

IN THE SUPREME COURT OF OHIO

Louise Terry, et al.,) Supreme Court Case No. 2006-0705
Appellees,) On Appeal from the Ottawa
County Court of Appeals,
v.) Sixth Appellate District
Ottawa County Board of Retardation) Court of Appeals
and Developmental Delay, et al.,) Case No. OT-05-009
Appellants.)

**REPLY BRIEF OF APPELLANTS LAKE INVESTMENTS, INC.,
JOHN CAPUTO, LEONARD PARTIN, NORTHCOAST PROPERTY
MANAGEMENT, AND W.W. EMERSON CO.**

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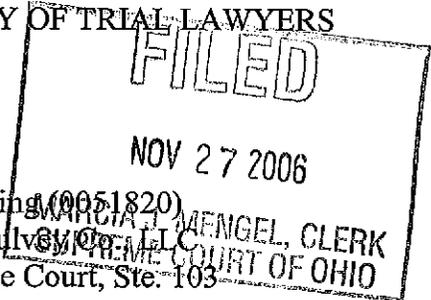


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ARGUMENT IN REPLY

Lacking any reliable expert testimony as to specific causation, Appellees now contend – for the first time – that the report of an industrial hygienist suggesting a “correlation” between Appellees’ alleged exposure and injuries is sufficient evidence to justify reversal of summary judgment. The record in this case is clear, however, that Appellees offered only the testimony of Dr. Bernstein to establish specific causation. The trial court held Dr. Bernstein’s testimony was insufficient to establish specific causation and the Sixth District affirmed. Appellees did not appeal that decision, instead choosing to reverse their lower court position and suggest for the first time that the report of an industrial hygienist, which was not presented in opposition to summary judgment, should now be considered as evidence of specific causation. The trial court, however, granted summary judgment after considering the hygienist’s report, in addition to all evidence in the record, and the Appellees failed to raise the report as the basis of an assignment of error in the Sixth District. The Sixth District should be reversed: there is no competent expert testimony establishing a causal connection between Appellees’ alleged exposure and injuries and Appellees cannot now rely upon a hygienist’s report that was neither presented in opposition to summary judgment or raised as an assignment of error in the Sixth District.

A. APPELLEES MISCHARACTERIZE THE SIXTH DISTRICT’S HOLDING.

Appellees mischaracterize the Sixth District’s holding, altogether ignoring that both of the lower courts held Dr. Bernstein’s testimony unreliable as to specific causation. Instead, Appellees incorrectly state “[t]he appellate court found that the trial court incorrectly excluded Bernstein’s testimony.” (Appellee’s Merit Brief, p.1). Critically, the Sixth District in fact *affirmed* the exclusion of Dr. Bernstein’s testimony as to specific causation: “We agree with

the trial court: Dr. Bernstein did not conduct a scientifically valid differential diagnosis because his method primarily relied upon temporal relationships and because he did not ‘rule out’ other possible causes. He was properly barred from testifying to specific causation.” (Appellants’ Merit Brief Appx. 24).

Indeed, the Sixth District reversed the trial court only as to Dr. Bernstein’s general causation testimony, finding his testimony reliable *solely* for the proposition that “mold is capable of causing certain symptoms and maladies;” i.e., general causation (Appellants’ Merit Brief Appx. 35). As the Sixth District noted, however, Dr. Bernstein’s general causation testimony standing alone is clearly insufficient to establish a causal connection between exposure and a specific injury to a particular plaintiff: “Here, Dr. Bernstein’s invalid differential diagnosis renders his testimony scientifically unreliable on the issue of whether these individual plaintiffs’ illnesses were caused by mold exposure * * *.” (Appellants’ Merit Brief Appx. 35).

Appellees have **not** appealed the exclusion of Dr. Bernstein’s specific causation testimony. Accordingly, unlike *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, this is not a case about the scientific reliability of an expert’s opinion. Rather, the only question before this Court is whether the Sixth District erred in reversing summary judgment after affirming the exclusion of Appellees’ only expert who testified as to specific causation.

The Sixth District reversed summary judgment on the incorrect basis that “air sampling reports and the employees’ testimony regarding their exposures to mold in the Buckeye Building create issues of fact because the inference from this evidence is that they were exposed to mold.” (Appellants’ Merit Brief Appx. 37-38). The Sixth District’s decision should be reversed: without any expert testimony to establish a causal connection between exposure and

injury (the Sixth District having affirmed the exclusion of Dr. Bernstein's testimony), any inferences of exposure were clearly insufficient to defeat summary judgment as to proximate cause. See *Valentine*, at ¶ 21 ("the fact that a number of the chemicals to which Mr. Valentine was exposed have been classified as carcinogens does not establish that they are capable, individually or collectively, of causing glioblastoma multiforme.") Moreover, the "air sampling report" referred to by the Sixth District, and now relied upon by Appellees, was the report of an industrial hygienist, Clint Jones, which: (1) Appellees never presented as causation evidence in either of the lower courts; (2) was not the basis of Appellees' assignments of error in the Sixth District; and (3) in any event, even if it had been presented as evidence, was evidence only as to "correlation," not causation, and thus unreliable for the same reason that both lower courts found Dr. Bernstein's testimony unreliable.

