No. 09-56331

UNITED STATES Court OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW W. SHALABY, SONIA DUNN-RUIZ, Plaintiffs - Appellants, v. NEWELL RUBBERMAID, INC.; THE HOME DEPOT, INC.; IRWIN INDUSTRIAL TOOL COMPANY, INC.; BERNZOMATIC, Defendants-cross-claimants - Appellees, and WESTERN INDUSTRIES, INC.; WORTHINGTON INDUSTRIES, Cross-defendants - Appellees.	D.C. No. 3:07-cv-2107-MMA-BLM Southern District of California, San Diego

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding,
Barbara L. Major, Magistrate Judge, Presiding

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellees Newell Operating Company, Irwin Industrial Tool, BernzOmatic, and the Home Depot (collectively, BernzOmatic), and Worthington Industries (Worthington), attempt to try the case before this Court instead of addressing the substantive issues of this appeal. Neither defendant addresses Plaintiffs' argument that a prima facie showing of proximate cause here is a simple, rather than complex, matter of proof. Instead, they present as a foregone conclusion that "a jury would be at a complete loss to assess whether the product's design 'violated minimum safety assumptions' " (Worthington's answering brief ("WB") at 38, BernOmatic's answering brief ("BB") at 1), without ever explaining the basis of this assertion. In addition to addressing much of their argument to facts in dispute, and therefore not a fit topic for summary judgment, Defendants also misrepresent a number of facts in the record.

(A) THE COURT IMPROPERLY WEIGHED THE SAME INCORRECT FACTS PRESENTED ON APPELLEES' BRIEFS

Whether Dr. Anderson's "conclusion that 'voids' substantially weaken the braze joint is completely unfounded" (WB at 22) just because it contradicts Worthington's asserts that a "70% porosity the [sic] braze joint would still be 4 times stronger than the parent metal" (WB at 10) is a question of fact to be determined at trial, not summary judgment. The District Court properly articulates its summary

judgment role. (Doc. 209 at 20:22-21:19.)[1] Significantly, it notes that "the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . *Anderson* [v. Liberty Lobby, Inc.], 477 U.S. [242,] 255 [(1986)]." (Doc. 209, 21:18.) Nevertheless, the Court proceeds to weigh the evidence, much of which is demonstrably false, as further discussed below.

Despite summary judgment not being a trial on the merits, Defendants push every fact in the record in an attempt to try the case here. Sometimes, defendants push too far and make assertions directly contradicted by the record. So, for instance, Worthing asserts that an eyewitnesses "saw" Plaintiff kick the cylinder into the fire. (WB at 26). In fact, review of Worthington's citations reveals that there was no eyewitness to the accident, apart from Plaintiffs themselves. In fact, prior to the District Court's ruling, only the Court itself gave credence to this theory of the accident (Doc. 209 at 12:20-14:19.) Numerous MAPP cylinders were exposed to heat and flame in the report titled, *"The Behaviour of 'Bernzomatic' MAPP and Propane Cartridges When Exposed to Heat and Flame"* (the "British Report" - Doc. 200-30, ER v.1 at 253). Not one of these cylinders failed in the location where the cylinder in this case failed. Photos of Plaintiff's injuries taken in the hospital where he was admitted because of burns that covered 20 percent of his body show that, though his hands were severely burned, the areas of his right hand in contact with the cylinder

[1]All reference in this brief is to the final order, document 209, located at ER v.1 pp. 5-29, and shall be cited "Doc. 209."

sustained no injury, while only the exposed area of his hand was injured.

(ER v4 769, 843 - Portion of hand protected by the cylinder was not injured.)

(ER v.4 865 - Plaintiff held assembly by cylinder, AOB at 6.)

In fact, Plaintiff was burned so severely that all the burned skin, from the neck down, required skin-grafting, with exception of his protected right hand.

ER v.4 766

ER v.4 768

ER v.4 767

ER v.4 771

ER v.4 772

Based soundly on this evidence, Worthington's own expert, Dr. Eagar, found serious flaw with the "kicked-into-the-fire" theory of the accident: (Doc. 173-12 at 121:17, ER v.4 p. 743):

> 121:17 - The problem I have with that [theory] is Mr. Shalaby described being engulfed in a flame in the middle of the fireball. Shooting out of a pressure relief valve is more like being hit with a flame thrower as opposed to being engulfed in a fire ball. If it was coming straight at you, maybe. Then I have to factor in where his burns were. His hands are fairly severely burned. That is consistent with banging it like a hammer.[2]

BernzOmatic's two experts also did not believe the "kicked-into-the-fire" theory, declaring the cause of injury "undetermined":

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[2] Dr. Eagar was correct to the extent that a force was indeed applied to the tip of the torch, as Plaintiff attested ("light tapping force" - Doc. 209 at 2:22), but Dr. Eagar was not likely aware that a fracture groove existed on the torch to prevent failure of the cylinder if the torch had been "bang[ed] it like a hammer").

