CT would have shown cannot be known. That is all I meant to agree to and cannot speak to the words he chose in asking me the question. I can testify, however, that it is more medically probable than not that it would have revealed a small brain bleed. I gave that opinion to Plaintiffs' counsel before my disclosure, I believe I gave that opinion during my deposition, and I am giving that opinion again in this affidavit. The fact is, no CT was ordered so what it would have precisely shown will never be known to anyone, including defense experts.

Id. Dr. Davis did not, however, testify that there is no scientific evidence to establish within a reasonable medical probability that there was blood in Mr. Nephew's skull that could have been detected on **CT scan**.

Dr. Davis determined that the cause and timing of Mr. Nephew's [intracranial hemorrhages](#) based on sound scientific principles. In his decades of experience in providing Neurological Surgery consultations in Emergency Departments, this is precisely the type of extrapolation that would occur in an acute setting. Doctors routinely face the situation in which they patch together a patient's history and tailor the patient's treatment based on the conclusions reached as a result of that prior history. [Affidavit of Jordan Davis, M.D. ¶8]. In his practice, Dr. Davis reviews the [CT scans](#) of his patients. [Davis Deposition, pp. 27:25-28:4, attached hereto as "Exhibit 1"].

Mr. Nephew's medical records reveal that Mr. Nephew was an [elderly](#) man, on anti-coagulants, who had a history of multiple falls and significant confusion prior to his presentation at the Lovelace Emergency Department. [Affidavit of Jordan Davis, M.D. ¶7]. It is also not in dispute that Mr. Nephew's [platelet](#) counts in the Emergency Department were very low. *Id.* In a patient presenting to the Emergency Department with Mr. Nephew's known medical history, a brain scan and neurological consultation were necessary. [Affidavit of Jordan Davis, M.D. ¶9]. The medical literature firmly establishes a connection between falls in the [elderly](#), Coumadin, brain bleeds and the need for repeat [CT scan](#) evaluation. [Affidavit of Jordan Davis, M.D. ¶10].

It is Dr. Davis' opinion that at the time Mervyn Nephew was treated at the Lovelace Emergency Department he had a small brain bleed (related to the falls at home) that would have been found had a [CT scan](#) been ordered. [Affidavit of Jordan Davis, M.D. ¶12]. These opinions are based upon the review of the [CT scan](#) and the diffuse nature and location of the bleeds seen. [Affidavit of Jordan Davis, M.D. ¶14]. It is Dr. Davis' opinion that as reflected on Mr. Nephew's [CT scan](#), he had two brain bleeds. [Affidavit of Jordan Davis, M.D. ¶15]. Mr. Nephew has four areas of blood in the brain. *Id.* He's got subdural blood, intracerebral -- intracerebral blood, intraventricular blood, to the point where one of the ventricles is basically full of blood, and subarachnoid bleeding. *Id.* In Dr. Davis' opinion, it is more medically probable than not that the subdural bleed began on November 19th with the falls. *Id.* It is Dr. Davis' opinion that the [arterial bleed](#) was related to the anti-coagulant and was precipitated by Mr. Nephew's documented falls. [Affidavit of Jordan Davis, M.D. ¶16].

It is Dr. Davis' opinion that the [CT scan](#) eventually taken of Mr. Nephew's head shows [diffuse bleeding](#) that was more likely than not from Coumadin. [Affidavit of Jordan Davis, M.D. ¶17]. It is his opinion that the bleed that was eventually found was most likely not a thalamic bleed. *Id.* The subdural bleed seen on Mr. Nephew's [CT scan](#) is not related to [hypertension](#). *Id.* As he testified in his deposition, bleeding inside the brain does not extend into the dural space because there is a membrane to keep the blood out. [Affidavit of Jordan Davis, M.D. ¶18; Davis Deposition pp. 43:7-44:1]. The blood does not flow from the hypertensive area to the dura; it travels the other way, from the skull to the dura. *Id.* Additionally, Mr. Nephew's blood pressure was not elevated sufficient to cause a hypertensive bleed. [Affidavit of Jordan Davis, M.D. ¶18; Davis Deposition, p. 34:8-35:21, attached hereto as "Exhibit 1"].

When he was questioned during his deposition about the ability to rule out or exclude an AV malformation, a [ruptured aneurysm](#), or hypertensive bleed as a cause of Mr. Nephew's brain bleeds, Dr. Davis answered that he could not exclude those causes. [Affidavit of Jordan Davis, M.D. ¶21]. However, those causes are possibilities, not probabilities in this case. *Id.* It is his opinion to a reasonable degree of medical probability that those were not the causes of Mr. Nephew's brain bleeds. *Id.* As he testified in his deposition, a delayed [intracranial hemorrhage](#) 24 to 48 hours after a fall, is a remote possibility, not a probability. [Affidavit of Jordan Davis, M.D. ¶22].

As he testified in his deposition, there are all degrees of intracranial bleeds. [Affidavit of Jordan Davis, M.D. ¶24]. Patients with a small [subdural hematoma](#) may show no signs of focal neurologic deficit. *Id.* It is common for neurologic deficits to ebb and flow in patients with [subdural hematoma](#). *Id.* The presence or absence of focal neurologic deficit is not the determining factor of whether to order a [CT scan](#) on a patient with a medical history such as Mr. Nephew. *Id.*

Based on all of this scientific evidence, it is Dr. Davis' opinion that it is more medically probable than not that in an [elderly](#) gentleman on anti-coagulant with a history of multiple falls in the hours preceding his presentation to the Emergency Department

who remained in the Emergency Department for six hours would have had a [CT scan](#) that revealed a small brain bleed. [Affidavit of Jordan Davis, M.D. ¶23].

Because the ruling related to Defendants' Motion has a direct impact on Dr. Davis, he specifically requests the opportunity to be heard on the matter. [Affidavit of Jordan Davis, M.D. ¶26].

WHEREFORE Plaintiffs request this Court deny Defendants' motion to exclude the testimony of Dr. Jordan Davis.

Respectfully Submitted:

JARAMILLO | TOUCHET, LLC

Electronically Filed

By: /s/ *Maria E. Touchet*

David J. Jaramillo

Maria E. Touchet

505 Roma Avenue NW

Albuquerque, NM 87102

Telephone: (505) 200-9454

Facsimile: (505) 717-1502

David@JTlawyers.com

Mia@JTlawyers.com

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.