

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JAMES ALDERMAN, ET. AL.,)	
)	
Plaintiffs,)	
)	
v.)	C.A. NO. 04C-06-181-FSS ¹
)	E-FILED
CLEAN EARTH, ET AL.,)	
)	
Defendants.)	

Submitted: January 9, 2007
Decided: April 30, 2007

MEMORANDUM OPINION

**Upon Defendants' Motion to Strike Plaintiffs' Experts
is *GRANTED* in part and *DENIED* in part.**

SILVERMAN, J.

¹ This decision also relates to the consolidated cases: *Donna Mills, et al. v. Clean Earth, et al.*, C.A. No. 04C-05-230-FSS and *Louis McDuffy v. Clean Earth, et al.*, C.A. No. 04C-06-170-FSS.

This is Defendants' Motion to Strike Plaintiffs' Experts in an environmental tort case. Plaintiffs are homeowners who claim, generally, that Defendants, nearby industries, mishandled or improperly stored hazardous substances, releasing toxins and contaminating Plaintiffs' properties. Together, the experts opine that contaminants on Plaintiffs' land probably came from Defendants' operations. Defendants contend that the experts' "opinions" are unscientific and, therefore, inadmissible under *Daubert v. Merrell Pharmaceuticals, Inc.*²

I.

Specifically, Defendants are, or were, businesses that dealt with hazardous substances at their facilities, located near Hamilton Park and Eden Park, near New Castle, Delaware. For example, Defendant, Clean Earth of New Castle, Inc., cleans and recycles soil for beneficial reuse. A consultant to Delaware's environmental protection agency, DNREC, often sent soil to Clean Earth for treatment in remediation projects. In some instances, the complaint does not say what the Defendant does.

Plaintiffs live, or lived, in Hamilton Park or Eden Park. Their homes are, or were, anywhere from a few feet to a mile, or more, from Defendants' sites. Although Defendants' sites are in various locations, Clean Earth is closer to Plaintiffs

² 509 U.S. 579 (1993).

than most other Defendants. Clean Earth is located on the southern side of Pyles Lane. From Clean Earth, a few houses are across the street and a few yards west. The rest of Hamilton Park, though, is located farther northwest, past a wooded area. Since they are in subdivisions, some houses are adjacent to the wooded area, while others are farther north.

Eden Park is even farther north of Hamilton Park, across Pyles Lane, past a large parking lot, past a wooded area, across I-495, which is an six-lane divided highway, and past another wooded area. Again, Eden Park also has various subdivisions, so some houses border the wooded area, and others are even farther north. Some Plaintiffs are a mile, or more, from the source(s) of the alleged contamination.

Around 2001, DNREC began researching sites where tanneries, which were arsenic users, were located. DNREC initially looked at Hamilton Park, but later realized that only a patent leather producer, which did not use arsenic, was located there. Nevertheless, DNREC continued investigating community concerns about toxins.

DNREC sampled soil from Hamilton Park and found high toxin levels. It conducted additional tests and reported that arsenic, lead and other heavy metals were in the community. The environmental agency, however, concluded the toxin

levels did not pose an immediate threat to the residents. It neither ordered remediation nor took further action.

Nevertheless, on June 16, 2004, two hundred fifty-seven Plaintiffs filed this action against thirty-one Defendants. In broad brush fashion, Plaintiffs allege Defendants received, deposited and released hazardous substances, including arsenic and lead, contaminating Plaintiffs' properties, specifically the soil. These toxins allegedly migrated from Defendants' facilities to Plaintiffs' properties through surface water and groundwater runoff, air flow transportation, and so on. The causes of action include negligence, nuisance, trespass, and strict liability.

Plaintiffs seek money damages, including their properties' fair value. Plaintiffs also seek medical monitoring, for the on-going, increased risk of contracting serious injuries and illnesses. Some Plaintiffs alleged personal injuries, but those claims have been dropped. Now, the case only concerns property damage.

Plaintiffs offer two experts, James H. Mulry, a geologist, and Michael A. Wolfson, M.D., an occupational physician, to support their position. Both have been deposed and submitted reports for Plaintiffs. Mulry also testified at the hearing on Defendants' *Daubert* motion.

II.

On November 19, 2006, Defendants, Clean Earth of New Castle, Inc., Wilmington Chemical Corporation, Seton Mariner, Inc., and Seton Company, Inc., filed this Motion to Strike Plaintiffs' Experts based on *Daubert*³. On November 29, 2007, these Defendants also filed a Motion for Summary Judgment. And, on December 6, 2006, they filed a Motion to Strike the Affidavits of Plaintiffs' Experts.