> Consistent with methodologies in NFPA 921 *Guide for Fire & Explosion Investigations,* 2008 Edition, the cause of the fire and Mr. Shalaby's burns is undetermined. (Doc. 198-3, (ER v.4 at 872)).[3]

When the facts in the record are compared to the Court's order, one can only conclude that the Court credited certain evidence but not others, in contradiction to the teaching of *Anderson* the Court cites in its very order (*Anderson v. Liberty Lobby, Inc*., 477 U.S. at 242). So, for instance, the Court did not credit, or in fact mention, Plaintiff Dunn-Ruiz's testimony that she saw Plaintiff Shalaby holding the torch while he was on fire. (Doc. 173-14 at 2:20 (ER v.4 at 751), Doc. 173-4 at 34:2-24 (ER v.3 pp. 557-558).) Instead, the Court spends two pages detailing select portions of the rangers' testimony, and how tidbits of allegations supposedly corroborate disputed hearsay allegations that Plaintiff "admitted" kicking the cylinder into the fire. (Doc. 209 at 12-13.) The District Court relies on this misinformation as "fact" when it asserts that Dr. Anderson's testimony fails under Rule 702 in part because of his

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[3] BernzOmatic's experts also apparently did not know about the existence of the fracture groove, which rules out the "banged" theory (Doc. 93-3, ER v.4 at 836). The fracture groove is not mentioned anywhere on any defense expert's report or deposition transcript. For whatever reason, the existence of the fracture groove and its significance evaded every expert in the case, perhaps due to a design change in June 2005, where the visible fracture groove was replaced by an obscure "fracture point" design." See RJN 14-18, Doc. 200 at 7-8 (ER v.2 pp. 146-147). Moreover, contrary to the Court's belief that "it remains in dispute whether Worthington Industries or Western Industries manufactured the MAPP gas cylinder," the date of the fracture groove's re-design establishes that Worthington was the manufacture of the subject cylinder. See RJN 19-20, ER v.2 p.147.

"complete disregard of the state of the torch and cylinder as described by the only witnesses who viewed them after the accident." (Doc. 209 at 14:13.) In truth, the rangers' description of the MAPP torch after the accident is consistent with Dr. Anderson's theory that the brazed joint was unreasonably weak.

Ranger Warren Ratliff's Description of the Cylinder
(Doc. 173-5, ER v.3 at 561)

> 25:22 - The cylinder had a right-angle bend to it at the torch, where the connection of the cylinder is, and appeared to be a crack in the cylinder at the bottom thread level of the cylinder.
>
> 26:24: It just appeared to be a split along the very bottom, the last thread of the neck.
>
> 28: 6 [the bend was] at the base of the nozzle and the torch - the cylinder itself.
>
> 28:9 At the explosion part, or whatever the break in the cylinder was, is where it was actually bent.
>
> 33:23 Q: Do you remember whether the label was damaged in any way, either burned or scratched off or anything like that?
>
> 34:1 - Appeared to be normal wear and tear.
>
> 34:16 Q: Was there any soot or burn residue anywhere on the exterior of the cylinder?
>
> 34:18 No, sir...There was some dust from the ground.
>
> 70:24 The threaded part was forced at a right angle of the cylinder itself.
>
> 71:2 Q: Is that what you were testifying about earlier, that right angle?
>
> 71:4 Yes, the right angle. Not the torch nozzle, but the cylinder and the

torch nozzle... Opposite of the bend of the side – on the side of where the crack was, the angle went to the right; right-side angle of that crack.

73:23 Q: Other than the one crack– I'm going to use the term "crack" – you describe up on the neck of the bottle, did you see any other breaches in the metal bottle of the cylinder or anywhere else?

74:2 No, sir.[4]

(ER v.4 806 - Glenn cylinder failing at brazed joint, matches above description of angle bend and point of failure.)

The Defendants and the Court appeared to have regarded Ranger Ratliff as somewhat of an expert witness, based on his background as a welder and his familiarity with the subject torch.[5] Ironically, Ranger Ratliff opined that a force was applied to the tip of

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[4] Ranger Stephens corroborates Ranger Ratliff's description of the cylinder. (Doc. 173-7, Stephens depo. pp. 31:4, 42:3, 42:19, 44:19, 44:23, 45:12, 45:14, 47:12, 47:16, 48:4, 72:24, 73:15, 79:24, 80:7 (ER v.4 at 638).

