

IN THE SUPREME COURT OF OHIO

CASE NO. 06-0705

LOUISE TERRY, *et al.*
Plaintiff-Appellees

-vs-

OTTAWA COUNTY BOARD OF MENTAL RETARDATION
AND DEVELOPMENTAL DELAY *et al.*
Defendant-Appellants

BRIEF OF *AMICUS CURIAE*,
OHIO ACADEMY OF TRIAL LAWYERS
IN SUPPORT OF LOUISE TERRY, *et al.*, PLAINTIFF-APPELLEES

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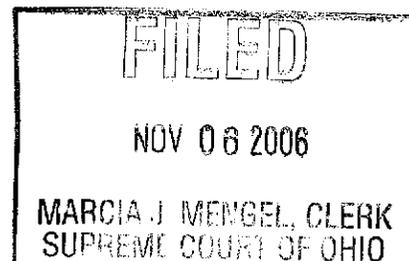


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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This *Amicus Curiae* represents the interests of the Ohio Academy Trial Lawyers (“OATL”). OATL is comprised of approximately two thousand (2, 000) attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

This *Amicus Curiae* is intervening in this appeal on behalf of Plaintiffs – Appellant Louise Terry, *et. al.* OATL is concerned about creating rigid and unnecessary obstacles within Civil Rule 56 or Evid R. 702 that will serve only as “booby-traps” and prevents litigants in the face of uncertain rules concerning expert testimony from ever having their day in court or their cases tried on the merits.

ARGUMENT

PROPOSITION OF LAW NO. 1: EXPERT TESTIMONY IS REQUIRED TO ESTABLISH A CAUSAL CONNECTION BETWEEN EXPOSURE TO MOLD AND A SUBSEQUENT INJURY.

The Court of Appeals reversed the trial court on the admissibility of Dr. Bernstein and then reconsidered the Defendant’s motion for summary judgment in light of its reversal. It found that sufficient evidence existed to deny summary judgment. The court was mindful that inferences from evidence should be tested to “to determine whether they are sufficient to justify but one conclusion, which conclusion is adverse to the non-moving party”. *Appellants’ Appendix, p. 37.* It found that the combination of Dr. Bernstein’s testimony, coupled with all inferences from the various air sampling reports and the employees’ depositions were sufficient to overcome Defendants’ Summary Judgment motion. It specifically noted that the trial court relied upon the fact that, as a result of its exclusion of the testimony of Dr. Bernstein, the Plaintiff then had no expert testimony. Having reversed that exclusion, the court of appeals

found genuine issues of material fact. The Court allowed that Plaintiff “may yet still obtain a relevant and reliable expert opinion on the issue of specific causation.” *Appellants’ Appendix*, p. 39.

The admissibility of Dr. Bernstein’s testimony is not before this Court; it was not appealed. Further, this is not a case in which a motion in limine was filed immediately before trial, or in which a trial has been completed. The issue is whether at the summary judgment stage Plaintiffs will be denied permission to continue prosecuting their claims. The Court of Appeals would permit Plaintiffs to continue, while Appellants urge this Court to find error and deprive Plaintiffs at this early stage of the case of their ability to proceed to trial.

It appears to Amicus OATL that the real issue is not whether expert opinion is required to establish a causal connection between exposure to mold and a subsequent injury, but whether in this particular case Plaintiffs have produced sufficient evidence at summary judgment stage to be allowed to continue. Neither brief of Appellants nor Amicus OACTA has addressed this issue.

Because of the uniqueness of this case, perhaps it should be dismissed as being improvidently granted. The intermediate appellate decision was issued while *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E. 2d. 683, was being considered by this Court. Dr. Bernstein’s opinion has been admitted for proof of general but not specific causation. Appellees introduced a substantial body of evidence, including an extensive report by Hygienetics including expert testimony. The precedential value of this Court’s decision may be questionable considering the unusual underlying circumstances are not likely reoccur. Certainly there is no shortage of mold cases in the lower courts from which a more appropriate set of circumstances upon which to consider this or a similar issue may arise. OATL submits

that further review of the Court of Appeals Opinion is now unnecessary given that any uncertainties in this area of the law were settled in *Valentine*, 110 Ohio St.3d 42.

Should this Court opt to proceed with this case, Amicus OATL cautions against a rigid approach suggested by Appellant and Amicus OACTA, particularly on motions for Summary Judgment. This Court again made clear recently the trial court's standard of review at the summary judgment stage.

Before ruling on a motion for summary judgment, the trial court's obligation is to read the evidence **most favorably for the nonmoving party** to see if there is a "genuine issue of material fact" to be resolved. **Only if there is none** does the court then decide whether the movant deserves judgment as a matter of law. The material issues of each case are identified by substantive law. As the United States Supreme Court has explained, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202; *Byrd v. Smith*, 110 Ohio St.3d 24, 27, 2006-Ohio-3455 850 N.E.2d 47, 51.

In this case the Court of Appeals applied that mandate. In reviewing the testimony of Dr. Bernstein, the depositions of the employees, and the many reports in evidence the court below found issues of material fact existed in this case. This approach is consistent with this Court's mandate of reviewing the evidence most strongly in favor of the non-moving party.

