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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
Case No. 44073-3**

**BONNY M. BOLSON
Appellant,**

v.

**HAYDEN G. WILLIAMS and DONITA G. WILLIAMS, individually,
and their marital community, and WILLIAMS & SCHLOER, CPAs,
PS, a professional services corporation,
Respondents.**

RESPONSE BRIEF OF RESPONDENTS

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ORIGINAL

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I. COUNTERSTATEMENT OF ISSUES

1. Was the trial court correct to grant summary judgment on an employee's claims for negligence and negligent infliction of emotional distress based upon the affirmative defense of collateral estoppel when the evidence established that a dispositive issue on both claims, medical causation, had already been fully litigated and determined in previous proceedings of the Department of Labor and Industries ("DLI")?
2. Was the trial court correct to require expert medical testimony to prove that an alleged workplace exposure to mold and other unknown pathogenic agents was a proximate cause of an employee's sarcoidosis, "an inflammatory disease that can appear in almost any body organ, but most commonly affects the lungs?" *See* Appellant's Corrected Br. at 10.¹
3. Was the trial court correct to exclude the speculative and unreliable expert opinion of a toxicologist/immunotoxicologist with no medical degree that an unexamined employee's alleged exposure to unknown pathogenic agents in an unexamined workplace was a proximate cause of sarcoidosis?²
4. Was the trial court correct to grant summary judgment on the employee's claims for negligence and negligent infliction of emotional distress when the plaintiff did not present evidence of the correct standard of care or of any breach of the relevant standard?³
5. Was the trial court correct to grant summary judgment on the employee's claim for intentional infliction of emotional distress because there was no evidence of any outrageous misconduct?⁴

¹ This issue is responsive to Appellant's Issues 1 and 2.

² This issue is responsive to Appellant's Issues 3-6.

³ This issue is responsive to Appellant's Issues 7-8.

⁴ This issue is responsive to Appellant's Issue 9.

II. COUNTERSTATEMENT OF CASE

A. Bolson's employment at W&S.

(1) W&S employed Bolson.

Respondent Williams & Schloer, CPA's, P.S. is a small accounting firm with a staff of less than ten in Puyallup, Washington that has offered accounting and consulting services to other small businesses and individuals for several decades. CP 14, 18.⁵ The firm is owned and managed by Respondent Hayden Williams (CPA), his wife, Respondent Donita Williams (Enrolled Agent (EA)), and their daughter, Tina Schloer (CPA).⁶ CP 14, 18. For ease of reference, Respondents are collectively referred to as "W&S." W&S employed Appellant Bonny Bolson ("Bolson") from January 28, 2003 until December 3, 2010 (CP 16, 248), when W&S relieved Bolson due to a shortage of work. CP 16.

(2) Bolson had a long history of illnesses from mold exposure before the flood of 2009.

In 1985, after she experienced "unusual intense headaches and fatigue," Bolson was diagnosed as having "a very high allergic response to mold and mites," and her doctor advised her to avoid additional exposure. CP 82. After discovering that she was being exposed in her home at that time, Bolson moved to another location. *Id.* In 2005, Bolson suffered watery eyes, fatigue

⁵ "CP" refers to the original clerk's papers. "SCP" refers to the supplemental clerk's papers prepared per Respondent's requests. "VRP" refers to the verbatim report of proceedings.

⁶ Ms. Schloer, individually, is not a party to this matter. CP 1-2.

and facial swelling after she was exposed to mold in her home at the time during the repair of a leaky window. *Id.*; *see also* CP 49-50.⁷ “Several times throughout the years, she has come into contact and experienced allergic reactions when exposed to mold, which resulted in watery eyes, headache and fatigue, which all stopped when she was removed from exposure.” CP 82-83, 152.

(3) W&S repaired the damage from the flood.

In early January 2009, the W&S building was flooded by the Puyallup River. CP 14. The water reached the flooring. CP 15. The day after the flood, Mr. Williams and Ms. Schloer “aggressively implemented a plan of action to mitigate and then repair the damage.” CP 19; *see also* CP 15.

W&S immediately purchased fans and dehumidifiers, opened up the offices for ventilation, and dried or disposed of all wet personal property. CP 15, 19. W&S also rented a 40-foot container for the safe storage of the desks and furniture. CP 19. As it happened, Ms. Schloer’s husband at the time (CP 15), Doug Schloer, had been a contractor in the flooring industry with extensive experience working for other companies, including Boeing, in professional flooring and construction, including remediation and repair from “floods arising from sprinkler head breaks and broken water mains.” CP 102-03. Immediately after the flood subsided, Mr. Schloer inspected the interior and exterior of the building, including the crawl space, to assess the extent of

⁷ In a written statement prepared by Bolson for her claim with the DLI, Bolson noted that this incident occurred in 2003, rather than 2005. CP 30.

the water damage and determined that the water levels had reached the subfloor area; opened windows; elevated the copy machine and other light material; removed doors; removed all the wet carpet and carpet padding from building; set fans and dehumidifiers up throughout the building; and cut out small test holes in subfloor. CP 103. Another contractor was brought in to remove and dispose of all insulation. CP 15, 19. Additionally, bleach and other cleaning products were applied underneath the building. CP 15, 19. After confirming that the flooring area was completely dry, Mr. Schloer removed and replaced various subflooring; repaired the test holes he had created; installed new vinyl flooring, carpet padding, and carpet; and replaced the doors he had removed. *Id.*

The repairs generated noise and odors of dampness, bleach, and sawdust, which all went away after the new carpet was installed. CP 15, 21, 45, 48. The flood had occurred during a busy part of tax season. CP 15, 20, 44-45, 48. While some employees worked in a back room away from the repairs (CP 15, 20, 44), Bolson primarily worked remotely from home, except for limited visits to pick up or drop off information. CP 16, 20, 45, 48; *see also* CP 250-51 (admitting that she worked from home January 12, 14-15, and 20 and that she did not stay for a full day on the other days).

At some point during the repairs, some of the employees purchased do-it-yourself mold test kits. CP 15-16, 21. The kits did not reveal the presence of any harmful type of mold. CP 21, 45. W&S did not send the kits to a laboratory

for analysis, because the repairs were ongoing and the office was exposed to open air; however, W&S never forbade anyone from sending the kits to a laboratory for analysis. CP 19-20, 23-24. Later, an expert confirmed that the kits were unreliable for determining the presence of toxic levels of mold. CP 56-57, 282.

Although Bolson insists that the remediation project took a month to complete (Appellant's Corrected Br. at 6, CP 249-50), there is a general consensus that the project only lasted about two weeks. CP 15, 19, 45, 48. Regardless, after the repairs were completed, W&S did not receive any complaints about any symptoms related to the workplace condition from any staff member, including Bolson, until it learned in December 2010 that Bolson had filed a claim for workers' compensation benefits. CP 16, 21, 45.⁸

As a family business, Hayden Williams, his wife Donita, and his daughter Tina Schloer all worked in the same building as their employees. CP 19. They would never knowingly expose themselves, their employees, or their clients to any hazardous condition. CP 15, 19. Indeed, one expert concluded there is no evidence that the office ever had dangerous levels of any mold or other substance. CP 53-59.

⁸ Bolson's declaration states that she had numerous absences "due to exhaustion" or "fever" in January –April of 2009, but nothing indicates that Bolson believed at that time that these symptoms were in any way related to her workplace. CP 252-53. Williams did attest that Bolson first complained about mold sensitivity after her diagnosis with sarcoidosis. CP 21. However, according to Bolson herself, she merely informed Williams that her doctor had diagnosed her with sarcoidosis, that it could be related to mold exposure, and that she was "hopeful her doctors would be able to identify the cause." CP 253.

(4) None of Bolson’s post-flood doctors connected any of her various symptoms to any workplace exposure.

In a written statement Bolson stated that, after the flood, she began experiencing flu-like symptoms, a cough, and fatigue, which she assumed “was from particles within office air from humidifiers and fatigue from stress of tax season.” CP 30.⁹ By February, Bolson had added back aches, began seeing a chiropractor, and she thought she was “dealing with a flu.” *Id.* In March, 2009, Ms. Bolson’s medical providers considered a possible kidney infection, excessive sitting and/or spring time allergies as the cause(s) of her symptoms. *Id.* In July 2009, Bolson underwent a CT scan and doctors began considering the possibility of cancer, but a subsequent biopsy indicated she had sarcoidosis [a disease involving inflammation or small lumps of cells in certain parts of the body]. CP 30-31.) In November, 2009, Ms. Bolson grew dissatisfied with medical providers and began independent “web” research on her medical condition. CP 31. By January, 2010, Ms. Bolson conducted further research and assumed, despite medical opinions to the contrary, that her condition was connected to workplace exposures. *Id.*

Finally, on September 9, 2010, Dr. Lin, Bolson’s treating physician, issued a report stating that Bolson’s sarcoidosis appeared “clinically stable.” CP 38. As for the relationship between her disease and her alleged “moldy and

⁹ The trial court did not consider this document, or any of the records attached to Ms. Schloer’s declaration from the DLI in rendering its summary judgment. The question of its admissibility is addressed below.

humid work environment,” Dr. Lin reviewed studies on sarcoidosis and concluded as follows:

At this point, there is insufficient evidence to suggest that her sarcoid was the result of her work exposure on a more probable than not basis. It is possible that the environment may have contributed to the development of her illness based on the above mentioned studies, although the time frame would be unusually rapid. These conclusions shared with the patient. The patient has asked to proceed with the filing of an L&I claim and therefore she was provided with a Report of Accident form and she will send it back to us once she has completed her section and we will fill in the physician section and submit it to L&I.

*Id.*¹⁰

B. Procedural History

1. Without any supporting medical opinion, Bolson sought workers’ compensation benefits.

Despite the fact that Bolson’s own treating physician rejected her suggestion that exposure to mold in the workplace caused her sarcoidosis, on September 21, 2010, Bolson prepared a Report of Industrial Injury or Occupational Disease for the DLI.¹¹ CP 29. On the claim form, Ms. Bolson claimed that her sarcoidosis was a condition caused by her workplace, but her Attending Health Care Provider did *not* check the box to show that her diagnosis was “probably (50% or more)” caused by her workplace exposure.

Id.

¹⁰ See, *supra*, note 9.

¹¹ See, *supra*, note 9.

On December 14, 2010, the DLI notified W&S that Bolson had filed a claim for “Sarcoidosis due to workplace exposure.” CP 27.¹² Like Ms. Bolson’s own medical providers, W&S responded to the claim and disputed any connection between the workplace flood and the diagnosis. CP 25, 33-35.¹³

Not surprisingly, the DLI denied Bolson’s claim for benefits because it concluded that her condition was (1) not the result of the injury alleged; (2) not the result of industrial injury as defined by the law; and (3) not an occupational disease. CP 42.¹⁴ Although Bolson initially appealed the DLI’s decision to the Board of Industrial Insurance Appeals, she subsequently moved to dismiss that appeal, and the Board granted her motion on June 22, 2011. CP 43.¹⁵

2. After failing to get workers’ compensation benefits, Bolson sued W&S.

On or about January 6, 2012,¹⁶ still without any opinion by any doctor that her sarcoidosis was caused by any workplace exposure, Ms. Bolson filed the present lawsuit seeking damages for the same alleged workplace injury—sarcoidosis caused by workplace exposure to mold and other agents—that she pursued before the DLI. CP 17, 27, 29, 38, 42.¹⁷ W&S moved to dismiss the

¹² *See, supra*, note 9.

¹³ *See, supra*, note 9.

¹⁴ *See, supra*, note 9.

¹⁵ *See, supra*, note 9.

¹⁶ The original complaint is not a part of the Clerk’s Papers. However, the date of filing is not dispositive of any issue and is most likely undisputed.

¹⁷ CP 27, 29, 38, 42 were not considered by the trial court. *See, supra*, note 9.

Original Complaint, but Bolson filed her First Amended Complaint, so W&S withdrew the motion to allow further investigation into the claims. CP 93, 142. Bolson's Amended Complaint asserted actions for negligence and premises liability, negligent infliction of emotional distress, and intentional infliction of emotional distress. CP 6-8.

3. The trial court granted summary judgment.

After conducting discovery, on July 5, 2012, W&S moved for summary judgment (CP 89) on the following grounds:

- (1) collateral estoppel precluded Bolson's claims for negligence (including premises liability) and negligent infliction of emotional distress, because those claims require proof that a workplace exposure caused her disease, which was an issue that had already been litigated in the DLI proceeding (CP 94);
- (2) there was no evidence of the applicable standard of care (CP 93);
- (3) there was no evidence that W&S had negligently or intentionally breached any applicable standard of care (*id.*); and
- (4) there was no evidence of causation between the workplace and Bolson's damages (*id.*); *see also* VRP 13 & 16 (listing grounds).

In support of the motion, W&S submitted the following evidence: the Declaration of Tina Schloer with records from the DLI proceedings attached; (2) the Declaration of Hayden Williams; (3) the Declaration of Doug Schloer; (4) the Declaration of Tina Dougher; (5) the Declaration of Jacie Russum; (6)

the expert report of Susan Evans, an industrial hygienist; and (7) excerpts of Bolson's discovery responses. CP 89-90.

On July 23, 2012, Bolson moved to continue the summary judgment so that she could conduct further discovery, moved to strike and exclude all of the DLI documents attached to Tina Schloer's declaration (SCP 338-44), and opposed the motion for summary judgment with (1) the Declaration of Bolson prepared for the summary judgment; (2) the Declaration of Jack D. Thrasher, Ph.D., a toxicologist/immunotoxicologist; (3) various discovery responses; (4) the report of Barbara A. Trenary, an industrial hygienist; and (5) various motions and responses that Bolson had previously filed in the case. CP 106-07.

W&S filed a brief reply on July 31, 2012, which included a rebuttal report by Evans addressing the opinions of Dr. Thrasher and Ms. Trenary. CP 281-89, 290-97. In the reply, W&S also objected generally that "Dr. Thrasher's opinion is insufficient to meet the standard for admission of expert opinion linking a specific toxic exposure to a specific medical condition." CP 295. Specifically, W&S argued that, under CR 56(e), Dr. Thrasher's declaration lacked an adequate foundation for a medical diagnosis because it was based on flawed and speculative assumptions, rather than generally-accepted theories or methods. *Id.*; *see also* CP 290-91. W&S also responded to Bolson's motion to strike the DLI records. SCP 359-64; CP 291.

On August 3, 2012, the trial court held a hearing on W&S's summary judgment and Bolson's related motions to strike the DLI records and for a

continuance to do more discovery. VRP 1-2. After some discussion, Bolson waived her request for a continuance and permitted the summary judgment proceeding to go forward. VRP 12. Before getting to the merits of the summary judgment, the trial court addressed the motion to strike the DLI records, and indicated that those records would not be considered in the summary judgment hearing. VRP 19, 27.

After hearing both sides' arguments on the summary judgment motion, the trial court orally ruled that he was granting the summary judgment. VRP 33; *see also* App. Tab C.¹⁸ For the benefit of the parties, the trial court explained that the law required Bolson to present expert medical testimony to establish proximate causation on a more likely than not basis, and that such testimony was beyond the skill of Dr. Thrasher and had not been done by Dr. Thrasher. *Id.* Importantly, the trial court noted that he was not "saying for a moment that the rest of the issues are not pertinent," referring to the other grounds for summary judgment. VRP 34; *see also* App. Tab C. The order granting summary judgment was filed. CP 321-22.

4. The trial court denied reconsideration.

Bolson moved for reconsideration of the trial court's order granting summary judgment on August 13, 2012. CP 298. Defendant responded to the motion (CP 310), and Bolson filed a reply in support of the motion (CP 313). The hearing occurred on September 14, 2012. VRP 36. According to Bolson's

¹⁸ Various documents are included in the Appendix to this brief as a matter of courtesy.

counsel, the motion for reconsideration did not make any new arguments. VRP 37. The motion was denied.