[5] BernzOmatic values Ranger Ratliff's opinion as to the cause of failure of the cylinder based on his "work as a Seabee in the Navy" and his "experience using similar [BernzOmatic] MAPP gas torches" (BB at 9). Likewise, the Court also appears to recognize Ranger Ratliff's potential "expert" qualification based on his background

the torch, and that the failure was the result of a defect of the cylinder, *based on his experience with the same cylinders*:

> 68:15: Okay. It appears to me that it was banged against -- the top of the nozzle was banged against something of a hard surface and not created the crack, but maybe, in my experience, that weakened the connection between the torch nozzle and the cylinder itself.
>
> 29:20 Q: Can you remember any other thoughts that came to your mind as to what might have caused the bend that you saw in the torch [sic]?
>
> 29:23 - Just the natural explosion itself could have- or a faulty - you know, my personal experience with these cylinders is faulty materials, manufactured materials.

Dr. Anderson, arrived at the same conclusion long before the close of expert discovery (WB at 29 - ("[s]ome force applied to the tip in the order of 12 to 30 pounds.")[6] Worthington's expert, Dr. Eagar, was in agreement, as quoted above, and further supported his opinion with the findings on the British Report. (Doc. 173-12 at 121:17, ER v.4 p.743) The British Report details that when MAPP gas cylinder fail under exposure to heat and flame, the failed cylinder will have ashes, soot, burn marks, and will explode into several pieces, rather than releasing its explosive force through a small crack in the neck of the cylinder. (ER vol.2 253-276, esp. pp. 8, 12, and 14).

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as a welder familiar with the MAPP torch used by Plaintiff (Doc. 209 at 12:24).

[6]Dr. Anderson explains that force of "12 to 30" pounds is the equivalent of 1 to 2.5 foot-pounds. Doc. 173-2 at 117:21 (ER v.3 at 461).

(ER vol.2 269 - an “Exploded” MAPP cylinder from British Report)

The subject cylinder was split at the brazed joint, and contained no soot or burn marks of any kind:

> 44:19 Q: was there any evidence, in the area where you saw this fracture of the neck of the cylinder, that there were any by-particles of combustion, like soot or anything?
>
> 44:23 A: No. In fact, I didn't even see–I didn't even see like a scorching around where the crack was. I don't know exactly how the explosion worked, but I didn't see, like, burning to the actual cylinder itself.
>
> 45:12 Q.: With respect to the cylinder, still, did it have any labels on it?
>
> 45:14 A: Yes, it did. It said–I believe it was "Bernzomatic"...I saw the standard label that was on it... [the label] was mostly intact.
>
> (Depo. of Randall Stephens, Doc. 173-7, ER v.4 at 679.)

Again, none of this is intended to assert what happened on April 21, 2006. It is intended to point up that not only did the Court deviate from its summary judgment role, but that its understanding of the information it gleaned from its injudicious foray into the facts of the case is seriously deficient.

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(B) OTHER FALSE FACTS

While irrelevant to the summary judgment order, the correct facts are relevant to the orders denying Plaintiffs' requests for judicial notice and motions to strike Defendants' false allegations. Some of those falsities are re-presented on Defendants' appellate briefs as follow:

1. There were three witnesses to Plaintiff's "admission" that he kicked the torch and cylinder into the campfire: Paramedics Russo and Price, and then the fireman preparing the "fire department report" (WB at12). This is false. The fire department did not prepare any such report. The report was prepared by Paramedic Price (SER vol.3 800:8). BernzOmatic states that Russo heard the story from Price (BB at 9 top), but Price testified that he may have heard the story from Russo or someone else (Deposition of Robert Price pp. 13-21, Appellees' Excerpts, SER vol.3 802:12-6).

2. "EMT Price...determined that Mr. Shalaby kicked the cylinder into the fire" (BB at14 ¶ 3). There is no citation to the record because this allegation is false.

3. "Plaintiff was seen banging the torch/canister on the cement campfire ring" (WB at1). There is no citation to the record for this "fact" either, because it is false. Ranger Stephens testified that a female in a group of bystanders "*gave* [him] *a story – that the guest* [was banging the torch on the side of the fire ring]" (Doc. 173-5 at 20:2, ER vol.3 p.569:2), while another bystander alleged Plaintiff was "*lighting a*

water heater on the pilot light" (Doc. 173-7 at 38:3, ER v.4 at 674), and yet another alleged that "*he was kicking around the cylinder, like, in the coals*" (Doc. 173-7 at 38:6, ER v.4 at 674).

4. The brazed joint is stronger than the parent metal (WB at 9-11). But BernzOmatic admits the brazed joint is the vulnerable part of the cylinder, and that it had to construct a fracture groove on the torch to prevent its failure (SER vol.1 p. 174, http://www.bernzomatic.com/resources/glossary.aspx):

> Fracture Groove: A designed in failure point in the torch, so that when the torch & cylinder are dropped, the fracture groove will fail prior to the cylinder center bushing failing. If the center bushing fails, then an extremely large 8 to 10 foot flame will erupt from the cylinder.

Moreover, Plaintiff's cylinder failed at the brazed joint (ER vol.3 p. 575 at line 24), as did every failed cylinder in every disclosed case (e.g. ER vol.4 pp. 804-810).

