

CA APPEALS COURT INTERPRETS POLLUTION EXCLUSION IN FAVOR OF TENANT

In an unpublished February, 2009 decision, a California Appellate Court affirmed a judgment in favor of the plaintiff. Their rationale was that the pollution exclusion does not plainly or clearly exclude mold related injuries from coverage therefore the policy must be interpreted narrowly against the insurer.

The primary legal question raised in the appeal was whether airborne toxic mold spores, in the context of this case, qualify as a pollutant or contaminate, and if so, whether injuries caused by exposure to the mold should be excluded from coverage under the landlord's insurance policies issued by Constitution Insurance Company (Constitution) and Clarendon National Insurance Company (Clarendon). Both policies contained essentially identical pollution exclusion clauses, denying coverage for any injuries arising from the introduction or "discharge, dispersal, seepage, migration, release or escape of pollutants."

In arriving at its decision, the appeals court looked to the California Supreme Court's analysis of similar pollution exclusions — *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635 (*MacKinnon*).

They wrote: "After considering the historical evolution of the pollutant clause, conflicting

authority from other jurisdictions, and its own application of California contract law, the Supreme Court held the exclusion was intended to cover what is understood by the policyholder to be substances typically associated with pollution of the environment. It created a test for coverage as being dependent not only upon the type of pollutant, but also how it is released into the environment. (*Id.* at pp. 650-654.)



Applying the *MacKinnon* test here, we conclude neither the dispersal of clean water nor the negligent building maintenance resulting in an isolated incident of mold growth would necessarily qualify as the escape or introduction of a conventional environmental pollutant. Because the pollution exclusion does not plainly or clearly exclude mold related injuries from coverage, it must be interpreted narrowly against the insurer."

General overview of the case: This case originated with a landlord's negligence in maintaining the walls and roof of a condominium unit, and in overwatering the yard around the structure. The combination of these acts caused water to leak inside the structure, which in addition to the typically warm California climate, and the presence of naturally-occurring airborne mold spores, caused toxic mold to grow in and around Carol Johnson's home. For several years, Carol Johnson and her family suffered from various mold-related medical ailments and they sued the landlord to recover damages.

Facts of the case are as follows:

In 2002, Johnson, on behalf of herself and as guardian ad litem for her children, Taylor Godwin, Lexi Swearingen, and Nichole Swearingen (collectively referred to in the singular as Johnson), filed a complaint for damages arising from the exposure to mold in the condominium they leased from its owners, Jennifer and Joyce Gregg. Johnson sued the Greggs and Kellogg Terrace (Kellogg), which managed and controlled the condominium complex. They later added as defendants a landscaper, a general contractor, and a roofing contractor hired by Kellogg.

From 1998 to 2000, Clarendon insured Kellogg under two successive commercial policies (October 1998 to 1999, and October 1999 to 2000). From 2000 to 2002, Constitution insured Kellogg under two successive commercial policies (October 2000 to 2001, and October 2001 to 2002). The policies generally provided coverage for bodily injury and property damage that occurred during the policy periods. Kellogg tendered the Johnson lawsuit to Clarendon and Constitution for a defense and indemnity.

The insurance firms advised Kellogg they had no duty to defend because their policies contained pollution/contamination exclusions that eliminated any potential coverage for Johnson's claims. Constitution also alleged the "discovered injury" exclusion barred its coverage because Johnson was injured several years before inception of Constitution's policy in October 2000.

The Clarendon policy's pollution exclusion provided, in relevant part, "*This insurance does not apply to: '(1) The 'pollution' and/or 'contamination' of any 'environment' by 'pollutants' that are introduced at any time, anywhere, or in any way, or arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of*

CA Appeals Court ... continued from page 28

'pollutants'; or (2) Any 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' arising out of such 'pollution' and/or 'contamination'; or (3) Payment for the investigation or the defense of any loss, injury, or damage, or for any cost, fine or penalty, or for any expense, claim or 'suit,' related to any of the above'