Later, Defendants Bollman Trucking Company, F&H Transport, Inc., Christiana Motor Freight Company, Greggo & Ferrara, Parkway Gravel, Inc., and New Castle Hot Mix joined the motions. A few Defendants have not joined, yet, and Greggo & Ferrara, Parkway Gravel, Inc., New Castle Hot Mix, and Bollman Trucking Company were dismissed, by agreement.

On January 9, 2007, the court heard the *Daubert* motion, including Mulry's testimony. Two other witnesses, Paul Chrostowski and Joe McAndrew, testified for Defendants. Although the court is not relying on the testimony of Defendants' witnesses, they helped demonstrate scientific methods for testing the contamination's origin that Mulry did not employ.

³ *Id.*

III.

Defendants contend Mulry is not an expert. Their main argument, though, is that Mulry's opinions are unreliable because he failed to conduct scientific analysis to determine whether Defendants caused the contamination. Similarly, his opinions are not "based on commonly accepted methodology employed by the State of Delaware, the EPA, the geological professional community or any other credible source." Also, Mulry failed to consider other sources of contamination. Instead, Mulry merely speculated in reaching his conclusion. Mulry's conclusions, Defendants claim, will confuse and mislead the jury into incorrectly assuming that Defendants caused the contamination.

This decision focuses primarily on Mulry's opinion and report. As the court recollects, the parties concede that if Mulry is disqualified as an expert, Dr. Wolfson must be struck as well, because Wolfson relied heavily on Mulry.

IV.

Plaintiffs offer James Mulry, a geologist with extensive ground and surface water contamination experience, as their first expert. As discussed below, Mulry took samples of Plaintiffs' soil, looked at DNREC's samples, and visited Clean Earth a few times. From this, Mulry concludes: "surface soil in the Eden Park and Hamilton Park neighborhoods is contaminated. . . ."; "[t]he source of the soil

contamination in the Eden Park and Hamilton Park neighborhoods has been the contaminated materials and soil on industrial properties surrounding these neighborhoods. . .”; “[c]ontamination spread . . . by various transport mechanisms such as wind transport. . . and surface runoff . . .”; and “[t]he most practical remediation of surface soil contamination in Eden Park and Hamilton Park is the removal of the surface soil, to an approximate depth of one foot below current grade and the placement of ‘clean’ topsoil.”

A. Mulry’s Conclusions are Unscientific

Under the Delaware Rules of Evidence, an expert may testify if: “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”⁴ And, following the United States Supreme Court in *Daubert*,⁵ the Supreme Court of Delaware adopted a five-part test to determine whether scientific expert testimony is admissible.⁶ Paraphrasing slightly:

⁴ D.R.E. 702.

⁵ *Daubert*, 509 U.S. at 579.

⁶ *Tolson v. State*, 900 A.2d 639, 645 (Del. 2006).

When evaluating whether scientific evidence is admissible, the trial court must determine (1) that the expert is qualified (D.R.E.702); (2) that the evidence offered is otherwise admissible, relevant and reliable (D.R.E. 401 & 402); (3) that the opinion's basis are those "reasonably relied upon by experts in the field" (D.R.E.702); (4) that the specialized knowledge being offered will assist the jury to understand the evidence or to determine a fact in issue (D.R.E.703); and (5) that the evidence will not create unfair prejudice, confuse the issues or mislead the jury (D.R.E.403).⁷

1. Expertise

Defendants contend that because Mulry was not a licensed geologist in Delaware when he wrote his report, he is not an expert. That, by itself, does not disqualify him.⁸ Mulry was a licensed geologist in Pennsylvania, and his Delaware license lapsed only because he failed to pay dues. Also, an expert need not be licensed at all, let alone be licensed in Delaware.⁹

Mulry's background is replete with educational and hands-on expertise in field, soil and groundwater contamination. He is a certified geologist in Pennsylvania and Delaware, who received a Bachelor of Science in geology from the

⁷ *Id.* (citing *Daubert*, 509 U.S. at 592-95).

⁸ *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 795 (Del. 2006) (citing *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995) and *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994)).

⁹ *Id.*

University of Delaware in 1982. His *curriculum vitae* states that he has over twenty years experience investigating and remediating soil and groundwater contamination.

