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## STATEMENT OF THE FACTS

Appellants fail to mention the evidence in the record demonstrating general and specific causation. Appellees must briefly explain the underlying evidence and case history.

### **I. History of the Litigation**

Appellees commenced litigation against Appellants for injuries and damages sustained while in premises located at 140 Buckeye Boulevard, Port Clinton, Ohio (the “Buckeye Building”).<sup>1</sup> Appellees alleged exposure to mold and other irritants found in the Buckeye Building and injuries and damages proximately caused by Appellants’ acts and omissions. The pleadings included causes of action for intentional and negligent infliction of emotional distress.

Appellants moved to exclude testimony of Jonathan Bernstein, M.D. (“Bernstein”) which they claimed did not satisfy the requirements for relevancy and reliability of expert testimony. Although the trial court granted this motion, the Sixth District Court of Appeals reversed it. Appellants moved for summary judgment on the sole issue of Appellees’ personal injuries.<sup>2</sup> Not supported by the facts or the law with genuine issues of material fact remaining, the trial court’s decision granting summary judgment was also reversed. The appellate court found that the trial court incorrectly excluded Bernstein’s testimony, overlooked the remaining expert evidence regarding the presence and effect of mold in the record, and did not address the emotional distress claims.

Appellees offered the expert report of an industrial hygienist who tested Buckeye Building as well as the recorded trial testimony of Appellees’ treating physicians and specialists.

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<sup>1</sup> The trial court dismissed the claims against Ottawa County MRDD on the basis of R.C. §2744. Summary Judgment as to Paul Gilmore and Paul Gabel as incorporators of Lake Investments was granted on May 8, 2003. The court denied Lake Investments, Inc.’s request for Summary Judgment and Lake Investment remained a party.

<sup>2</sup> Appellants’ claims for emotional distress were not raised in Appellees’ motion for summary judgment or in any of the filings before this Court.

Appellees and their spouses also testified as to the condition of Buckeye Building and their clinical symptoms. The appellate court found the expert report of the industrial hygienist to be reliable to support Appellees' claims of specific causation when coupled with their complaints recorded in their discovery depositions. The appellate court also found that this evidence combined with the general causation expert testimony of Bernstein that mold causes injuries was sufficient to overcome summary judgment. Rather than acknowledge the clear statement of the appellate court, Appellants claim that Appellees offered no "reliable expert testimony to establish a causal connection."<sup>3</sup> Appellees strenuously disagree with Appellants' characterization of the appellate court's holdings.

## **II. Evidence in the Record**

Appellees worked in the Buckeye Building from May 1996 until August 20, 2000, when the building was vacated due to the confirmed presence of harmful molds, including, but not limited to, *Stachybotrys Chartarum*, in concentrations that exceeded acceptable levels.<sup>4</sup> Testing conducted by the Ottawa County Health Department on August 7, 2000, and later testing conducted on behalf of Appellees on October 18, 2000, confirmed the presence of mold, bacteria, and their by-products.<sup>5</sup> Each of the Appellee employees<sup>6</sup> became ill with irritant-induced symptoms and sought medical treatment while they were working at the Buckeye Building. Appellees' treating physicians documented the complaints and the symptoms of their patients, along with the physicians' efforts to properly diagnose and treat Appellees.

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<sup>3</sup> Merit Brief, Caputo, et al., p. 2.

<sup>4</sup> See Correspondence from Young to Appellant Caputo, 08/23/2000 (Ex. 1 to Plfs.' Mem. in Opp. to Defs.' Motion to Exclude Evid. and Testimony re: the Oct. 2000 Testing Conducted by Hygienetics Env. Serv.).

<sup>5</sup> Id.; Hygienetics Env. Serv. Test results, 10/18/2000 (unmarked exhibit to Defs.' Motion to Exclude Evid. and Testimony Re: the Oct. 2000 Testing Conducted by Hygienetics Env. Serv.).

<sup>6</sup> Appellees include employees of MRDD and the employees' spouses. Unless stated otherwise, Appellees shall refer solely to the actual employees.

In addition to the medical expertise of their treating physicians, Appellees sought the expert advice of Bernstein as to their personal injuries. Bernstein specializes in internal medicine and is board certified in allergy immunology. Bernstein reviewed the complete medical records of Appellees, including all test results ordered by the treating physicians, and the environmental test results conducted at the Buckeye Building by the Appellees' expert in industrial hygiene. Bernstein concluded that Appellees suffered from building-related illness due to poor ventilation, filtration and humidity control resulting in accumulation of mold, mold by-products and other air particulates resulting in Appellees' clinical manifestations.

Appellants Caputo and Partin own W.W. Emerson, title-holder of Buckeye Building, and leased Suites A, D, and E of that building to MRDD in 1996<sup>7</sup> and the remainder in 1998.<sup>8</sup> MRDD used the building until vacating it in August 2000.<sup>9</sup> Appellants used the premises for their businesses and Partin continued to work there, even after leasing it to MRDD. Buckeye Building showed signs of deterioration from 1996 when Appellees began working there.<sup>10</sup>

**A. General Maintenance.**

Appellant W.W. Emerson participated in remodeling and maintenance of the Buckeye Building from 1996 to 2000, either directly or through Appellant Northcoast and subcontractors.<sup>11</sup> If any maintenance was needed as noted by MRDD employees, MRDD telephoned Northcoast, which was to provide maintenance.<sup>12</sup> Northcoast occasionally arrived to

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<sup>7</sup> Dep. of L. Partin, 09/05/01, pp. 6, 28-29, 35-36; Dep. of J. Caputo, Jr., 09/05/01, pp. 4, 15; Dep. of Pfahl, 02/19/02, pp. 12-13.

<sup>8</sup> Partin Dep., p. 43; Pfahl Dep., pp. 15-16.

<sup>9</sup> Pfahl Dep., p. 31.

<sup>10</sup> Dep. of J. Reynolds, 01/14/04, p. 71.

<sup>11</sup> Partin Dep., p. 38; Dep. of F. Szabo, 01/22/04, p. 17; Maintenance Log of W.W. Emerson for Buckeye Building, Defs.' Ans. to Plfs.' RFD No. 1 (Ex. 1 to Plfs.' Opp. to Defs.' Motion for Summary Judgment ("SJ")) ("Maintenance Log").

<sup>12</sup> Pfahl Dep., pp. 19-20.

work at the Buckeye Building in a Northcoast van.<sup>13</sup> The Maintenance Log for W.W. Emerson for Buckeye Building shows that Partin and Caputo through W.W. Emerson hired Northcoast to work inside the building and hired “NCC” Janitorial Service to clean bathrooms and hallways in the building.<sup>14</sup> Caputo testified that they “used the property management company from time to time to fix things.”<sup>15</sup> Northcoast also came when the fire department responded.<sup>16</sup>

Appellees reported maintenance problems on forms given to MRDD Associate Director, Daniel Pfahl (“Pfahl”). Responsible for human resources, Pfahl acted as liaison between Appellees and Appellants. Correspondence confirmed MRDD’s attempts to compel Appellants to address these maintenance problems. For instance, in January 2000, Pfahl wrote to Partin that the Buckeye Building fire doors did not meet the fire regulation requirements.<sup>17</sup> Pfahl pointedly asked Partin, “Will the landlord make these corrections to keep the building habitable?”<sup>18</sup>

Appellants were responsible for the interior maintenance of the premises. NCC Janitorial Service worked in Buckeye Building from at least March 8, 1995, until November 12, 1997<sup>19</sup>, and Appellees began working in Buckeye Building in May of 1996.<sup>20</sup> Many of the complaints voiced by Appellees and noted in the maintenance requests concern the bathrooms.<sup>21</sup> W.W. Emerson invoices indicated that it hired Blevins Plumbing and Northcoast to work on toilets and

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<sup>13</sup> Dep. of K. Taylor-Peters, 03/18/02, p. 117; Dep. of J. Snavely, 01/13/04, p. 47.

