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, Sixth Appellate District
v.	)	
Ottawa County Board of Retardation and Developmental Delay, et al.,	)	Court of Appeals Case No. OT-05-009
	)	
Appellants.	)	

APPELLANTS' MEMORANDUM IN OPPOSITION TO APPELLEES' MOTION FOR RECONSIDERATION

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SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Appellees' Motion for Reconsideration amounts to reargument of an issue previously raised by Appellees in their Merit Brief: "[t]he appellate court found that the trial court...did not address the emotional distress claims." (Appellees' Merit Brief, p.1). This issue was also raised by Appellees in both the trial court and the court of appeals. (Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, p.2); (Appellees' Court of Appeals Brief, p.43). This issue has thus been raised and briefed by the parties at every stage of this litigation and does not merit further consideration or clarification by this Court.

Appellants moved for summary judgment as to all of Appellees' claims, expressly including "all illnesses/injuries, including emotional distress, claimed by Plaintiffs." (Defendants' Reply Memorandum in Support of their Motion for Summary Judgment, p.2). The trial court, after considering all pleadings and all evidence in the record, awarded summary judgment as to all claims and dismissed this case. Upon reversal by the court of appeals, Appellants requested 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." (Appellants' Merit Brief, p.7). This Court has done so and Appellees have failed to demonstrate some error upon which this Court should reconsider and/or clarify its Opinion. Accordingly, the Motion for Reconsideration should be denied.

II. THERE IS NO BASIS FOR RECONSIDERATION AND/OR CLARIFICATION OF THIS COURT'S OPINION REINSTATING THE TRIAL COURT'S SUMMARY JUDGMENT DISMISSAL OF ALL APPELLEES' CLAIMS.

In the trial court, Appellants filed a six-part Motion for Summary Judgment as to all of Appellees' claims, arguing, inter alia, that: (1) "the alleged dangers were not reasonably

foreseeable;" (2) "even if Defendants had notice of a dangerous condition in the Buckeye Building, they took reasonable action under the circumstances to remedy the problem;" and (3) "the evidence does not establish that Plaintiffs' alleged injuries were proximately caused by their alleged exposure to mold and/or irritants." (Defendants' Motion for Summary Judgment, pp.6, 9-10). Appellees, however, erroneously interpreted Appellants' Motion for Summary Judgment as requesting judgment as to only their physical injury claims, and not their emotional claims. Appellants therefore, to the extent there was any confusion, clarified their position in their Reply Memorandum: **"Contrary to Plaintiffs' suggestion, Defendants seek, and are entitled to, summary judgment as to all illnesses/injuries, including emotional distress, claimed by Plaintiffs."** (Defendants' Reply Memorandum in Support of their Motion for Summary Judgment, p.2) (emphasis added).

In ruling upon Appellants' Motion for Summary Judgment, the trial court indicated that: "in addressing Defendants' Motion for Summary Judgment, this Court has reviewed the record, all pleadings, exhibits and the relevant case law." (Trial Court's February 7, 2005 Decision and Order, ¶24). Accordingly, the trial court's judgment entry included all claims asserted by Appellees, including their claims of emotional distress: "Based on the foregoing, this Court concludes that Plaintiffs have failed to establish proximate causation between any negligence on Defendants' part and their *personal* injuries.[1] As such, this Court finds Defendant's Motion for Summary Judgment to be appropriate. Accordingly, ... IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this cause is DISMISSED." (Trial Court's February 7, 2005 Decision and Order, ¶¶ 47, 51) (emphasis added).

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[1] This Court has previously held that emotional distress claims *are* personal injury claims. *Lawyers Cooperative Publishing Co. v. Muething* (1992), 65 Ohio St.3d 273, 280.

The court of appeals reversed summary judgment and Appellants sought review in this Court, requesting 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." (Appellants' Merit Brief, p.7). This Court reinstated the trial court's judgment and Appellees have not demonstrated grounds for reconsideration of this Court's decision.

This Court has used its reconsideration authority under Supreme Court Practice Rule XI "to correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Shemo v. Mayfield Hts.* (2002), 96 Ohio St.3d 379, 380, 2002 Ohio 4905. Appellees have not demonstrated any error by this Court. Instead, Appellees argue: "If this issue had actually been raised in Appellants' motion for summary judgment, Appellees could have provided additional testimony." (Motion for Reconsideration, p.5). First, as set forth above, Appellants did seek summary judgment as to all of Appellees' claims; Appellants did not file a "partial" summary judgment motion and, in fact, specifically referred in their Reply Memorandum to "all illnesses/injuries, **including emotional distress**, claimed by Plaintiffs." (Defendants' Reply Memorandum in Support of their Motion for Summary Judgment, p.2) (emphasis added).

Second, in any event, this Court reinstated summary judgment because Appellees failed to provide sufficient evidence of the proximate cause of their injuries. Appellees should not be permitted to cure this defect by simply suggesting they can now provide "additional testimony," regardless of whether the "additional testimony" would be expert or non-expert. The point is that Appellees had five years to provide sufficient evidence of the cause of any and

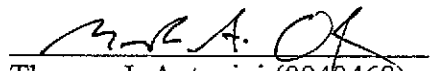
all of their alleged injuries and the trial court held that they failed. This Court agreed and Appellees have not pointed to any evidence in the record to suggest this Court was wrong.

Finally, a simple review of the record confirms that a remand would simply result in a rehashing of issues previously briefed by the parties in the trial court. For example, Appellees argue in their Motion for Reconsideration that "[t]he injuries that Appellees sustained were reasonably foreseeable to Appellants." (Motion for Reconsideration, p.6). Indeed, Appellants moved for summary judgment on this very point: "Defendants are entitled to summary judgment because the alleged dangers were not reasonably foreseeable." (Defendants' Motion for Summary Judgment, p.6). Appellees, in turn, opposed summary judgment by arguing: "[a]s owners and professional property managers, they should have been aware of the dangers of molds and other irritants." (Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, p.23). Thus, notwithstanding that the parties have already briefed and argued this issue, Appellees would have this Court remand for further litigation of the reasonable foreseeability of their injuries. Appellees should not be permitted to continue to litigate this case.

III. CONCLUSION

For the foregoing reasons, Appellees' Motion for Reconsideration should be denied.

Respectfully submitted,



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October 15, 2007

This is to hereby certify that a copy of the foregoing was sent this day by regular U.S. mail to:

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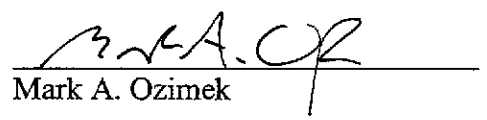

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