

**THE LATEST ON MOLD
AND
WHAT YOU MUST KNOW**

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I. INTRODUCTION

The authors have been involved in mold related litigation for many years. The damages take two forms- property damage or personal injury. Each type of damage must be carefully established to prevail on a claim. Claims typically take two paths- claims against a contractor or other entity who caused the water intrusion, which caused the mold or claims against an insurance company which ignored a covered water intrusion related claim which led to mold. Both claims have to be handled with extreme care and planning. Immediate testing of the mold is critical. Further, if the mold has caused personal injury, a doctor knowledgeable about mold related illness should be visited immediately. Please refer to the attached paper by Ron Wright of RV Buric for the latest on proper investigation of mold related claims.

II. SUMMARY OF CURRENT MEDICAL ARTICLES REGARDING MOLD

The authors of this paper felt that a summary of relevant articles regarding mold and mold related health problems from various physicians and administrative agencies from 1999 until the present would be helpful in understanding the current views toward mold. We would be happy to provide you with a copy of any article referenced upon request.

In 1999, the American Conference of Governmental Industrial Hygienists published Bioaerosols, Assessment and Control which is a trade manual for industrial hygienists. As stated below, Bioaerosols, Assessment and Control discusses the asthmatic and toxic health effects that could result from mold.

Immediate Type Allergic Reactions. Most fungi produce highly allergic proteins or glycoproteins that, under appropriate exposure conditions, can cause hypersensitivity diseases in susceptible hosts. Between 10% and 60% of genetically susceptible (atopic) persons develop immediate sensitivity to fungi, as demonstrated by skin tests (citations omitted). Exposure to some fungi is clearly associated with symptoms of asthma and hay fever (citations omitted). There is also some evidence that sensitization and exposure to fungi increases the chances that an asthma attack will be fatal (citations omitted).

Unfortunately, the nature of exposures that stimulate either sensitization or subsequent symptoms remains unknown ...

Bioaerosols, Assessment and Control, section 19.2.2, P. 19-6 (1999).

Toxic Effects. Mycotoxins. Mycotoxins produce a variety of health effects via ingestion, skin contact and inhalation (citations omitted). . . effects may include mucous membrane irritation, skin rashes, dizziness, nausea, immunosuppression, birth defects and cancer. Nearly all of the mycotoxin literature focuses on ingestion exposure, although the role of inhaled mycotoxins in human disease is currently under scrutiny. In view of the potential severity of resulting diseases, a conservative approach to limiting exposures to mycotoxins is recommended.

Id., pp. 19-6 and 19-7.

Volatile Organic Compounds. Fungi produce VOCs while growing and degrading substrates. Some of these compounds have distinctive odors and low odor thresholds, and many people find these VOCs offensive or annoying. Exposure to such compounds may be responsible for some nonspecific BRSs [building related symptoms]. However, the role of fungal VOCs in clinically evident disease has not been studied.

Id., p. 19-7.

Also, in 1999, in “*The Diagnosis and Incidence of Allergic Fungal Sinusitis*”, the Mayo Clinic connected most chronic rhinosinusitis infections (97%) [infection of the sinuses] to actually be caused by fungal allergens as opposed to pollen or other common irritants. This article also significantly challenged allergy diagnostics.

In March 2001, the United States Environmental Protection Agency (“EPA”) published “*Mold Remediation in Schools and Commercial Buildings*.” In the Introduction of the publication the authors write “Concern about indoor exposure to mold has been increasing as the public becomes aware that exposure to mold can cause a variety of health effects and symptoms, including allergic reactions.” The publication not only discusses ways to prevent mold growth, but also ways to safely investigate damp moldy environments and how to safely remediate the conditions. The publication also discusses the “health effects and symptoms associated with

mold exposure.” It includes discussions on allergic reactions to mold; effects on people with asthma; certain lung diseases such as hypersensitivity pneumonitis that can be caused by exposure to mold; the irritant effects of mold exposure; infections caused by mold exposure; and, toxins that can be produced by molds such as *Aspergillus* and *Stachybotrys*.

Specifically, the EPA stated:

All molds have the potential to cause health effects. Molds can produce allergens, irritants, and in some cases, toxins that may cause reactions in humans. . . . Specific reactions include . . . allergic reactions: inhaling or touching mold spores may cause allergic reactions in sensitive individuals. Allergic reactions to mold are common . . . can be immediate or delayed. . . include hay fever-type symptoms, such as sneezing, runny nose, red eyes, and skin rash. . . spores and fragments can produce allergic reactions . . . **repeated or single exposures can cause previously non-sensitive individuals to become sensitive** . . . molds can trigger asthma attacks . . . may worsen asthma in non-allergic people . . . may cause hypersensitivity pneumonia . . . can cause irritation of eye, skin, nose, throat and lungs . . . **people with weakened immune systems may be more vulnerable**. . .

Id., pp. 40-41.