Mulry's expertise, however, does not extend very far into contamination caused by air transport. Therefore, Mulry's opinions about airborne contamination are questionable from the start.

2. Relevance

As discussed below, the main issue is whether the contamination from Defendants' properties caused contamination on Plaintiffs' properties. Mulry addresses the contamination levels on Defendants' and Plaintiffs' properties and possible migration routes, which are clearly relevant to the complaint. Thus, Mulry could help Plaintiffs establish that their land has been contaminated and by what. Mulry's opinions, however, become irrelevant, in a broader sense, because he cannot tie Defendants' activities to Plaintiffs' contamination. The scientific shortcomings of Mulry's opinions are explained below.

3. Reasonably Relied Upon

Some of Mulry's testimony is "reasonably relied upon by experts in the field." When determining contamination levels, a geologist would reasonably rely on personally obtained samples and reliable samples taken by a regulatory agency, like DNREC, to determine contamination levels. Therefore, based on his and

DNREC's samples, Mulry could testify about the contamination levels on the properties.

The rest of Mulry's testimony, however, does not meet *Daubert's* third prong because Mulry failed to test his hypothesis.

The subject of an expert's testimony must be "scientific ... knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."¹⁰

Therefore, "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., 'good grounds,' based on what is known."¹¹

"Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."¹² *Daubert* also directs the

¹⁰ *Daubert*, 509 U.S. at 591 (internal citations omitted). See also *State v. McMullen*, 900 A.2d 103, 113 (Del. Super. Ct. 2006); *Spencer v. Wal-Mart Stores East, LP*, 2006 WL 1520203 (Del. Super.); *McLaren v. Mercedes Benz USA, LLC*, 2006 WL 1515834 (Del. Super.).

¹¹ *Id.*

¹² *Id.* at 593

court to "consider the known or potential rate of error."¹³ Therefore, "[t]he foci of a *Daubert* analysis are the 'principles and methodology' used in formulating an expert's testimony, not on the expert's resultant conclusions."¹⁴

Here, Mulry concluded that:

[c]ontamination has spread from these industrial sites into the residential neighborhoods by various transport mechanisms such as wind transport and deposition, transport by vehicle and foot traffic, surface runoff and stream over-bank deposits during flooding of local wetlands, the Lobdell Canal and Christiana River and by dumping of wastes. Weather records show variable wind direction for this area; the nature and number of industries located in the area creates very heavy truck traffic and the fairly low lying elevation of the area make it prone to flooding. All of these factors cause migration of particles, sediment and dust, throughout the area, including from the contaminated industrial sites to the residential neighborhoods.

In other words, Mulry hypothesized that there basically were two transport mechanisms from Defendants' properties to Plaintiffs' properties, air flow or wind transport and surface water runoff. As discussed below, Mulry never tested his hypothesis. In fact he testified that he had "no data other than the existence of

¹³ *Id.* at 594

¹⁴ *Bowen*, 906 A.2d at 794 (citing *Daubert*, 509 U.S. at 589).

migration pathways" to support his conclusion. Therefore, his hypotheses about the source of contamination are unproven and inadmissible.

Mulry's lack of testing is problematic for four reasons: (1) he cannot show that Defendants caused any of Plaintiffs' contamination; (2) even if Defendants are a source of contamination, he cannot say to what extent; (3) Mulry does not even try to distinguish among Defendants as sources of pollution; and (4) he cannot eliminate other sources of contamination, such as lead paint and passing traffic.

a. Air Flow Hypothesis

As to his air flow or wind transport hypothesis, Mulry found that dust particles, which may or may not have been polluted, blew from Defendants' properties to Plaintiffs' properties. Mulry testified that on several occasions he "visually observed dust being emitted from Clean Earth. . . [and] the transport of dust particles, a cloud of dust along Pyles Lane by truck traffic." He further observed that the wind was traveling from Defendants' to Plaintiffs' properties and also checked weather records for these days, which generally support his hypothesis.

Several problems, however, exist with Mulry's air flow conclusion. First, as mentioned above, although Plaintiffs hold Mulry out as a geologist generally, nothing in his *curriculum vitae* shows that he has training or expertise in

meteorology, much less specialized expertise on airborne pollution. And, he has no expertise on air transport of lead and arsenic-bearing particles.

Second, Mulry never did tests to determine whether contaminants were actually in the dust clouds he saw, or that the dust actually traveled from Defendants' to Plaintiffs' properties. As mentioned above, he testified that all he did was visit the Clean Earth area three times, where he saw trucks kick-up dust. And, because the wind was blowing toward Hamilton Park, Mulry assumes Defendants caused Plaintiffs' contamination.