III. SUMMARY OF ARGUMENT

This Court may affirm the trial court's order granting summary judgment on any basis that was expressly argued or sufficiently developed in the record. RAP 2.5(a). In this case, there are three independent grounds upon which this Court should affirm the trial court's dismissal of Bolson's claims for negligence, premises liability, and negligent infliction of emotional distress. First, collateral estoppel bars those claims because an element upon which they all hinge—medical causation—was already determined by the DLI. Second, Bolson's failure in the summary judgment proceeding to present admissible expert testimony establishing to a reasonable degree of medical certainty that a workplace exposure to mold or anything else caused her sarcoidosis also justifies dismissal of the negligence-based claims. Third, the lack of any evidence that W&S breached any applicable standard of care when it promptly and adequately remediated its premises after the flood supports the trial court's ruling on the negligence claims. Additionally, this Court should affirm the trial court's summary dismissal of Bolson's claim of intentional infliction of emotional distress because W&S did not engage in any "outrageous" act or omission, as that term is defined by law.

IV. ARGUMENT

A. Standard of Review

As Bolson notes, this Court conducts a de novo review of a summary judgment, including evidentiary rulings made in conjunction with such a motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Where (as here) there are multiple grounds to affirm, the Court may affirm on any ground having support in the record. RAP 2.5(a). A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion, which means that the ruling will not be disturbed unless it was manifestly unreasonable or was based on untenable grounds. *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010) (reconsideration was properly denied where movant merely repeated arguments from her original motion).

B. Bolson Has Failed To Address Collateral Estoppel, Which Properly Bars Her Negligence Claims.¹⁹

The summary judgment ruling on Bolson's negligence claims should be affirmed under the doctrine of collateral estoppel, because the DLI previously ruled against Bolson on the issue of medical causation. Importantly, Bolson has never addressed this dispositive issue – neither in the trial court nor in her opening brief. In the summary judgment proceedings, Bolson focused her opposition on the related, but separate, doctrines of res judicata and exclusivity, which W&S never raised. *Compare* CP 137-48 *with* CP 100-101 &

¹⁹ For ease of reference the term “negligence claims” refers to negligence, premises liability, and negligent infliction of emotional distress, collectively.

CP 297. Thus, she never provided the trial court with a substantive opposition to W&S's collateral estoppel arguments.

Bolson has apparently recognized this default on appeal, and therefore focuses exclusively on a procedural argument. Her sole argument regarding collateral estoppel is that W&S's failure to cross-appeal the trial court's exclusion of the records from the DLI (CP 26-43) somehow robs this Court of its right to review the issue of collateral estoppel. Appellant's Corrected Br. at 45-47. To the contrary, this Court is free to review the trial court's rulings excluding the DLI records, which were erroneous, and the issue of collateral estoppel, without the filing of a cross-appeal. Regardless, the DLI records were unnecessary to support a finding of collateral estoppel because Bolson has never disputed that the discrete issue of causation—whether her workplace exposure caused her sarcoidosis—was fully litigated by the DLI and not appealed by either side. Bolson's utter failure, in both the trial court and in this appeal, to dispute the substantive question of whether the doctrine of collateral estoppel precluded her from relitigating the question of proximate cause provides this Court with an obvious basis for affirming the trial court's order granting summary judgment on Bolson's claims for negligence, premises liability, and negligent infliction of emotional distress.

(1) W&S was not required to file a cross-appeal on collateral estoppel or the admissibility of DLI records.

According to Bolson, this Court may not affirm on the ground of collateral estoppel because W&S did not cross-appeal the trial court's ruling

excluding the DLI records. Bolson's position is that W&S needed the DLI records to prove its affirmative defense of collateral estoppel, so the trial court's exclusion of those records precluded it from granting summary judgment on the basis of collateral estoppel. Bolson's purely procedural argument suffers from several fatal flaws.

First, Bolson invokes RAP 2.4(a) to argue that "[a] respondent is not entitled to affirmative relief absent a cross-appeal." Appellant's Corrected Br. at 45. However, the "affirmative relief" referred to in the rule is "modifying the decision which is the subject matter of the review." RAP 2.4(a).²⁰ W&S does not ask this Court to modify the trial court's order granting summary judgment; W&S requests that the Court affirm that order. Thus, W&S is not seeking any "affirmative relief" by requesting that this Court affirm the summary judgment on the basis of collateral estoppel. Indeed, as the respondent, W&S can present any ground for affirming the trial court's decision, even one that was not presented to the trial court but was sufficiently developed in the record. RAP 2.5(a). In this instance, the admissibility of the DLI records (for purposes of causation and collateral estoppel) and the affirmative defense of collateral estoppel were briefed and presented to the trial court. Therefore, W&S may raise those questions on appeal.

²⁰ Additionally, the doctrine of collateral estoppel is an affirmative defense, not an action for "affirmative relief." *LeMond v. Dept. of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008).

Second, Bolson cites *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000), 27 P.3d 608 (2001), for the proposition that “[f]ailure to cross-appeal an issue precludes its review on appeal.” However, *Amalgamated* clearly releases W&S from the burden of cross-appealing the trial court’s rulings excluding the L&I records (which is not even necessary to determine the issue of collateral estoppel) because W&S seeks to affirm the trial court’s order granting summary judgment and does not seek any additional affirmative relief. *See id.* at 202 (stating that a respondent need not cross-appeal any additional reasons to support the judgment, even those rejected by the trial court, but no additional relief will be granted on appeal).

Third, Bolson cannot fault W&S for failing to file a cross-appeal, which was not allowed under the Rules of Appellate Procedure. RAP 2.2(a) defines the categories of rulings from which any party may appeal, and the trial court’s exclusion of the DLI records does not fit within any of its categories. Additionally, RAP 2.2(b)(2) only permits appeals from pretrial orders suppressing evidence when the trial court expressly finds that the practical effect of the order is dispositive, which did not happen here.

In short, W&S was not required to file a cross-appeal in order to challenge the trial court’s exclusion of the DLI records or to support summary judgment on the basis of collateral estoppel.

(2) Bolson's DLI records are relevant and admissible on the issue of collateral estoppel, as well as medical causation.

Bolson's DLI records are clearly relevant to two discrete issues: collateral estoppel and proximate cause.

First, Bolson's DLI records are independently relevant for the court's application of collateral estoppel. "The doctrine of collateral estoppel precludes relitigation of issues once litigated and determined between the parties, even though a different claim or cause of action is asserted." *McCarthy v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 812, 823, 759 P.2d 351 (1988). In resolving a collateral estoppel issue, a court is entitled to examine the DLI records to determine whether the worker's claim was outside the scope of the law's coverage or whether the worker simply failed to prove an aspect of her claim that was necessary for benefits to be paid. *Id.* at 823, 825. In this case, Bolson's DLI records clearly showed that Bolson had failed to prove an element of her claim: that her injury was caused by a workplace exposure or injury. CP 25, 33-35. Bolson also failed to address in the trial court DLI's express finding that her claims failed on the issue of causation. In light of these failures, this Court may affirm the summary judgment dismissal of her claims under the doctrine of collateral estoppel. *McCarthy*, 110 Wn.2d at 825.

Second, medical causation was a central element for Bolson's negligence claims. *See Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 687-88, 183 P.3d 1118 (2008) (expert medical testimony must be provided to prove causation when the nature of the injury is beyond the

ordinary lay person's knowledge). The DLI records include among them the opinion of one of Bolson's treating physicians, Dr. Lin, who opined that it was not more probable than not that a workplace exposure caused Bolson's sarcoidosis. This evidence goes to the heart of Bolson's claims of negligence/premises liability and negligent infliction of emotional distress. Without a legal basis for suppressing these records, they should have been admitted for this purpose.

(3) The DLI records are admissible, and the trial court erroneously excluded them.

In her motion to strike (SCP 338-44), Bolson argued that there is a "rule of evidence" that precludes the admission of DLI records at trial. Bolson constructed this position by cobbling together a number of authorities that do not, individually or collectively, support the weight of her contention, including RCW 51.28.070, *Mebust v. Mayco Mfg. Co.*, 8 Wn. App. 359, 360, 506 P.2d 326 (1973), and *Folden v. Robinson*, 58 Wn.2d 760, 364 P.2d 924 (1961). See SCP 359-64 (W&S response); VRP 19.

First, RCW 51.28.070 makes industrial insurance claim files and records "confidential" from the public, but it allows their dissemination to employers involved in the proceeding, like W&S. Nothing in the text of the statute places the records beyond the reach of a court.

Second, in *Mebust*, the sole issue was whether RCW 51.28.070 made DLI records undiscoverable in litigation. Although the *Mebust* court noted its agreement that "if RCW 50.12.110 establishes a 'rule of evidence' which

makes a personal injury plaintiff's employment security file inadmissible at trial, RCW 51.28.070 likewise establishes a similar rule for a personal injury plaintiff's industrial insurance file," this statement is pure dictum. *Id.* at 363. In addition, the legislature amended the statute after *Mebust* to expressly permit access to these files at the Department's discretion. *See* RCW 51.28.070, amended by Laws of 1975, 1st Ex. Sess., ch. 224, § 6. W&S was given access to these files during its defense of the meritless workers' compensation claim. As such, W&S is authorized to use those records to defend against that claim and in this case.

Third, *Folden* does not govern this case because it involved a different statute – RCW 50.12.110. In *Folden*, the employer defendant was seeking records pertaining to the employee's "written application for unemployment compensation." *Folden*, 58 Wn.2d at 767. The subpoena was quashed pursuant to a special motion of the Attorney General, on behalf of the state. Neither the statute nor the case is applicable here, where the DLI records are relevant to the questions of causation and collateral estoppel.

Fourth, at least one court has rejected the interpretation of RCW 51.28.070, *Folden*, and *Mebust* that Bolson champions here and has permitted the admission into evidence of DLI records in another personal injury case. In *Papadopoulos v. Fred Meyer Stores, Inc.*, No. C04-0102RSL, 2006 U.S. Dist.

LEXIS 81863, *1, *3-4 (W.D. Wash. Nov. 8, 2006),²¹ the Western District of Washington noted that “Washington courts . . . have not *held* that *RCW 51.28.070* creates a rule of evidence at trial.” (emphasis in original). Thus, it determined that DLI records were admissible because they contained relevant information of the plaintiff’s pre-injury medical condition. *Id.* Likewise, Bolson’s DLI records contain relevant information of Bolson’s post-“injury” medical condition. Even more compelling, the records are also relevant to the question of collateral estoppel.

Additionally, Bolson has waived the doctor-patient privilege by bringing a personal injury claim against her employer, W&S. Under RCW 5.60.060, a plaintiff who brings a personal injury action automatically and mandatorily waives the physician-patient privilege. The statute provides that 90 days “after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege . . .” RCW 5.60.060(4)(b). Otherwise, “[a] patient who could select among various physicians' opinions, and claim privilege as to the remainder, would make a mockery of justice.” *Carson v. Fine*, 123 Wn.2d 206, 213, 867 P.2d 610 (1994). In fact, this is precisely what Bolson did in the trial court—she tried to rely on a favorable opinion by Dr. Thrasher and hide the unfavorable opinions of her own treating physicians.

²¹ Under GR 14.1(b) and Fed. R. App. P. 32.1, parties and Washington courts may cite to federal unpublished opinions filed on January 1, 2007 or later. A copy of this opinion is attached hereto at App. Tab D.

Finally, in order to avoid any unnecessary disclosures of Bolson's private information and to comply with RCW 51.28.070, W&S stated in its response to the motion to strike that it agreed that the DLI records should be sealed pursuant to a protective order. SCP 363.

In sum, Bolson's DLI records are relevant to the issues of proximate cause and collateral estoppel. There is no legal basis for excluding them under RCW 51.28.070 or any case law. The parties' agreement to seal the records would preclude any undue prejudice to Bolson or any invasion of her rights. Under these circumstances, the trial court should have considered the DLI records in resolving the questions of medical causation and collateral estoppel. Nonetheless, on the issue of collateral estoppel, Bolson's DLI records were ultimately unnecessary because of Bolson's failure to dispute that the DLI had already determined the issue of medical causation against her. Thus, the trial court had more than sufficient grounds for granting summary judgment on Bolson's negligence claims.

C. Bolson Presented No Evidence of Causation for her Negligence Claims.

"A 'proximate cause' of an injury is defined as a cause that, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred." *Fabrique*, 144 Wn. App. at 683. Although Bolson is correct that a plaintiff need only establish causation by "a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable," evidence

establishing proximate cause must rise above speculation, conjecture, and mere possibility. *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn. App. 326, 330-31, 996 P.2d 351 (1998). “Accordingly, the issue of proximate cause may be determined on summary judgment where the evidence is undisputed and only one reasonable conclusion is possible.” *Fabrique*, 144 Wn. App. at 683.

(1) Bolson Needed Expert Medical Testimony that a Workplace Condition Caused Her Sarcoidosis for her Negligence Claims to Survive.

“Expert medical testimony is necessary to establish causation where the nature of the injury involves ‘obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding.’” *Id.* at 685, citing *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986).²² The nature of the injury is what determines the necessity of expert medical testimony. *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986). For example, “technical medical expertise is not required in cases where a physician amputates the wrong limb or pokes a patient in the eye while stitching a wound on the face.” *Berger v. Sonneland*, 144 Wn.2d 91, 111-12, 26 P.3d 257 (2001). Likewise, no expert testimony is necessary if a doctor accidentally leaves a sponge inside a patient after surgery. *McCormick v. Jones*, 152 Wash. 508, 510-11, 278 P. 181 (1929).

²² Bolson cites *Douglas v. Freeman*, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991) (Appellant’s Corrected Br. at 32) for the proposition that not every aspect of causation must be established by medical testimony; some aspects can be proven by the facts and circumstances. However, *Douglas* involved a claim against a dentist and clinic for injuries sustained during a dental procedure, and the court concluded that the defendant himself provided the necessary evidence of causation, along with the testimony of two other expert witnesses.

On the other hand, in *Riggins*, hip pain and headaches that were not apparently related to either the plaintiff's original fall or her subsequent surgery required expert medical testimony. *Id.* In other examples,

1. Expert medical testimony was needed to establish a causal link between a woman's salmonella exposure at a hotel buffet and her subsequent arthritic condition. *Fabrique*, 144 Wn. App. at 685;

2. Expert medical testimony was required to prove the plaintiffs' claim that "multiple airborne chemicals caused them to experience various physical reactions." *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 214-15, 890 P.2d 469 (1995), cited by Bolson (Appellant's Corrected Br. at 30);

3. A plaintiff required expert medical testimony to establish that his fall in a store caused his torn rotator cuff. *Bradley v. Walmart Stores, Inc.*, 544 F. Supp. 2d 1167, 1171 (W.D. Wash. 2008);

4. A nurse needed expert medical testimony to connect her hepatitis to workplace exposure. *Sacred Heart Medical Center v. Carrado*, 92 Wn.2d 631, 636-37, 600 P.2d 1015 (1979);

5. Expert medical testimony was necessary to demonstrate that a fire fighter's heart disease was caused by his job. *City of Bellevue v. Raum* 171 Wn. App. 124, 154 n.25, 286 P.3d 695 (2012) (cited at *Appellant's Corrected Br.* at 28 as "*Raum v. City of Bellevue*").

The above cases illustrate that given the nature of medical facts, "expert testimony will generally be necessary to establish . . . most aspects of

causation.” *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (cited at Appellant’s Corrected Br. 33-34). Indeed, Bolson’s development of sarcoidosis, which, according to Bolson, is “an inflammatory disease that can appear in almost any body organ, but most commonly affects the lungs,” from workplace exposure to mold and other unknown pathogenic agents, is at least as complex as the examples cited above, *see* Appellant’s Corrected Br. at 10.

Nonetheless, Bolson argues that the temporal relationship between her alleged exposure and the onset of her symptoms is compelling evidence that excuses her from the requirement of presenting expert medical testimony of medical causation. In support of this argument, Bolson points to *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1059 (9th Cir. 2003). However, *Clausen* does not support Bolson’s ultimate position that no expert testimony is required in this case. Instead, the Ninth Circuit upheld a trial court’s decision to admit expert testimony that relied, only in part, upon the temporal relationship between an oil spill and the deaths of oysters near the location of the spill. *Id.*; *see also Zuchowicz v. United States*, 140 F.3d 381, 385, 390 (2d Cir. 1998) (cited in Appellant’s Corrected Br. at 20) (a medical doctor partially relied upon a temporal analysis to reach his conclusions). Noting that temporal evidence can be compelling, in *Clausen*, the Ninth Circuit acknowledged that “the mere fact that two events correspond in time and space does not necessarily mean they are causally related” *Id.* (emphasis in original).