<sup>14</sup> Caputo Dep., p. 28; Maintenance Log.

<sup>15</sup> Caputo Dep., p. 27; Maintenance Log.

<sup>16</sup> Snavely Dep., p. 48; Szabo Dep., p. 18.

<sup>17</sup> Ans. to Plfs.’ 1<sup>st</sup> Set of RFD to MRDD, Rsp. No. 5 (Bates No. M00087) (Ex. 3 to Plfs.’ Opp. to Defs.’ Motion for SJ).

<sup>18</sup> Id.

<sup>19</sup> Reynolds Dep., p. 71.

<sup>20</sup> MRDD’s Resp. to Plfs.’ 1<sup>st</sup> Set of Interr. No. 9.

<sup>21</sup> Szabo Dep., p. 17; Dep. of G. Wine, 01/21/04, pp. 18-21, 43-45; Dep. of M. Rice, 01/21/04, pp. 21-22; Dray Dep., pp. 32-35; Reynolds Dep., pp. 25-28, 57; Maintenance Custodial Work Order Forms, dated 09/18/99, 04/15/00, 05/17/00 (Bates Nos. M00078, M00084, and M00085), MRDD’s Rsp. to Plfs.’ 1<sup>st</sup> Set of RFD No. 4 (Ex. 2 to Plfs.’ Opp. to Defs.’ Motion for SJ).

plumbing **after** Appellees began working in the building.<sup>22</sup> Appellees raised concerns about the same hallways that Appellants bore responsibility for maintaining. An April 1999 maintenance form completed by Appellee Sennich drew attention to the fact that the floor register in the foyer in Suite E was pushed out of the floor.<sup>23</sup> When reviewed, the floor vent was seen to have **rusted** and the floor around the vent was bowed.<sup>24</sup>

**B. Heating, Ventilation and Air Conditioning at Buckeye Boulevard.**

In early 1998 Campbell, Inc., an independent contractor, was sent by Northcoast to work in the attic of Buckeye Building.<sup>25</sup> After completing his work, the contractor showed Appellee Crabtree the attic interior with a flashlight.<sup>26</sup> Dust and cobwebs filled the attic.<sup>27</sup> Plastic had been laid across the attic and had water sitting in it.<sup>28</sup> The contractor assured that Northcoast would be made aware of the mess in the attic.<sup>29</sup>

In July 1999, Pfahl wrote to Appellants about the HVAC system's condition. Pfahl stated, "We have reached our limit in repairing equipment that needs to be replaced"<sup>30</sup> adding that, "We have had a lot of leakage during high winds and rain and it appears that rotting wood may be part of the problem." Pfahl asked Appellants to inspect the building soffits; but the HVAC system was not replaced between July 1999 and August 2000. The evidence shows that the system was installed in 1989 and replaced in 1993.<sup>31</sup> No other invoices were produced.

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<sup>22</sup> Maintenance Log.

<sup>23</sup> Bates No. M00061, MRDD's RFD No. 4 (Ex. 2 to Plfs.' Opp. to Defs.' Motion for SJ).

<sup>24</sup> Id.

<sup>25</sup> Deposition of V. Crabtree, 01/15/04, p. 33.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id. at p. 34.

<sup>29</sup> Id.

<sup>30</sup> Ans. to Plfs.' 1<sup>st</sup> Set of RFD to MRDD, Rsp. No. 5 (Bates No. 00090) (Ex. 3 to Plfs.' Opp. to Defs.' Motion for SJ).

<sup>31</sup> Maintenance Log.

The HVAC system malfunctioned twice in the three years before August 2000 and was serviced by Appellants through Campbell, Inc.<sup>32</sup> When Campbell employees serviced the furnace, they would go into the attic.<sup>33</sup> Appellees learned the ductwork was a mess and the unit did not run properly.<sup>34</sup> The ceiling vents were black.<sup>35</sup> When the A/C was activated on May 8, 2000, individuals in the building became ill and required medical care.<sup>36</sup> The employees were vacated and kept out of the building for several days.<sup>37</sup> In March 2000, the P.C. Fire Department reported to Buckeye Building twice.<sup>38</sup> Heavy amounts of dust and dirt were visible in the ceiling ductwork.<sup>39</sup> Even after cleaning in May or June 2000, dust and dirt was visible in the vent.<sup>40</sup>

### C. Windows.

While Appellees worked in Buckeye Building, the windows were always damp and shook.<sup>41</sup> The frames were so badly damaged that the windows needed to be propped up to stay open.<sup>42</sup> When Appellees came in March 1996 and attempted to open the windows, windows fell out of the frames and Appellants were contacted.<sup>43</sup> Pfahl told Appellants in 1999 that the windows did not fit.<sup>44</sup> Rainwater came in, pooled on the floor and collected between the walls, resulting in rot.<sup>45</sup> The windows were drafty, rattling when windy and papers would blow off

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<sup>32</sup> Roberts Dep., p. 102; Taylor Dep., p. 35.

<sup>33</sup> Roberts Dep., p. 103.

<sup>34</sup> Taylor Dep., p. 38; Szabo Dep., pp. 16-17.

<sup>35</sup> Reynolds Dep., p. 25; Dep. of L. Terry, 02/23/04, p. 30.

<sup>36</sup> Pfahl Dep., pp. 28-29; Terry Dep., pp. 43-48.

<sup>37</sup> Id. at pp. 47-48.

<sup>38</sup> See Fire Dept. reports (Ex. 4 to Plfs.' Opp. to Defs.' Motion for SJ).

<sup>39</sup> Wine Dep., p. 18.

<sup>40</sup> Deposition of A. Chio, 01/21/04, pp. 14-15.

<sup>41</sup> Wine Dep., p. 13.

<sup>42</sup> Id.

<sup>43</sup> Crabtree Dep., p. 36.

<sup>44</sup> Pfahl Dep., p. 17.

<sup>45</sup> Taylor Dep., p. 92; Snavelly Dep., pp. 24-25; Dep. of B. Dray, 01/14/04, pp. 32-33; Caputo Dep., pp. 21-22.

desks.<sup>46</sup> Rainwater came in one “leaky” window in Suite D, collecting between the screen and window and running through the wall.<sup>47</sup> The window was so loose that the security system could not be used without malfunctioning.<sup>48</sup> Contacts for the security system would not stay aligned and the wind would set off the alarm.<sup>49</sup> When not repaired promptly, a second maintenance form was sent to Appellants on April 14, 1999.<sup>50</sup> The P.C. Fire Department repeatedly responded to alarm malfunctions in 1999-2000.<sup>51</sup> The windows in Suite B were damaged and needed repair or replacement in early 1999.<sup>52</sup>

When Appellants did not fix the windows in 1999, Pfahl raised the issue with Appellants in early 2000.<sup>53</sup> Concerned about inefficiency of the windows and that Appellees were uncomfortable, Pfahl explained to Appellants that Appellees were suffering from headaches and raised problems with water leakage and lack of ventilation.<sup>54</sup> Appellants agreed to replace the windows.<sup>55</sup> Caputo was responsible for replacing the windows at Buckeye Building.<sup>56</sup> Based on Appellants’ representations during that March 2000 meeting, Pfahl understood that the windows would be replaced.<sup>57</sup> Appellants chose to wait to replace the windows until late summer and did not, in fact, undertake any replacement until September 2000, “after the Ottawa County Health Department issued its findings to Caputo, Partin, Pfahl and Plaintiff Terry.”<sup>58</sup>

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<sup>46</sup> Id. at pp. 135, 194; Dep. of B. Roberts, 03/20/02, p. 44.