In 2002, the New York City Dept. Health & Mental Hygiene, a leader in mold investigations, published *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*. The *Guidelines* state:

Inhalation of fungal spores or metabolites from a wide variety of fungi may lead to or exacerbate immunologic (allergic) reactions, cause toxic effects, or cause infections. . . intensity of exposures and health effects seen in studies of fungal exposure in the indoor air environment was typically much less severe than those experienced by agricultural workers but were of a long term duration. . . illness can result from both high level, short-term exposures and lower level, long term exposures. . . most common symptoms . . . are runny nose, eye irritation, cough, congestion, aggravation of asthma, headache, and fatigue. . . immunological effects include asthma, hypersensitivity pneumonitis, and allergic rhinitis. . . a wide variety of effects have been attributed to toxic

effects . . . such as fatigue, nausea and headaches, and eye irritation.

The NYC guidelines were revised in 2006 to embrace all fungi types because of the potential to “produce potent mycotoxins” and an expansion of known health effects.

In April 2004, the Institute of Medicine of the National Academy of Sciences published a 341 page book entitled “*Damp Indoor Spaces and Health*” (“IOM Report”) addressing the issue of the scientific research of the topic of mold related illnesses. Harriet Ammann, Ph.D. was a co-author of the IOM report. In an affidavit written in 2006, Dr. Ammann explained the health effects that exist from mold and what she found during her research for the IOM report.

Dr. Ammann states:

The fact is that there comes a point where the body of medical and scientific literature, discussed further below, shows a strong enough association, and is consistent with clinical experience, that physicians utilize that knowledge to do their causal assessments in individual cases, and public health officials utilize that knowledge to take appropriate measures for public safety. When the health of the public is in question, strong association is “sufficient” as stated in the IOM report, for physicians, health agencies and public health personnel to take action to treat and prevent illness. IOM clearly stated in its Public Health Response chapter that:

- Dampness is prevalent in residential housing in a wide array of climates. (Chapter 2).
- Sufficient evidence of an association exists between signs of dampness and upper respiratory tract infections, cough, wheeze, asthma symptoms in sensitized persons. (Chapter 5)
- **Sufficient evidence of an association exists between signs of mold and upper respiratory tract symptoms, cough, wheeze, asthma symptoms in sensitized persons and hypersensitivity pneumonitis in susceptible person.** (Chapter 5)

Ammann Aff. ¶ 7.

And concludes that:

This is a public health problem that needs to be addressed through intervention on a variety of governmental, professional and public health levels.

Ammann Aff. ¶ 7.

Dr. Ammann also stated that “in fact IOM found that damp indoor spaces are strongly associated with respiratory symptoms and disease. Such spaces contain molds and bacteria, but especially smaller, more readily inhaled products. Moisture is rather obviously not the cause of the illness, but what grows and is produced by microbes is, with a high degree of scientific certainty. Ammann Aff. ¶. 10. She explains in detail that the IOM conclusions certainly should satisfy applicable legal standards about the adverse health effects of mold. “[T]he weight of evidence required for scientific causation to an absolute certainty is many times greater than what is required or practical in real-world medicine and public health for physicians to do exposure and causation assessments in individual cases, and for public health officials to plan appropriate actions to protect the community.” Ammann Aff. ¶. 12.

Dr. Ammann also explains that the IOM report, “with its 2003 cut-off date, is somewhat out-of-date already” and that a tremendous amount of research has been performed in the last few years, which was requested by the report, and “which address a number of the scientific questions raised by the IOM report.” Ammann Aff. ¶ 11.

On September 30, 2004, the University of Connecticut Division of Occupational and Environmental Medicine Center for Indoor Environments and Health published *Guidance for Clinicians on the Recognition and Management of Health Effects Related to Mold Exposure and Moisture Indoors*. (“Guidance for Clinicians”). The purpose of the document is to provide guidance on the diagnosis and management of mold caused injury from damp building

exposures. Chapter 4 of the publication states affirmatively that “**fungi [mold] can cause disease in humans and animals by a variety of biological mechanisms, which can be classified into four groups: (1) infections, (2) allergic or hypersensitivity reactions, (3) irritant reactions, and (4) toxic reactions.**” Id., p. 21. The publication also briefly discussed how byproducts of certain toxic molds have been used in bio-warfare as far back as the 1940’s. Id., p. B-5.

This document describes exactly what causes the potential for human exposures in damp buildings:

Three factors combine in indoor environments to support mold growth and the corresponding potential for human exposure to mold: building materials that can become sources of nutrition for mold; moisture from leaking roofs, leaking pipes, or from condensation on or **water intrusion through walls** or basements; [and] inadequate or poorly maintained ventilation systems that may not provide enough air for dilution or dehumidification or that may themselves harbor sources of mold or disperse mold spores into the occupants’ breathing zone. (Emphasis added)

Id., p.3.

As all documents before it, the Guidance for Clinicians makes a clear statement about mold and human health:

Fungi can cause disease in humans and animals by a variety of biological mechanisms, which can be classified into four groups: (1) infections, (2) **allergic or hypersensitivity reactions**, (3) **irritant reactions**, and (4) **toxic reactions**.