Bolson also points to *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 149 (3d Cir. 1999), in which Heller sued Shaw Industries for damages from “certain respiratory illnesses allegedly caused by volatile organic compounds emitted by Shaw carpet installed in Heller's former home.” However, in *Heller*, the Third Circuit concluded that the trial court properly excluded the expert's causation testimony because his conclusion regarding the cause of Heller's illness was heavily based on a flawed temporal relationship between the installation of the Shaw carpet and the presence of Heller's illness, among other reasons. *Id.* As the court explained, “[t]he temporal relationship will often be (only) one factor, and how much weight it provides for the overall determination of whether an expert has ‘good grounds’ for his or her conclusion will differ depending on the strength of that relationship.” *Id.* at 154.

In response to the motion for summary judgment, Bolson argued that, in *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 814, 701 P.2d 518 (1985), “the court determined that expert opinion on causation was not required.” CP 131. In *Wilson*, property owners sued the county and the corporate owner of a nearby landfill and alleged that the landfill contained industrial waste that had contaminated the property owners’ drinking water. Rather than holding that the plaintiffs did not need expert testimony to prove proximate cause, the court actually concluded that the plaintiff’s expert testimony was admissible, although it was insufficient, by itself, to fully establish proximate cause. *Id.* at

814-15. The court admitted the testimony of Dr. Maddox that the industrial waste at issue came from one of two landfills in the area, but he could not identify which of the two. *Id.* The court found that Dr. Maddox’s testimony was admissible because it “assisted the trier of fact since the question at issue involved matters not within the common knowledge of lay persons.” *Id.* Further, the court held that Dr. Maddox’s testimony, combined with other evidence, allowed the plaintiff to meet its burden of proof that the contaminant came from defendant’s landfill. *Id.*

In her summary judgment response, Bolson argued that the issue of proximate cause is less complicated in this case than it was in *Wilson*. But the question of whether Bolson’s sarcoidosis was proximately caused by workplace exposure to mold is no less complex than whether the water wells were contaminated by industrial waste at a neighboring landfill. Neither question can be answered by the common knowledge of a layperson.

(2) Dr. Thrasher’s Opinion Was Not Admissible Evidence of Medical Causation.

Without considering the DLI records in which Dr. Lin opined that it was not more probable than not that Bolson’s developed sarcoidosis as a result of any workplace exposure, Bolson has no evidence of proximate cause. Bolson’s only expert evidence on the issue of medical causation—whether her particular disease was caused by any conduct of W&S or any condition on its premises—came from Dr. Jack Thrasher, a toxicologist and immunotoxicologist. CP 254-80. The trial court concluded that Dr. Thrasher’s

testimony was not admissible on the issue of proximate cause because he is “not a medical doctor,” and he “doesn’t have the skill.” VRP 33, 37; App. Tab C. As W&S argued, there are other reasons generally supporting the trial court’s exclusion of Dr. Thrasher’s causation testimony: Dr. Thrasher’s declaration lacks a proper foundation for a medical diagnosis of toxicity, and his conclusion is based upon flawed and speculative assumptions. CP 290-91.

(a) W&S preserved error on the admissibility of Thrasher’s opinions.

Before a discussion of the merits of admissibility, however, Bolson’s procedural challenge must be addressed. Specifically, Bolson contends that W&S’s failure to file a “motion to strike” Dr. Thrasher’s testimony constitutes a failure to preserve error on the admissibility of Dr. Thrasher’s testimony. There are two reasons why this argument fails.

First, the law does not mandate the filing of a motion to strike to preserve error. Instead, simply objecting or raising the issue with the trial court will suffice. *See In re Welfare of Young*, 24 Wn. App. 392, 397, 600 P.2d 1312 (1979) (cited by Bolson at Appellant’s Corrected Br. 27) (“To preserve error for consideration on appeal, the general rule requires that the alleged error first be brought to the trial court’s attention at a time that will afford that court an opportunity to correct it.”); *Smith v. Showalter*, 47 Wn.App. 245, 248, 734 P.2d 928 (1987) (“[W]here no objection or motion to strike is made prior to entry of summary judgment, a party is deemed to waive any deficiency in the

affidavit.”);²³ *Bonneville v. Pierce County*, 148 Wn. App. 500, 508-09, 202 P.3d 309 (2008) (“A party may object to an affidavit filed in support of a motion for summary judgment if it sets forth facts that would not be admissible in evidence. If a party fails to object or bring a motion to strike deficiencies in affidavits or other documents in support of a motion for summary judgment, the party waives any defects.”) (internal citations omitted).²⁴ Thus, Bolson is incorrect to impose a “magic words” requirement on W&S before it can defend the trial court’s decision to exclude Dr. Thrasher’s opinions. *See* RAP 9.12 (“the appellate court will consider only evidence and issues called to the attention of the trial court.”). Actually, there is one recent case indicating that the proper practice on summary judgment is to object to declarations, not moving to strike them. *Parks v. Fink*, 173 Wn. App. 366, 375 n. 7, 293 P.3d 1275 (2013), *quoting* *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). As it happened, the trial court took a moment during the summary judgment hearing to instruct the parties that courts “strike” evidence from a jury’s deliberations, and they merely “refuse to consider” evidence in summary judgment proceedings. VRP 19.

Second, contrary to Bolson’s assertion that “there were no challenges to the admissibility of Dr. Thrasher’s testimony,” in its reply in support of the summary judgment motion, W&S objected generally that “Dr. Thrasher’s

²³ *Smith* cites *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979), the case Bolson uses to support her argument.

²⁴ *Bonneville* cites *Smith* and notes the citation of *Lamon*.

opinion is insufficient to meet the standard for admission of expert opinion linking a specific toxic exposure to a specific medical condition.” CP 295. W&S also specifically argued that, under CR 56(e), Dr. Thrasher’s declaration lacked an adequate foundation for a medical diagnosis because it was based on flawed and speculative assumptions, rather than generally-accepted theories or methods. *Id.*; *see also* CP 290-91. In fact, the majority of W&S’s reply and a significant portion of its counsel’s oral argument related to the admissibility of Dr. Thrasher’s testimony. VRP 13-14. Thus, W&S properly preserved error.

(b) Dr. Thrasher’s testimony is inadmissible because he is not qualified to testify about specific medical causation and his opinions are unreliable.

ER 702 provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and the testimony will assist the trier of fact.” *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). “Unreliable testimony does not assist the trier of fact.” *Id.* As The Court of Appeals has explained,

Medical testimony as to a causal relationship between the negligent act and the subsequent injuries or condition complained of must demonstrate “that the injury “probably” or “more likely than not” caused the subsequent condition,

rather than that the accident or injury "might have," "could have," or "possibly did" cause the subsequent condition." Importantly, medical testimony must be based on the facts of the case and not on speculation or conjecture. Finally, such testimony must also be based upon a reasonable degree of medical certainty.

Fabrique, 144 Wn. App. at 687-88 (internal citations omitted).

CR 56 states, in part, that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). Thus, in a summary judgment proceeding, after a defendant meets its "initial burden by showing that the plaintiff lacks admissible expert testimony to support his or her case, the burden shifts to the plaintiff to present competent medical expert testimony establishing that the alleged injury was proximately caused by the defendant's actions." *Fabrique*, 144 Wn. App. at 685, *citing Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). "If the plaintiff fails to come forward with the requisite expert medical testimony, summary judgment is appropriate." *Id.*, *citing Berger*, 144 Wn.2d at 111-12.

- (i) **Dr. Thrasher's opinions are inadmissible because he is not qualified to testify about specific medical causation and his opinions are not established by a reasonable degree of medical certainty.**

Bolson assigns error to the trial court's determination that Dr. Thrasher's lack of a medical license rendered him unqualified to testify about specific causation. Bolson contends that the modern trend among courts is not to set a bright-line rule or "per se requirement" that an expert testifying about medical causation have a medical license. In support of this position, Bolson cites *Harris*, 99 Wn. 2d at 450-51, which explained that "whether or not the expert is licensed to practice medicine is *certainly an important factor* to be taken into account We hold simply that it may not be considered dispositive." (emphasis added).²⁵ Thus, in *Paoli R.R. v. Monsanto Co.*, 916 F.2d 829, 855 (3d Cir. 1990), the Third Circuit reversed a trial court's erroneous exclusion of a toxicologist's testimony based solely on his lack of a medical degree.

In *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991), another case cited by Bolson, the federal district court excluded a toxicologist's

²⁵ Bolson cites other cases following *Harris* on this point, but they are distinguishable from this matter. In *Goodman v. Boeing Co.*, 75 Wn. App. 60, 81-82, 877 P.2d 703 (1994), the court held that a nurse was qualified to assess whether the plaintiff's medical condition would deteriorate over a specific timeframe, because that was a nursing opinion rather than a medical opinion. Here, Dr. Thrasher's insistence that Bolson's disease was caused by exposure to unknown agents at her workplace, as opposed to agents elsewhere, is outside the scope of his expertise. In *Judd v. Dep't of Labor & Indus.*, 63 Wn. App. 471, 475, 820 P.2d 62 (1991), the defendant argued that the attending psychologist should not have testified because he was not a physician. The court rejected this argument because he was a "treating nonphysician." Dr. Thrasher cannot claim to be a treating nonphysician. *Breit v. St. Luke's Memorial Hosp.*, 49 Wn. App. 461, 465-66, 743 P.2d 1254 (1987) involved an objection to a pharmacologist offering testimony about whether a nurse improperly injected a patient with a drug while in a sitting position. Although the pharmacologist was not a nurse, the court determined that he was qualified to testify about possible adverse reactions to medicines that he dispenses as part of this profession. *Id.* Here, Dr. Thrasher has gone beyond providing information about possible adverse reactions to exposure to mold and other pathogens. Instead, he has taken one step further to attest about the etiology of Bolson's particular disease.

testimony that exposure to the toxic chemicals that were present at the defendant's landfill could cause the symptoms plaintiffs reported. *Id.* at 916. The Third Circuit disagreed with the trial court's exclusion of the toxicologist simply because he lacked a medical degree. *Id.* at 917. However, the Third Circuit affirmed the trial court's exclusion of the toxicologist on other grounds, including that the record contained insufficient information about the expert's credentials as a toxicologist. *Id.* Additionally, the Third Circuit found no evidence as to how the toxicologist would

connect the toxic chemicals at the GEMS landfill to these plaintiffs' alleged injuries. He did not physically examine the plaintiffs and their symptoms. Brubaker may have been qualified as a toxicologist to identify poisons generally and offer treatment for exposure to poisons, but there is no evidence in this record that would connect the presence of poisons to the plaintiffs' particular grievances.

Id. The toxicologist relied upon the reports of the plaintiffs themselves, rather than on firsthand observation. *Id.* Also, the toxicologist had not conducted the personal physical investigation necessary to form an expert opinion that toxins in the landfill caused the plaintiffs' symptoms. *Id.* The Third Circuit distinguished the expert testimony it had accepted in *In re Paoli, supra*, where the toxicologist proposed to establish a causal relationship between exposure to PCB's and the plaintiffs' illnesses by using the results of tests of the plaintiffs' blood as well as comparison with the medical and clinical records of

the plaintiffs. *Id.* at 917-18. Dr. Thrasher did not compare his findings against any medical records or clinical tests on Bolson.

Similarly, in this instance, the trial court's statements reveal that it did not find that Dr. Thrasher, as a toxicologist, had the "skill" (VRP 33, App. Tab C) to provide "medical testimony" (*id.*) or "medical evidence" (VRP 37, App. Tab C) that "someone was hurt from toxic material" (*id.*). Bolson reads the court's comments as setting a medical degree as the litmus test for admissibility. Actually, the court's comments reveal the trial court's view that Dr. Thrasher had not provided an opinion "based on a reasonable degree of medical certainty" that Bolson's own sarcoidosis was caused by a workplace exposure. In fact, Dr. Thrasher does not purport to offer any opinion to "a reasonable degree of medical certainty" or "reasonable degree of medical probability," nor did he rely upon any other such opinion, since there were none. CP 267-68 (stating only that the opinions were formed "on a more probable than not basis").

(ii) Dr. Thrasher's opinions are inadmissible because they lack an adequate foundation.

Dr. Thrasher's opinions on specific medical causation are inadmissible under CR 56(e) and ER 702 because they lack a reliable foundation. In particular, Dr. Thrasher has concluded, that it is "more probable than not" that Bolson's sarcoidosis was caused by exposure to "mold, its by-products, and other environmental contaminants" at the W&S building immediately after the January 2009 flood. He formed this conclusion

1. without any pictures, data, or other specific finding that a toxic mold or other contagion of concern for sarcoidosis was present in the W&S building in January 2009 (CP 283);

2. without any physical examination of Bolson, other than reviewing the records from Dr. Lin's treating examination, who concluded that it was not probable that her disease was caused by any workplace exposure;

3. without conducting any inspection or analysis of the building where the exposure allegedly occurred;

4. without justifying his conclusion in light of its contradiction with the scientific studies he relied on;

5. without explaining how a paper discussing an association "1-3-beta-D-Glucans" and sarcoidosis establishes a connection between the W&S office and Bolson's health;

6. without ruling out other sources of mold, its by-products, and other environmental contaminants that Bolson could (and likely would have been) exposed to back in January 2009, such as her home, or the region in general; and

7. without ruling out that Bolson's prior medical history had any impact on her current state of health.

In responding to these deficiencies, Bolson argues that the law does not require Dr. Thrasher to pinpoint the exact cause of Bolson's disease. She cites two main cases to support this position. The first case is *Intalco Aluminum*

Corp. v. Dep't of Labor & Indus., 66 Wn. App. 644, 833 P.2d 390 (1992), in which three aluminum plant workers filed workers' compensation claims for neurological disease caused by air pollution at their workplace. One of the employer's objections to the medical testimony was that the *physician*-experts were unable to identify any specific toxic agent or agents that proximately caused the workers' diseases. *Id.* at 655. The court disagreed with the employer because there was other evidence establishing the existence of at least some toxins in the workplace that have been associated with neurologic disease. Additionally, the fact that all three workers had similar exposures and diseases supported the finding. Also, animal studies established the possibility of neurological disease from exposure to the same types of toxins. In this instance, Dr. Thrasher is not a physician, and there is absolutely no other evidence establishing the existence of at least some toxins in the W&S workplace (other than the supposition of Bolson).

The second case Bolson cites for its contention that a toxic tort plaintiff need not isolate the specific chemical or agent that caused her disease in order to prove proximate cause is *Bruns*. In that case, truck drivers presented a list of multiple airborne chemicals that were actually present in the cabs of their trucks and the concentrations in which they were found. *Id.* Thus, while they could not isolate one or more of those chemicals as the cause of their illness, they were able to point to the "chemical soup" present at their workplace, rather than any agents, as the cause. *Id.* Again, in this case, there is no hard

data or other confirmation that there was ever any toxic mold or other pathogenic agent at the W&S building at any time up to the present.

The court in *Fabrique* held that the plaintiffs in that case failed to present sufficient medical evidence to establish a causal link between the wife's salmonella exposure at a hotel buffet and her arthritic condition, when the wife's treating physician, who diagnosed the condition, "could not render an opinion regarding the arthritis causation with a reasonable degree of medical certainty" because the wife had a genetic predisposition to inflammatory joint disease, and the doctor was unable to identify which of two possible triggers resulted in her condition. *Fabrique*, 144 Wn. App. at 686. The analysis of *Fabrique* supports excluding Dr. Thrasher's opinions as unreliable, given Bolson's extensive medical history of allergies and other symptoms before January 2009, documented prior exposures to mold in her various homes, and the fact that she is a person who lives in the Pacific Northwest and has been diagnosed as highly sensitive to mold.