<sup>47</sup> Szabo Dep., p. 15.

<sup>48</sup> Id. (Bates No. M00062) (Ex. 2 to Plfs.’ Opp. to Defs.’ Motion for SJ).

<sup>49</sup> Id.; Szabo Dep., p. 18.

<sup>50</sup> Id. (Bates No. M00063) (Ex. 2 to Plfs.’ Opp. to Defs.’ Motion for SJ); Bates No. M00059.

<sup>51</sup> Certified P.C. Fire Dept. records for 1999-2000 (Ex. 4 to Plfs.’ Opp. to Defs.’ Motion for SJ).

<sup>52</sup> Id. (Bates No. M00059) (Ex. 2 to Plfs.’ Opp. to Defs.’ Motion for SJ).

<sup>53</sup> Pfahl Dep., p. 20; Partin Dep., p. 50; Caputo Dep., p. 22.

<sup>54</sup> Pfahl Dep., p. 20; Partin Dep., pp. 51, 54; Caputo Dep., p. 23; Interr. No. 27 (Caputo).

<sup>55</sup> Plfs.’ 1<sup>st</sup> Set of Inter. to Caputo; Inter. No. 10.

<sup>56</sup> MRDD’s Rsp. to Plfs.’ 1<sup>st</sup> Set of Inter., No. 18.

<sup>57</sup> MRDD’s Rsp. to Plfs.’ 1<sup>st</sup> Set of Admissions and 2<sup>nd</sup> Set of Inter., No. 1.

<sup>58</sup> Partin Dep., pp. 50-52 (emphasis added).

Partin occupied Buckeye Building from 1981 to 1997, when it was used in part for his office.<sup>59</sup> He knew in the 1980's that the windows were inefficient and installed storm windows to conserve energy.<sup>60</sup> Caputo knew the windows were problematic and that metal brackets were installed to hold up the windows.<sup>61</sup> Partin also knew metal brackets were there because springs to hold the windows up had broken.<sup>62</sup> When replaced in September 2000, the wood framing had rotted and needed replacement.<sup>63</sup> When the old windows were removed, moisture had visibly seeped from the window seals inside the exterior wall.<sup>64</sup>

#### **D. Restrooms.**

Appellees repeatedly brought maintenance problems to Appellants' attention, including wetness on the ladies' room floor.<sup>65</sup> The toilet in the ladies' room leaked and the floor remained wet.<sup>66</sup> Water on the floor came from the wall resulting in a puddle 3-5" wide.<sup>67</sup> The toilet refill valves in both ladies' restrooms would not automatically close in September 1999.<sup>68</sup> Six weeks later, the toilets were allegedly repaired. Nonetheless, the same problem was reported by Appellees in April 2000.<sup>69</sup> In May 2000, Pfahl completed a maintenance form requesting the "leaking toilet" be fixed.<sup>70</sup> Also, the bathroom wall of the men's restroom was always wet.<sup>71</sup>

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<sup>59</sup> Id. at pp. 4-5, 24-25.

<sup>60</sup> Id. at p. 50.

<sup>61</sup> Caputo Dep., p. 21; Roberts Dep., p. 44.

<sup>62</sup> Partin Dep., pp. 39-40.

<sup>63</sup> Caputo Dep., pp. 21-22.

<sup>64</sup> Partin Dep., p. 51.

<sup>65</sup> Taylor Dep., p. 34.

<sup>66</sup> Id. at p. 34; Roberts Dep., p. 44.

<sup>67</sup> Id. at p. 101; Snaveley Dep., p. 24.

<sup>68</sup> Ans. to Plfs.' 1<sup>st</sup> Set of RFD to MRDD, Rsp. No. 4 (Bates No. M00078) (Ex. 2. to Plfs.' Opp. to Defs.' Motion for SJ).

<sup>69</sup> Id. (Bates No. M00084) (Ex. 2. to Plfs.' Opp. to Defs.' Motion for SJ).

<sup>70</sup> Id. (Bates No. M00085) (Ex. 2. to Plfs.' Opp. to Defs.' Motion for SJ).

<sup>71</sup> Szabo Dep., p. 17.

**E. Visible Mold.**

Mold was visible around the windows, baseboard, and electrical outlets in Suites B and D in January 1999.<sup>72</sup> Floor tile was pushed up by mold.<sup>73</sup> Black residue was on ceiling vents and walls of Suite C<sup>74</sup>, the ladies' restroom<sup>75</sup>, and a vent in Suite D<sup>76</sup>. Carpeting in Suites D and A had large spots that grew larger and darker.<sup>77</sup> From 1996 to August of 2000, no Appellee working there ever saw the carpets being cleaned.<sup>78</sup>

**F. Other Water Incursion and Humidity.**

In 1998, adult service records stored in Suite A were wet and water marks ran down the wall to the floor.<sup>79</sup> So much moisture was in the building that the clock face in Suite D warped.<sup>80</sup> In 1998, Caputo was in the building and was told by Appellees about the clock warping while hanging on an interior wall, the damp odor in the building and the water running down the wall in the back area.<sup>81</sup> Caputo assured Appellees that he would look into the problems.<sup>82</sup> After Caputo was advised of the excessive humidity, more problems were discovered in Suite D. Before January 1999, Appellees moved items to make room for additional employees. When boxes were moved out of Suite D, they discovered that box bottoms and carpet were wet.<sup>83</sup> Pfahl was immediately telephoned and said he would tell the building owners about the problem.<sup>84</sup> In

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<sup>72</sup> Dep. of J. Bast, 01/13/04, p. 24; Snavely Dep., p. 23; Chio Dep., p. 16.

<sup>73</sup> Terry Dep., p. 52.

<sup>74</sup> Bast Dep., p. 24; Snavely Dep., pp. 23, 27; Terry Dep., p. 52.

<sup>75</sup> Rice Dep., pp. 21-22.; Szabo Dep., p. 16.

<sup>76</sup> Dray Dep., p. 36; Reynolds Dep., pp. 25-28; Szabo Dep., p. 16.

<sup>77</sup> Dep. of A. Sennich, 01/21/04, p. 15.

<sup>78</sup> Id. at p. 18.

<sup>79</sup> Id. at pp. 18-20.

<sup>80</sup> Id. at pp. 20-24.

<sup>81</sup> Id. at p. 59.

<sup>82</sup> Reynolds Dep., pp. 21, 23-24, 60.

<sup>83</sup> Id. at pp. 18-20.

<sup>84</sup> Id.