The policy defined pollution and contamination as "any unclean or unsafe or damaging or injurious or unhealthful conditions arising out of the presence of 'pollutants,' whether permanent or transient, in any 'environment.'" "Environment" was defined as "any man-made object or feature (including but not limited to buildings and other items of man-made property), and crop or vegetation, and land, any body of water or water course, any underground water or water table supply, any air, and any other feature of the earth or its atmosphere, whether or not altered, developed, cultivated, owned, rented, controlled, occupied or used by any 'insured[.]'" "Pollutants" was defined as meaning "any noise, solid, semi-solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fume, acid, alkali, chemical, biological and/or other etiological agent or material, electromagnetic and/or ionizing radiation and energy, genetically engineered agent or material, teratogenic, carcinogenic and/or mutagenic agent or material, and waste. Waste includes any material to be disposed of, recycled, reconditioned or reclaimed."

Similarly, the Constitution policy contained an endorsement barring coverage for any bodily injury or property damage arising out of "pollution" and/or "contamination" of any "environment" by "pollutants." The terms were essentially identical to those defined in Clarendon's policy.

Johnson settled with all the defendants except Kellogg before trial.

With respect to Kellogg, the bench trial was held in November 2003. Kellogg did not present a defense and did not object to any of Johnson's evidence. The court entered judgment in Johnson's favor for \$1,274,149.70, plus costs in the amount of \$4,883. Kellogg assigned its claim for breach of contract against the insurance companies to Johnson in exchange for a covenant not to execute on the judgment.

In October 2005, Johnson filed a breach of contract action against Clarendon and Constitution. The insurance company answered the complaint asserting the underlying action was excluded by their policies' pollution/contamination exclusion provisions. The insurance companies filed motions for summary judgment raising the same legal defense. The court denied the motions.

The matter was heard in a bench trial based on stipulated facts by the parties. The court concluded the pollution/contamination exclusion provisions did not apply to preclude a defense in the underlying action, and it entered judgment in favor of Johnson. The court concluded it was undisputed there was "no direct language in the [subject pollution] exclusion that excludes mold. There are no cases cited . . . That directly hold that the language of the policies exclude mold. The exclusion is vague and ambiguous." It reasoned, "The definition of contamination or pollution in the insurance policy is any unclean or unsafe or damaging or injurious or unhealthful condition arising out of the presence of pollutants . . . in any environment. This discretion is arguably broad enough to encompass just about anything that is considered harmful but it is also vague and ambiguous which is construed against the insurer. Exclusions are to be narrowly interpreted in favor of the insured and liberally against the insurer [citation]."

An exclusion in an insurance policy must be clear, plain and conspicuous in order to be effective [citation]."

The stipulated facts were as follows: Johnson alleged in the underlying action that the family was exposed to toxic mold in late 1998 and early 1999 when they moved into the premises. The mold resulted from water intrusion into the condominium unit. This was caused by the negligent

maintenance of the common areas of the property maintained by Kellogg and its property management company. The negligent maintenance led to water intrusion through the roofs, windows, walls, sub-floors, and other areas. Specifically, mold and fungi formed when Kellogg negligently: (1) failed to repair the rotted condition of the roof permitting water to leak into the structure; (2) placed rat poison in the walls; (3) overwatered the landscape permitting water to enter through inadequate moisture barriers; (4) failed to prevent water from entering through the vent piping at the roof sheafing; (5) failed to repair a significant leak adjoining the east wall of the utility room; and (6) installed roof, siding, and building paper.

In June 1998, Kellogg became aware of the mold on the external wall of Johnson's unit, but was not aware of the internal mold growth. In late 1998, Johnson and her family began experiencing various illnesses and health problems. This continued to 2001, and the family experienced progressively severe illnesses, such as bronchitis, pharyngitis, asthma, acute upper respiratory infection (URI), sinusitis, shortness of breath, headaches, chest congestions, rashes, and coughs.

In February 2001, Johnson found extensive mold in one of the bedrooms when the carpet was pulled up. The family moved out later that month.

Thereafter, Johnson obtained an evaluation by multiple environmental testing companies indicating the presence of elevated levels of molds and fungi in every area of the condominium except the front room. The molds discovered in the unit included aspergillus, penicillium, chaetomium, and stachybotrys. The fungi included aspergillus ochraceus, aspergillus restrictus, aspergillus penicillioides, aspergillus sydowii, and aspergillus ustus.