Id.

In 2005, the American Industrial Hygiene Association (AIHA), which produces testing requirements for hygienists to become Certified Industrial Hygienists and is one of the most highly respected scientific organizations that address concerns related specifically to indoor environments, published a second edition of a Field Guide for the Determination of Biological Contaminants in Environmental Samples. Chapter 2 of the publication addresses the known

health effects of exposure to molds and other biotoxins. It even goes on to discuss “building-related illness” and “non-specific building-related illnesses” citing 114 scientific articles on the topic. *Id.*, pp 4,17,21-28.

In October 2005, the CDC published *Prevention Strategies and Possible Health Effects in the Aftermath of Hurricanes Katrina and Rita*. The Center for Disease Control (“CDC”) has long been concerned with all aspects of public health including the effects of exposure to indoor mold. The health effects of exposure to mold is something that the CDC brought into focus as a result of the damage left behind by hurricanes Katrina and Rita. Chapter 5 of the publication addresses the potential adverse health effects related to exposure to mold. The authors summarize the findings of the IOM April 2004 publication mentioned above. The Chapter goes on to discuss various diseases and other adverse health symptoms that are known to be caused by exposure to molds. *Id.*, pp 20-28.

On January 5, 2007, in a follow-up to the research that was being done on the victims of the hurricanes, scientists with the CDC published *Characterization of Airborne Molds, Endotoxins, and Glucans in Homes in New Orleans after Hurricanes Katrina and Rita*. In this peer reviewed article that was published in Applied and Environmental Microbiology, March 2007, the authors summarized their findings in their abstract by stating “[m]olds, [e]ndotoxins and fungal [g]lucans were detected in the environment after Hurricanes Katrina and Rita in New Orleans at concentrations that have been associated with health effects.” They go on to state “[M]uch evidence exists indicating that indoor exposure to molds contribute to occupant respiratory disease and symptoms.” *Id.*, p. 1630, *Characterization of Airborne Molds, Endotoxins, and Glucans in Homes in New Orleans after Hurricane Katrina and Rita*, Applied and Envntl. Microbiology, Vol. 73, No. 5 (2007).

In 2006, in “*Sick Building Syndrome and Exposure to Water Damaged Buildings*”, a peer-reviewed article for Neurotoxicology and Teratology, Drs. Ritchie Shoemaker and Dennis House conducted a time series study to determine whether the chronic exposure to the indoor air of water-damaged buildings (“WDBs”) is associated with Sick Building Syndrome (“SBS”). Drs. Shoemaker and House measured the levels of MMP-9, leptin, MSH, VEGF, IgE, and the pulmonary function of the twenty-eight participants during the study. Id. Also, thirteen of the participants agreed to a double-blinded, placebo-controlled clinical trial to assess the efficacy of cholestyramine (CSM) therapy. Id. After assessing the participants throughout the study, Drs. Shoemaker and House concluded that the study “supported the confirmatory hypothesis, thereby supporting the general hypothesis that SBS is associated with exposure to WDBs.” Id. Also, the results from the double-blinded clinical trial of CSM efficacy indicated a highly significant improvement in group-mean numbers of symptoms. Id.

In 2007, Drs. Mudarri and Fisk, in peer reviewed paper for the U.S. EPA found that “dampness and mold in buildings is a significant public health problem with substantial economic impact.” *See, D. Mudarri & W.J. Fisk, Public Health and Economic Impact of Dampness and Mold, Indoor Air, Vol. 17, Issue 3 (2007).* And that “there is **general consensus in the scientific community** that exposure to dampness and mold substantially increases the risk of a variety of health effects, most notably those associated with the respiratory system.” Id.

Also, in 2007, Dr. Shenassa, in a peer-reviewed paper, concluded “that dampness and mold were associated with depression.” From the studies used, “both objective and subjective measures of dampness and mold [and] produced results showing associations with depression and with reports of emotional distress.” *See, Edmond Shenassa et al., Dampness and Mold in the Home and Depression: An Examination of Mold-related Illness and Perceived Control of One's*

Home as Possible Depression Pathways, Am. J. of Pub. Health, Vol. 97, No. 10 (forthcoming Oct. 2007).