Bolson also takes issue with the criticism that Dr. Thrasher never examined her, but he just relied upon her medical records. While it is true that an expert's reliance on medical records can be perfectly appropriate, it is not in this case because those medical records contradict all of Dr. Thrasher's conclusions and he makes no attempt to reconcile or otherwise account for this.

Further, the number and variety of defects in Dr. Thrasher's reasoning is what dooms the admissibility of his reports. One federal district has excluded

the expert medical causation testimony of another toxicologist in a mold exposure case. In *Jenkins v. Slidella L.L.C.*, No. 05-370: J5, 2008 U.S. Dist. LEXIS 49204, *1 (E.D. La. June 27, 2008), *aff'd*, 318 F. App'x 270 (2009),²⁶ the plaintiffs alleged they suffered health problems as a result of their exposure to high levels of molds in their apartment. *Id.* at *3-4. The district court excluded the testimony of plaintiffs' "mold inspection" expert due to his flawed methodologies. *Id.* at *10. The *Jenkins* court cited *Roche v. Lincoln Property Co.*, 175 F. App'x 597 (4th Cir. 2006), which Bolson also cites, in holding that the plaintiff's medical expert lacks the necessary expertise because he is not an allergist and for the proposition that the expert's overreliance on a temporal relationship between alleged exposure and the occurrence of symptoms. *Id.* at *17-18. Even more relevant is the court's exclusion of an expert toxicologist on the grounds that (1) he was not qualified to testify about "specific causation," without being a medical doctor or having any experience or training in diagnosing and treating patients; (2) he did not examine the plaintiffs, perform a differential diagnosis, rule out other possible causes, apply reliable methods or principles, or provide a theory with support in the relevant scientific community, *id.*; and (3) he generally based his decision upon temporal causation, which the court found was an overreliance that was insufficient as a matter of law. *Id.* at *19-22

²⁶ See, *supra*, note 21. A copy of this opinion is available at App. Tab E.

Likewise, a Massachusetts court excluded expert testimony in a mold exposure case for the failures to: (1) test for mold during the timeframe of exposure; (2) produce any evidence of the presence of mold in the apartment at issue; and (3) exclude other potential causes of health problems, in addition to other failures. *See Avalonbay Cmty. v. Hamilton*, No. MICV2004-00636-F, 2011 Mass. Super. LEXIS 277, *1, *4-5 (Mass. Super. Ct. 2011).²⁷ Dr. Thrasher's declaration suffers from all of the defects identified in both *Jenkins* and *Avalonbay*. Taken together, these deficiencies in the foundation of Dr. Thrasher's opinion are the hallmarks of unreliability.

(iii) Dr. Thrasher's opinions are inadmissible because they depend upon false assumptions and speculations.

In addition to the flawed methodologies and lack of reliable foundations for the opinions in Dr. Thrasher's declaration, Dr. Thrasher's proposed testimony is permeated with unwarranted claims and assumptions to the point that it cannot be considered reliable.

First, Dr. Thrasher speculated that signs of mold or moisture damage "might" have been revealed during Ms. Evans' inspection of the building by moving "furniture or other structures." CP 265. What Dr. Thrasher failed to realize is that before preparing her report, Ms. Evans followed Bolson's own

²⁷Under GR 14.1(b) and MASSACHUSETTS REPORTS STYLE MANUAL Rule 2.05, available at <http://www.massreports.com/sjcstyle11.pdf> (last visited June 11, 2013), and attached hereto at App. Tab F (allowing citations to unpublished opinions), parties and Washington courts may cite to unpublished opinions of Massachusetts courts. A copy of *Avalonbay* is attached at App. Tab G.

industrial hygienist as he performed a thorough inspection of each room within the building. CP 283. During this inspection, Bolson's expert did move furniture and look behind baseboards at carpet level, and there was no sign of mold in any of the areas observed. *Id.*

Second, Dr. Thrasher based his opinions upon the number of mold spots that grew on the do-it-yourself mold kits purchased by W&S employees in January 2009. CP 262-63. However, Dr. Thrasher never saw those kits himself and never saw any pictures of those kits. *Id.* Indeed, "[t]here is no conclusive evidence regarding the nature or actual quantity of mold to support an opinion at this late date based on the anecdotal information" of the results reported by W&S employees, including Bolson. CP 282.

Third, one of Dr. Thrasher's key conclusions is that, in January 2009, the W&S building was "grossly unsanitary because of microbial contamination" from *both* "sewage and [unspecified] pathogenic agents." CP 259. (emphasis and brackets added). In particular, Dr. Thrasher identified the Sewer & Storms Collections Division for the City of Puyallup the source of sewage in the W&S building. *Id.* However, in researching and forming this conclusion, Dr. Thrasher missed the key fact that the W&S building is located miles upstream from the Puyallup waste water treatment plant! CP 281, 284. As a matter of basic physics, sewage does not flow up hill.

D. Bolson Presented No Evidence of the Correct Standard of Care or that W&S Breached that Standard.

Even without the other grounds for summary judgment (collateral estoppel and lack of causation), the trial court properly dismissed Bolson's negligence claims because she failed to establish the relevant standard of care or any breach of that standard.

To establish the elements of an action for negligence, the plaintiff must show "(1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). A claim for negligent infliction of emotional distress must also exhibit the same elements, *Hunsley v. Giard*, 87 Wn.2d 424, 434–36, 553 P.2d 1096 (1976), plus the element of objective symptomology, *Strong v. Terrell*, 147 Wn. App. 376, 387, 195 P.3d 977 (2008).

In a premises liability case, a possessor of land is subject to liability for physical harm caused to invitees (including employees) (1) by a condition of the land only if the possessor knows or in the exercise of reasonable care should have discovered the condition, should have realized that it posed an unreasonable risk of harm, and should have expected that invitees either will not discover or realize the danger or will fail to protect themselves against it, and (2) fails to exercise reasonable care to protect such invitees to protect them from danger. *Id.*

In all of these claims, the standard of care focuses on what the reasonably prudent employer or landowner would have done under similar circumstances under which W&S found themselves in January 2009. *See McCarthy*, 110 Wn.2d at 818 (“The standard of care to be exercised by the employer is to take the precaution of an ordinarily prudent person in keeping the workplace reasonably safe.”); *Iwai*, 129 Wn.2d at 96 (“The phrase “reasonable care” imposes on the landowner the duty “to inspect for dangerous conditions, ‘followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee’s] protection under the circumstances.’”). For each of these claims, Bolson has presented no evidence on the industry standards for employers and/or landowners conducting mold remediation of their own premises and no evidence that W&S breached that standard. Instead, Bolson presented evidence (through Dr. Thrasher and industrial hygienist Barbara A. Trenary) on the irrelevant standard of care for remediation professionals and argued that W&S was subject to that inapplicable standard. CP 281-82, 219-223, and 258-266.

In Dr. Thrasher’s view, W&S, and all other landowners or employers, are legally obligated to hire remediation specialists with extraordinary credentials, including formal education in microbiology, biocide use, psychometrics, health and safety, equipment use, risk assessment, inspection, and communication of administrative procedures. CP 260-61. Similarly, Ms. Trenary relies on ANSI and IICRC standards “S500” and “S520”, as the

“voluntary” standards applicable to professional restorers, and also criticizes defendants for not employing individuals with the training or experience to respond to “Category 3 inundations.” CP 221-22.

Bolson has never cited a single case holding that it is industry standard for landowners or employers to follow the protocols for certified and professional remediators. CP 281-82 (explaining that there are no legal requirements requiring home or business owners to follow the professional standards set forth by Bolson and her experts). As Ms. Evans pointed out, under the ultra-high standard of care propounded by Bolson and her experts, an employer would be unable to use janitorial staff to clean up after a toilet backs up. *Id.* at 281-82. As another example, the reasonably prudent employer or landowner faced with a cleanup from a flood would use bleach as a disinfectant. CP 281, 286, 289. However, both of Bolson’s experts label W&S’s hiring of a contractor to use bleach as a violation of the standard of care. *Id.*; CP 223, 261-62. Dr. Thrasher also criticizes W&S for using fans to increase ventilation, but the materials from FEMA attached to Ms. Evans’ declaration state that it is permissible to use fans, especially in the absence of sewage. CP 285. In fact, the repair process that W&S witnesses have described exactly matches the overall process endorsed by FEMA. CP 285-88.

Instead, as the authorities cited by both parties recognize, the relevant standard of care is what the ordinarily prudent person would do to keep the workplace reasonably safe. *McCarthy*, 110 Wn.2d at 818. Without any

evidence to establish the standard of care applicable to W&S, there is no way for Bolson to demonstrate that W&S acted unreasonably. *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 655-56, 869 P.2d 1014 (1994) (plaintiff's lack of evidence on governing standard of care cannot be overcome with speculation about what an expert might say). Moreover, the evidence shows that W&S acted reasonably in cleaning up after the flood and that no harmful levels of mold were ever present. CP 21, 45, 53-59, 281-83. For these reasons, this Court should uphold the trial court's dismissal of Bolson's negligence, premises liability, and negligent infliction of emotional distress claims.

E. Bolson Presented No Evidence of "Outrageous" Conduct to Support Her Claim for Intentional Infliction of Emotional Distress.

In addition to the numerous other gaps in Bolson's summary judgment proof, Bolson has presented no evidence that W&S's conduct rose to the level of "outrageousness" required to sustain a claim for intentional infliction of emotional distress. This lack of proof justifies the trial court's summary dismissal of the outrage claim.

For an outrage claim, a plaintiff must establish the following elements: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) resulting severe emotional distress. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995). Specifically, to be actionable, the defendant's conduct "must be '*so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*'" *Id.* at

867, quoting *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (emphasis in original). Courts “must consider the following factors” in determining whether conduct was sufficiently extreme to result in liability:

- (a) the position occupied by the defendant;
- (b) whether plaintiff was peculiarly susceptible to emotional distress, and if defendant knew this fact;
- (c) whether defendant's conduct may have been privileged under the circumstances;
- (d) the degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties; and,
- (e) the actor must be aware that there is a high probability that his conduct will cause severe emotional distress and he must proceed in a conscious disregard of it.

Id., quoting *Phillips v. Hardwick*, 29 Wn. App. 382, 388, 628 P.2d 506 (1981).

For example, in *Birklid*, a supervisor warned Boeing that its use of a product was creating dizziness, nausea, and other symptoms in employees, which the supervisor expected would increase with production. *Id.* at 856-57. Boeing refused to take action and more employees got sick. *Id.* The workers’ outrage claim was based upon evidence that Boeing removed labels on chemicals, denied workers access to Material Safety Data Sheets, harassed employees who requested personal protective equipment or medical treatment, altered the workplace to disguise harms from chemicals, and experimented with exposing employees to toxic chemicals. *Id.* at 857. Under the “*Hardwick*

factors,” the workers stated a claim for intentional infliction of emotional distress. *Id.* at 868.

In contrast, there is absolutely no evidence in this case to support a finding of sufficiently outrageous conduct by W&S. In particular, there is no evidence that, W&S was aware of a high probability that conducting the repairs of the office would cause Bolton or anyone else severe emotional distress, or that W&S proceeded in disregard of such knowledge.

Although Bolson contends that W&S’s failure to send the workers’ do-it-yourself mold kits into a laboratory was “gambling with people’s lives,” (Appellant’s Corrected Br. at 44-45), this is mere hyperbole. There is no evidence that there was ever (or is now) any toxic mold or other pathogen inside the W&S building. Instead, the evidence shows that W&S made a good faith effort to bring in experienced professionals to perform the repairs immediately after the flood. Further, the summary judgment record confirms that W&S is a small business in which family members work together with the other employees in the same offices. There was no significant evidence that Mr. Williams, Ms. Williams, or the company would ever knowingly expose themselves, their employees, or their clients to any hazardous condition. CP 15, 19. It was also undisputed that Bolson was permitted to work from home during the repair project, as Bolson testified. (CP 250-51).

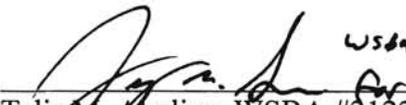
Viewed in the best possible light, Bolson's evidence that Mr. Williams, Ms. Williams, and/or Ms. Schloer knew that the workers had purchased the mold kits out of a concern over the odors during the repairs, and that W&S refused to send the kits to the lab does not rise to the level of audacity required to constitute outrageous conduct, and Bolson cites no authority that shows otherwise. Bolson's allegations against W&S pale in comparison to the outrageous conduct in *Birkliid*.

For these reasons, the Court should uphold the trial court's summary dismissal of Bolson's claim for intentional infliction of emotional distress.

V. CONCLUSION

Based on the foregoing, Respondents, Hayden G. Williams, Donita C. Williams, and Williams & Schloer, CPA's, P.S., respectfully ask that this Court affirm the trial court's order granting summary judgment on all grounds presented or sufficiently raised, and that they be awarded their costs and attorney's fees for responding to this appeal.

RESPECTFULLY SUBMITTED this 17th day of June, 2013.

 WSBA # 39701

Talis M. Abolins, WSBA #21222 of
Campbell, Dille, Barnett, & Smith, PLLC
Attorneys for Respondents

APPENDIX A



THE HONORABLE GAROLD E. JOHNSON

DEPT. 10
IN OPEN COURT

AUG - 3 2012

Pierce County Clerk
By *[Signature]*
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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

BONNY M. BOLSON,

Plaintiff,

v.

HAYDEN G. WILLIAMS and DONITA C. WILLIAMS, individually and on behalf of the marital community composed of HAYDEN G. & DONITA C. WILLIAMS; WILLIAMS & SCHLOER, CPA'S, P.S., a Washington professional service corporation,

Defendants.

NO. 12-2-05169-6

[PROPOSED]
GRANTING
ORDER ~~DENYING~~ DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

[Handwritten signatures and initials]

THIS MATTER having come before the Court based on defendants' motion for summary judgment, and the Court having considered the following pleadings and evidence submitted by the parties:

1. Defendants' Motion for Summary Judgment;
 - a. Declaration of Tina Schloer;
 - b. Declaration of Hayden Williams;
 - c. Declaration of Doug Schloer;
 - d. Declaration of Talis M. Abolins;
 - e. Declaration of Tina Dougher;
 - f. Declaration of Jacie Russum;

ORDER DENYING DEFS' MOTION
FOR SUMMARY JUDGMENT - 1 of 2
(NO. 12-2-05169-6)
(2026.01 - 00005884)

VREELAND LAW PLLC
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Pierce County Clerk
By [Signature] DEPUTY

2. Plaintiff's Opposition to Defendants' Motion for Summary Judgment

a. Declaration of Bonny M. Bolson;

b. Declaration of Jack Dwayne Thrasher, Ph.D.;

c. Declaration of Victor J. Torres and exhibits attached thereto;

3. Defendants' Reply to Plaintiff's Opposition;

4. Declaration of Susan Evans; and [Signature]

5. However, the labor and industries files have not been considered, and the CR56(A) motion is waived. It is hereby,

ORDERED that defendants' motion for summary judgment is ~~DENIED~~ **GRANTED**.

DONE IN OPEN COURT this 3rd day of August 2012.

(None pro type correction)
[Signature]

[Signature]
JUDGE GAROLD E. JOHNSON

Presented by:

VREELAND LAW PLLC

[Signature]

Victor J. Torres, WSBA No. 38781
Attorneys for Plaintiff

Approved as to Form, Presentment Waived:

CAMPBELL, DILLE, BARNETT & SMITH, PLLC

[Signature]

Talis M. Abolins, WSBA No. 21222
Attorneys for Defendants

ORDER DENYING DEFS' MOTION
FOR SUMMARY JUDGMENT - 2 of 2
(NO. 12-2-05169-6)
{2026.01 - 00005884}

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APPENDIX B



THE HONORABLE GAROLD E. JOHNSON



SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

BONNY M. BOLSON,

Plaintiff,

v.