May 1999, Appellee Terry moved from Suite D to C, where a large water stain ran from the ceiling down the wall.<sup>85</sup> Pfahl and Caputo were in the office performing a walk-through of the newly leased space.<sup>86</sup> Terry brought the stain to Caputo's attention.<sup>87</sup> When questioned, Caputo responded that there was a problem but that he had repaired it so there was no need to worry.<sup>88</sup>

### **G. Doors and Fire Exits.**

The front doors of the building did not close properly because the wood was so warped.<sup>89</sup> When closed and locked, the doors would still open.<sup>90</sup> Water came through the closed doors between Suites A and B when the wind blew, and would have to be mopped back out the doors.<sup>91</sup> MRDD Safety Committee Meeting notes of May 24, 2000, required replacement of all exit doors and door knobs.<sup>92</sup> The Safety Team saw that structural work was the owners' responsibility.<sup>93</sup>

A fire door on Buckeye Building was in such bad repair that the property owners sealed it closed to prevent usage.<sup>94</sup> In September 1999, a maintenance work order form requested "repair (fire) exit door on Toy Lending Library side (it is locked [with] no key)".<sup>95</sup> Appellee Terry spoke to Caputo to get the fire door opened.<sup>96</sup> Caputo had the fire door was unsealed only to realize that the door was too warped to use properly.<sup>97</sup> Rather than replace it, Caputo resealed it.

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<sup>85</sup> Ans. to Plfs.' 1<sup>st</sup> Set of RFD to MRDD, Rsp. No. 4 (Bates No. M00066) (Ex. 2. to Plfs.' Opp. to Defs.' Motion for SJ); Terry Dep., p. 30.

<sup>86</sup> Id. at pp. 30-31.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Chio Dep., p. 15.

<sup>90</sup> Terry Dep., p. 29.

<sup>91</sup> Taylor Dep., p. 92.

<sup>92</sup> Ans. to Plfs.' 1<sup>st</sup> Set of RFD to MRDD, Rsp. No. 10 (Bates No. M00102) (Ex. 5 to Plfs.' Opp. to Defs.' Motion for SJ).

<sup>93</sup> Id.

<sup>94</sup> Taylor Dep., pp. 30-31.

<sup>95</sup> Id. Rsp. No. 4 (Bates No. M00079) (Ex. 2. to Plfs.' Opp. to Defs.' Motion for SJ).

<sup>96</sup> Terry Dep., p. 34.

<sup>97</sup> Id.

Appellants said they would fix the door, but it remained unusable.<sup>98</sup> Appellants had a key and claimed to be bringing the building “up to code” including installing proper exit latches.<sup>99</sup> But no repair was made to the door in 1999 and a key was required. Because the key was so hard to use, a sign was hung advising that the door was not usable.<sup>100</sup> Correspondence to Appellants in January 2000 highlighted that the building still violated the fire code due to its doors.<sup>101</sup>

#### **H. Mildew.**

From 1996, a foul smell of mildew hung in the air.<sup>102</sup> A “damp, musty smell”<sup>103</sup> ran through Suite E, in Suite D, in Suites A and B, and throughout the building<sup>104</sup>. In June of 1999, the entryway floor was stripped, cleaned, and waxed in an attempt to rid the building of the foul odor.<sup>105</sup> The offensive smell remained, however, until the premises were vacated.<sup>106</sup>

#### **I. Toy Lending Library.**

In early 2000, Appellee Taylor reported to Northcoast that a pipe burst in the toy lending library and the floor was soaking.<sup>107</sup> The leak was repaired and standing water was “shop-vacuumed” but the carpeting was not cleaned or fully dried.<sup>108</sup> When asked to leave the fans, Northcoast said the fans were needed elsewhere.<sup>109</sup> When the fans were taken, the carpeting was

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<sup>98</sup> Taylor Dep., p. 32.

<sup>99</sup> Id.

<sup>100</sup> Taylor Dep., p. 31.

<sup>101</sup> Ans. to Plfs.’ 1st Set of RFD to MRDD, Rsp. No. 5 (Bates No. M00087) (Ex. 3 to Plfs.’ Opp. to Defs.’ Motion for SJ).

<sup>102</sup> Crabtree Dep., pp. 28-29.

<sup>103</sup> Snavelly Dep., p. 24.

<sup>104</sup> Roberts Dep., p. 49; Rider Dep., p. 35; Taylor Dep., p. 24; Rice Dep., pp. 13-14; Sennich Dep., p. 15.

<sup>105</sup> Reynolds Dep., p. 26; Ans. to Plfs.’ 1st Set of RFD to MRDD, Rsp. No. 4 (Bates No. M00069) (Ex. 2. to Plfs.’ Opp. to Defs.’ Motion for SJ).

<sup>106</sup> Taylor Dep., p. 205.

<sup>107</sup> Taylor Dep., pp. 20-22, 25; Snavelly Dep., pp 26-27.

<sup>108</sup> Id. at p. 20.

<sup>109</sup> Chio Dep., pp. 18-19.

still very wet.<sup>110</sup> Although it always smelled musty before the flooding, the odor in the building grew stronger and more noticeable.<sup>111</sup> Dark spots on the carpet were obvious and growing.<sup>112</sup>

#### **J. Safety Committee Inspections.**

In May 2000, the MRDD Safety Committee conducted its annual inspection of the Buckeye Building and found extremely dirty air vents, water-stained ceiling tiles, and complaints among Appellees of headaches.<sup>113</sup> The Safety Committee was concerned about excessive employee absenteeism and wondered if it was due to mildew in the building.<sup>114</sup> A musty smell was obvious at the entrances.<sup>115</sup> The Committee again required replacement of “windows to prevent future mildew – Landlord’s responsibility”.<sup>116</sup>

MRDD claims to have cleaned the building and at least a superficial dusting of the vents was apparent.<sup>117</sup> Appellants should have known that cleaning was needed because they rented the carpet cleaning machine.<sup>118</sup> For less than a month, employees were not as ill, but the next month discoloration appeared on the carpet and streaking was seen under a window.<sup>119</sup> The dark spot on the carpeting started getting bigger at an increasing rate after the “deep cleaning”.<sup>120</sup>

Caputo walked through the Buckeye Building many times while MRDD was a tenant.<sup>121</sup> Caputo is a professional with a B.A. in Business from the University of Toledo.<sup>122</sup> It should

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<sup>110</sup> Id. at p. 18.

<sup>111</sup> Taylor Dep., pp. 23-24; Roberts Dep., p. 49.

<sup>112</sup> Taylor Dep., p. 142; Roberts Dep., pp. 66, 68; Reynolds Dep., p. 18.

<sup>113</sup> Id. at pp. 23-25.

<sup>114</sup> Id. at p. 25.

<sup>115</sup> Id.

<sup>116</sup> Ans. to Plfs.’ 1<sup>st</sup> Set of RFD to MRDD, Rsp. No. 10 (Bates No. M00102) (Ex. 5 to Plfs.’ Opp. to Defs.’ Motion for SJ).

<sup>117</sup> Pfahl Dep., pp. 23, 25.

<sup>118</sup> Maintenance Log, OK Rental Receipt (05/22/00) renting carpet cleaner and fans for a day.

<sup>119</sup> Id. at pp. 27-28.

<sup>120</sup> Reynolds Dep., p. 28.

<sup>121</sup> Id at p. 23.

have been apparent to a professional landlord that these problems identified by Appellees posed health hazards. Appellee Terry contacted the local Health Department on August 14, 2000, regarding Appellees' health concerns.<sup>123</sup> Because Appellants had not resolved the noted maintenance concerns, upon learning from the Health Department that the mold was growing on the walls, carpeting and floor, MRDD immediately vacated the building.<sup>124</sup>

## ARGUMENT

### **I. Introduction**

Evidence of causation in response to a motion for summary judgment is well-established in Ohio. Genuine issues of material fact will always preclude summary judgment. This case essentially involves (1) assessing the evidence introduced by Appellees which demonstrated exposure to mold and other irritants and the capability of mold and other irritants present to cause injury and (2) applying those facts to the summary judgment standard.