While Appellants rely heavily upon the Fourth District's ruling in *Valentine v. PPG Industries, Inc.*, 158 Ohio App.3d 615, 2004-Ohio-4521, 821 N.E.2d 580, claiming that expert testimony is always required in every case under every condition, the Court of Appeals rightly pointed out that *Valentine* did not so rule. It only held "Expert testimony **ordinarily** will be required to prove both general and specific causation." *Valentine*, 158 Ohio App.3d at 615. To

this it did not disagree, simply noting that while it is ordinarily required, it is not always required. *Appellants' Appendix, p. 22.*

Amicus OATL submit that this is sound reasoning. A flexible case-by-case standard is to be preferred. The approach, at summary judgment, should be whether there are any set of facts upon which the non-moving party could prevail. In this case, the set of facts included the depositions of the employees and the many reports in evidence all indicating that a set of abnormal conditions existed, that those conditions contained a high degree of irritants (measured in several ways) that can cause the injuries to the plaintiffs- the very injuries from which they reported that they indeed were suffering.

If anything is missing for trial, now that the exclusion of Dr. Bernstein's testimony was reversed, it is perhaps medical expert opinion in addition to the Hygienetic's report as to specific causation. The Hygienics report itself may serve as expert testimony. A case should be tried on its merits. Where any material facts are in dispute, Summary Judgment is inappropriate.

Rule 56 does not provide for dismissal of the claim or defense where expert opinion is permitted in part. Indeed, the rule makes no reference to "opinions" at all. The rule is not based upon opinions, but upon "material facts" to be resolved, and the rule requires the court to look at the evidence most favorably to the non-moving party. In other words, look toward allowing a trial upon the merits unless there are no material facts in dispute.

Viewed in this light, the evidence adduced clearly demonstrates that material facts are in dispute. At this early stage of the proceedings, denying Plaintiffs their ability to continue to prosecute their claims would be grossly unfair, particularly during this uncertain post *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, period when there are no acceptable and time proven principles of inclusion or exclusion of

certain expert opinion. As the Court of Appeals noted, "The prejudice to appellants is clear." *Appellants' Appendix, p. 40.*

If anything requires this Court's attention in this case, it is the interplay between the standards for admissibility adopted in *Daubert/Valentine* and summary judgment procedures. Prior to the formulation of the Ohio Rules of Civil Procedure, the *modus operandi* of skilled trial lawyers was "trial by ambush", *i.e.* waiting until nothing could be done to remedy a situation before striking a fatal blow to the opponent. Witnesses would be kept secreted, documents would be withheld, challenges would be left until trial when it was too late for the non-moving party to react. Further, papering the opponent with procedural motions, including summary judgments, was commonplace.

The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Surowitz v. Hilton Hotels Corp. (U.S. Ill. 1966) 383 U.S. 363, 373, 86 S.Ct. 845, 851¹

A new type of "booby trap" is being laid in cases where the law requires expert testimony. The party setting the trap will file a motion in limine challenging an expert's

¹ This Court expressed similar views in an oft cited case involving expert testimony.

One of the purposes of the Rules of Civil Procedure is to eliminate surprise. This is accomplished by way of a discovery procedure which mandates a free flow of accessible information between the parties upon request, and which imposes sanctions for failure to timely respond to reasonable inquiries. Jones v. Murphy (1984), 12 Ohio St.3d 84, 86, 465 N.E.2d 444, 446.

testimony pursuant to *Daubert*, followed simultaneously by a Summary Judgment motion.² Sometimes as a result, a bona fide case eliminating a sometimes essential claim or defense is dismissed without allowing the other side the opportunity to remedy what can be a mere technical deficiency. Because the law is so uncertain as to what expert testimony will be allowed or not, this new element of surprise has arisen again to create unfair trials not adjudicated on the merits.

How to disarm the booby trap? OATL offers several alternative suggestions, all with the goal of allowing both parties the opportunity to remedy when the trial court closes the gate on the testimony of an expert before a claim or defense is eliminated summarily.

One is to create a new procedure within the Ohio rules of procedure to deal with challenges to expert opinion testimony allowing sufficient time for the challenged party to have at least one opportunity to "remedy" e.g. by correcting expert testimony, adding additional experts, introducing additional evidence upon which the expert relied, or otherwise.

Another is to move forward in the litigation process challenges to experts to allow additional time to remedy between a ruling on the challenged expert testimony and the filing by the successful challenger of summary judgment or the commencement of trial, thereby eliminating the use of the motion in limine to challenge experts immediately before summary judgment or trial.

Until a formal procedure is adopted, OATL submits that the proper judicial approach is to adopt the procedure utilized by the Sixth District Court of Appeals in this case, *i.e.* to consider after a review of the evidence whether the material facts, viewed most favorably to the non-moving party, including a possible remedy to a successfully challenged expert opinion, are sufficient to justify but one conclusion as a matter of law.

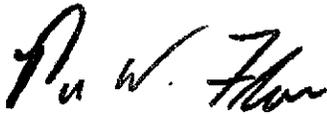
² A similar trap is laid the day or two before trial when the opponent is likewise unprepared to remedy.

The rules should not be used in a harsh technical way so as to create a booby trap, but should, as nearly as possible, guarantee that bona fide complaints be carried to an adjudication on the merits.

CONCLUSION

For the foregoing reasons, the *Amicus* OATL hereby urges this Court to either dismiss these proceedings as improvidently accepted or affirm the decision of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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