Even though the summaries described above have numerous authoritative bodies relating mold to health effects, many Defendants and defense attorneys will place heavy reliance on the position paper by the American College of Occupational and Environmental Medicine (“ACOEM”) titled “Adverse Human Health Effects Associated with Molds in the Indoor Environment” that was published in 2003. The ACOEM paper alleges that indoor mold does not cause serious health effects. However, a recent WSJ article stated that this paper “was written by people who regularly are paid experts for the defense side in mold litigation.” David Armstrong, *Amid Suits Over Mold, Experts Wear Two Hats*, Wall Street Journal, January 9, 2007 at A1 (“WSJ”). One of the primary authors, Andrew Saxon, M.D., has served as a defense expert in numerous mold suits, charging \$510 to \$720 an hour, and generates \$250,000 to \$500,000 in fees. The other two authors of the ACOEM paper are Bryan Hardin, Ph.D. and Bruce Kelman, Ph.D. They are the principles of a firm called Veritox, Inc. which is a front for defense work in mold cases as well. They routinely charge \$375-\$500 an hour for work on mold cases. The WSJ pointed out that the ACOEM paper reached its conclusions by extrapolating from animal studies in which rodents’ throats were injected with molds.” Id. The WSJ also pointed out that “[t]he [ACOEM] paper’s authors say their conclusions are validated by the Institute of Medicine’s paper. But the author of the Institute paper’s mold toxicity chapter, Harriett Ammann, Ph.D. disagrees and criticizes the ACOEM paper’s methodology: ‘They took hypothetical exposure and hypothetical toxicity and jumped to the conclusion there is nothing there.’” Id. at A16.

The position paper “The medical effects of mold exposure” published in 2006 by the American Academy of Allergy, Asthma and Immunology is also frequently cited by defendants

and defense attorneys because it states that mold-related toxicity due to inhaled mycotoxins is not supported by current data. However, the WSJ exposes that two of the authors were Dr. Saxon and Dr. Abba Terr, a San Francisco immunologist. WSJ at A16. Dr. Saxon as discussed above is a highly compensated defense expert. However, Dr. Abba Terr is also a defense expert. Id. The third author of the AAAAI paper is Jay Portnoy, M.D., Chief of allergy, asthma and immunology at the Children's Mercy Hospital in Kansas City, Mo. Id. Dr. Portnoy says he "felt there was an agenda" –the effort "seemed very biased toward denying the possibility of there being harmful effects from mold on human health" and that he considered removing his name from the paper but that "it was published before he could decide." Id. Dr. Saxon actually rewrote Dr. Portnoy's section of the paper saying it was "too diffuse" and "denies the authors had a bias but **says they applied a high standard for proving mold causes a particular effect.**" (emphasis supplied). Id. This incredible admission certainly demonstrates that this biased paper should be given little or no weight especially since Dr. Saxon is applying a "high standard" of which only he knows.

Dr. Harriett Ammann in her affidavit mentioned above further corroborated the WSJ investigation and stated that "it should be noted that the AAAAI Position Paper . . . was a great embarrassment to the AAAAI. It turned out that their 'position paper' was written by scientists who worked as defense witnesses in mold cases. Moreover, so many of the members disagreed with the findings, and there was such an uproar among the members and other physicians and scientists, that the AAAAI was required to (1) disclose that the authors were defense witnesses; (2) change their conflict of interest disclosure policy; and (3) agreed to and did allow a certain number of doctors and scientists to publish their disagreements with the paper. I was one of them." Ammann Aff. ¶. 14. Further, in a letter to the editor of the Journal of Allergy and

Clinical Immunology, Dr. Ammann and Dr. Shoemaker and others address the lack of credible evidence and evaluation performed prior to publishing the AAAAI position paper.

III. SIGNIFICANT APPELLATE DECISIONS

There are a number of reported appellate decisions dealing with mold related issues. The most prevalent issue on appeal is the admissibility of numerous experts seeking to opine on various mold induced health problems. In general, as more data becomes available the trend appears to be allowing qualified experts to testify about causation related issues. Attorneys have already successfully litigated mold cases where the plaintiffs have more easily proven injuries such as asthma.¹ Injuries that are more difficult to prove include chronic fatigue syndrome and fibromyalgia, which is characterized by muscle pain.² It appears that the growth of recoverable mold claims will be directly related to the scientific advances made in the field of causation.

¹ See New Haverford Partnership v. Stroot, 772 A.2d 792 (2001) (holding expert testimony establishing causal relationship between mold exposure and asthma admissible); Mondelli v. Kendel Homes Corporation, 631 N.W.2d 864, 262 Neb. 263, per curiam 641 N.W.2d 624, 262 Neb. 663 (2001) (allowing causation testimony on adult onset asthma); Miner v. American Mortgage & Guaranty Co., 791 A.2d 826 (Del. Sup. 2000) (holding expert testimony on reactive airways dysfunction syndrome admissible). See also; Traub v. Crawford & Company, et al. (No 1995-C-153(Pa. Comm. Pls. Lehigh City)) utilizing a Frye standard (see FN.35 Infra) this Pennsylvania Court rules in late June 2002 that it will allow the testimony of medical experts in the casual connection between brain damage and mold exposure in a case filed by homeowners against their insurer and the adjuster hired to inspect their storm-damaged home. The experts apparently were allowed to testify regarding respiratory problems and cognitive problems and cognitive injuries suffered during a nine month period of exposure. The authors of Columns, a Harris Martin publication, reports that this decision marks the first time testimony regarding an alleged link between a plaintiff's mold exposure and impaired cognitive function has survived defendant challenged in mold litigation. See www.harrismartin.com.