(ER v.4 805, Vanderlinde cylinder, failing at the *brazed joint* (Declaration of J. Vanderlinde at ER vol.2 354)

5. Other False Assertions: Defendants' assertion that Plaintiffs' Experts'

opinions were contradicted by "uncontroverted facts" (BB at 19), by "Plaintiff's admissions" (BB at 28), and by "eyewitness testimony" (BB at 31). None of these assertions is true. Nor does BernzOmatic cite any authority that holds an expert must consider certain items of disputed fact if his or her testimony is to be admitted under Rule 702. Notably, Dr. Anderson's opinions were no more or less dictated by these supposed uncontroverted facts than were those of Dr. Eager. These sometimes incredible assertions are a reflection of what the parties may sink to when encouraged by a trial court that impermissibly wades into disputed evidence.

(C) DEFENDANTS' OWN THEORIES OF WHAT CAUSED THE TORCH TO FAIL ARE IN CONFLICT, THUS PROVING THE MATTER IS IN DISPUTE AND NOT A PROPER SUBJECT FOR SUMMARY JUDGMENT

1. Kicked Into Fire

The "kicked-into-the-fire" theory would evidence a defect of the pressure relief valve, hence Defendants' liability (Eager depo., Doc. 200-29 p.152:10-14, ER v.2 p.252). However, both defendants' adopt this theory as one of the viable possibilities of what happened the day in question. (BB at 9, 14, passim; WB at 1, 12, 17.) Yet each defendant's adoption of this theory is more than a little strange. Worthington, seeking to prove that its braze joints never fail, offers evidence (without citation to the record) of the results from its own "burst tests":

> Since engaging in the manufacture of MAPP gas cylinders, not less than 24,000 cylinders have been burst tested. In all of the burst tests

> conducted by Worthington, the bursts have always occurred in the cylinder sidewall and not in any of the brazed joints," (WB at 10-11).

This is strange because these "burst tests" only serve to corroborate that the cylinder described by the rangers did not fail because it was exposed to heat and flame.[7] Worthington's burst test results corroborate the authoritative *"The Behaviour of 'Bernzomatic' MAPP and Propane Cartridges When Exposed to Heat and Flame,"* which showed that MAPP cylinder failure from exposure to heat and flame invariably explode catastrophically at the sidewall of the cylinders, rather than the top (supra). Additionally, Worthington's expert, Dr. Eager, also rules out the theory:

> 152:9 - A: You wouldn't get this type of crack at this location [had it been kicked into the fire]. **You definitely wouldn't get it by putting it in the fire**. You get the pressure relief valve to go first. If the pressure relief valve, for some reason, didn't let go, you'd get a split on the side. Just like they did in the British test where they defeated the pressure relief or whatever. You'd get the highest stresses, the internal pressure stresses, as we've discussed a couple of times today, are on the side of the cylinder not at the top....
> (Doc. 200-29 p.152:9, ER v.2 p.252, emphasis supplied.)

Despite the consensus of all experts that the physical evidence disproves the "kicked" theory, the Court raises it to support its incorrect assertion that Dr. Anderson did not consider the theory, an assertion the Court improperly supports by selectively taking portions of Dr. Anderson's deposition testimony out of context. (AOB pp. 46-47.)

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[7] Both Rangers Ratliff and Stephens attested to an elliptical split in the cylinder right below the neck threads (RJN 29 (ER vol.2 150, quoted supra), an undisputed fact which is also presented on Defendants' briefs (WB at 13 and BB at 9), hence another request for judicial notice which should have been granted.

2. Banged Against Campfire Ring

Worthington absurdly alleges that Plaintiff held the torch by the "torch handle" at the time of the explosion (Doc. 118 at 12:5, ER v.2 at 133), while pounding the assembly by the base of the torch (Doc. 58 at 22:7, ER v.2 at 135 (in other words, pounding his own knuckles).

(ER v.2 136)

The theory is impossible because the application of force anywhere on the torch handle, if held by the "torch handle," will not exert any force to the cylinder, since the cylinder is below the torch handle (photo, above). Furthermore, as Worthington's expert (Dr. Eagar) testified, the amount of force required to fail the cylinder would be extreme, and inconsistent with the physical evidence:

> 148:16 A: It [15 to 30 foot pounds] is not something that you do with your wrist. It is not something that you do with your wrist and your elbow. This is something that you have to do with your shoulder on. Okay. Let me just say that. In order to get 15 foot pounds, you don't do that with your wrist. Not even Arnold Schwarzenegger does it with his wrist...I have to use my shoulder into it. I have to have leverage of the length from my shoulder to my hand. (Doc. 173-12, ER v.4 at 745)

As mentioned above, Dr. Eagar apparently overlooked the fracture groove, which would have fractured under such force.