Although not vocalized either by Appellants or by their amicus curiae writers, Appellants object to the survival of a claim on summary judgment with reliable expert testimony on general causation, reliable expert testimony on air sampling encompassing general and specific causation evidence, and correlating competent medical evidence sufficient to raise genuine issues of material fact. Rather than challenge the underlying decision overturning summary judgment, Appellants reframed the issue, claiming the appellate court held that specific causation expert testimony is not required at trial. This simply is an incorrect reading of the appellate decision.

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<sup>122</sup> Interr. No. 23 (Caputo).

<sup>123</sup> Pfahl Dep., p. 32.

<sup>124</sup> Id. at pp. 32-33.

## II. Standard of Review.

“A summary judgment shall not be rendered unless it appears from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party’s favor.”<sup>125</sup>

“Pursuant to Civ.R. 56(C), summary judgment is proper when no genuine issue of materials fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.”<sup>126</sup> “Summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary materials that reasonable minds can reach only an adverse conclusion as to the party opposing the motion.”<sup>127</sup> The burden of demonstrating that no genuine issue of material fact exists falls upon the party requesting summary judgment.<sup>128</sup> If the facts are subject to reasonable dispute when viewed in the light most favorable to the non-movant, summary judgment is inappropriate.<sup>129</sup> All inferences to be drawn from the underlying facts contained in depositions, affidavits and other exhibits must be

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<sup>125</sup> Civ.R. 56(C).

<sup>126</sup> *Bakos v. Insura Prop. & Cas. Ins.* (1997), 125 Ohio App.3d 548, 551; Civ.R. 56.

<sup>127</sup> *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1; *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358.

<sup>128</sup> *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

<sup>129</sup> *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 104.

viewed in the light most favorable to the party opposing the motion.<sup>130</sup> Summary judgment should be used cautiously and with utmost care so that a litigant's right to trial is not usurped.<sup>131</sup> “[S]ince a summary judgment is a shortcut resulting in termination of litigation, it must be granted carefully and all reservations must be resolved against the moving party.”<sup>132</sup>

The Sixth District correctly construed the facts and applied the law in concluding that genuine issues of material fact precluded summary judgment. The court also held that the party opposing summary judgment must have evidence of general and specific causation. This is sound law.

Appellants mistakenly claim that the record lacks “any reliable expert testimony to establish a casual connection”.<sup>133</sup> However, the record unequivocally demonstrates that Appellees presented reliable expert testimony as to general and specific causation by means of the report of Clint Jones, an industrial hygienist; reliable expert testimony as to general causation by means of the report and testimony of Bernstein, a medical doctor; reliable medical records spanning fifteen years for each Appellee; testimony of thirteen treating physicians for the individual Appellees<sup>134</sup>; and, the testimony of each Appellee and spouse confirming the symptoms experienced.

The court of appeals decided three specific issues: (1) whether the opinion of Appellees' expert Bernstein was reliable; (2) whether summary judgment was appropriate; and, (3) whether the claims of intentional and negligent emotional distress were raised in Appellants' motion for

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<sup>130</sup> *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152; *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 433.

<sup>131</sup> *Viock v. Stowe Woodward Co.* (1983), 13 Ohio App. 7, 13.

<sup>132</sup> *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 66.

<sup>133</sup> Merit Brief, Caputo, et al., p. 2.

<sup>134</sup> Many of the treating physicians rendered medical treatment to more than one Appellee herein. More than twenty trial depositions were filed with the trial court in support of Appellees' claims.

summary judgment. Rather than acknowledge these findings, Appellants continue to claim that the court of appeals “sua sponte determined that Appellees’ claims could survive without expert testimony as to specific causation.”<sup>135</sup> However, the appellate court did not so rule and certainly did not depart from Ohio law regarding general and specific causation. Appellants were denied certification of this identical issue on April 12, 2006.<sup>136</sup>

The appellate court concluded that Appellees successfully established general causation through the evidence and the expert opinion of Bernstein. The trial court had mistakenly concluded that Bernstein’s opinion was unreliable and excluded it – and the entire case – in toto. However, Bernstein reliably established that mold causes personal injury. This is the essence of general causation. Conversely, in *Darnell v. Eastman*<sup>137</sup>, this Court found “absolutely no medical evidence, ‘competent’ or otherwise, as to such a causal relation.” This Court held that the opinion of a competent medical witness was needed to express opinions which went beyond matters of common knowledge.<sup>138</sup> The Court certainly did not consider general versus specific causation but rather found a complete absence of any evidence of causation. That decision is distinguishable from the case at bar where a competent medical expert provided reliable testimony as to general causation; a reliable hygienic expert provided scientific evidence of general and specific causation; and the authenticated medical records and treating physicians’ testimony provided competent evidence of the clinical manifestations.

The framing of the issue – “whether expert testimony is required to prove specific causation” – misstates the appellate decision. As the appellate court noted, “[appellees] have

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<sup>135</sup> Id., at p. 3.

<sup>136</sup> See Appendix, Decision and Judgment Entry of the Sixth District Court of Appeals (April 12, 2006).

<sup>137</sup> (1970), 23 Ohio St.2d 13, 16.

<sup>138</sup> Id. at 17. Accord, *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 112.

advanced genuine issues of material fact on the issue of specific causation, even discarding Dr. Bernstein's conclusions (or lack thereof) regarding particular employees."<sup>139</sup> When considering the reliable expert evidence of air sampling and the Appellees' testimony, "the reported differences between indoor and outdoor air quality is significant enough to raise a genuine issue of material fact as to whether it *could* cause injury and whether it *did in fact* cause these particular plaintiffs' injuries."<sup>140</sup> The court of appeals explicitly instructed the parties and the lower court what "an expert's reliable differential diagnosis opinion supportive of specific causation" must encompass, to wit: it must not rely solely on temporal causation and "must rule out and eliminate alternative potential causes until the most likely cause is isolated."<sup>141</sup>

Appellants and their amicus curiae interchange "mold" and "toxic tort" as though (1) accurately reflecting the evidence herein and (2) synonymous. Both authors attempt to confuse a rather simple issue: whether irritants, including mold, were present and caused a physical response, such as sneezing or exacerbation of asthma from dust. Instead, the authors are disingenuously claiming that this simple case, admittedly involving many witnesses and many doctors, is analogous to a toxic tort, such as that of *Valentine v. PPG Industries, Inc.*<sup>142</sup> The Court should not tolerate such intellectual dishonesty.

Appellants and their amicus curiae also conveniently overlook the basic summary judgment premise that Appellees "need not conclusively establish proximate causation on summary judgment."<sup>143</sup> "The issue of proximate causation in this matter is not the type of

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<sup>139</sup> *Terry v. Ottawa County MRDD*, 165 Ohio App.3d 638, 2006-Ohio-866, at ¶83.

<sup>140</sup> *Id.*, at ¶87 (emphasis of the court).

<sup>141</sup> *Id.*

<sup>142</sup> 158 Ohio App.3d 615, 2004-Ohio-4521, *aff'd*, sub nom, *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561.

<sup>143</sup> Decision and Judgment Entry, 04/12/2006, p. 4.