² See Stephanie F. Cahill, *For Some Lawyers Mold is Gold: Toxic Troubles Translate into Millions of Dollars for a Practice that's Bound to Grow*, 87 A.B.A. J. 22 (2001); Miner v. American Mortgage & Guaranty Co., 791 A.2d 826 (Del. Sup. 2000) (holding expert testimony on sick building syndrome, chronic fatigue syndrome, and fibromyalgia inadmissible).

1. New Haverford Partnership v. Stroot.³

In this 2001 Delaware case, two tenants, Stroot and Watson, brought a negligence suit against the landlord of the apartments for health problems allegedly caused by mold contamination. Stroot, whose health problems were more severe, lived in two different mold infested Haverford Place apartments over a twenty-one month period. While living at the apartments, Stroot made seven emergency room visits for asthma attacks, logged nine days of inpatient care, and required intravenous steroids twelve times. Although Stroot suffered from allergies and asthma since childhood, the severity and frequency of her medical problems increased while living at the apartment complex.

Watson lived in Haverford place four years, but was rarely there during the first two years of the tenancy. Despite repeated attempts to rid the apartment of mold, it continued to reappear. Upon spending more time at the apartment, Watson began to suffer a number of ailments including: fatigue, frequent headaches, sinus problems, chest pains and body aches. Prescription medicine did not help, and it was not until six months after moving out did her health begin to improve.

At trial Stroot received a \$1,000,000 jury verdict for personal injuries and a \$5,000 verdict for property damage, which were reduced by 22% for contributory negligence. Watson was awarded \$40,000 for personal injures, which was also reduced by 22% for contributory negligence. The Superior Court of Delaware denied the defendant's motion to alter or amend the judgment. On appeal, the decision was affirmed by the Supreme Court of Delaware. The critical issue before the Supreme Court was whether or not the expert testimony relating to excessive mold in the apartment building and causation of tenants' health problems was properly admitted. The defense argued that none of the expert's opinions were reliable because no extensive

³ New Haverford Partnership v. Stroot, 772 A.2d 792 (2001).

baseline testing was conducted to determine the normal mold level, and because other possible causes of the injuries were not excluded. *Id.* at 799. The Court held that although there was no testing to establish a baseline, one of the plaintiffs' experts did find the mold level inside the apartments to be ten times higher than outside *Id.* at 800. In ruling, the Court said that "the failure to conduct extensive baseline testing goes to the weight of the expert's opinion, not their admissibility." *Id.* The Court applied this same principle to the experts' failure to exclude other possible causes of the plaintiffs' health problems. *Id.*

The defense also argued that the opinions of the plaintiffs' experts were deficient for a number of reasons. The Delaware Supreme Court, reciting the *Daubert* guidelines, stated that when making a determination on the admissibility of expert testimony, the trial court may consider whether the scientific method has been tested and subjected to peer review; whether it is governed by standards; and whether it is generally accepted in the relevant scientific community. *Id.* at 799. Applying these guidelines, the Court found that the experts' methodologies were reliable because they had undergone peer review and were generally accepted by the scientific community. *Id.*

2. Centex-Rooney Construction Co., Inc., v. Martin County.⁴

In this 1998 Florida case, the plaintiff, Martin County, moved into a new courthouse complex built under the management of defendant Centex. Shortly after occupancy, the County filed several complaints about window and exterior wall leaks, mold growth, and excessive humidity. Occupants and visitors also complained of health problems. An advisory committee voted to evacuate the complex on December 8, 1992 following testing that revealed a significant presence of two highly unusual and toxic molds.

⁴ Centex-Rooney Construction Co., Inc. v. Martin County, 706 So.2d 20 (Fla. 4th DCA 1997), rev. denied 718 So.2d 1233 (Fla. 1998).

The County sued Centex, the sureties, the architect, and the concrete and masonry company. During the trial, the court held a Frye⁵ hearing for the purpose of determining if the testimony of the plaintiff's expert was based on a generally accepted scientific principle. Id. at 26. From this hearing the trial court determined the plaintiff's expert testimony was admissible. The County ultimately obtained a jury verdict and was awarded a final judgment in excess of \$14 million.

On appeal, the Fourth District Court of Appeals affirmed the trial court's admittance of the plaintiff's expert testimony under the Frye test. The defense assigned error to the court's admittance of expert testimony linking health risks to the toxic molds found in the buildings. The defense argued that the Frye test had not been satisfied because the underlying principles of the experts' causation testimony were not generally accepted in the scientific community. The appellate court, however, noted that the experts' testified to a number of publications accepted within the field that recognize a causal relationship between exposure to molds and adverse health effects. The appellate court agreed that these publications supported that plaintiff's experts' theories had been tested and generally accepted.