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(ER v.2 179)

The theory that such a force was applied, whether to a campfire ring or otherwise, also runs contrary to the physical evidence attested-to by the rangers:

> 47:12 Q.: And did [the torch] have any damage to it, consistent with being banged on a hard surface, as one of the people that you overheard said?
>
> 47:16 A: Not that I saw...on the torch body itself, I didn't see any damage.
>
> 48:4 Q.: Do you remember seeing any other damage to the cylinder?
>
> 48:8 A: No, sir.
>
> (Doc. 173-7, Stephens depo. pp. 47-48 (ER v.4 at 682)

These misuse theories were all addressed on Plaintiffs' motions to strike, which the Court set-aside so that it could terminate the case on summary judgment, evidencing abuse of discretion, and grounds for re-assignment:

> Because Plaintiffs' lawsuit could very well be terminated on summary judgment, the motions are DENIED... (Doc. 205 at 2:16, ER v.1 at 31.)

(See AOB at 26.)

LEGAL ARGUMENT

I. EXPERT ADMISSIBILITY UNDER RULE 702

As has been shown, the facts surrounding the cylinder's failure are in dispute. Additionally, Dr. Anderson and Dr. Eager both ruled out the possibility that the cylinder failed due to exposure to heat or flame. As has also been thoroughly described, most, if not all, of the rangers' testimony, and Defendants' own expert opinions, discredit the "kicked-into-the-fire" theory. That the Court failed to grasp the state of the evidence before it seriously undercuts its 702 ruling, because its understanding of the facts in issue informed its Rule 702 ruling.[8]

Yet even given the Court erroneous statements of fact, as well as its propounding the "kicked-into-the-fire" theory of failure not put forward by any of the experts, the Court makes three findings that still should resolve the matter in favor of the admissibility of Dr. Anderson's opinion. The first is that "the Court finds that Dr. Anderson's education, training, and experience, meet the standards for qualification as an expert witness in metallurgy under Fed. R. Evid. 702." (Doc. 209 at 5:14.) The

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[8] The Court's misunderstanding of the facts in issue, and how that leads it to an erroneous 702 Ruling, is perhaps most clearly demonstrated in its coverage of the elements of the failure to warn cause of action. Because the Court believes that causation under failure to warn means that Plaintiffs must prove "that the accident would not have occurred" (Doc. 209 at 19:26) if a proper warning had been given, the Court excludes Dr. Vredenburgh largely because her testimony will not answer this legally specious test.

second is that "the Court agrees that a microhardness test is a generally accepted way to test the strength of the brazing material, valve, and cylinder." (Doc. 209 at 12:2-3). The third is that "the Court finds that Dr. Anderson's metallurgical tests were conducted in accordance with generally accepted principles." (Doc. 209 at 6 fn. 7.) This language, of course, follows the formerly applicable *Frye*[9] test for the admissibility of expert testimony.

It is hard to see how Dr. Anderson's run-of-the-mill metallurgical analysis of defendants' product could possibly satisfy *Frye* but not Rule 702. As the Supreme Court noted, *Frye* posed a more exacting standard of admissibility: "The drafting history [of Rule 702] makes no mention of *Frye*, and a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.' " *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993). The Court supplies no rationale for how expert testimony could satisfy *Frye* but not *Daubert*.

As the Court does note in its order, "[t]he *Daubert* analysis focuses on the principles and methodology underlying an expert's testimony , not on the expert's

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[9] The *Frye* test, which is that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs," (*Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)) was abrogated by F.R.Evid., rule 702. *Daubert v. Merrell Dow Pharms*., 125 L. Ed. 2d 469, 478-479 (U.S. 1993):

conclusions. *Daubert*, 509 U.S. at 595." (Doc. 209 at 4:20.) Yet the Court's complaints with Dr. Anderson focus exclusively on his conclusions, including those he draws from the evidence relating to the cylinder's failure. Accordingly, the Court erred as a matter of law in ruling Dr. Anderson was incompetent to testify.

The Court's analysis of Dr. Anderson's testimony is like that disapproved of by *United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. Mont. 2007), where this Court observed that the trial "Court conducted a document-by-document Rule 702 analysis that deconstructed the experts' testimony in a manner not contemplated by Rule 702." In other words, the Court's Rule 702 ruling reads like an advocate's argument.

Dr. Anderson's testing fully satisfies the requirement articulated in *General Electric v. Joiner*, 522 U.S. 136 (1997) that there be no "analytical gap" between the tests and data[10] on which an expert relies and the facts of the case. To the extent that the Court [erroneously] believes Dr. Anderson failed to address certain matters, as

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[10] In *Joiner*, the excluded expert sought to express an opinion about the likelihood that the plaintiff contracted cancer from his workplace exposure to PCB's. The data on which they relied included studies of infant mice that had been exposed to massive doses of PCB's via injection. The cancers the infant mice developed were not the same form of cancer from which plaintiff suffered. Furthermore, there were apparently no scientific studies demonstrating that " 'PCB's lead to cancer in any other species.' " 522 U.S. at 145. Also relied on by the excluded experts were four epidemiological studies that appeared to have as little bearing on the questions presented in the litigation as did the infant mice study. *Id*. at 145-146.