'factually unsupported claim' ideally disposed of by summary judgment."<sup>144</sup> On remand, Appellees must establish proximate cause at trial or risk a directed verdict. As noted by the appellate court, this application is "entirely consistent with *Darnell*".<sup>145</sup> As noted by this Court, "a trial court's role in determining whether an expert's testimony is admissible under Evid.R. 702(C) focuses on whether the opinion is based upon scientifically valid principles, not whether the expert's conclusions are correct or whether the testimony satisfies the proponent's burden of proof at trial."<sup>146</sup> The facts and law of the case do not support Appellants' characterization of the issues decided or the proposition of law admitted for discretionary review.

### **ARGUMENT IN RESPONSE TO THE PROPOSITION OF LAW**

#### **Proposition of Law: Expert testimony is required to establish a causal connection between exposure to mold and a subsequent injury.**

This Proposition of Law is self-evident and reflects the current law. The appellate decision does not contradict this proposition but rather holds that general and specific causation are required. Appellants do not challenge the appellate court's conclusion finding that Appellees established general causation through the testimony of Bernstein, that is, that irritants, including mold, are capable of causing personal injury; or that Appellees established evidence of specific causation sufficient to withstand summary judgment through their expert industrial hygienist in combination with the facts in the record about Appellees' medical conditions.

The appellate court unanimously decided that Bernstein's opinion reliably established that mold is capable of causing personal injury. Bernstein's "testimony with respect to the distinctions between mold's alleged toxic effects and its *allergen and irritant* effects would be

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<sup>144</sup> *Id.*, pp. 4-5, quoting *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 288; *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 321-328.

<sup>145</sup> Decision and Judgment Entry, 04/12/2006, p. 5.

<sup>146</sup> *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 613-14.

helpful to a jury, and is relevant and probative to the issue of general causation – whether the specific types of mold identified in Foley’s and Hygienetics’ reports are capable of causing certain irritant and allergen induced effects.”<sup>147</sup>

In contrast, both *Valentine* and *Alden v. Phifer Wire Products, Inc.*<sup>148</sup>, dealt with the determination of general causation in toxic torts. Because neither plaintiff established general causation to the satisfaction of the courts, the issue of specific causation was not reached in either decision.

In *Alden*, a product liability toxic tort case, the plaintiffs were unable to establish general causation. The experts had made assumptions about the environment, that is, that the product released toxins. However, there was no scientific evidence or expert testimony to make that nexus. Because “the potential harmful effects of chemical ‘outgassing’ from a product manufactured with phenol is not within common knowledge”, the plaintiffs established neither that the product emitted toxins nor that the product proximately caused injury.<sup>149</sup> Because the plaintiffs were unable to establish general causation, the issue of specific causation was not reached. Therefore, *Alden* does not apply to the case at bar in which general causation was established. Appellants have not appealed the sufficiency of Bernstein’s opinion as to general causation.

In the appellate decision in *Valentine*, the court found “no direct scientific evidence that any particular chemical or group of chemicals to which Valentine was exposed caused his glioblastoma multiforme. The plaintiffs’ experts agree that the only scientifically proven cause

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<sup>147</sup> *Terry*, 2006-Ohio-866, at ¶62 (emphasis of the court).

<sup>148</sup> 8<sup>th</sup> Dist. No. 85064, 2005-Ohio-3014.

<sup>149</sup> *Alden*, at ¶21.

of brain tumors is ionizing radiation, a factor that is not applicable to this case.”<sup>150</sup> In that case, the plaintiffs were unable to establish general causation. Because the medicine and science would not enable anyone to establish general causation, the plaintiffs’ claims were dismissed.<sup>151</sup> Only one issue was before this Court: “In reviewing the denial of a claim for Ohio Workers’ Compensation benefits, does a common pleas court abuse its discretion in granting summary judgment for the employer and refusing to allow a jury to consider expert testimony that a laboratory worker’s extensive exposure to multiple toxic chemicals was the probable cause of his fatal brain cancer.”

In determining *Valentine*, this Court recognized the issue before it as “whether Evid.R. 702(C) requires a scientifically valid connection between the opinion of an expert witness and the resources relied upon by the expert.”<sup>152</sup> In that case, the plaintiff suffered from a condition identified as glioblastoma multiforme. Both of plaintiffs’ treating physicians “acknowledged that no chemical is known to cause glioblastoma multiforme and that ionizing radiation, which is not involved in this case, is the only proven cause of the disease.”<sup>153</sup> Therefore, the physicians were unable to establish general causation with respect to any factor to which this plaintiff was actually exposed. While there was an opinion sufficient to establish general causation that ionizing radiation can cause this brain disease, this plaintiff was not exposed to ionizing radiation and could not prove specific causation either. This Court concluded that differential diagnosis “is appropriate only when considering potential causes that are scientifically known.”<sup>154</sup>

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<sup>150</sup> 2004-Ohio-4521, ¶37.

<sup>151</sup> *Id.*, at ¶56.

<sup>152</sup> 110 Ohio St.3d 42, 2006-Ohio-3561, ¶1.

<sup>153</sup> *Id.*, at ¶5.

<sup>154</sup> *Id.*, at ¶22.

The decision in *Valentine* is significant to this case for its recognition of the use of the differential diagnosis in exposure to irritants. In *Westberry v. Gislaved Gummi AB*<sup>155</sup>, the plaintiff, as this Court noted, “alleged that breathing airborne talc caused aggravation of a preexisting sinus condition.”<sup>156</sup> The Court acknowledged that this methodology is appropriate “when considering potential causes that are scientifically known.”<sup>157</sup> In other words, after establishing that a factor, such as an irritant, is capable of causing a particular response, the plaintiff can then prove exposure to that cause and the scientifically known effect.

In their amicus brief, Appellants claim that the trial and appellate courts concluded that Bernstein “was unable to resolve the issue of ‘specific causation’”.<sup>158</sup> Unlike the experts in *Valentine*, however, Appellees can establish specific causation as well as general causation. It is not that Bernstein could not establish specific causation, but rather the lower courts found that he did not properly rule in and rule out other potential causes. Unlike toxic tort cases in which general causation often cannot be established, the irritants, including mold, present in the Buckeye Building were capable of causing harm. The record confirmed evidence of the types of harm known in the scientific community to be caused by these irritants. Bernstein simply failed to satisfy the lower courts that he fully analyzed the evidence. As the appellate court noted, “[Appellees] have advanced genuine issues of material fact on the issue of specific causation, even discarding Dr. Bernstein’s conclusions (or lack thereof) regarding particular employees.”<sup>159</sup>

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<sup>155</sup> (C.A.4 1999), 178 F.3d 257.

<sup>156</sup> *Valentine*, at ¶22.

<sup>157</sup> *Id.*

<sup>158</sup> Amicus Curiae Brief, Ohio Assoc. of Civil Trial Attorneys, p. 5.

<sup>159</sup> 2006-Ohio-866, ¶83.

The remaining cases cited by Appellants in support are inapposite. In *Cavallo v. Star Enterprise*<sup>160</sup>, the expert testimony tendered was found to be lacking adherence to the “established toxicology methodology”. The plaintiffs in that case were exposed to toxic gasoline vapors, not irritants. Likewise, the plaintiffs in *Rohrbough v. Wyeth Lab, Inc.*<sup>161</sup>, filed a claim based on injection of toxoids, the toxins extracted from bacteria. Clearly, that area of science is more complex than itchy eyes due to dust and mildew. As the court noted, “the subject matter of the case is of a high degree of scientific complexity”.<sup>162</sup> The experts in *Porter v. Whitehall Lab., Inc.*<sup>163</sup> were unable to establish general causation of the toxic effects of ibuprofen. Finally, the case of *Bradley v. Brown*<sup>164</sup> dealt with exposure to pesticides, known toxins.