A California Appeals Court rejected the insurers argument and interpreted the policy in favor of the tenant.

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Couple Sues Over Black Mold

ClickOnDetroit.com, Feb 25

PONTIAC, Mich. – A Michigan couple and their insurance company are in a dispute over a black mold infestation in their home.

Mary and Carl Becker have been out of their home for two and half years while repairs were being completed on their home in Pontiac that was filled with mold and toxins.

The couple said they were away from their home in July 2006 when two pipes burst in their basement. The couple said their basement was flooded for several days before their daughter discovered what had happened.

They said a plumber fixed the burst and they returned to their home after a few days of vacation.

Mary Becker said she began experiencing dizzy spells, memory lapses, sinus infections and bronchitis and was diagnosed with toxic poison disorder because it was discovered that black mold had infiltrated the home.

The couple's homeowner's insurance, AutoOwners of Lansing, initially approved the repairs then halted the work in progress, stating the couple's policy did not cover mold.

"Had they not mis-

represented the coverage, probably four or five thousands dollars would have solved this case," said Carl Becker, who is a civil action lawyer. "Instead they let toxins and spores go all over my house."

In July 2008, the couple said the insurance company stopped paying for their rental house even though their original house was not yet inhabitable.

"Mold is one issue, consumer rights is another," said Carl Becker.

The Beckers are seeking damages for fraud and misrepresentation and the almost \$500,000 they said it will take to restore the house back to being livable.

The Beckers have started a Web site, www.ipetitions.com, urging lawmakers to protect families against mold.

The insurance company did not return calls for comment. The attorneys for the insurance company declined to comment.

An Oakland County Circuit Court judge Wednesday gave the two sides a week to try and settle some of the issues outside of court.

 [Homeowners Battle Insurance Over Black Mold Claim](#)



Mich. Appeals Court Allows Plaintiffs' Experts to Testify on Causation

TROY, Mich. — Michigan's Court of Appeals has vacated dismissal of a woman's mold claims against a landlord after concluding that the trial court applied an incorrect standard when weighing the admissibility of causation testimony offered by plaintiff's expert. *Trice v. Oakland Development Limited Partnership*, No. 278392 (Mich. Ct. App.).

In an unpublished opinion, the Court of Appeals affirmed dismissal of other chemical exposure and disability claims brought by Marcy K. Trice, but remanded with orders to the trial court to schedule a "DAUBERT" hearing on the expert mold testimony.

Trice brought her lawsuit against Oakland Development Limited Partnership in 2001, alleging that she was exposed to hazardous chemicals and mold at The Springs Apartments, which Oakland owns and operates.

Trice alleged that she told Oakland of her chemical sensitivity issues when she began residence at The Springs in 1998.

She sought damages for negligent failure to warn, gross negligence, violations of the Michigan Consumer Protection Act, intentional and negligent misrepresentation, fraud, bad faith, violations of Michigan's Persons with Disabilities Civil Rights Act, breach of contract, and intentional infliction of emotional distress.

She also brought claims against building manager Thomas Ball.

The Oakland Circuit Court granted Ball's motion for summary disposition, ruling that Trice's claims arose solely from Ball's duties for the apartment complex, precluding individual liability.

The trial court also dismissed

Trice's chemical exposure and mold claims for lack of causation, and denied her motion to amend her Consumer Protection Act claim, which was also dismissed. Trice appealed.

The Court of Appeals affirmed summary disposition of claims against the manager, although on different grounds.

The appellate judge said the trial court failed to properly analyze whether the manager had a duty to Trice separate from the duty imposed by his position, but that summary disposition was nevertheless proper given the lack of causation in support of Trice's claim of injury from pesticides and harmful chemicals.

With regard to those claims, the court said that Trice failed to offer any evidence of testing to support her claim of injury.

Trice's experts did not testify to exposure levels, the court noted. "Furthermore," the court said, "plaintiff herself acknowledged that she was not aware of any studies of the quantity or duration of any exposure she may have had to any harmful chemicals."

"Without such testing, it is not certain that plaintiff was exposed to harmful chemicals at all, let alone that she was exposed to chemicals at a dosage or level that would be harmful," the court said. "At the very least, plaintiff was required to present evidence that she was exposed to some chemical at some level."