HAYDEN G. WILLIAMS and DONITA C. WILLIAMS, individually and on behalf of the marital community composed of HAYDEN G. & DONITA C. WILLIAMS; WILLIAMS & SCHLOER, CPA'S, P.S., a Washington professional service corporation,

Defendants.

NO. 12-2-05169-6

[PROPOSED]

~~ORDER GRANTING~~ **DENYING** PLAINTIFF'S CR 59 MOTION FOR RECONSIDERATION

THIS MATTER having come before the Court based on plaintiff's CR 59 motion for reconsideration, and the Court having considered the following pleadings and evidence submitted by the parties:

1. Plaintiff's CR 59 Motion for Reconsideration;
 - a. Defendants' Motion for Summary Judgment;
 - i. Declaration of Tina Schloer;
 - ii. Declaration of Hayden Williams;
 - iii. Declaration of Doug Schloer;
 - iv. Declaration of Talis M. Abolins;
 - v. Declaration of Tina Dougher;

ORDER GRANTING PLF'S MTN FOR RECONSIDERATION - 1 of 3 (NO. 12-2-05169-6) {2026.01 - 00006410}

VREELAND LAW PLLC CITY CENTER BELLEVUE 500 108TH AVENUE NE, SUITE 740 BELLEVUE, WASHINGTON 98004 (425) 623-1300 - FACSIMILE (425) 623-1310

vi. Declaration of Jacie Russum;

b. Plaintiff's Opposition to Defendants' Motion for Summary Judgment;

i. Declaration of Bonny M. Bolson;

ii. Declaration of Jack Dwayne Thrasher, Ph.D.;

iii. Declaration of Victor J. Torres and exhibits attached thereto;

c. Defendants' Reply to Plaintiff's Opposition;

i. Declaration of Susan Evans;

2. Defendants' Response to Motion for Reconsideration; and

3. Plaintiff's Reply to Defendants' Response to Motion for Reconsideration of the

Court's Order Granting Defendants' Motion for Summary Judgment.

It is hereby ORDERED that,

1. Plaintiff's CR 59 Motion for Reconsideration is hereby ~~GRANTED~~ **DENIED** *Garold Johnson*
2. The Court's prior ruling granting defendants' motion for summary judgment is VACATED pursuant to CR 59;
3. The Clerk shall issue a new trial date and Order Setting Case Schedule. Only the deadlines from the prior case schedule from August 3, 2012 and forward will be rescheduled and reissued.

DONE IN OPEN COURT this 14th day of September, 2012.

Garold E. Johnson
JUDGE GAROLD E. JOHNSON

Presented by:

VREELAND LAW PLLC

Victor J. Torres
Victor J. Torres, WSPA No. 38781
Attorneys for Plaintiff

ORDER GRANTING PLF'S
MTN FOR RECONSIDERATION - 2 of 3
(NO. 12-2-05169-6)
(2026.01 - 00006410)

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FILED
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Approved as to Form, Presentment Waived:

CAMPBELL, DILLE, BARNETT & SMITH, PLLC


Talis M. Abolins, WSBA No. 21222
Attorneys for Defendants

ORDER GRANTING PLF'S
MTN FOR RECONSIDERATION - 3 of 3
(NO. 12-2-05169-6)
{2026.01 - 00006410}

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1 amazing how much we learn every week here. Unbelievable.
2 You saw the variety in front of me today. There's always
3 something. In all the years of practice, there's always
4 something new for me, I guess. Makes the job really
5 interesting.

6 I am going to grant summary judgment. The key issue
7 to me here that is not proven or not -- it doesn't have
8 to be proven -- it doesn't meet the test necessary to go
9 forward in this case is causation. I do agree with that.

10 It's not sufficient to have someone who is not a
11 medical doctor telling the jury to draw conclusions on
12 this sort of thing. There has to be a connection done by
13 medical testimony as far as I read the law.

14 I understand a reviewing court may disagree with me
15 on that, but my reading of the reviewing courts
16 repeatedly is that that is the requirement.

17 Now, there are exceptions, and I appreciate that.
18 Doctor takes off the wrong leg, you don't need a doctor
19 telling him he took off the wrong leg; that's kind of a
20 famous case. But this case here does require someone to
21 draw the connection, the proximate cause between the two
22 on a more likely than not basis. And it's not present in
23 this case that I could find. And Dr. Thrasher doesn't
24 have the skill. He's not the expert to do that,
25 irrespective of his conclusions. Therefore, summary

1 judgment will be granted.

2 I'm not saying for a moment that the rest of the
3 issues are not pertinent. I just took one of the issues
4 and focused on that for the purposes of giving you the
5 reasons. Court of Appeals doesn't care what my reasons
6 are. Well, I shouldn't say they don't care; that's not a
7 fair statement. It's de novo at the Court of Appeals, as
8 you both know. My analysis is more to help you than
9 probably the Court of Appeals.

10 Do you have an order for me?

11 MR. ABOLINS: He has an order that is very
12 close, so I decided I'd rely on his.

13 THE COURT: Be sure it includes all the
14 documents, including your final reply.

15 MR. ABOLINS: Yes, Your Honor.

16 THE COURT: Except for, excuse me, scratch a
17 line through the records from --

18 MR. ABOLINS: Labor & Industries.

19 THE COURT: -- Labor & Industries. Thank you
20 very much.

21 MR. ABOLINS: If we can have a moment.

22 THE COURT: Sure.

23 MR. TORRES: Your Honor, while we figure out the
24 summary judgment response, there's the protective order
25 as well as the motion to seal.

1 granted. Can you do that before you leave today.

2 MR. ABOLINS: Yes.

3 MR. TORRES: Certainly, Your Honor.

4 THE COURT: Secondly, I have read your
5 materials. I want you to focus on arguments that were
6 not made before. If you're going to argue the same
7 thing, your motion is denied.

8 If you're going to argue something new, only
9 something new that you could not have argued before, I'll
10 consider it. But I didn't see any.

11 MR. TORRES: And I didn't have anything new, per
12 se, Your Honor. The only argument that wasn't
13 specifically discussed at that particular motion for
14 summary judgment was the ER 702 type of analysis, and
15 that was kind of the focus of this particular motion,
16 Your Honor.

17 THE COURT: I did consider whether or not this
18 particular expert witness could give medical evidence on
19 whether or not someone was hurt from toxic material, and
20 the answer I gave to that was no. He's a toxicologist,
21 but he's not qualified as a medical doctor.

22 Consequently, my answer remains the same. Motion for
23 reconsideration is denied.

24 Hand me an order. I don't need to hear anything
25 further on it. I read it carefully.

APPENDIX D



THEOFANIS PAPADOPOULOS, et al., Plaintiffs, v. FRED MEYER STORES,
INC., Defendant.

No. C04-0102RSL

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON

2006 U.S. Dist. LEXIS 81863

November 8, 2006, Decided

November 8, 2006, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *Papadopoulos v. Fred Meyer Stores, Inc.*, 2006 U.S. Dist. LEXIS 81864 (W.D. Wash., Nov. 8, 2006)

PRIOR HISTORY: *Papadopoulos v. Fred Meyer Stores, Inc.*, 2006 U.S. Dist. LEXIS 81862 (W.D. Wash., Nov. 8, 2006)

COUNSEL: [*1] For Theofanis Papadopoulos, Patricia Papadopoulos, husband and wife, Plaintiffs: Jeffrey Hutten Tyler, LEAD ATTORNEY, MCKAY HUFFINGTON PLLC, SEATTLE, WA.

For Fred Meyer Stores Inc, a Washington corporation doing business as Fred Meyer Stores of Ohio Inc, Kroger Company, a foreign corporation, Defendants: Charles Albert Willmes, LEAD ATTORNEY, BULLIVANT HOUSER BAILEY (SEA), SEATTLE, WA.

For Nelson & Langer, Interested Party: Michael E. Nelson, NELSON TYLER LANGER, SEATTLE, WA.

JUDGES: Robert S. Lasnik, United States District Judge.

OPINION BY: Robert S. Lasnik

OPINION

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE LABOR AND INDUSTRY RECORDS AND TO EXCLUDE COLLATERAL SOURCE PAYMENT EVIDENCE

This matter comes before the Court on "Plaintiffs' Motion in Limine to Exclude Labor and Industry Records and to Exclude Evidence of Collateral Source Payments" (Dkt. # 75). In their motion, plaintiffs seek to exclude two types of evidence: (1) "evidence of any and all Labor and Industry ("L&I") claims and/or records with regard to Mr. Papadopoulos"; and (2) "any other collateral source benefits received by Mr. or Mrs. Papadopoulos in connection with this, or any prior, [*2] insurance claims." In response, defendant argues that the L&I records are **admissible** because they contain evidence of Mr. Papadopoulos' pre-incident medical condition, which is relevant in this case, and contain evidence related to his credibility. *See* Response at 1. Defendant also argues that the collateral source rule does not apply to evidence of plaintiff's medical condition stemming from previous incidents. *See* Response at 4. For the reasons set forth below, the Court grants plaintiffs' motion in part.

A. Labor and Industry claims and records

Plaintiffs argue that L&I's records pertaining to Mr. Papadopoulos should be excluded at trial because: (1) they are not relevant under *Fed. R. Evid. 401* and *402*; (2) their probative value is substantially outweighed by the risk of unfair prejudice under *Fed. R. Evid. 403*; (3) they are inadmissible by statute under *RCW 51.24.100* and *RCW 51.28.070*; and (4) they contain inadmissible hearsay. These arguments are discussed, in turn, below.

First, plaintiff Theofanis Papadopoulos' [*3] L&I records contain information regarding his pre-June 19, 2003 medical condition. *See* Dkt. # 98. Plaintiff's medical condition is relevant to both his pre-injury condition and his earning capacity at issue in this case. The records also

contain information that may be relevant to plaintiff's credibility. Therefore, the Court finds that the records contain relevant information.

Second, the L&I records' probative value is not substantially outweighed by danger of unfair prejudice under *Fed. R. Evid. 403* because the records contain substantial information regarding plaintiff Theofanis Papadopoulos' medical condition.

Third, the L&I records are not excluded by statute. *RCW 51.24.100* states: "The fact that the injured worker or beneficiary is entitled to compensation under this title shall not be pleaded or **admissible** in evidence in any third party action under this chapter." Plaintiffs' claim in this case, however, is not a "third party action" under *RCW* chapter 51.24. See *RCW 51.24.030*. Therefore, plaintiff Theofanis Papadopoulos' L&I records are not excluded by *RCW 51.24.100*. Plaintiff's [*4] L&I records are also not excluded as a matter of law by *RCW 51.28.070*, which states, in part:

Information contained in the claim files and records of injured workers, under the provisions of this title, shall be deemed confidential and shall not be open to public inspection (other than to public employees in the performance of their official duties), but representatives of a claimant, be it an individual or organization, may review a claim file or receive specific information therefrom upon the presentation of the signed authorization of the claimant.

Plaintiffs argue that this section creates a "rule of evidence" under two Washington cases: *Folden v. Robinson*, 58 Wn.2d 760, 364 P.2d 924 (1961) and *Mebust v. Mayco Mfg. Co.*, 8 Wn. App. 359, 506 P.2d 326 (1973). See Reply at 3. Washington courts, however, have not held that *RCW 51.28.070* creates a rule of evidence at trial. The *Mebust* court stated, "[W]e agree that if *RCW 50.12.110* establishes a 'rule of evidence' which makes a personal injury plaintiff's employment security file inadmissible at trial, *RCW 51.28.070* [*5] likewise establishes a similar rule for a personal injury plaintiff's industrial insurance file." *Mebust*, 8 Wn. App. at 362 (emphasis in original). This language, however, is pure dictum as expressed in the next line of the opinion, which states: "[b]ut the question we review does not involve a 'rule of evidence.'" *Id.* Therefore, the Court concludes that plaintiff's L&I records are not excluded at trial as a matter of law under *RCW 51.28.070*.

Finally, plaintiffs argue that the L&I records should be excluded because they contain inadmissible hearsay.

Plaintiffs, however, have not set forth specific L&I records they seek to exclude as containing inadmissible hearsay. See Reply at 8. Plaintiffs simply conclude the records "would be offered in evidence only to prove the truth of the matter asserted." See Reply at 8. Until the Court hears what evidence is being offered "to prove the truth of the matter asserted," the Court cannot exclude all the L&I records as containing inadmissible hearsay. See *Fed. R. Evid. 801*.

For all the foregoing reasons, plaintiffs' motion to exclude "any and all [*6] Labor and Industry claims and/or records with regards to Mr. Papadopoulos" is DENIED in part and RESERVED in part. Plaintiffs' hearsay objections are RESERVED for trial.

B. Collateral source benefits

Plaintiffs also move to exclude plaintiffs' collateral source benefits from the June 19, 2003 incident and any prior insurance claims. See Motion at 1. Defendant's only argument in opposition is that the "rule applies where a plaintiff receives benefits from another source for the injury caused by the tortfeasor" and does not apply to exclude "evidence of plaintiff's prior medical condition stemming from [an] incident unrelated to the incident that gives rise to the present case." See Response at 4.

In Washington, "the very essence of the collateral source rule requires exclusion of evidence of *other money received* by the claimant so the fact finder will not infer the claimant is receiving a windfall and nullify the defendant's responsibility." *Cox v. Spangler*, 141 Wn.2d 431, 440, 5 P.3d 1265 (2000) (emphasis added) (citing *Johnson v. Weyerhaeuser*, 134 Wn.2d 795, 803, 953 P.2d 800 (1998)). "Thus, even when it is otherwise relevant, proof of such collateral [*7] payments is usually excluded, lest it be improperly used by the jury to reduce the plaintiff's damage award. . . . In this respect, courts generally follow a policy of strict exclusion." *Id.*

In this case, if the Court admits evidence of payments from prior incidents, there is a substantial risk that the jury will improperly reduce plaintiffs' damage award, if any. Accordingly, the Court excludes evidence of other money or benefits received by plaintiffs, whether related to the June 13, 2003 incident or L&I claims. Relevant evidence about plaintiff Theofanis Papadopoulos' medical condition, however, is not excluded by this ruling.

For all of the foregoing reasons, "Plaintiffs' Motion in Limine to Exclude Labor and Industry Records and to Exclude Evidence of Collateral Source Payments" (Dkt. # 75) is GRANTED in part, DENIED in part, and RESERVED in part.

DATED this 8th day of November, 2006.

Robert S. Lasnik

United States District Judge

APPENDIX E



2 of 4 DOCUMENTS

HEATHER JENKINS, ET AL VERSUS SLIDELLA L.L.C., ET AL

CIVIL ACTION NO: 05-370 SECTION: J(5)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA*2008 U.S. Dist. LEXIS 49204; 76 Fed. R. Evid. Serv. (Callaghan) 1063*

June 27, 2008, Decided

June 27, 2008, Filed

SUBSEQUENT HISTORY: Affirmed by *Jenkins v. Slidella, LLC*, 2009 U.S. App. LEXIS 6572 (5th Cir. La., Mar. 27, 2009)

COUNSEL: [*1] For Heather Jenkins, Melissa Dawn McKee, Plaintiffs: Timothy J. Young, LEAD ATTORNEY, Jason C. MacFetters, Robert J. Young, Jr., The Young Firm, New Orleans, LA; Nolte H. DeRussy, Halpern & Martin, LLC, Metairie, LA.

For Slidella LLC, Sizeler Real Estate Management Company, Inc., Defendants, Cross Claimants: Richard S. Vale, LEAD ATTORNEY, Joseph F. LaHatte, III, Pamela Ferrage Noya, William Lee Brockman, Blue Williams, LLP (Metairie), Metairie, LA; Sara E. Mouledoux, Gordon, Arata, McCollam, Duplantis & Eagan (New Orleans), New Orleans, LA.

For Flournoy Construction Company, LLC, Defendant, Third Party Plaintiff: Richard S. Vale, LEAD ATTORNEY, Joseph F. LaHatte, III, Pamela Ferrage Noya, William Lee Brockman, Blue Williams, LLP (Metairie), Metairie, LA; Michael Joseph Haskell, Barrasso Usdin Kupperman Freeman & Sarver, LLC, New Orleans, LA.