In the case at bar, Appellees established that irritants, including mold, are capable of causing particular response (general causation) by means of the testimony of Bernstein. Appellees also proved exposure to the irritants at the Buckeye Building through the expert report of Clint Jones, referenced by the appellate court as the “Hygienetics report”. Appellees also established the presence of the scientifically known effects referenced by Bernstein and Jones through their testimony, their physicians’ testimony, their medical records, and Jones’ report (specific causation). The appellate court correct reviewed all of this evidence in the light most favorable to Appellees as non-movants and determined that summary judgment was wrongly granted. “The inferences from this evidence, construed in [Appellees’] favor, are sufficient to create issues of material fact and preclude summary judgment; also, [Appellees] may yet still

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<sup>160</sup> (E.D. Va. 1995), 892 F.Supp. 756, rev’d in part (1996), 100 F.3d 1150.

<sup>161</sup> (N.D.W.Va. 1989), 719 F.Supp. 470.

<sup>162</sup> Id. at 473.

<sup>163</sup> (C.A.7 1993), 9 F.3d 607.

<sup>164</sup> (N.D. Ind. 1994), 852 F.Supp. 690.

obtain a relevant and reliable expert opinion on the issue of specific causation.”<sup>165</sup> Furthermore, the appellate court found that “[i]n its grant of summary judgment, the trial court explicitly relied on the fact that the plaintiffs had no expert witness to establish causation in order to conclude that they would not advance a genuine issue of fact. The prejudice to [Appellees] is clear.”<sup>166</sup> As this Court has held, where “substantial justice has not been done” by means of an evidentiary ruling, the decision of the trial court is properly reversed.<sup>167</sup> “Reversing summary judgment on the basis of this improper evidentiary ruling is proper because it affects the substantial rights of the adverse party.”<sup>168</sup>

Appellants attempt to make this case unduly complex by interchanging toxic tort cases with negligence cases involving allergens and irritants. Grossly misrepresenting the holding of the appellate court, Appellants also claim that the appellate court decreed that Appellees need not provide expert testimony at trial. However, as Appellants are fully aware, the appellate court held that “an expert’s reliable differential diagnosis opinion supportive of specific causation” must not rely solely on temporal causation and “must rule out and eliminate alternative potential causes until the most likely cause is isolated.”<sup>169</sup> This is good, sound law. Furthermore, Appellants err in their statement that the case as remanded lacks expert causation evidence. In addition to the testimony of Bernstein as to general causation and Hygienetics as to general and specific causation testimony, Appellees also presented the trial testimony of more than a dozen physicians confirming the existence of symptoms clinically that correlate with the experts’ opinions about the exposure.

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<sup>165</sup> 2006-Ohio-866, at ¶88.

<sup>166</sup> *Id.* at ¶89.

<sup>167</sup> *O’Brien v. Angley* (1980), 63 Ohio St.2d 159, 164-65; *Terry*, 2006-Ohio-866, at ¶89.

<sup>168</sup> *Terry*, 2006-Ohio-866, at ¶89, citing *O’Brien*, 63 Ohio St.2d at 164-65.

<sup>169</sup> *Terry*, 2006-Ohio-866, at ¶87.

This Court's decision in *Shilling v. Mobile Analytical Services, Inc.*<sup>170</sup> bears note here. In *Shilling*, this Court reviewed the issue of whether an expert who was not a medical doctor was qualified to render an opinion that the ingestion of a toxin caused personal injury. Examining the decision in *Darnell*, this Court found that the term "medical witnesses" used in that decision was ambiguous. "Many issues of medical diagnosis involve areas of expertise."<sup>171</sup> Critically, this Court unanimously held that the "fact that *additional* expert testimony may be required to establish a connection between [the personal injury] and all of the symptoms claims by plaintiffs does not bar conclusions which fall within [this non-medical doctor's] expertise."<sup>172</sup> The trial court had excluded the expert's testimony and granted summary judgment against the plaintiffs. This Court found, however, that the expert testimony of the non-medical witness was "sufficient to overcome a motion for summary judgment. \*\*\* The trial court erred in granting summary judgment, as there remain material issues of fact for a jury to determine."<sup>173</sup>

In reviewing evidentiary rulings of a trial court, the Eighth Appellate District reversed a directed verdict regarding irritant-induced asthma. In *Allen v. Conrad*<sup>174</sup>, a workers' compensation case, the trial court excluded the testimony of the plaintiffs' expert which "effectively destroyed Allen's prima facie case".<sup>175</sup> Although the reasons the trial court excluded the expert's testimony have no bearing on this case, the decision of the appellate court is instructive. Having determined that the trial court abused his discretion in excluding the expert's opinions, the court of appeals reversed the decision of the trial court directing the verdict and

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<sup>170</sup> (1992), 65 Ohio St.3d 252.

<sup>171</sup> Id. at 255.

<sup>172</sup> Id. (emphasis of the Court).

<sup>173</sup> Id.

<sup>174</sup> (2001), 141 Ohio App.3d 176.

<sup>175</sup> Id. at 181.

remanded the case for trial. The court found that “we cannot accept the grant of a directed verdict without first assessing the evidentiary rulings on which it is based.”<sup>176</sup>

Likewise, in the case at bar, the trial court held that “as a result of the Dr. Bernstein’s (sic) failure to conduct a valid, reliable differential diagnosis, Plaintiffs are precluded from adjudicating potentially valid claims.”<sup>177</sup> Because the trial court excluded Bernstein’s opinion in toto, it determined that summary judgment was appropriate. However, the appellate court found that (1) Bernstein’s opinion was incorrectly excluded with respect to general causation and (2) that Appellees provided sufficient information to show there were genuine issues of material fact. The result of the trial court’s evidentiary ruling was prejudice to Appellees for which reversal was warranted.

The appellate court found that Appellees “raised genuine issues of fact since the evidence (specifically, the air sampling report, their deposition testimony, and their expert’s testimony regarding general causation), demonstrates that they were exposed to mold and that mold is capable of causing injury.”<sup>178</sup> Although argued by Appellants, “[Appellees] need not conclusively establish proximate causation on summary judgment.”<sup>179</sup> While the parties agree that expert testimony is necessary in this case, Appellants err in concluding that the “Sixth District sua sponte determined that Appellees’ claims could survive without expert testimony as to specific causation.”<sup>180</sup> As demonstrated hereinabove, there was expert testimony as to specific causation and sufficient evidence to raise genuine issues of material fact.

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<sup>176</sup> Id. at 184.

<sup>177</sup> Decision and Order Regarding Summary Judgment, Ottawa Cty. Ct. of Common Pleas, Case No. 00-CIV-217, Feb. 7, 2005, ¶44.

<sup>178</sup> Decision and Judgment Entry, C.A. Case No. OT-05-009, April 12, 2006, 3-4 (Appendix pp. 3-4).

<sup>179</sup> Id. at 4 (Appendix p. 4).

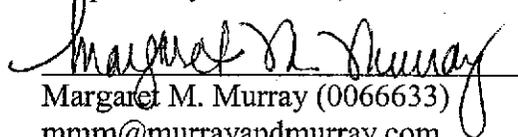
<sup>180</sup> Merit Brief, Caputo, et al., p. 3.