Although this is a sound hypothesis, Mulry has no hard data to back it up. He conceded at his deposition that he "didn't do any sampling of the dust that was in the air. . . ." Nor did he "do any wind modeling" or "look at [long-term] meteorological studies." Mulry could have performed air dispersion modeling to determine if the particles in the air actually traveled from Defendants' to Plaintiffs' properties. With this modeling, Mulry would have looked at the wind currents, wind speed, particle size, precipitation, etc. Or, he could have collected dust samples to determine whether the dust he saw actually contained contaminants. Or, he could have analyzed the properties' soil, using lead "fingerprinting" or arsenic speciation, to learn whether the toxins on Plaintiffs' land are the same as those found on Defendants' land. Mulry testified that he knew what air transport modeling was,

"mathematical models that would predict the transport of airborne particles," but he conceded that he "did not prepare or look at any air transport modeling in the preparation of [his] report."

Third, even if contamination spread from Defendants' to Plaintiffs' properties, Mulry cannot say to what, if any, degree of probability Defendants caused Plaintiffs' contamination. Nor can he say which Defendant was responsible for it.

The court is not deciding what is necessary to be an air transport expert. Nor is it deciding what testing is necessary to support an air flow theory such as Mulry's. The court is merely suggesting ways that Mulry could have scientifically tested his theories. Plaintiffs argue that each case requires different testing methods, depending on the case's facts, and Defendants suggestion that transport modeling must be done is simply fallacious because other tests are available. While Plaintiffs are correct that different testing can be done, their argument still fails because Mulry did no testing. Since he did not test his limited empirical observations, nor could he describe or quantify the contamination, nor could he state how long any contamination existed, and so on, Mulry cannot testify about his air flow or transport theory.

b. Surface Water Hypothesis

As for his surface water hypothesis, Mulry relied on topographical maps showing possible surface water migration routes from Defendants' properties to Plaintiffs' properties, based on elevation levels, to conclude that Defendants contaminated Plaintiffs' property. Because most of Mulry's background has been in hydrogeology or groundwater technology, he is highly qualified as a hydro-geologist. Therefore, Mulry should be well-qualified to testify about surface and groundwater issues.

The problem again, however, is that Mulry did no scientific testing to determine whether surface water actually went from Defendants' to Plaintiffs' properties, much less how it happened and under what conditions. First, Mulry could have constructed a model showing that, based on the elevation levels, surface water would have gone from Defendants' to Plaintiffs' properties. Or, he could have tested the surface water to determine what, if any, contaminants it contained, and in what amounts. Or, again, he could have done arsenic speciation or lead "fingerprinting." Again, the court is not deciding what an expert is required to do. But, the expert must do something.

Second, Mulry admitted that,

runoff direction isn't a consistent thing [because] it changes over the course of decades as these facilities have been re-graded, building have been taken down and put back up, the storm water pond, I don't know how long it has been at its current location, so, you know, over the course of the decades that there have been operations there, you know, I'd be surprised if the storm water runoff is consistent.

Therefore, Mulry is unable to say how long or how much surface water actually went from Defendants' to Plaintiffs' properties.

Finally, Mulry conceded that, since Clean Earth's operations are heavily regulated, it has a specific structure for controlling surface water runoff. And, Clean Earth has never been cited for a run-off violation.

Based on his work, Mulry can not show to any degree of scientific probability that surface water went from Defendants' to Plaintiffs' properties; whether the water actually contained contaminants; or, assuming polluted water did flow from Defendants' to Plaintiffs' properties, how long the surface water ran that way. Because Mulry cannot say whether Defendants' caused Plaintiffs' contamination or how much contamination Defendants actually caused, Mulry cannot testify about his surface water theory.

c. Other Sources of Contamination

Further, Mulry did not distinguish between the contaminants' sources. Mulry cannot say that the contamination was not natural or man-made from sources other than Defendants, such as lead paint. Mulry did not even know what the contamination background levels, the naturally occurring levels, were. In fact Plaintiffs concede that Mulry "openly acknowledge[s] that there are likely multiple sources for the arsenic and lead on plaintiffs' properties, including other defendants, 'historic' industrial operations, and. . . [h]e has not estimated the percentage of their contribution. . . ." Also, Mulry testified that it was possible that some arsenic or lead went from Hamilton Park onto Defendants' properties.