For Zurich American Insurance Company, Northern Insurance Company of New York, Third Party Defendants: David P. Salley, LEAD ATTORNEY, Glen Mercer, Salley, Hite & Mercer, LLC, New Orleans, LA.

For Flournoy Construction Company, LLC, Cross Defendant: Michael Joseph Haskell, Barrasso Usdin Kupperman Freeman & Sarver, LLC, New Orleans, LA.

For Commercial [*2] Flooring & Mini Blinds, Inc., Third Party Defendant: Richard S. Vale, LEAD ATTORNEY, Pamela Ferrage Noya, William Lee Brockman Blue Williams, LLP (Metairie), Metairie, LA.

For M&M Plumbing Co Inc, Third Party Defendant: Jill Ann Hrivnak, LEAD ATTORNEY, Sidney W. Degan, III, Degan, Blanchard & Nash (New Orleans), New Orleans, LA; Craig L. Kaster, Craig L. Kaster & Associates, LLC, Zachary, LA; Keith A. Kornman, Sher, Garner, Cahill, Richter, Klein & Hilbert, LLC, New Orleans, LA.

For Trinity Universal Insurance Company, -, Third Party Defendant: Shannon Howard-Eldridge, LEAD ATTORNEY, Claudia Patricia Santoyo, Adams, Hoefer, Holwadel & Eldridge, LLC, New Orleans, LA.

JUDGES: CARL J. BARBIER, UNITED STATES DISTRICT JUDGE.

OPINION BY: CARL J. BARBIER

OPINION

ORDER AND REASONS

Before the Court is Defendants Slidella, L.L.C. ("Slidella"), Sizeler Real Estate Management Company, Inc.'s ("Sizeler"), and Defendant/Third Party Plaintiff Flournoy Construction Company, L.L.C.'s ("Flournoy") **Motion in Limine to Exclude Testimony of Chester J. Doll (Rec. Doc. 163)**; Third-party Defendant M&M Plumbing Co., Inc.'s ("M&M Plumbing") **Motion in Limine Regarding the Testimony of Chester J. Doll**

(Rec. Doc. 216); Slidella, Sizeler, and Flournoy's [*3] Motion in Limine Regarding Testimony of Dr. Johnny Belenchia (Rec. Doc. 156); M&M Plumbing's Motion in Limine Regarding the Testimony of Dr. Johnny Belenchia (Rec. Doc. 217); Slidella, Sizeler, and Flournoy's Motion in Limine Regarding Testimony of Dr. Ernest D. Lykissa (Rec. Doc. 158); M&M Plumbing's Motion in Limine Regarding the Testimony of Dr. Ernest D. Lykissa (Rec. Doc. 215); Slidella and Sizeler's Motion for Summary Judgment (Rec. Doc. 153); M&M Plumbing's Motion for Summary Judgment (Rec. Doc. 124); and Flournoy's Motion for Partial Summary Judgment on Third Party Demand Against Trinity Universal Insurance Company (Rec. Doc. 160).

These motions, which are opposed, were set for hearing on May 16, 2008 on the briefs. Upon review of the record, the memoranda of counsel, and the applicable law, this Court now finds as follows.

Background Facts

This matter arises out of alleged injuries sustained by Plaintiffs, Heather Jenkins and Melissa Dawn McKee, when they were allegedly exposed to high levels of Aspergillus and other molds in their apartment, which was owned and operated by Defendants Slidella and Sizeler,¹ and constructed by Flournoy, who subcontracted portions of the work [*4] to M&M Plumbing and Commercial Flooring and Mini-Blinds ("Commercial Flooring"). Plaintiffs lived in the apartment from February 1, 2004 through July 2004.

1 Sizeler is Slidella's management company.

On February 11, 2005, Plaintiffs filed suit against Slidella and Flournoy, alleging that the apartment they rented from Slidella and constructed by Flournoy was contaminated with mold, causing Plaintiffs health problems. Slidella subsequently filed a cross-claim against Flournoy and its insurer, Zurich American Insurance Company, for defense and indemnity in connection with Plaintiffs' claims.² Flournoy in turn filed third-party demands against two of its subcontractors and their respective insurers: 1) M&M Plumbing and its insurer, Trinity Universal Insurance Company ("Trinity"); and 2) Commercial Flooring³ and its insurer, Northern Insurance Company of New York, alleging that these subcontractors caused or contributed to the alleged mold contamination.⁴

2 This claim has since been dismissed.

3 Commercial Flooring was subcontracted to install the flooring and tile work in the bathroom, while M&M Plumbing was subcontracted to install the showers and plumbing work throughout the complex. Commercial [*5] Flooring has

since been dismissed by Flournoy as Flournoy's insurer, which is also the insurer of Commercial Flooring, decided to consolidate its defenses in this case.

4 In its third-party petition, Flournoy alleges that Slidella and Sizeler have alleged that certain work performed by M&M Plumbing was defective and non-conforming. Flournoy denied these allegations, but alleged that to the extent Flournoy is found liable to the Plaintiffs or to Slidella and Sizeler, Flournoy is owed defense and indemnity from M&M Plumbing under both the terms of the subcontract and law.

Discussion

A. Flournoy, Sizeler, Slidella, and M&M Plumbing's Motions in Limine re: testimony of Chester Doll

Flournoy, Sizeler, Slidella, and M&M Plumbing collectively seek to exclude the testimony of Plaintiffs' expert, Chester Doll, who is offered as an expert in the field of mold inspections, growth, exposure, and sampling techniques. Defendants argue that Doll's opinions do not fulfill the requirements for expert testimony pursuant to *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵ 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

5 In making the determination of reliability, the Court should consider the [*6] following non-exclusive factors: (1) the extent to which the theory has or can be tested; (2) whether the theory has been subject to peer review and publication; (3) the technique's potential rate of error; (4) whether the underlying theory or technique has been generally accepted as valid by the scientific community. *Daubert*, 509 U.S. at 592-94.

The motion is premised on the fact that Doll deviated from accepted industry standards in his testing methodologies in the following ways:

(1) Numerous publications and articles by nationally accredited organizations in the mold and/or bioaerosol sampling industry cite minimal industry standards concerning mold testing that Doll did not meet during his one-day, three-sample test at Plaintiffs' apartment. He did not obtain non-complaint area samples or "reference" samples that could be measured against the complaint samples taken near the source of the alleged moldy smell in the apartment closet. Specifically, Mr. Doll took only two air samples and one tape lift sample which is against industry standards. He also failed to take an air sample near the purported cause of the alleged Aspergillus mold in the apartment, i.e., the upstairs bathroom. [*7] And he failed to repeat his testing the next day, which is a devia-

tion from the National Institute for Occupational Safety and Health ("NIOSH") sampling strategies;

(2) The lab to which Doll sent the air samples was not accredited by a nationally recognized accrediting authority or an accrediting body recognized by "NACLA" or its equivalent, which is a practice recommended by the American Industrial Hygiene Association ("AIHA");

(3) He did not quantify or document the atmospheric conditions, including temperature, humidity, or weather conditions on the date of testing, July 28, 2004, as is referenced by the AIHA's Field Guide for the Determination of Biological Contaminants in Environmental Samples, section 5.2.1. Such conditions are important in a mold assessment and sampling techniques, as temperature directly influences fungal growth;

(4) He did not document his findings in the Plaintiffs' apartment in a required "Chain of Custody" document as is mandated by industry standards. Doll's "Mold Testing Identification Report" is the entirety of Doll's documentation in this case, and consists mostly of broad statements about mold in general. Without proper record keeping, Doll has no evidence [*8] of his methodology and of the sampling strategy he used at Plaintiffs' apartment;

(5) He did not quantify the existence of sweaty/wet athletic clothes being thrown into the downstairs closet by the plaintiffs and how "that could cause mold" as Doll admitted. He failed to document this finding or even consider it a factor during his mold testing as an independent cause of alleged growth of *Aspergillus* mold. According to Defendants, this is a possible superceding factor that was never documented nor considered by Doll in his report;

(6) He did not document the fact that the plaintiffs were not living in the apartment at issue for three weeks prior to his test on July 28, 2004;

(7) He testified that he did not know if the operation of an air conditioning system affects mold spores. Industry standards clearly say that information about the functioning of an air conditioning system in an area being tested is necessary for an accurate interpretation of air test results; and

(8) He has testified that the only standard he should follow when doing air mold testing is to "test the air outside and compare it to the air inside." This is in clear disregard of the standards set forth by the AIHA, NIOSH, [*9] and ACGIH.

In addition, Defendants state that Doll's highest degree of formal education is in the counseling field. The only actual education experience he received regarding mold sampling and testing amounted from a two-day class. Furthermore, Doll's home inspection "business"

under which he operated his mold testing enterprise was not an official business registered with the Louisiana Secretary of State.

Finally, Defendants submit the affidavit of expert Larry Townsend, a Louisiana Registered Professional Environmental and Mechanical Engineer and board certified microbial consultant, in which Mr. Townsend testifies that Doll's methods do not follow the generally accepted methodology for mold testing and are thus unreliable.

In opposition, Plaintiffs argue that Defendants' arguments for excluding the results of Doll's report are "more properly focused on the weight accorded the evidence, not its overall admissibility." Plaintiffs argue that Doll followed the protocol set forth in his training, and that his testimony, which Plaintiffs argue is limited to the collection of his samples and the air sample results report he received from the laboratory to which he submitted the testing results, [*10] should be allowed.

In reply, Defendants argue that Doll, in his report and deposition, attempted to offer evidence "well beyond the very narrow area the plaintiffs now propose." Specifically, Doll related general causation opinions about the effects of *Aspergillum/penicillum* on humans.

This Court determines that the testimony of Chester Doll should be excluded as it fails to pass muster under the Daubert standard. Doll's testimony concerning mold sampling he performed at Plaintiffs' apartment and his alleged finding of *Aspergillus* mold is unreliable as it is supported by an inadequate factual foundation. Furthermore, the sampling standards used by Doll do not follow the accepted scientific methodology used by certified experts in the mold sampling field.

B. Flournoy, Sizeler, Slidella, and M&M Plumbing's Motions in Limine re: testimony of Dr. Johnny Belenchia

Flournoy, Sizeler, Slidella, and M&M Plumbing collectively seek to exclude the testimony of Plaintiffs' expert, Dr. Johnny Belenchia, which is offered by Plaintiffs to show that their chronic respiratory problems were caused in whole or in part by their exposure to mold at their apartment. Defendants argue that Dr. Belenchia's opinions [*11] do not fulfill the requirements for expert testimony pursuant to *Federal Rule of Evidence 702* and *Daubert 509 U.S. at 592-93*.

Specifically, Defendants highlight the following issues:

a. Regarding Dr. Belenchia's qualifications:

Defendants highlight the following concerns:

(1) Dr. Belenchia obtained Board Certifications in "pulmonary and critical care." He is not board certified as an allergist. As suggested in *Roche v. Lincoln Property Co.*, this lack of board certification as an allergist is problematic, particularly since the symptoms of which the instant Plaintiffs complain lie more in the filed of allergic medicine. 278 F. Supp. 2d 744.

(2) The studies with which he is most familiar dealing with *Aspergillus* relate to occupational lung disease (as distinguished from residential exposure) and date from the 1970s, 1980s, and early 1990s. In the recent decision of *Fraser v. 301-52 Townhouse Corporation*, 13 Misc. 3d 1217A, 831 N.Y.S.2d 347, 2006 N.Y. Misc. LEXIS 2704, 2006 WL 2828595 (Sup. Ct. N.Y. Sept. 27, 2006), the court undertook an extensive review of the vast scientific writings available associated with mold exposure and conducted a hearing on the issue with several doctors and specialists testifying, and concluded that the studies with which Dr. [*12] Belenchia is familiar are outdated. Id.

Plaintiffs fail to respond to either concern in their brief opposition.

b. Regarding Dr. Belenchia's testimony and methodology:

Defendants state that where a plaintiff claims that a substance caused his injury, he must show not merely general causation (i.e., that exposure to the substance at issue increases the risk of a particular injury), but specific causation (i.e., that the substance in question did, in fact, cause a particular individual's injury). According to Defendants, it is also well settled that the reliability of a medical causation opinion requires the proffered expert to rule out other likely causes. See *Turner v. Iowa Fire and Equipment Company*, 229 F.3d 1202, 1208 (8th Cir. 2000); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 156 (3d Cir. 1999). In other words, "for a doctor to pass muster under *Daubert* he or she must perform a proper differential diagnosis."⁶

6 Most circuits have held that a reliable differential diagnosis satisfies *Daubert* and provides a valid foundation for admitting an expert opinion. But see *Pick v. American Medical Systems, Inc.*, in which the Court stated that the Fifth Circuit "has not written on the question [*13] of whether an expert opinion based on differential diagnosis can meet the *Daubert* standard." 198 F.3d 241 (5th Cir. 1999). In *Pick*, the Court opted not to make such a ruling, and instead assumed that even if the process of differential diagnosis can provide sufficient scientific reliability, the doctor in that case did not base his opinion regarding the cause of the plaintiff's illness on differential diagnosis.

Differential diagnosis is "a process of elimination by which medical practitioners determine the most likely cause of a set of signs or symptoms from a set of possible causes." *Pick*, 198 F.3d 241. The essential components include: 1) ruling in through accepted testing methodology the various molds to which the plaintiffs were exposed in their apartment; 2) ruling out all other potential causes to determine that the plaintiffs' injuries were proximately caused by the molds in question, or, at least, that said molds aggravated pre-existing conditions; 3) performing appropriate physical examinations; 4) taking thorough medical histories; and 5) reviewing all relevant clinical tests and laboratory tests.

Defendants deny that Dr. Belenchia performed a proper differential diagnosis. [*14] They state that they cannot be sure, as Dr. Belenchia did not provide a written expert report. Either way, Defendants note that Plaintiffs' symptoms could be caused by any number of other exposures and/or conditions. In this way, Dr. Belenchia failed to perform a differential diagnosis adequate to explain why exposure to *Aspergillus* mold at Plaintiffs' apartment is "the most probable cause of the Plaintiffs' complaints."

And as for Dr. Belenchia's opinion that the Plaintiffs' exposure to *Aspergillus* rendered them hypersensitive to other allergens to which they would not be sensitive, Defendants argue that Plaintiffs have come forward with no authoritative support for this hypothesis.

In opposition, Plaintiffs argue that Dr. Belenchia did perform a sufficient differential diagnosis. Plaintiffs state: "[a]s a doctor formulating a diagnosis, Dr. Belenchia, by taking a history from the patient, reviewing other medical providers records, and ruling out other possible causes, performs a differential diagnosis."

In reply, Defendants argue against any notion that a proper differential diagnosis was performed and submit several deposition transcripts in support which, according to Defendants, [*15] reveal that Plaintiffs showed no sensitivity to *Aspergillus*. As such, Dr. Belenchia has not and cannot explain why it is more probable than not that Plaintiffs' symptoms are attributable to exposure to *Aspergillus* rather than other allergens to which they have both tested positive.

c. *Daubert* analysis

Defendants argue that Chester Doll is the only expert proffered by Plaintiffs who performed air sampling in the apartment and who is prepared to testify that he detected "elevated" levels of *Aspergillus* mold spores. According to Defendants then, if Mr. Doll is not permitted to testify, the testimony of Dr. Belenchia relating to a possible causal connection between Plaintiffs' alleged exposure to mold and their injuries will lack essential factual support.

In opposition, Plaintiffs argue that if Mr. Doll is not permitted to testify, Plaintiffs will not lack factual support for the presence of mold in their apartment. Mold was in fact detected by Slidella and Sizeler in Plaintiffs' apartment prior to Plaintiffs' residency there; two separate issues with moisture intrusion were noted during Plaintiffs' residency there; and three separate tests conducted shortly after Plaintiffs vacated the [*16] unit confirmed elevated levels of *Aspergillus*.⁷

7 Plaintiff attaches documents, notably, a "Spore Trap Report," which record these findings. Defendants, in opposition, argue that such reports reveal nothing about the presence of *Aspergillus* in the apartment when Plaintiffs were living there as they were taken weeks after Plaintiffs had left the apartment.