⁵ Under the Frye standard, the party proposing the expert testimony must show that the basic underlying principles of the scientific evidence are well recognized and generally accepted by the relevant scientific community. See, Frye V. United States, 293 F. 1013, 1014. Daubert, however, replaced Frye's general acceptance standard with the reliability requirement. Daubert created a "gatekeeping" role for the district court judge where "under the rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). Daubert is controlling law for the admissibility of expert testimony on the federal level. State courts, however, apply whichever evidentiary standard its highest court has chosen.

3. Mondelli v. Kendel Homes Corporation.⁶

In this 2001 Nebraska case, the plaintiffs sued their homebuilder and municipality for mold contamination caused by the shoddy construction of their new home. After suffering from persistent health problems such as asthma, the plaintiffs were forced to abandon the house.

At trial, judgment was entered against both defendants. A separate trial, however, was ordered to make specific determinations on causation and damages. At trial, the defense successfully excluded the plaintiffs' expert witnesses on the grounds that causation could not be testified to because no standards existed in the scientific community concerning a permissible level of indoor mold. Following the close of evidence, the district court granted the defendants' motion for a directed verdict on the grounds that causation had not been proven. Id. at 853. On appeal, the Supreme Court of Nebraska held that the District Court's exclusion of testimony to be an abuse of discretion.

The critical issue on appeal was whether the district court erred in excluding the testimony of the plaintiffs' expert witnesses. In reversing the district court, the Nebraska Supreme Court thoroughly reviewed the expert's qualifications, and the scientific publications relied upon by the expert in forming his opinions. The Court held that the extensive list of publications demonstrated "[t]hat the scientific community has generally accepted the principle that a connection exists between the presence of mold and health." Id. at 856; Blundell supra note 1, at 400. Thus, the Supreme Court concluded that because the expert's opinion was built upon accepted scientific principle, as evidenced by the publications, it should have been presented to the jury to aid in deliberation.

⁶ Mondelli v. Kendel Homes Corporation, 631 N.W.2d 846, 262 Neb. 263, per curiam 641 N.W.2d 624, 262 Neb. 663 (2001).

4. Miner v. American Mortgage & Guaranty Co.⁷

In this Delaware case, the plaintiffs sued the owner and property manager of a commercial office building for negligent control of the building's internal environment. The plaintiffs alleged various medical and psychological illnesses, caused by the building's contaminated HVAC system. The plaintiffs argued that although no specific toxins could be identified, their long-term exposure to a contaminated environment supported the causation analysis.

At trial, the defense filed a motion in limine to prevent the plaintiffs' causation experts from testifying that the injuries were caused by exposure to mold. The Superior Court held that the expert testimony on sick building syndrome, chronic fatigue syndrome, and fibromyalgia could not be validly diagnosed and therefore could not be presented to the jury. The court did find, however, that in regards to the reactive airways dysfunction syndrome and toxic encephalopathy, the scientific principle underlying the expert's opinion on causation was sufficient. Miner v. American Mortgage & Guaranty Co., 791 A.2d 826 (Del. Sup. 2000).

5. Searle v. City of New Rochelle.⁸

In this 2002 New York case, a family leasing a house from the defendant sued to recover damages for personal injuries stemming from the presence of toxic mold in the home. The plaintiffs first noticed the growth of mold in the fall of 1995 and began to experience chronic health problems thereafter. The plaintiffs filed a notice of claim in the spring of 1998, after learning that their health problems were related to mold exposure. At trial the defendants were awarded summary judgment because the time for the cause of action had expired. On appeal, the Supreme Court, of the Appellate Division, affirmed the lower court's grant of summary

⁷ Miner v. American Mortgage & Guaranty Co., 791 A.2d 826 (Del. Sup. 2000).

⁸ Searle v. City of New Rochelle, 293 A.D.2d 735, 742 N.Y.S.2d 314 (2 Dept. 2002).

judgment. The court held that “[a] plaintiff’s cause of action for damages resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his or her physical condition, i.e. when the injury is apparent, not when the specific cause of the injury is identified.” Id. at 1. Thus, the plaintiffs’ time for cause of action began to accrue in 1995 when the mold was discovered and the health problems began. Thus, the notice of claim filed in 1998 was untimely.

6. Ballard v. Fire Insurance Exchange.⁹

Perhaps the most famous mold case involving the exclusion of personal injury damages is Ballard v. Fire Ins. Exchange. The facts and result of this case are well known for those familiar with mold related litigation. As discussed in this paper, a simple plumbing leak resulted in wide spread mold contamination. A jury awarded \$32 million against the insurance company.¹⁰ What many may not know is that the Court excluded any evidence of personal injuries. The ultimate award was based solely on property damage, punitive damages, emotional distress, and attorney fees.

In granting the defendant’s motion to exclude evidence of personal injuries, the Court agreed that the evidence was not sufficiently reliable to establish that molds can cause personal injury. The Court reasoned that the underlying scientific data were not reliable as required by the Texas Supreme Court case of Merrell Dow Pharmaceuticals Inc. v. Havner.¹¹ Havner addressed the admissibility of evidence from epidemiological studies, which examine existing populations to attempt to determine if there is an association between a disease or condition and a factor

⁹ No. 99-05252 (Tex. Dist. Ct., Travis County, June 1, 2001).