d. Damages Theory

Beyond the causation problems mentioned above, Mulry's opinions as to damages are also unsupported and unreliable. First, Mulry testified that he did not rely on any federal or state standards to support his opinion that remediation is necessary. Rather, he simply declares in because-I-say-so fashion, remediation is necessary "to a level that satisfies the property owner" and does not take into account "the level satisfactory to the state or federal environmental agency. . . ." Further, he concludes that the "most practical remediation" is "removal of the surface soil, to an approximate depth of one foot below current grade and the placement of 'clean'

topsoil." Mulry, though, never said how he arrived at his "one foot" standard and never presented scientific evidence showing that this depth is required for any Plaintiff, let alone every Plaintiff. Plaintiffs defend Mulry's position by arguing that soil excavation is a commonly accepted remediation method. While this is true, Mulry still cannot defend his one foot depth requirement.

Defendants rely on *Goodridge v. Hyster*.¹⁵ In *Goodridge*, the expert was rejected because he wanted to testify that it was unreasonably dangerous for forklifts not to have back-up signals, even though no regulation, statute, OSHA or other expert required or recommended them.¹⁶ Equipping forklifts with back-up signals was his personal opinion.¹⁷ Mulry's opinion about remediation suffers from the same problem as the expert's in *Goodridge*. Here, Mulry is using his personal opinion, or Plaintiffs' desires, to determine what remediation is necessary. Mulry arrived at his opinion on remediation depth without any scientific or regulatory support.

Second, at his deposition, Mulry stated that he used samples "that would most likely have a higher concentrations of metals. . . ." This is problematic because

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

it is unknown how many Plaintiffs actually have elevated contamination levels, and therefore, the jury will have to speculate which properties would require remediation.

Third, at his deposition, Mulry was asked how the jury should “distinguish [the sources of contamination] when it comes to the verdict?” Mulry answered, “If they believe the sources of these properties did contribute to contamination of these properties, they would have to do their best to try to determine to what extent.” If the jury has no evidence on who caused what, then its verdict on damages will be speculative.¹⁸

And finally, Mulry lumps all Plaintiffs together. Some Plaintiffs live a few yards from one Defendant, while others live a mile, or more, away from any Defendant. Mulry, however, does not distinguish between any Plaintiff, but simply concludes that all require remediation. Therefore, to conclude that all Plaintiffs have the same contamination and require the same remediation is tenuous at best.

4. Assisting the Jury and 5. Confusing or Misleading the Jury

Allowing Mulry to testify about the contamination levels he and DNREC found could assist the jury. As presented above, however, Mulry’s ultimate conclusions are unreliable, and allowing him to testify will mislead or confuse the

¹⁸ *Goodridge v. Hyster Co.*, 2002 WL 32007200 (Del. Super.), aff’d, 845 A.2d 498, 501 (Del. 2004).

jury. Mulry, in effect, invites the jury to leap to the same conclusions as he, namely that Defendants caused Plaintiffs' contamination. The jury is not likely to understand the availability and importance of testing. Instead, the jury may agree with Mulry simply because he is an "expert." In that sense, Plaintiffs' reliance on Mulry is a fallacious argument *ad autoritatum*.

B. Dr. Wolfson's Opinions Fail Under *Daubert*

Plaintiffs offer Dr. Wolfson, an occupational and environmental physician experienced in toxin poisoning, as their second expert. Plaintiffs rely on Dr. Wolfson:

[who] identified a large number of plaintiffs who manifest current conditions consistent with exposure to lead and arsenic. Based on the existence of this exposure confirming the pattern and the levels of lead and arsenic in plaintiffs' soil, Dr. Wolfson has opined that all plaintiffs who reside in the affected community should undergo a regimen of medical monitoring.

Further, according to Plaintiffs, his conclusions were "[b]ased on historical information and environmental test results, widespread toxic contamination of Eden Park and Hamilton Park were due to the release of toxic substances over many years from industrial sites owned by defendants. . . ." Wolfson also concluded that the toxins "have been present for many years, likely even decades," and "[a]rsenic and

lead have, for many years, posed significant health risks to the Hamilton Park and Eden Park residents from a wide range of adverse health effects."

The problem with Dr. Wolfson's conclusions, though, is his almost total reliance on Mulry's report. At his deposition, Dr. Wolfson stated he relied on Mulry and never reviewed the operations of any industries around the area. In fact he assumed "that the data that [Mulry] presented is accurate data. . ." and has no other source showing how long the toxins were present.