B. THE INDUSTRIAL HYGIENIST'S REPORT WAS NOT PRESENTED IN EITHER OF THE LOWER COURTS AS CAUSATION EVIDENCE.

Appellants moved for summary judgment on the basis that "the evidence does not establish that their alleged injuries were proximately caused by exposure to mold." (Appellants' Motion for Summary Judgment, p.3). In Appellees' thirty-four page Opposition to Defendants' Motion for Summary Judgment, Appellees never once referred to the industrial hygienist's report, nor was it attached as any one of the various exhibits to their Opposition. Even more significantly, in Appellees' thirty page Opposition to Defendants' Rule 104(A) Motion seeking the exclusion of Appellees' expert testimony, the *only* reference to the hygienist's report was as follows: "In addition to the review of plaintiffs' medical records, Dr. Bernstein reviewed the results of microbial assessments of Buckeye Boulevard conducted by Hygenics Environmental Services in 2000 and 2001." (Appellees' Memorandum in Opposition to Rule 104(A) Motion, p.9). In fact, in acknowledging that the hygienist's report was merely information that Dr.

Bernstein relied upon in forming his opinion (which opinion was ultimately excluded), Appellees admitted the limited value of the hygienist's report: "The state of the art and costs involved limited the information that could be ascertained from these test results." (Appellees' Memorandum in Opposition to Rule 104(A) Motion, p.9). Now, Appellees rely on the same report to justify reversal of the trial court's twenty-three page Decision and Order granting summary judgment, notwithstanding that such report was not even presented in opposition to summary judgment.

Additionally, in Appellees' fifty page Brief in the Sixth District, the hygienist's report was again referred to only as information relied upon by Dr. Bernstein in forming his opinion, rather than as independent causation evidence: "In addition to [Appellees'] medical records, Dr. Bernstein reviewed the results of microbial assessments of Buckeye Boulevard conducted by Hygenics Environmental Services in 2000 and 2001." (Appellees' Sixth District Brief, p.28). This was the sole reference to the hygienist's report in Appellees' Sixth District Brief. In fact, although Appellees now repeatedly refer to a Mr. Clint Jones as their "hygienic expert" throughout their Merit Brief in this Court, a simple review of Appellees' lower court brief and memorandum in opposition to summary judgment confirms that Appellees never once relied upon Mr. Jones as any sort of causation expert, much less an expert qualified to establish a causal connection between Appellees' alleged exposure and specific injuries.

Indeed, and as further discussed below, had the hygienist's report been offered as causation evidence, the report would have been excluded on the same basis that Dr. Bernstein's testimony was excluded. Appellees should not be allowed to rely upon that report for the first

time in this Court.¹

C. THE TRIAL COURT GRANTED SUMMARY JUDGMENT AFTER CONSIDERING THE HYGIENIST'S REPORT AND APPELLEES FAILED TO RAISE THAT ISSUE AS AN ERROR IN THE APPELLATE COURT.

The trial court granted summary judgment after considering the hygienist's report and excluding Dr. Bernstein's testimony. Indeed, the trial court specifically found that: "[s]ignificantly, however, the Hygienetics survey concluded *only* that 'there is a probable correlation * * *.'" (Appellants' Merit Brief Appx. 61, 88) (emphasis added). Appellees did not argue that finding was erroneous in the Sixth District. "It is axiomatic, however, that issues not presented for consideration below will not be considered by this court on appeal." *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220, 574 N.E.2d 457. "This Court has long recognized that it will not consider a claimed error which was not raised and preserved in the appellate court." *Foran v. Fisher Foods, Inc.* (1985), 17 Ohio St.3d 193, 194, 478 N.E.2d 998.

Rather than arguing the trial court erred on the basis of the hygienist's report, Appellees assigned only the following errors in the Sixth District: "[Appellees] appeal the decision of the trial court to exclude the testimony of Dr. Jonathan Bernstein. Second, [Appellees] appeal the decision of the trial court granting summary judgment on its earlier decision to exclude the testimony of Dr. Bernstein and on all claims, rather than only those raised in [Appellants'] motion." (Appellees' Sixth District Brief, p.14). In fact, Appellees' Sixth District Brief is completely devoid of any reference to a Mr. Clint Jones or a "hygienic expert."