The court rejected Trice's reliance on differential diagnosis testimony offered by Dr. R. Michael Kelly, saying that without evidence of exposure, it was insufficient to establish causation.

As for the mold claim, the Court of Appeals said that the trial court "applied an incorrect standard for analyzing the admissibility of plaintiff's expert witnesses' scientific testimony."

"The trial court focused almost exclusively on whether evidence that mold causes health problems in humans had gained general acceptance in the scientific community," the Court of Appeals said. "This was the proper standard for evaluating the admissibility of novel scientific techniques and principles under the obsolete 'DAVIS-FRYE' test. . . . It would also be the correct standard for evaluating the admissibility of novel scientific methodologies or novel forms of scientific evi-



MICHIGAN APPEALS COURT...

Continued from page 31

dence, as distinct from scientific evidence itself . . . ,” the court added.

The court said that the Michigan Supreme Court has adopted the inquiry established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (509 US 579; 113 S. Ct. 2786; 125 L Ed 2d 469 [1993])(*Gilbert v. Daimler Chrysler Corp.*, 470 Mich 749; 685 NW2d 391 [2004]), and still weighs seven nonexhaustive factors set out in MCL 600.2955(1).

Acceptance by the scientific community is but one of the seven factors, the Court of Appeals noted.

“Indeed, the trial court has a ‘fundamental duty of ensuring that all expert opinion testimony – regardless of whether the testimony is based on “novel” science – is reliable,” the court explained, quoting *Gilbert*. “Its ‘gatekeeper role

applies to all stages of expert analysis’ and ‘mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. . . .”

“The trial court’s limited focus on general acceptance in the scientific community did not constitute the ‘searching inquiry’ that its gatekeeper role required it to conduct . . . ,” the court concluded.

The Court of Appeals said the trial court improperly attempted to resolve a scientific dispute as to whether mold can cause human illness, based on an article offered by defendants and written by Drs. Kuhn and Ghannoum (“Indoor Mold, toxigenic fungi and *Stachybotrys chartarum*: Infectious disease perspective,” *Clin. Microbiol Rev* 16:144-172 [2003]).

That is not the function of the trial court, the Court of Appeals emphasized.

The trial court also erred in concluding that the Kuhn-Ghannoum article supported the view that it is not generally accepted that a causal link between mold and illness cannot be established.

“Drs. Kuhn and Ghannoum’s article does not state this,” the Court of Appeals said. “Furthermore, the article does not dispute that there is a causal effect between indoor mold and human illness or assert that such a causal effect does not exist or cannot be established; rather, the authors conclude that further objective studies are needed to make this determination.”

Steven H. Huff of Ann Arbor, Mich., is counsel for Trice.

Janet C. Barnes of Farmington Hills, Mich., is counsel for Oakland Development.

[CLICK HERE](#) for documents in the case.

The paper offered by the defense to exclude expert medical testimony that mold caused the illnesses does not dispute the causal effect between mold and human illness. The article simply states more objective studies are needed.

Before the lid blew off of big tobacco, the industry and its testifying medical experts claimed there was no causal connection between smoking and lung cancer. They had their “scientific studies” to prove it. Now, they must sing a different tune. More than likely, mold will follow the same path.



“That’s a crazy idea but it might work.”

Court Warns Buyers of Caveat Emptor Doctrine

Harris Martin



Not familiar with the term “*Caveat Emptor* Doctrine”?

It’s Latin for “Let the buyer beware”. It’s the rules/laws that control the sale of real property after closing.

CLEVELAND — Homebuyers who knew of basement cracks and prior sump problems prior to the purchase cannot maintain a fraud claim against the sellers based on those defects if they later experience water intrusion, an Ohio appeals court has held. *Thaler, et al. v. Zovko, et al.*, No. 2008-L-091 (Ohio Ct. App., 11th Dist.).

In affirming summary judgment for William and Joan Zovko, Ohio’s 11th Appellate District said in its Dec. 24 opinion that buyers who experience latent defects but fail to show any reliance on misrepresentations are subject to the *caveat emptor* doctrine.