Dr. Wolfson, relying on Mulry's reported concentration levels, concluded that Plaintiffs require medical monitoring because all were exposed to toxins. Because Mulry only used samples with the highest concentration level, not all Plaintiffs land had such a high concentration level. Also, Wolfson never examined any Plaintiff, nor did he determine which Plaintiffs were actually exposed to the toxins. Therefore, because Mulry's opinions are knocked out, Dr. Wolfson's conclusions, which relied almost solely on Mulry and had no other bases, cannot be considered reliable either.

Even if Mulry's report were admissible, Dr. Wolfson's conclusion that medical monitoring is necessary fails because it, too, is not based on scientific testing or other medical examination. The only scientific data that Dr. Wolfson relied on were the soils' contamination levels. This is problematic for several reasons. First,

Dr. Wolfson never determined whether Plaintiffs were actually exposed to the toxins. He knew there was contamination in the soil, but contamination, by itself, does not prove that Plaintiffs were exposed to a known extent, or even to any extent. To suffer adverse health affects, a person must be exposed to a certain level, measured through duration, frequency, intensity, etc. If, for example, Plaintiffs were exposed to contamination, but at a non-toxic level, then the causation between contamination and any disease is speculative at best. Second, Dr. Wolfson could have done urinalysis or hair analysis to establish Plaintiffs' arsenic levels or a blood test to determine the lead levels, but he conducted neither of these tests or any other tests.

Finally, Dr. Wolfson never determined if any of the alleged diseases were actually caused by the contamination. Only when certain toxic levels exist and when the illness or injury cannot be explained by other causes can the exposure be linked to the disease. Some of the diseases that some Plaintiffs have could have been caused by other sources. For example, lung cancer can be caused by smoking. Yet, Dr. Wolfson never evaluated the chain of causation for these diseases to determine if they were probably caused by the toxins. Therefore, not only do Dr. Wolfson's opinions fail as they rely on Mulry's conclusions, but also because Dr. Wolfson did no independent examination of Plaintiffs or their exposure levels.

V.

At first blush, Mulry's and Wolfson's conclusions seem to be supported by common sense. That is why *Daubert* is so important in this case. The fact that Defendants work with pollutants that are too similar in some ways to those found on Plaintiffs' land, coupled with possible vectors for the contaminants' movement from Defendants' to Plaintiffs' land, does not prove that Defendants probably contaminated Plaintiff's land.

If, for example, A is struck by a stray rifle bullet, just because B was firing a rifle at the time, in A's direction and A was in range, that does not prove B probably shot A. B is a good suspect. But to prove the connection, A would have to produce more direct or circumstantial evidence, such as a bullet comparison. At least, A should show that no one else was firing a rifle in the vicinity or eliminate other suspects. Here, as explained, Mulry does not attempt to eliminate other possible suspects, much less quantify the damages Defendants caused. His syllogism is simply: Plaintiffs have arsenic and lead on their land; Defendants are involved with those elements and they could move from Defendants' to Plaintiffs' property; therefore, Defendants are responsible for Plaintiffs' problems. Mulry's opinions, however, are simply untested.

The court appreciates this decision's potential impact. As the court understands it, without Mulry and Wolfson, Plaintiffs are vulnerable to summary judgment. The court also appreciates the complaints' seriousness. Moreover, the court sees that Plaintiffs' concerns are not frivolous. Nevertheless, Plaintiffs demand what could be millions of dollars in damages. Even so, Plaintiffs' experts have not undertaken the sophisticated, rigorous, and perhaps expensive, scientific testing necessary to qualify their opinions. As it stands, allowing Mulry and Wolfson to offer their ultimate conclusions would only invite the jury's sympathy and speculation. As explained, a jury could not conclude, based on Mulry's and Wolfson's testimony, that any Defendant was probably responsible for the contamination on Plaintiffs' properties.

VI.

For the foregoing reasons, Defendants' Motion to Strike Plaintiffs' Experts is **GRANTED** in part and **DENIED** in part. In other words, Mulry and Wolfson may testify about contamination levels and the like. But they may not offer opinions about causation and damages, including remediation.

Plaintiffs shall have ten days in which to file for reargument and to supplement their response to Defendants' pending summary judgment motion. Defendants shall have five business days after that, in which to reply to any request

for reargument and reply to any supplement to Plaintiffs' response to Defendants' pending summary judgment motion.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

oc: Prothonotary (Civil Division)

pc: All Counsel of Record