Daubert observed, the traditional means by which such matters are addressed in the Courtroom were preferable to the "wholesale exclusion under an uncompromising 'general acceptance' test." *Daubert,* 509 U.S. at pp. 595-596. Certainly, Dr. Anderson's evidence here, which meets the general acceptance standard, must be tested in the Courtroom, before the jury: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." (*Id.* at 596.)

In *Kumho Tire Company, LTD v. Carmichael,* 526 U.S. 137,153 (1999), the High Court refers to the "broad latitude" accorded a trial Court in determining "whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case." (*Id.* at 153.) Yet, despite the trial Court's belief to the contrary, this is not the same as carte blanche. The High Court emphasizes that a trial Court "may" consider these factors, if they are "pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.' " (*Id.* at 150.) This latitude thus merely "reflects *Daubert*'s description of the Rule 702 inquiry as a '*flexible one.*' *Daubert*, supra, 509 U.S. at 594." (*Kumho, supra*, at 150.) In other words, the High Court articulates the features of a trial Court's discretion with the understanding, as the notes regarding the 2000 amendments to Rule 702 explain, that "rejection of expert testimony is the exception rather than the rule."

Kumho stands for the proposition that " '[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." (*Id.* at 150.) With this in mind, it becomes apparent that the trial Court's criticism of Dr. Anderson's proffered testimony is simply an unprincipled attack. Rather than determine what factors may or may not be pertinent in assessing reliability, the trial Court appears to concede admissibility in a footnote, and then criticize the tests and basis for Dr. Anderson's opinions with whatever statements of law it can find in the *Daubert* trilogy of cases, no matter how inapplicable they are to the facts of this case. It bears emphasis that this sort of analysis, drawing support for one's opinion from authoritative sources that actually have little bearing on "nature of the issue" at hand (*Id.* at 150), is precisely analogous to the approach the High Court criticized in *Joiner*, where it referred to the "analytical gap" between the facts underlying the studies relied on by the experts and the facts presented in the litigation. (*Joiner*, *supra*, 145-146.) In jurisprudence this "analytical gap," is called the misapplication of law and it constitutes reversible error under any standard.[11] However, as is plain, a qualified

[11] The California Supreme Court has summed up the principle of relevant authority quite well: ' " ' "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the Court. An opinion is not authority for propositions not considered." ' " ' *People v. Knoller*, 41 Cal.4th 139, 154-155 (Cal. 2007).

expert metallurgist's opinion regarding the construction of a metal cylinder and torch device that has failed is not a "less usual or more complex case where cause for questioning the expert's reliability arises." (*Kuhmo, supra,* 150.)

II. MISUNDERSTANDING OF THE BURDENS

In its brief, Worthington barely touches on the legal definition of defect. (See, e.g., WB at 34.) Never once does it address that, in California law, defect is a legal conclusion arrived at by the trier of fact after presentation of evidence. To put it plainly, despite Defendants' and the District Court's statements to the contrary, there is no California case that stands for the proposition that the plaintiff must make a showing as to what aspect of the product was defective to survive summary judgment. (Rest.3d, Torts: Products Liability §3, Comment c.) Defendants' arguments are therefore based on misstatements of the law, e.g. -

> "[t]he MAPP gas torch and cylinder is not something that most consumers understand. (WB at 38.)

The focus is not on the expectation of just any "consumers," it is on the "everyday experience of the product's users." *Soule , supra* at 567. As the California cases make abundantly clear, not only do Plaintiffs not have any burden to pinpoint the defect via expert testimony, but only in a complex case, where an inference of causation cannot readily be drawn from the evidence, will an expert be necessary to show causation. See, e.g., *West v. Johnson & Johnson Products, Inc*., 174 Cal.App.3d 831, 866-867

(Cal.App. 1985), where an expert was required to show causative connection between the defendant's tampon and the plaintiff's sepsis.

Worthington's coverage of California law is incorrect. It erroneously asserts,"Plaintiffs cannot meet their burden to show that the product failed while being used in an intended or reasonably foreseeable manner." (WB at 38). Worthington appears to be referring to Plaintiffs' ultimate burden at trial, because on summary judgment, apart from their properly pled complaint and discovery evidence, both of which present foreseeable use as conceded by the defendants (e.g. ([n]either the torch nor the cylinder will fail if lightly struck against a piece of firewood [absent a defect]." (Doc. 173-13, ER v.4 p. 749), and "The lack of any failure in the torch's fracture groove can be explained by...[A] manufacturing defect in the torch... [Doc. 58 at 22:5, ER v.2 p. 135], the actual manner in which Plaintiff Shalaby used defendants' product is a matter to be determined by the trier of fact.