Wayne and Kathleen Thaler alleged in a complaint filed in the Lake County (Ohio) Court of Common Pleas that they experienced significant water intrusion and mold in their basement after purchasing a house from the Zovkos in 2007. They alleged that the Zovkos concealed the true extent of problems they had with a leaky sump pump and basement wall cracks prior to the sale.

The Thalers said they paid Ohio State Waterproofing \$15,000 for repairs, and that the company believed that the true extent of problems with the basement wall were not discoverable until repairs were being made.

The Zovkos asked for summary judgment, asserting that the statutory disclosure form noted a broken water line and that the sellers had discussed with the Thalers the basement wall cracks and a sump pump repair in 1996.

The Zovkos also noted that the Thalers’ retained an inspector, who termed the wall cracks “not a problem,” and that Thaler himself was a licensed plumber who was familiar with sump pumps and water intrusion issues.

The trial court granted the Zovkos’ motion, ruling that the buyers failed to show that the Zovkos experienced any problems not disclosed prior to the sale, or that they misrepresented or concealed additional problems.

The Thalers appealed, arguing that the trial court committed error in granting the motion when it was not correctly filed or docketed with the clerk of courts, and because the trial court erred in finding there were not material issues of fact to preclude summary judgment.

The Appellate District rejected the appeal based on procedural grounds, noting that the issue was addressed previously and the court’s clerical error was corrected.

The court also found for sellers on the substantive issue, as well.

“Aware of a possible problem, the buyer has a duty to either (1) make further inquiry of the owner who is under a duty not to engage in fraud, . . . , or (2) seek the advice of

someone with sufficient knowledge to appraise the defect,” the court explained, quoting *Durica v. Donaldson* (Marc. 3, 2000), 11th Dist. No. 97-T-0183, 2000 Ohio App. LEXIS 789, 11).

The court also noted that the sales contract included an “as is” clause, and said that relieves a seller of the duty of disclosing latent defects.

“Quite simply, apart from the bare allegations in their complaint and argument in brief in opposition to the Zovkos’ motion for summary judgment, the Thalers failed to submit any evidence of a misrepresentation or concealment on the part of the Zovkos,” the court said. “There is no evidence that the Zovkos were aware of the extent of the water problems beyond which they disclosed.”

“It bears repeating that the ‘doctrine of *caveat emptor* is designed to finalize real estate transactions by preventing disappointed real estate buyers from litigating every imperfection existing in residential property,’ especially, where, as is the case here, there is no fraud and the buyers were well aware of the defect, yet they chose not to inspect further and purchased the property,” the court added, quoting *Belluardo v. Blankenship* ([June 4, 1998], 8th Dist. No. 72601, 1998 Ohio App. LEXIS 2409, 7).

Gerald R. Walker of Redmond, Walker & Murray in Painesville, Ohio, was counsel for the Thalers.

James A. Zaffiro and Robert J. Belinger of Independence, Ohio, represented the Zovkos.

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Ore. High Court Decides Tenants Not Bound to Statutory Remedies

Harris Martin

PORTLAND, Ore. — The Oregon Supreme Court has reversed lower court decisions barring tenants' common law negligence claims over mold and other issues, ruling that the state's Residential Landlord Tenant Act does not provide the sole remedy for such disputes. *Waldner, et al. v. Stephens*, Nos. CC 03C21165, CA A127595, SC S055351 (Ore. Sup. Ct.

The court said in its Dec. 31 *en banc* opinion that in enacting the ORLTA, the legislature "did not intend to sweep into that category all actions, including common-law actions, that merely bear some nexus to the relationship between landlords and tenants under a rental agreement"

Dave Waldner and others sued landlord Stephen Stephens in Marion County (Ore.) Circuit Court, seeking damages for allegedly unhealthy conditions they blamed on Stephens negligence. Stephens lived in the adjoining duplex unit and was entirely responsible for the roof and exterior maintenance, according to the plaintiffs.

Among other defects, Waldner cited water intrusion through the roof and exterior surfaces, that led to mold contamination, property damage and various illnesses.

The plaintiffs alleged common-law negligence, as well as statutory claims under the ORLTA.