¹⁰ Recently the Texas Court of Appeals significantly reduced the award to \$4,006,320 plus attorneys’ fees.

¹¹ 953 S.W.2d 706 (Tex. 1997), cert. Denied, 523 U.S. 1119 (1998).

suspected of causing that disease or condition.”¹² Epidemiological studies provide statistical information and do not establish the actual cause of a *particular* individual’s disease or condition. In other words, if medical examinations demonstrated that 100 people got sick from exposure to a certain toxic substance in a certain environment, then it is reasonable to assume without further medical examination that additional sick people exposed to the same toxic substance in the same environment became ill in the same manner as the 100 people in the original medical study. Havner held that evidence from such studies is generally admissible in toxic tort cases if it shows that there is a doubling of the risk of injury when exposed to the substance at issue and there is a high probability that if the pertinent studies were repeated, they would produce the same results 95 percent of the time. In Ballard, the court concluded that the evidence proffered by the experts did not meet the Havner standard and was therefore inadmissible.

7. Geffcken v. D’Andrea.¹³

Two plaintiffs claimed that they were exposed to mold mycotoxins at their residence causing them to suffer from various ailments. Id. at 1301. The trial Court conducted a hearing under Evidence Code section 402 which lasted two weeks to determine whether to exclude plaintiff’s expert medical witness and mold sampling expert. Id. at 1302. The Court of Appeals held that the trial Court properly excluded the testimony of the mold sampling expert because the mold sampling expert had little probative value because there was a “pervasive chain of custody errors and deficiencies” which invalidated the integrity of the sampling results. Id. at 1308.

¹² Havner, 953 S.W.2d at 715.

¹³ Geffcken v. D’Andrea, 137 Cal.App.4th 1298, 41 Cal.Rptr.3d 80 (2006)

8. Roche v. Lincoln Property Co.¹⁴

The Eastern District Court of Virginia barred a plaintiffs' experts' opinions in a mold case. The Court specifically noted that the plaintiffs' expert could not establish a direct nexus between the levels of mold exposure and any subsequent illnesses that overcame the plaintiffs due to the mold exposure.

9. Miscellaneous Cases.

In an effort to provide you with some flavor of the type cases which have had some type disposition or ruling in the last two years, we offer the follow case summaries and the settlement amount from cases around the country.

IV. MOLD CASES AND WATER INTRUSION CASES

1. Brain Gamble v. Garner Custom Homes (5th Fl. Judicial Circuit 2006)

Plaintiff had home built for \$218,864. The home had water leaks. At trial Plaintiff's experts testified the costs of repairs, including mold remediation, totaled \$600,000. Defendant's experts testified that necessary repairs costs were \$85,000. The verdict was returned for the plaintiff for \$247,400, which was reduced to **\$223,864**, the contract price plus \$5,000 for a change order that plaintiff had already paid for.

2. Metropolitan Property & Casualty Ins. Co. v. Gary Little WL 342509, (Fla. Cir. Ct. 2006)

Defendant Gary Little installed a bathtub on second floor which did not drain property and caused ceiling on first floor to leak. When being repaired, extensive mold damage was uncovered. Metropolitan indemnified home and they sued Gary Little for the \$39,000 it had to pay the homeowner. The court granted summary judgment to the insurance company in the amount of **\$39,000**.

¹⁴ 278 F.Supp.2d 744 (E.D.Va 2003)

3. **Greater Boca Raton Beach & Park District v. Schwab, Twitty & Hanser**
WL 22345177 (Fl. Cir. Ct. 2007)

The Sugar San Park Community Center in Boca Raton experience flooding problems after heavy rains. Moreover, mold was in parts of the center. The center closed down to avoid health complications. In a mediated settlement, the center's designers agreed to pay **1.5 million dollars**, the anticipated repair costs.

4. **Niko Black v. South Warner Business Center**
(California Case, 2007)

Water intrusion caused elevated levels of toxic mold growth, noxious odors and dust mites. Plaintiff's expert presented evidence of environmental tests indicating high levels of mold in the house which supported her claim that the mold caused her health to progressively decline. She was awarded **\$550,000** in a mediated settlement.

5. **Gorman v. Kormick & Bourgeois**
Cal., L.A. Co. Super, (2006)

This case involved a family of five including three minor children who suffered chronic respiratory and sinus infections, fatigue, and organic brain damage, resulting in developmental delays by their infant son, due to their exposure to mold in their custom built home. The mold got in the house because the defendant, a lumber company, supplied lumber to the general contractor that had mold on it. The family was given a non verdict award of **13 million dollars**, earlier the plaintiffs had settled with the general contractor, construction supervisor, engineers and window installer for **9.6 million dollars**.