Defendants' assertion that "the alleged defect is not something the trier of fact could understand without the assistance of expert testimony" (WB at 38) is also flawed, because the torch/cylinder user would never expect the cylinder to fail while being used in a reasonably foreseeable manner. See, e.g., AOB, 12. To assert such a burden at summary judgment is absurd, despite the District Court's order stating the contrary. (Doc. 209 at 24:9 - "without the testimony of their experts, Plaintiffs have not presented any admissible evidence to create a triable issue of material fact

regarding whether the torch was defective.")

Also, it is hard to see how Plaintiffs will not be entitled to an instruction on the consumer expectations test for defect. Plaintiff Dunn-Ruiz attested that one moment she saw Plaintiff "standing over the fire ring bent like he was about to light it" (Doc. 173-4 at 34:2, ER v.3 at 557), then after turning her back for a moment ("3 or 4 strides" - Doc. 173-14 at 2:14, ER v.4 at 751), she "heard a loud hissing sound and saw flames, just a ball of flame in the air." (Doc. 173-4 at 34:7, ER v.3 at 557.) She then turned and saw Plaintiff "engulfed in fire" (Doc. 173-4 at 34:14, ER v.3 at 557), "with the cylinder in his right hand" (Doc. 173-14 at 2:20 (ER v.4 at 751), Doc. 173-4 at 24 (ER v.3 at 447)). Plaintiff attested that the cylinder ignited with a negligible application of force applied to the torch (Doc. 93-3, ER v.4 p. 864). It is hard to imagine how the facts Plaintiffs attested to could fail to "engage the [product's] ordinary consumers' reasonable minimum assumptions about [its] safe performance." *Soule*, pp. 567-568. This torch is, after all, mass marketed through retails establishments as Home Depot, and recommended for such common uses as lighting barbecue grills. (Doc. 209 at 16:20.)

Much of Defendants' briefs are given over to argument about the facts of this case. As observed earlier, such argument is irrelevant to a summary judgment ruling, which may only be granted where the Court determines there are no triable issues of material fact, and "[t]he inferences to be drawn from the facts must be viewed in a

light most favorable to the nonmoving party." *Gibson v. County of Washoe,* Nev., 290 F.3d 1175, 1180 (9th Cir. 2002); AOB, pp. 20-21. Yet when arguing against Plaintiff's request for judicial notice, Worthington observed that matters like whether " '[the] subject torch and cylinder were . . . kicked into the campfire' . . . [are] factual issue[s] to be decided by the trier of fact." (WB at 50.) Only in this context, when opposing Plaintiffs' judicial notice request, does Worthington note the obvious. Virtually the same proposition holds true for the factual issues in dispute here that defendant seeks to have decided by the Court on summary judgment.

Bernzomatic's brief argues the facts of the case even more than does Worthington's. Notably, BernzOmatic seeks to resolve all factual disputes in its favor on this appeal. Thus, an alleged admission by Plaintiff at the scene of the accident, that he kicked the cylinder into the fire, becomes a factual "determin[ation]." (BB at 14.) Thus, testimony and evidence that may run counter to Dr. Anderson's expert opinion take on the mantle of "uncontroverted facts." P. 19. Thus, according to BernzOmatic, Dr. Anderson must base his expert opinion on the "undisputed facts in the record," p. 26. Dr. Anderson's opinion was rightly excluded under Rule 702 because "it is contracted by facts in the record," p. 28, and by "specific facts in the record," p. 29.

BernzOmatic finds Rule 702 so important that it quotes it on both pages 26 and 27. Yet on page 30 it thoroughly misstates the trial Court's gatekeeper role. It asserts

that the trial Court "should[12] consider many factors in determining whether an expert's testimony is scientifically valid." This is an error similar to that the District Court made when it nitpicked Dr. Anderson's conclusions by reference to irrelevant *Daubert* factors[13], after conceding the validity of both the tests he performed and his credentials. "A trial Court's overly rigid application of the *Daubert* factors to preclude relevant expert testimony constitutes an abuse of discretion and requires reversal." *Sullivan v. United States Dep 't of the Navy*, 365 F.3d 827, 833-34 (9th Cir. 2004).

BernzOmatic's treatment of Calfiornia products liability law is particurly deficient. BernzOmatic asserts that Dr. Anderson's expert opinion must include extensive coverage of "alternative designs." P. 32. This is utter nonsense, as California law places no such burden on the plaintiff. The burden is on the defendant. *Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1565. BernzOmatic then

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12 This is an even greater error than the Court makes at doc. 209, 11:17, where it states a court "should 'consider the known or potential rate of error' " of the scientific technique used. In fact, "a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho*, supra, 526 U.S. at 141.