## CONCLUSION

The proposition of law stated by Appellants does not merit review. Appellees suffered clear prejudice when the trial court excluded the expert testimony of Jonathan Bernstein, M.D. in toto and dismissed the entire case based on that erroneous evidentiary ruling. Numerous genuine issues of material fact exist as to whether the Appellees sustained injuries and damages when working in Appellants' building. Appellees have provided a mountain of evidence, including reliable expert evidence on general and specific causation, and established that numerous issues of material fact remain. The appellate court below correctly and unanimously ruled that Bernstein's opinion was reliable with respect to general causation, that Appellees provided additional reliable evidence as to specific causation sufficient to overcome summary judgment and that Appellees were prejudiced as a result of the trial court's exclusion of Bernstein's opinion in toto as well as the granting of summary judgment when there was competent evidence of causation.

For these reasons, Appellees urge this Court to affirm the decision of the Sixth District Court of Appeals and remand this case to Ottawa County for trial.

Respectfully submitted,



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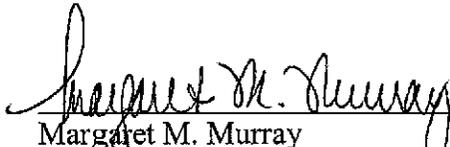
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**CERTIFICATION OF SERVICE**

This is to certify that copies of the foregoing Brief were sent on this 6<sup>th</sup> day of November 2006, to Thomas J. Antonini and Mark A. Ozimek, at Robison, Curphey & O'Connell, 9<sup>th</sup> Floor Four Seagate, Toledo, Ohio 43604, Attorneys for Defendants/Appellants John J. Caputo, Jr., Leonard A. Partin, Lake Investments, Inc., Northcoast Property Management Company, and W.W. Emerson Company; and to Lynne K. Schoenling, at Curry, Roby & Mulvey Co., L.P.A., 8000 Ravines Edge Court, Suite 103, Columbus, Ohio 43235, Attorney for Amicus Curiae, Ohio Association of Civil Trial Attorneys, by regular U.S. mail.

  
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Attorney for Plaintiffs/Appellees

**FILED**  
**COURT OF APPEALS**

APR 12 2006

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IN THE COURT OF APPEALS OF OHIO  
 SIXTH APPELLATE DISTRICT  
 OTTAWA COUNTY

Louise Terry, et al.

Court of Appeals No. OT-05-009

Appellants

Trial Court No. 00-CVC-217

v.

Ottawa County Board of Mental  
 Retardation and Developmental Delay,  
 et al.

**DECISION AND JUDGMENT ENTRY**

Appellees

Decided: APR 12 2006

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This matter is before the court on appellee's motion to certify our decision in *Terry et al. v. Ottawa County Board of MRDD et al.*, 6th Dist. No. OT-05-009, 2006-Ohio-866, unreported, as being in conflict with *Valentine v. PPG Indust.* (2004), 158 Ohio App.3d 615, 2004-Ohio-4521, discretionary appeal allowed by *Valentine v. PPG Indust.* (2004), 104 Ohio St.3d 1438, and *Alden v. Phifer Wire Products, Inc.*, 8th Dist. No. 85064, 2005-

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 APPENDIX

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Ohio-3014. Appellants have filed a memorandum in opposition. Appellees request certification of the following issue:

"Whether expert testimony is required to prove specific causation in mold, bacteria, or toxic exposure cases; that is, whether expert testimony is required to show that the alleged exposure was more likely than not the cause of Plaintiff's injuries."

In order to qualify for certification to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, a case must meet the following three conditions:

"First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596. (Emphasis in original.)

Appellees frame our holding in *Terry* as not requiring appellants "to offer expert testimony to prove specific causation to show that their exposure to mold, bacteria, and other irritants specifically caused their complained of medical conditions." Appellees mischaracterize our holding. Specifically, *Terry* held:

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1) A temporal relationship between an effect and an alleged cause "cannot alone suffice for a valid differential diagnosis unless other potential causes are ruled out for each particular plaintiff." *Terry*, 2006-Ohio-866, at ¶ 67.

2) "[A]n expert's reliable differential diagnosis supportive of specific causation must (1) not rely solely upon temporal causation, and (2) must rule out and eliminate alternative potential causes until the most likely cause is isolated; it need not, however, 'rule in' specific types of mold or, if scientifically unachievable, quantify a dose/threshold relationship, specific levels of the mold necessary to cause injury." *Id.* at ¶ 87.

Appellees argue that these holdings – and the reversal of the grant of summary judgment – contradict the well-established rule that "Except as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion. In the absence of such medical opinion, it is error to refuse to withdraw that issue from the consideration of the jury." *Darnell v. Eastman* (1970) 23 Ohio St.2d 13, syllabus.

As is proper on summary judgment, the evidence was viewed in a light most favorable to the non-moving parties, and all inferences therefrom drawn in their favor. Civ.R. 56(C). Appellants raised genuine issues of fact since the evidence (specifically, the air sampling report, their deposition testimony, and their expert's testimony regarding general causation), demonstrates that they were exposed to mold and that mold is capable

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of causing injury. Establishing proximate causation requires, in part, that a particular substance is capable of causing harm and that the plaintiffs prove they were exposed to the substance capable of causing harm. *Terry* at ¶ 84.

Appellees cite cases which are inapposite to the instant matter. In *Valentine v. PPG Industries, Inc.*, (2004), 158 Ohio App.3d 615, 2004-Ohio-4521, the plaintiffs were unable to establish general causation because *no* scientific evidence existed to date that anything other than ionizing radiation was capable of causing brain tumors. The *Valentine* decision to discard the plaintiffs' expert's differential diagnosis hinged largely upon the absence of any evidence as to what substance was capable of causing their injury, see *id.* at ¶ 55-56; in this matter, evidence was advanced that mold has the potential to cause the plaintiffs' injuries and evidence shows they were exposed. In *Alden v. Pluifer Wire Products, Inc.*, 2005-Ohio-3014, the plaintiffs were likewise unable to demonstrate that the product was capable of causing injury; no evidence had been adduced that the product was even defective. *Id.* at ¶ 11. Additionally, in their memorandum in opposition, appellants demonstrate an understanding of our decision in *Terry* when they note that any expert opinion obtained on the issue of proximate causation must not rely solely on temporary causation and "must rule out and eliminate alternative potential causes until the most likely cause is isolated." *Terry*, *supra* at ¶ 87.

A motion for summary judgment is not, in this case, the appropriate procedural device to follow *Whitlock's* rule. Appellants need not conclusively establish proximate causation on summary judgment. The issue of proximate causation in this matter is not

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the type of "factually unsupported claim" ideally disposed of by summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 288, citing *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 321-328. Entirely consistent with *Darnell*, therefore, the trial court may still, if appellants are conclusively unable to establish proximate causation with expert testimony, withhold the issue from the jury's consideration by granting a directed verdict, pursuant to Civ.R. 50. See *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 220; *Celotex Corp. v. Catrett*, 477 U.S. at 323 (the standard for granting summary judgment mirrors the standard for granting a directed verdict), citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 250.

Because there is no "true and actual conflict on a rule of law," *Whitelock*, 66 Ohio St.3d at 599, the motion to certify is not well-taken and is denied.

Arlene Singer, P.J.

William J. Skow, J.

Dennis M. Parish, J.  
CONCUR.

Arlene Singer  
JUDGE  
William J. Skow  
JUDGE  
Dennis M. Parish  
JUDGE

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