

## 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In an unpublished opinion, the Court of Appeals affirmed dismissal of other chemical exposure and disability claims brought by Marcy K. Trice, but remanded with orders to the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-



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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.”

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[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.”