¹ Ironically, the Ohio Academy of Trial Lawyers argues in their Amicus Curiae Brief filed on behalf of Appellees that Appellees were the victims of a "booby trap" when Appellants filed their motion to exclude Appellees' expert testimony contemporaneously with their motion for summary judgment. Appellants submit that, in fact, it is Appellees who have laid a "booby trap" by relying solely on Dr. Bernstein's testimony in the trial court and Sixth District, only to argue for the first time in this Court that the hygienist's report was also intended as evidence of specific causation.

In the end, Appellees did not present the hygienist's report as causation evidence, did not raise the report as the basis of an assignment of error in the Sixth District, and did not appeal the Sixth District's decision affirming the exclusion of Dr. Bernstein's specific causation testimony. Accordingly, there is no competent expert testimony as to a causal connection between Appellees' alleged exposure and specific injuries. While Appellees suggest in their Brief that the testimony of thirteen treating physicians was evidence as to causation, **none** of those physicians testified as a causation expert, instead merely testifying as to the nature and extent of Appellees' claimed symptoms. Again, a simple review of Appellees' memoranda and briefs in the lower courts will confirm that none of the treating physicians were presented as causation experts and none testified as to causation. Thus, and pursuant to this Court's holding that "[e]xcept 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," the Sixth District should be reversed and the decision of the trial court affirmed. *Darnell v. Eastman* (1970), 23 Ohio St.2d 13, syllabus, 261 N.E.2d 114.

D. IN ANY EVENT, EVEN IF APPELLEES WERE ALLOWED TO RELY UPON THE HYGIENIST'S REPORT AS CAUSATION EVIDENCE FOR THE FIRST TIME IN THIS COURT, THE HYGIENIST'S REPORT DOES NOT ESTABLISH A CAUSAL CONNECTION.

Even if the hygienist's report had been presented as specific causation evidence, the report merely states that "[t]here is a probable *correlation* of the complaint symptoms to symptoms associated with the organisms detected during the FOHC and Hygienetics survey."² (emphasis added). The trial court correctly determined that this was significant in granting

² Although Appellees rely extensively on the hygienist's report in their Merit Brief in this Court, it is not attached as a supplement to their Brief pursuant to Supreme Court Rule VII(3).

summary judgment. (Appellants' Merit Brief Appx. 61, 88). "It is axiomatic in logic and in science that correlation is not causation." *Craig v. Oakwood Hosp.* (Mich. 2004), 471 Mich. 67, 93, 684 N.W.2d 296; see also, *Lasley v. Georgetown Univ.* (D.C. 1997), 688 A.2d 1381, 1387 ("Correlation and causation are hardly synonymous. We find that 'a proximate temporal association alone does not suffice to show a causal link' because a mere temporal coincidence between two events does not necessarily entail a substantial causal relation between them. Consequently, more evidence is required."). Accordingly, the report is unreliable for the same reason that Dr. Bernstein's testimony was excluded by the *both* of the lower courts: it is improperly based solely upon a temporal relationship and not the product of a scientifically valid differential diagnosis.

As the Sixth District stated: "Dr. Bernstein never gave any specific basis establishing or tending to establish causation for any particular plaintiff in his deposition testimony beyond the relation in time between their exposure to mold and their symptoms." (Appellants' Merit Brief Appx. 30). Without *any* expert testimony "tending to establish causation for any particular plaintiff," the trial court should have been affirmed.

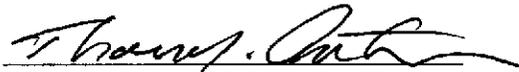
Moreover, it was clear error for the Sixth District to remand the case on the basis that Appellees "may yet still obtain a relevant and reliable expert opinion on the issue of specific causation." (Appellants' Merit Brief Appx. 39). The trial court's discovery cut-off date and deadline for disclosing expert witnesses had long since passed. A trial court has discretionary power, not a ministerial duty, regarding discovery practices. See, e.g., *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 592, 664 N.E.2d 1272. An appellate court should only reverse a trial court's discovery order "when the trial court has erroneously denied or limited discovery." *Id.* Appellees never requested an extension of time to disclose additional experts and were never

denied an opportunity to disclose experts. After five years of litigation, it was clear error for the Sixth District to reverse the trial court and suggest the Appellees find a new and reliable expert.

CONCLUSION

For the reasons discussed above, Appellants respectfully request this Court to reverse the Decision of the Sixth District Court of Appeals and affirm the Decision of the Ottawa County Common Pleas Court granting summary judgment to Appellants.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Toledo, Ohio
November 22, 2006

I hereby certify that a copy of the foregoing was this day sent by regular U.S. mail
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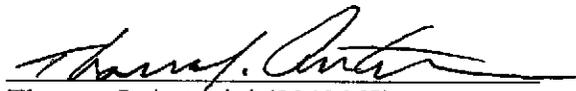
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