6. Gianardi v. Simpson Property Group d/b/a Shadowridge Apartment
WL 4003747 (Santa Fe Co., N.M., Dist. Ct., 2006)

The plaintiff, a tenant of the landlord/defendant was exposed to mold over an extended period of time inside of his apartment. He complained respiratory distress, headaches, emotional distress, rashes and lesions on up to 85% of his body. The award was for **\$750,000** but the plaintiff was found 25% comparatively negligent for not moving out quicker so award was reduced to \$562,500.

7. Trimble v. Price
WL 1786240, JVR No. 380,390, (California, 2006)

Family of five suffered multiple injuries including bronchitis, nose bleeds, and skin irritations after mold was found in the home they rented from the defendant. Plaintiff argued defendant knew of mold and painted over it. Defendant argued he had no knowledge of the problem. Jury awarded plaintiff **\$235,000**, of which \$5000 was past medical cost and the rest was pain and suffering.

8. Corey v. Stone
(California, 2006)

Plaintiff claimed sinus problems, headaches, fatigue, nose bleeds, eye irritation, respiratory problems, decreased concentration, and depression as a result of mold. The plaintiff leased an apartment from defendant and throughout tenancy complained of water intrusion, mold, musty odors, and other conditions. The plaintiff claimed damages for medical expenses, loss of enjoyment of premises, loss of possessory interest, general damages. The parties settled in mediation for \$167,500.

9. Pressentin v. Westra Construction Co.

WL 1985516, JVR No. 447,319 (Dane Co., Wis., Cir. Ct., 2006)

35 plaintiffs suffered multiple injuries including asthma and respiratory dysfunction when exposed to mold at a school built by the defendant. Plaintiffs claimed water intrusion occurred because of an improperly installed window and that led to mold growth. The contractor settled the case with plaintiffs for **\$650,000**.

10. Buckler v. Raley

(Maryland, 2006)

St. Mary's County Jury returned verdict for **\$270,000** finding mold caused by water intrusion in rental house aggravated already existing chronic obstructive pulmonary disease. \$250,000 of the \$270,000 was non economic damages.

11. Powell v. John Mourier Construction

(California, 2005)

After the Powells, a married couple moved into a newly constructed home in Sacramento they found water intrusion in 12 areas of the home including windows, roof, and flashing. The Powells had to move out of their home and claimed damages for mold-related illness and loss of value of their home. The Powells had sought \$220,000 for loss of equity in their home and \$193,000 in loss of personal property, including loss of use, storage and cleaning for that property. The jury awarded them **\$593,000**.

12. Joanne Miller, Ryan Miller, Allison Miller, and Hayley Smith v. Palm Garden Apartments

(California, 2004)

The plaintiffs were tenants in the landlord/defendants apartment and were awarded **\$392,500** in a mediated settlement. The plaintiffs moved into an apartment, three months after they moved in, water intrusion started that resulted in mold growth. They lived in the apartment for just under three years during the time period between fall 2000 and fall 2003.

They claimed their injuries were allergic sensitization, asthma, allergic rhinitis and other symptoms.

13. Johnnie Pratt, Louise Bills and Mary Roy v. Housing Authority of Baltimore City
(Maryland, 2006)

The plaintiffs were exposed to mold caused by water intrusion while living in public housing (a converted school building). The Plaintiffs claimed the mold caused their respiratory problems, aggravated asthma, and caused the chronic symptoms of a cold such as a running nose. The three plaintiffs were awarded **\$382,000**, ranging from \$177,000 to one defendant, to a low of \$102,000 for another of the three defendants.

14. Kevin Stark; Casey Stark; Individually and As Guardian Ad Litem to Kyle
(California, 2006)

Family purchased house for slightly over \$800,000. They claimed the seller concealed water damage and that mold caused their family to suffer from repeated bouts of sinusitis, rhinitis, blood discharge from the sinuses, upper respiratory infections, fatigue, nausea, vomiting and gastrointestinal illnesses. In a bench trial, Judge Dennis S. Choate ruled in favor of the Starks, finding that the Lunas were negligent. He awarded **\$209,016**, consisting of \$188,716 for economic damages and \$30,000 for pain and suffering. Judge Choate also awarded \$100 to each minor plaintiff.

15. Harold v. California Casualty Insurance Co.
(Sacramento Co., Calif. Super. Ct. 02AS04291, 2006)

Couple's home was torn down because of toxic mold; they claimed insurance company and contractor hid situation for five years. They settled for **\$2,304,784**.

16. Moffett v. Hilton Hotels Corporation

Honolulu Co., Hawaii, Cir. Ct., 03-1-1043-05 (SFM) (1/13/2006)

Hilton Hotel was slow to inform guests about mold in their rooms. The award was for **\$1,832,700.**

17. Higgins v. Alexanian

(Sacramento Co., Calif., Super. Ct. 2006)

Tenant claimed her asthma worsened from mold that grew after her bedroom ceiling collapsed; landlord said she waited 2.5 years after collapse to seek care. The defendant received a verdict in his favor.