Turning to Daubert specifically, Defendants point to *Fraser* in which the court concluded that "with the exception of one article, the scientific research has not established that indoor exposure to mold causes the symptoms for which the plaintiffs seek to recover in this action." 2006 WL 2828595, at *4. Furthermore, the *Fraser* court found that the evidence presented at the hearing held by the court demonstrated that:

[T]here are no generally accepted standards for measuring indoor airborne mold; there are no generally accepted standards for the acceptable amount of mold in indoor air; there are many types of mold, each of which have different or no health effects; there are no standard scientific definitions for "dampness" or "moisture"; skin prick tests for allergy, which were not done here, were deemed the most reliable way to test [*17] for allergy by the literature [and the testifying doctors] . . .

Id. at *26. As a result, the *Fraser* court precluded the plaintiffs from introducing testimony demonstrating that mold caused their health complaints and dismissed plaintiffs' causes of action based upon personal injury. *Id.*

The *Fraser* court went on to state that "plaintiffs failed to demonstrate that the community of allergists, immunologists, occupational and environmental health physicians and scientists accept their theory--that mold and/or damp indoor environments cause illness." *Id.* at *26. In other words, there are no medical or scientific authorities which even establish a general causal relationship, much less a case of specific causation, between

such exposure and injurious consequences to human health.

Plaintiffs fail to respond to these arguments, merely stating that "any questions regarding [Dr. Belenchia's] diagnosis and treatment shall reflect the weight accorded his testimony."

Finally, Defendants note that Dr. Belenchia's "opinion"--that Plaintiffs' symptoms are consistent with mold exposure and that since they started (in the case with Plaintiff McKee) or were exacerbated (in the case with Plaintiff Jenkins) [*18] during the time in which Plaintiffs resided in the apartment at issue, their symptoms and illnesses must have been caused by mold exposure in the apartment--suffers from the fatal "leap of faith" condemned in both *Roche* and *Fraser*. That is, he asserts a causal relationship based merely upon a temporal relationship between alleged exposure and the occurrence of symptoms.⁸

8 Defendant notes that Plaintiffs underwent several skin testing/scratch tests, and that neither Plaintiff showed sensitivity or allergy to *Aspergillus* at any point. Plaintiff McKee's results were negative to mold sensitivity for all molds tested, including *Aspergillus*, but they were positive for numerous other allergens. Plaintiff Jenkins tested severely allergic to the molds *cladosporium* and *helminthosporium*, but not *Aspergillus*, and she showed severe allergies to numerous other allergens, including grass pollens, etc.

Dr. Belenchia opines that the scratch test of Plaintiff McKee might have shown negative results because the test was performed too close in time to the exposure and she had not had an opportunity to develop an allergy. However, as Defendants point out, the burden of proof is on the Plaintiffs in this [*19] instance, and as such, they should have had a scratch test performed before now and under proper conditions to meet their burden of proof.

Plaintiffs also fail to respond to this argument. Instead, as if anticipating this Court's granting of Defendants' motion in limine as to Dr. Belenchia's testimony, Plaintiffs request a continuance of the trial date should Dr. Belenchia be excluded in order to "select a physician more qualified . . . to address the plaintiffs' diagnosis and the causal relationship between their exposure to mold . . . and their present condition."

This Court determines that Defendants' motion in limine should be granted and that the testimony of Dr. Belenchia as to medical causation should be excluded as it fails to pass muster under Daubert.

C. Flournoy, Sizeler, Slidella, and M&M Plumbing's Motions in Limine re: testimony of Dr. Ernest Lykissa

Flournoy, Sizeler, Slidella, and M&M Plumbing collectively seek to **exclude** the testimony of Plaintiffs' expert, Dr. Ernest Lykissa, a **toxicologist**, which they believe will be offered by Plaintiffs to show that their chronic respiratory problems were caused in whole or in part by their exposure to **mold** at their apartment. Defendants [*20] argue that Dr. Lykissa's opinions do not fulfill the requirements for expert testimony pursuant to *Federal Rule of Evidence 702* and *Daubert*, 509 U.S. at 592-93.

Specifically, Defendants highlight the following issues:

(1) Dr. Lykissa is not a medical doctor, but a Ph.D., and as such, he cannot render a medical diagnosis. Defendants cite *Plourde v. Gladstone* in which the court held that an expert, although he had a Ph.D. in toxicology, could not offer an opinion that the plaintiff's medical issues were caused by an exposure to a toxic chemical compound because that expert was not a medical doctor and had no experience or training in diagnosing and treating patients. ⁹ 190 F. Supp. 2d 708, 719 (D. Vt. 2002). The *Plourde* court further concluded that under *Federal Rules of Evidence 703* and *Daubert*, the doctor's lack of appropriate qualifications invalidated any attempt to rely on the opinions and medical records of previous examining physicians and to perform a differential diagnosis. *Id.* at 719-20. In his report, Dr. Lykissa states in direct contravention to this standard that "[a]fter a thorough study of the extensive medical records of these two, young, female patients, I have formed [*21] the opinion that while these two ladies lived in their apartment . . . concentrations of *Aspergillus* mold spores" (emphasis added).

9 Defendants also point out that the Fifth Circuit has recognized the standard of medical doctors being the proper authority on medical diagnoses. See *In re: Vioxx Products Liability Litigation*, 401 F. Supp. 2d 565, 587 (5th Cir. 2005) (a professor could not opine on the specific issues of a person's death since he was not a medical doctor nor could he review any clinical information of the deceased).

(2) Chester Doll is the only expert proffered by Plaintiffs who performed air sampling in the apartment and who is prepared to testify that he detected "elevated" levels of *Aspergillus* mold spores. According to Defendants then, if Mr. Doll is not permitted to testify, the testimony of Dr. Lykissa relating to a possible causal connection between Plaintiffs' alleged exposure to mold and their injuries will lack essential factual support. ¹⁰ (3)

Dr. Lykissa's purported testimony suffers from the same deficiencies associated with Dr. Belenchia's. Like Dr. Belenchia, Dr. Lykissa did not perform an adequate differential diagnosis, did not examine the Plaintiffs, [*22] did not rule out other possible causes, has not applied reliable principles and methods, and espouses a theory or hypothesis that finds no support within the relevant scientific community. Also, like Dr. Belenchia, Dr. Lykissa essentially applies a theory of temporal causation, which is improper as a matter of law.

10 Plaintiffs make the same argument in opposition that they did with respect to Dr. Belenchia, namely, that if Mr. Doll is not permitted to testify, Plaintiffs will not lack factual support for the presence of mold in their apartment. Mold was in fact detected by Slidella and Sizeler in Plaintiffs' apartment prior to Plaintiffs' residency there; two separate issues with moisture intrusion were noted during Plaintiffs' residency there; and three separate tests conducted shortly after Plaintiffs vacated the unit confirmed elevated levels of *Aspergillus*.

In opposition, Plaintiffs state that Dr. Lykissa will testify regarding the effects of exposure to mold, including *Aspergillus*. He will not be testifying to specific causation (that is the role of Dr. Belenchia). Plaintiffs argue that Dr. Lykissa is qualified to offer relevant testimony as to the toxicological effects of *Aspergillus* [*23] and other molds. Plaintiffs list in support Dr. Lykissa's qualifications and state that he has been admitted to testify as an expert in the field of toxicology in the areas of both pharmacology and environmental toxins.

In reply, Defendants note their concerns that Dr. Lykissa has offered clear opinions as to specific causation both in his report and in his deposition.

Plaintiffs have provided no information which this Court can consider to properly conduct a *Daubert* analysis as to this issue. As such, this lack of information alone is grounds to exclude Dr. Lykissa's expert testimony which this Court determines is proper.

D. Slidella and Sizeler's Motion for Summary Judgment

Slidella and Sizeler move for summary judgment dismissing the claims of Plaintiffs should the Court exclude the expert testimony of Chester Doll, Dr. Johnny Belenchia, and Dr. Ernest Lykissa.

Chester Doll is the only expert proffered by Plaintiffs who performed air sampling in the apartment and who is prepared to testify that he detected "elevated" levels of *Aspergillus* mold spores. Since this Court has excluded Mr. Doll's testimony, according to Slidella and Sizeler, the testimony of Drs. Belenchia and Lykissa, relating

[*24] to a possible causal connection between Plaintiffs' alleged exposure to mold and their injuries will lack essential factual support.

According to Slidella and Sizeler, then, without the testimony of Drs. Belenchia and Lykissa, Plaintiffs will have no evidence of medical causation which is an essential element of their claim. See *Roche v. Lincoln Property Co.*, 175 Fed. Appx. 597 (4th Cir. 2006) (finding that the district court's exclusion of tenants' medical expert in a mold exposure case was not an abuse of discretion where expert failed to apply methodology of differential diagnosis to the facts, having been unable to determine that the particular types of mold found in plaintiffs' apartment were the specific cause of their respiratory ailments and failing to exclude any other non-mold allergens to which plaintiffs were sensitive).

In opposition, Plaintiffs argue that if Mr. Doll is not permitted to testify, Plaintiffs will not lack factual support for the presence of mold in their apartment.

Based on this Court's exclusion of Dr. Belenchia's testimony, Plaintiffs will have no evidence of causation and as a result, summary judgment should be granted dismissing Plaintiffs' claims.

E. [*25] M&M Plumbing's Motion for Summary Judgment

Based on the foregoing, this Court determines that M&M Plumbing's motion for summary judgment should be denied as moot.

F. Flournoy's Motion for Partial Summary Judgment on Third Party Demand against Trinity Universal Insurance Company

Flournoy moves for partial summary judgment as to its third party demand against Trinity which seeks recognition of Flournoy's additional insured status and right to a defense from Trinity in connection with the claims made by Plaintiffs in this case.

Flournoy argues that the contract documents establish that Flournoy is an additional insured under the policy of insurance issued by Trinity to Flournoy's subcontractor M&M Plumbing. As an additional insured, Flournoy argues that according to Louisiana law, an insurer must provide a defense to Flournoy if, assuming all of the allegations of the petition to be true, there would be both coverage under the policy and liability to Plaintiffs. *American Home Assur. Company v. Czarniecki*, 230 So. 2d 253 (La. 1969). Furthermore, the only evidence that may be considered in making the determination of whether a duty to defend is owed is the underlying petition(s) and the policy [*26] of insurance. *Id.*

Therefore, to determine whether Trinity must provide a defense to Flournoy, this Court must determine whether Flournoy is an additional insured under the contract of insurance issued by Trinity to M&M Plumbing. To do so, the following issues must be addressed: 1) what the Trinity Insurance Policy requires for an entity to be considered an additional insured; 2) whether the Subcontract required M&M Plumbing to name Flournoy as an additional insured; and 3) whether Plaintiffs' claims arise out of M&M's "ongoing operations" as is required in the Trinity Insurance Policy for additional insured status.

1. Trinity Policy of Insurance--Who Is an Insured

Flournoy points to the language in the policy of insurance issued by Trinity which defines who is an insured under the policy. The Commercial General Liability Coverage Expansion Endorsement (33-0496 (7/10)) provides:

Section II - WHO IS AN INSURED, is amended as follows:

Each of the following is also an insured:

a. Any person or organization you are required by a written contract, agreement, or permit to name as an insured, but only with respect to liability arising out of:

1. "your ongoing operations" performed for that insured [*27] at the location designated in the contract, agreement, or permit; or

2. Premises owned or used by you.

Flournoy argues that as there is a written contract requiring M&M to name Flournoy as an additional insured, see *infra*, Flournoy qualifies as such under the language in Section II above.

2. Whether the Subcontract Requires M&M Plumbing to Name Flournoy As an Additional Insured

Flournoy admits that it is neither a named insured nor an additional insured named by endorsement to the policy. Instead, to argue that it is an additional insured, Flournoy directs the Court to the contract (the "Prime Contract") entered into between Slidella (as owner) and Flournoy (as contractor); the Supplementary Conditions of the Contract

for Construction, which is a supplement to the Prime Contract; and the contract (the "Subcontract") entered into between Flournoy (as contractor) and M&M Plumbing (as subcontractor).

The Prime Contract requires the contractor to procure and maintain "comprehensive general liability and property damage insurance . . . which will cover the Contractor's, the Owner's, the Owner's Manager, the Owner's parent, and the Architect's legal liability arising out of the Work performed [*28] by the Contractor and any Sub-contractor . . . for property damage which may arise from operations for which the Owner and the Architect are not responsible" under the Prime Contract.

Flournoy argues that because the Subcontract has a provision stating that the "Subcontract Documents" consist not only of the Subcontract itself, but also the Prime Contract between Flournoy and Slidella, all three documents should be read together to determine which duties are owed to Flournoy by M&M and Trinity. Specifically, Flournoy refers to the language in Paragraph 2.1 of the Subcontract which states that: "the Subcontractor [M&M Plumbing] shall assume toward the contractor [Flournoy] all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, under such documents, has against the Contractor."

Relying on this language, Flournoy argues that the Subcontract requires M&M Plumbing to name Flournoy as an additional insured under M&M Plumbing's policy of insurance just as that obligation was imposed upon Flournoy in the Prime [*29] Contract to name Slidella as an additional insured under Flournoy's policy of insurance. Flournoy points out that M&M understood and attempted to satisfy this obligation by the series of certificates of insurance provided to Flournoy by and on behalf of M&M Plumbing which reflect that Flournoy is in fact an additional insured under the Trinity policies.¹¹

¹¹ Flournoy admits that certificates of insurance cannot alter coverage afforded under an insurance policy, but argues that these certificates establish, at a minimum, that both Flournoy and M&M understood that M&M had a contractual obligation to name Flournoy as an additional insured under the Trinity policy.

In opposition, Trinity argues that contract documents do not require M&M Plumbing to name Flournoy as an additional insured. Trinity states that Flournoy's arguments which "distort and stretch the language of the sub-contract agreement" are without factual or contractual basis.

Trinity notes that in the interpretation of contracts, the specific provision controls the general; one section of the Subcontract cannot be construed or applied separately at the expense of disregarding a more specific provision. *Smith v. Burton*, 928 So. 2d 74, 79 (La. App. 1st Cir. 2005). [*30] Trinity points to Article 13 of the Subcontract which specifically addresses insurance obligations and requirements for M&M Plumbing. Article 13 addresses insurance and bonds and requires the subcontractor to purchase and maintain insurance in certain amounts. The provisions of this section mention nothing about a requirement to name Flournoy or any other entity as an additional insured. Trinity also points to Section 5.3.1.3 of the Prime Contract which also relates specifically to insurance and states only that "the Subcontractor to carry and maintain, at a minimum, general liability insurance with limits of \$ 500,000 per occurrence and \$ 1,000,000 aggregate and workers compensation in statutory limits, and to file certificates of such coverage with the Contractor." Again, this specific provision mentions nothing about a requirement to name Flournoy or any other entity as an additional insured on the subcontractor's policy.

Further, Trinity notes that other courts have determined that the general language of the subcontract relied upon by Flournoy "was intended to cover the quality and manner of performance of the subcontractor." See *U.S. For Use and Benefit of T/N Plumbing and Heating Co. V. Fryd Constr. Corp.*, 423 F.2d 980, 983 (C.A. Fla. 1970) [*31] ("we hold . . . that a general incorporation by reference, of the terms of the principal contract into the subcontract, refers only to 'the quality and manner of the subcontractor's work'"); see also *H.W. Caldwell & Son, Inc. V. U.S. for Use and Benefit of John H. Moon & Sons, Inc.*, 407 F.2d 21, 23 (C.A. Miss. 1969) (same).

This Court agrees that Flournoy's reading of the Prime Contract (including the supplement) along with the Subcontract to find that M&M Plumbing was required to name Flournoy as an additional insured results in a strained interpretation. Had Flournoy required M&M Plumbing to name it as an additional insured, that obligation could and should have been set out in Article 13 of the Subcontract. It is not within this Court's authority to re-write the subcontract between M&M Plumbing and Flournoy, or to insert obligations into the subcontract that are not expressly stated.

Out of an abundance of caution, however, this Court now turns to the final factor that must be satisfied.