Stephens moved for dismissal of the negligence cause of action arguing that plaintiffs' claims were subsumed by the statutory claims. The landlord also moved for dismissal of the statutory claims for failure to meet the act's one-year statute of limitations.

The trial court agreed and the Court of Appeals affirmed.

Waldner appealed to the Supreme Court, arguing that the ORLTA was not the sole avenue of relief and that the relevant statute of limitations period for common-law negligence is two years, as set out in Oregon law for "injury to the person or rights of another, not arising on contract and not especially enumerated" (ORS 12.110[1]).

The Supreme Court agreed, noting that "[t]his court has stated on more than one occasion that the ORLTA does not supersede the common law of personal injury liability between a landlord and a tenant. . . ."

Stephens argued that even if the Supreme Court were to allow the negligence claim, plaintiffs would be bound the by the

ORLTA's one-year deadline for "all claims 'arising under' a rental agreement. . . ."

The high court said it is clear from the context of the act, that the legislature intended the limitations period to apply to claims that the act expressly authorized, but not to all claims between a tenant and landlord.

"The common-law negligence claim that we already have identified in plaintiffs' complaint does not rely on the ORLTA as direct authority in the sense we have described" the court explained. "Although it is true that the complaint is laced with references to the ORLTA and the rental agreement that are not relevant to that common-law claim, and which may have been susceptible to a timely motion to strike . . . , or a motion to make more definite and certain, . . . the inclusion of those allegations was not a permissible ground for dismissal of plaintiffs' negligence claims"

Robert K. Udziela of Beaverton, Ore., represents Waldner and other plaintiffs.

Thomas W. Brown and Julie A. Smith of Cosgrave Vergeer Kester in Portland, Ore., are counsel for Stephens.

Arthur C. Johnson and Douglas G. Schaller of Johnson, Clifton, Larson & Schaller in Eugene, Ore., submitted a brief on behalf of *amicus curiae* Pamela J. Pearson.

[CLICK HERE](#) for the documents.



Jury Gives \$475,000 to Family for Post-Hurricane Damage

Harris Martin

SUFFOLK, Va. — A Virginia Circuit Court jury has awarded a family \$475,000 for personal injuries and property damage the plaintiffs said was caused by an insurance company's delay in sending an adjuster to inspect hurricane damage to their mobile home in 2003. *Grant v. August Mutual Insurance Co.*, No. CL07-193 (Va. Cir. Ct., City of Suffolk)

Suffolk Circuit Court Judge Carl E. Eason Jr. denied an additional claim for bad faith damages against Augusta Mutual Insurance Co., which would also have allowed plaintiffs to demand attorney's fees.

Plaintiff Sandra Grant contended that she notified Augusta National, her home insurer, soon after Hurricane Isabel caused roof and window damage and serious water intrusion at her family's home in September 2003.

The insurer advised her to wait for an adjuster, but didn't send one for six weeks, Grant alleged. She said she placed a tarp on the roof and boarded up windows to prevent additional water damage, but that the house became contaminated with mold, injuring her two children, Sheila Grant and Isaac Perry.

Trial began on Jan. 5 and ended with the verdict on Jan. 23.

Grant sought damages for

breach of contract-failure to remediate and for personal injuries suffered by her children because of Augusta Mutual's alleged negligence.

A mold exclusion precluded damages for mold, but jurors awarded Grant \$50,000 on her contract claim for water and storm damage, and awarded \$125,000 for injuries to Sheila Grant and \$300,000 for injuries to Isaac Perry.

Grant relied on testimony by toxicologist Richard Lipsey, Ph.D., of Jacksonville, Fla., and physician Ritchie Shoemaker, M.D., of Pocomoke, Md.

Among the experts for Augusta Mutual were toxicologist Ronald E. Gots, M.D., Ph.D., of Rockville, Md., and hygienist Michael L. Cannon CIH of Forcon International Corp. in Richmond, Va.

Plaintiffs demanded \$3.5 million, while the defendant's highest offer was \$175,000, according to one trial report.

David S. Bailey of The Environmental Group in Richmond, Va., represents the Grants.

Terrence L. Graves of Sands Anderson Marks & Miller in Richmond represents Augusta Mutual Insurance Co.