13 See Order, doc. 209 at 6:3, where the Court articulates the Daubert factors but them imposes them on Dr. Anderson's testimony without any mention of how they are relevant to the Rule 702 inquiry.

proceeds to cite *Stephen v. Ford Motor Co*, 134 Cal.App.4th 1363, 1365 (Cal.Ct.App. 2005), although it does not note its holding or facts. Then, with scant reference to "*Id* at 1373," BernzOmatic asserts a legal proposition that we know to be false: "In California, a product liability case must be based on substantial evidence that establishes both the alleged defect and a substantial probability that the alleged defect caused the Plaintiff's injury." P. 36. As we have seen, defect is a legal conclusion, not something that can be established before trial. See, e.g., *Soule* at p. 562. As for the legal proposition involving "substantial probability,"as discussed earlier, only when the concept of defect is smuggled into the proximate cause determination can there be any doubt that Plaintiffs have met their burden of establishing a prima facie showing of causation. BernzOmatic cites to *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953 (Cal. 1997), an asbestos case, as well as the *Stephen* case, involving alleged tire defect, for the proposition that causation here is problematic and involves complex matters of proof. P. 38. Not only do these cases teach us nothing about how to determine whether proximate cause has been adequately proven here, but *Rutherford* does not even stand for the proposition that BernzOmatic attributes to it: that "failure to present admissible expert [is] fatal to Appellants' case." P. 36. In fact, *Rutherford affirmed* plaintiff's award. (*Id.* at 984-985.)

Lastly, BernzOmatic repeats the District Court's spurious comparison of this case to *Soule*. (See also AOB at 21.) In parting, BernzOmatic asserts that a "defect"

must be "established . . . with scientific reliability," p. 37, and that the facts of this case require Plaintiffs to have a "theory of causation," *ibid*. BernzOmatic does not cite to any authority for these assertions.

As explained in the opening brief, the District Court's grant of summary judgment misstates California law at every step. In other words, the Court's ruling rests on error after error and must be reversed.

> Under the facts of this case, the consumer expectations test is not applicable. It is undisputed that the cylinder can explode for reasons other than a defect, e.g. abuse. An ordinary consumer of a torch and MAPP gas cylinder cannot reasonably expect that a cylinder will be designed to be indestructible and incapable of exploding. Moreover, Plaintiffs' theory of defect is one of technical and mechanical detail. Plaintiffs' theory seeks to establish that porosity in the braze material exists, the level of porosity makes the braze joint in the cylinder unreasonably weak, and that this is what caused Mr. Shalaby's injuries. . . . A jury would be unable to assess the porosity in a cylinder without the benefit of an expert, nor would it be able to understand how the strength of the braze joint is affected by porosity. (Doc. 209: 23:10-20.)

In order, as we have seen from citation to the relevant cases: 1) the possibility of a products failure as a result of abuse (unforeseeable misuse) has nothing whatsoever to do with what test or tests for defect should apply; 2) indestructibility, too, has nothing to do with what test or tests for defect should apply; 3) design defect is either to be determined under a consumer's reasonable expectations, a risk-benefit analysis of the product's design, or a failure to warn; 4) under none of those tests does plaintiff have the burden of showing why the product failed, e.g., because of inadequate

brazing or excessive porosity; therefore, whether plaintiff's expert testifies or not about the brazing procedure used by the manufacture of the product is irrelevant on summary judgment; 6) any other discussion of the manufacturing process is entirely irrelevant to a Court's proper determination of whether there has been a prima facie showing of proximate cause, where a product has failed while being used in a reasonably foreseeable manner. (See AOB, pp. 16-18.)

Only the Court's profound misunderstanding of this case can lead it to conclude that "[w]ithout the testimony of their experts, Plaintiffs have not presented any admissible evidence to create a triable issue of material fact regarding whether the torch was defective. Accordingly, the Court hereby GRANTS BernzOmatic's motion for summary judgment on all claims." (Doc. 209 at 24:9-11.)

Contrary to the Court's belief, what caused the product to fail is not the same as legal causation. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1315 (9th Cir. Cal. 1995) - "the question is whether plaintiffs adduced enough admissible evidence to create a genuine issue of material fact as to whether Bendectin caused their injuries," not whether they presented enough admissible evidence as to what component of Bendectin was responsible for the alleged birth defects at issue. Once plaintiff establishes causation and foreseeable use by reasonable inference from the facts in the record, he has met his burden.

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CONCLUSION

For the foregoing reasons, Plaintiff-Appellants respectfully request that the orders appealed from be reversed, and that the matter be assigned to a different judge on remand on grounds that the District Court's order reflects a predisposition towards dismissal of the action rather than determination on the merits.

Dated: December 15, 2009

s/ Jonathan H. Lipsky
Jonathan H. Lipsky,
Lead Counsel for Appellants.

Dated: December 15, 2009

s/ Andrew W. Shalaby
Andrew W. Shalaby, Appellant and co-counsel for Appellants.