3. Trinity Policy of Insurance--Do Plaintiffs' Claims Arise out of M&M's "Ongoing Operations"

Referring again to Section II of the Commercial General Liability Coverage Expansion Endorsement

(33-0496 [*32] (7/10)) in the Trinity policy of insurance, to be considered an additional insured, not only must there be a written contract requiring M&M Plumbing to name Flournoy as an additional insured, but the liability must arise out of M&M Plumbing's "ongoing operations."

Flournoy argues that Trinity's policy does not define "ongoing operations. It points to a Louisiana case that has interpreted "ongoing operations" to require only that the accident at issue be related to the named insured's work. *Boucher v. Graphic Packaging Intern., Inc.*, No. 05-37, 2007 U.S. Dist. LEXIS 40762, 2007 WL 1655655 (W.D. La. June 5, 2007) (because the accident at issue was directly related to then named insured's work, the "ongoing operation" clause was satisfied and the policy extended additional insured status). To support its argument that M&M was still involved in ongoing operations at the apartment site, Flournoy attaches contractor sign-in sheets to its motion. Thus, according to Flournoy, as Plaintiffs contend they suffered personal injuries from mold in their apartment which Flournoy alleges could only have been caused by the negligence of its subcontractors, the accident at issue is clearly alleged to be related to M&M Plumbing's [*33] work, meaning that Trinity owes Flournoy a defense as an additional insured.

In opposition, Trinity argues that the alleged liability of Flournoy does not arise out of M&M Plumbing's "ongoing operations," but rather from M&M Plumbing's "completed operations," or work that had been put to use by Plaintiffs who rented and resided in the apartment. The insurance policy details two types of liability that can arise--liability arising from ongoing work and liability arising from completed work--and sets different limits for each. The "products-completed operations hazard" is defined in the policy and provides that M&M Plumbing's work is "deemed completed at the earliest of the following times: . . . (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. Work that may need service, maintenance, correction repair or replacement, but which is otherwise complete, will be treated as completed."

Trinity explains that the entire apartment complex in which Plaintiffs' resided consists of nineteen buildings. Flournoy does not allege in its motion that M&M Plumbing was [*34] performing work in Plaintiffs' specific unit or even in building 11, which is the building in which Plaintiffs' unit was located. What Flournoy does argue is that because M&M Plumbing may have been performing work in another section of the complex, that the alleged liability in this case "arises out of" M&M Plumbing's "ongoing operations." However, based on the policy language, M&M Plumbing's work in Plaintiffs' unit was a completed operation rather than an ongoing operation as Plaintiffs were actually living there. As a result,

Trinity argues that coverage under the additional insured endorsement is not triggered.

It is clear that M&M Plumbing had completed its work on Plaintiffs' unit such that any liability of M&M Plumbing arises out of "completed operations" rather than "ongoing operations." Under these circumstances, Flournoy does not qualify as an insured; there is no coverage under the endorsement to the policy; and Trinity has no duty to defendant Flournoy against the claims of Plaintiffs or other parties. As a result, Flournoy's motion must be denied. Accordingly,

IT IS ORDERED that Slidella, Sizeler, and Flournoy's **Motion in Limine to Exclude Testimony of Chester J. Doll (Rec. [*35] Doc. 163)** is hereby **GRANTED**.

IT IS FURTHER ORDERED that M&M Plumbing's **Motion in Limine Regarding the Testimony of Chester J. Doll (Rec. Doc. 216)** is hereby **GRANTED**.

IT IS FURTHER ORDERED that Slidella, Sizeler, and Flournoy's **Motion in Limine Regarding Testimony of Dr. Johnny Belenchia (Rec. Doc. 156)** is hereby **GRANTED**.

IT IS FURTHER ORDERED that M&M Plumbing's **Motion in Limine Regarding the Testimony of Dr. Johnny Belenchia (Rec. Doc. 217)** is hereby **GRANTED**.

IT IS FURTHER ORDERED that Slidella, Sizeler, and Flournoy's **Motion in Limine Regarding Testimony of Dr. Ernest D. Lykissa (Rec. Doc. 158)** is hereby **GRANTED**.

IT IS FURTHER ORDERED that M&M Plumbing's **Motion in Limine Regarding the Testimony of Dr. Ernest D. Lykissa (Rec. Doc. 215)** is hereby **GRANTED**.

IT IS FURTHER ORDERED that Slidella and Sizeler's **Motion for Summary Judgment (Rec. Doc. 153)** is hereby **GRANTED**.

IT IS FURTHER ORDERED that M&M Plumbing's **Motion for Summary Judgment (Rec. Doc. 124)** is hereby **DENIED** as moot.

IT IS FURTHER ORDERED that Flournoy's **Motion for Partial Summary Judgment on Third Party Demand Against Trinity Universal Insurance Company (Rec. Doc. 160)** is hereby **DENIED**.

New Orleans, Louisiana, this 27th day of June, [*36] 2008.

/s/ Carl J. Barbier

CARL J. BARBIER

UNITED STATES DISTRICT JUDGE

MASSACHUSETTS REPORTS

STYLE MANUAL

PREPARED BY

THE OFFICE OF THE REPORTER OF DECISIONS

2011

**C. CLIFFORD ALLEN
REPORTER OF DECISIONS**

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Massachusetts lower courts or agencies.

2.03 Federal Court Decisions

Abbreviate the titles of reports according to the Uniform System of Citation.

A citation to a United States Supreme Court decision should be to the United States Reports (U.S.). If that citation is not available, citation should be to S. Ct. or U.S.L.W., in that order.

2.04 Out-of-State Court Decisions

(a) Where a court's decisions are officially reported, as in the Commonwealth of Massachusetts, use only the official citation. No parallel citation is required.

(b) Where an out-of-State case is found only in the National Reporter System, such as those jurisdictions that have adopted that system as their sole law reporter (e.g. Maine), specify the court in parentheses before the year of decision: e.g., (Me. 1992); (Minn. Ct. App. 1989).

(c) For those States that have adopted a public domain format, ignore such format in favor of citation under method (a) or (b), as applicable.

(d) Abbreviate the titles of reports according to the Uniform System of Citation.

2.05 Unpublished Orders, Decisions, and Slip Opinions

Basic citation form:

name vs. name, court, No. --, slip op. at --- (full date)

Examples:

1. Raines vs. Byrd, U.S. Supreme Court, No. 96-1671, slip op. at 8 (U.S. June 26, 1997)
2. United States vs. Labovitz, U.S. Ct. App., No. 94-1725, slip op. at 2 (1st Cir. March 28, 1997)
3. Olin Corp. vs. Fisons PLC, U.S. Dist. Ct., No. 93-11166 (D. Mass. April 24, 1995)
4. Parks vs. Petraglia, Boston Housing Court, No. 93-CV-00155 (Jan. 20, 1995)

2.06 Massachusetts Statutes

APPENDIX G



Avalonbay Communities, Inc. dba Avalon at Lexington v. Paul Hamilton et al.

Opinion No.: 117614, Docket Number: MICV2004-00636-F

SUPERIOR COURT OF MASSACHUSETTS, AT MIDDLESEX

29 Mass. L. Rep. 158; 2011 Mass. Super. LEXIS 277

September 8, 2011, Decided

PRIOR HISTORY: *AvalonBay Cmty. v. Hamilton*, 2010 Mass. Super. LEXIS 6 (Mass. Super. Ct., 2010)

JUDGES: [*1] DENNIS J. CURRAN, Associate Justice.

OPINION BY: DENNIS J. CURRAN

OPINION

MEMORANDUM OF DECISION AND ORDER

Introduction

This case is before the Court on the defendant-in-counterclaim AvalonBay Communities, Inc.'s motion for attorneys fees and costs under *G.L.c. 231, §6F*, after the Court allowed its motion for summary judgment [26 Mass. L. Rptr. 436].

For the following reasons, this motion is ALLOWED in part. In so ruling, the Court issues the following Findings of Fact, as statutorily required.

I. FINDINGS OF FACT

In August 2003, water leaked into the living room of the Hamilton's apartment in Avalon at Lexington. AvalonBay, the management company for the apartment complex, quickly took steps to repair the leak and dried out the premises within five days.

Two months later, in October 2003, Paul Hamilton complained to AvalonBay that he was suffering from respiratory illness due to an alleged exposure to mold in the premises caused by the water leak.¹ AvalonBay responded by allowing the Hamiltons to use a model unit at Avalon at Lexington while it replaced the section of car-

peting and living room wall penetrated by the water. Following the repairs, AvalonBay had the apartment tested by a certified industrial hygienist [*2] who found that the mold concentrations outside of the premises were more than twice as high as inside the apartment, and concluded that any related health risk was low.

1 He also claimed that his two minor children suffered similar ailments.

After the repairs were completed, Hamilton refused to move back into the premises from the model unit. He rejected AvalonBay's offer to move the family to a comparable unit at its expense. He refused AvalonBay's offer to rebate one full month's rent. Instead, the Hamiltons simply remained in the model unit, maintained possession of the original premises, and stopped paying any rent altogether.

On February 19, 2004, AvalonBay filed a single-count complaint for trespass against the Hamiltons, seeking immediate possession of the model unit and rent owed on the premises. (*See* complaint, paper no. 1, copy attached and marked "A.")^{*} The Hamiltons responded by filing a 12-count counterclaim. At the hearing on its motion for preliminary injunction, AvalonBay again offered to allow the Hamiltons to remain in the model unit and pay up to \$1,500 in moving costs to carry the Hamiltons' possessions from the premises to the model unit.

* Editor's Note: The referenced [*3] attachment has not been reproduced.

AvalonBay's request for equitable relief to evict the Hamiltons from the model unit was allowed. In doing so, the session judge, then Superior Court Associate Justice Gants wrote that the defendant lawyer's rejection of the offer, "[w]as one of the more bizarre displays of lawyering [he] has seen." Moreover, he held that AvalonBay had

acted as a "responsible landlord and has bent over backwards to reach an amicable situation with Hamilton." (*See* Findings of Fact and Conclusions of Law on Plaintiff's Motion for a Preliminary Injunction, paper no. 10, copy attached and marked "B.")*

* Editor's Note: The referenced attachment has not been reproduced.

On February 27, 2004, the Hamiltons appealed Justice Gants' decision to the Appeals Court where Single Justice McHugh denied the appeal, finding "as the motion judge [did, that] there is *no* likelihood of success on appeal." (Emphasis added.) (*See* Notice of Docket Entry in *AvalonBay Communities, Inc. v. Paul Hamilton*, Appeals Court Docket No.: 2004-J-0089, docketed as paper no. 12, attached and marked "C.")*

* Editor's Note: The referenced attachment has not been reproduced.

Several years of contentious discovery [*4] ensued. The docket sheets spanned some 15 pages (a copy of which are attached hereto and marked "D");* 61 court events² were scheduled over a six-year period and the case demanded the attention of seven Superior Court Justices and one Appeals Court Justice.

* Editor's Note: The referenced attachment has not been reproduced.

2 Of these 61 events, 18 were status reviews scheduled and performed by the Assistant Clerk.

On May 31, 2006, the defendant-in-counterclaim AvalonBay filed a motion for partial summary judgment (*see* paper no. 29.0) which, after a hearing, was allowed by a second session judge (Fremont-Smith, J.).

What then remained of Hamilton's case rested primarily on the expert opinions of two individuals: Bruce Gulls, M.D., and Kenneth Weinberg, Ph.D. Both experts concluded that Hamilton had developed asthma and chronic respiratory disease due to exposure to mold in the premises and opined that Hamilton's injuries were severe, disabling, and permanent.

AvalonBay filed a *Daubert* motion, challenging the admissibility of Drs. Gillis' and Weinberg's opinions because they were not based upon a scientifically-reliable theory. A third session judge (MacLeod-Mancuso, J.) conducted two days [*5] of evidentiary hearings. On the eve of the hearing, the defendant's attorney withdrew Dr. Gillis as a witness and substituted John Ohman, M.D., Hamilton's treating physician, as his chief medical expert. Thereafter, the session judge rendered a thoughtful and lengthy decision, granting AvalonBay's *Daubert* motion because the opinions of Hamilton's expert witnesses were not based upon a generally-accepted or otherwise reliable

scientific theory. (*See* Memorandum of Decision and Order, dated April 27, 2009, paper no. 49, attached and marked "E.")*

* Editor's Note: The referenced attachment has not been reproduced.

Specifically, the judge found: (1) no testing of the premises for mold was ever conducted during the period of time that the Hamiltons resided in the apartment, such that the Hamiltons could never establish what, if anything, they were exposed to; (2) none of the industrial hygienists that tested the apartment obtained test results that would, in general, lead them to recommend further remediation; (3) there is no generally-accepted or other reliable scientific theory which established a causal relationship between exposure to mold and respiratory illness, in the absence of an allergic [*6] reaction; (4) prior allergic testing revealed that Hamilton was not allergic to the only mold found in the premises at an arguably elevated level; and (5) Hamilton had worked with various chemicals that are known to cause respiratory health problems for a period of 25 years, yet his experts did not conduct any testing to exclude exposure to those chemicals as the basis of his illness. The exclusion of their experts left the Hamiltons utterly unable to prove an essential element of their case; their claims against AvalonBay were now transparently a nullity.

Despite this critical development, the Hamiltons persisted in this lawsuit, forcing AvalonBay to incur significant legal expense in drafting, filing and arguing a motion for summary judgment on all remaining counts of the Hamilton's counterclaim. AvalonBay argued that without expert testimony, the Hamiltons were unable to prove causation. The Hamiltons opposed this motion, and after a hearing, the motion was allowed. (*See* Memorandum of Decision and Order dated February 5, 2010 (*sic*), paper no. 54, copy attached and marked "F") [*26 Mass. L. Rptr. 436*].

* Editor's Note: The referenced attachment has not been reproduced.

AvalonBay's motion [*7] for fees is organized into three discrete litigation phases: (1) those services rendered in the trespass complaint filed against the Hamiltons (*i.e.* to regain possession of the model unit); (2) those incurred in defending against the Hamiltons' twelve-count counterclaim; and (3) those forced by the Hamiltons' insistence in pressing its claims despite having no causation expert (*i.e.*, those services rendered to AvalonBay after the *Daubert* decision was issued on April 29, 2009). For the first phase, AvalonBay seeks \$9,075; for the second, \$156,460.50; and for the third, \$23,875. AvalonBay's total request is for \$189,410.50.

We address each phase of the lawsuit.

a. The First Litigation Phase: The Hamiltons' Defense to the Trespass Count

The Hamiltons were bare licensees who occupied a fully-furnished, model apartment, with no legal right to remain there after AvalonBay revoked their license to use it. In his decision, then Associate Justice Gants stated that the Hamiltons' contention that they had a right to remain in the unit "astonishing" and was surprised that the Hamiltons advanced arguments that they had a right to remain in the premises, "with a straight face."³ That prescient observation [*8] exposed the absurdity of the Hamilton's position: they insisted upon occupying two apartments at the same time, without paying rent, despite AvalonBay's offer to move them to a comparable apartment at its own expense. As Justice Gants ruled: "Here, Hamilton had neither a legal nor equitable leg to stand on." (See Memorandum of Decision, page 3.)

3 Justice Gants found Hamiltons' position "even more untenable when one recognizes that he is receiving free use of the furniture and the model unit that was leased by AvalonBay, and for which AvalonBay must now pay \$659 per month."

Hamiltons' defense was marginally frivolous and although it presents a close question, given the freshness of AvalonBay's complaint, I cannot declare it wholly insubstantial at that time. However, with the passage of time in this case, both the Hamiltons' knowledge of the insubstantial nature of its claims and its culpability increased.

There can be little doubt that the \$9,075 expended by AvalonBay's attorneys to prosecute the trespass claim was both reasonable and necessary. Nevertheless, I decline to find that Hamilton's conduct--at this first stage of the lawsuit--meets the high burden imposed by *G.L.c. 231, Section 6F*.

b. [*9] The Second Litigation Phase: The Hamiltons' Counterclaims

The Hamiltons filed a 12-count counterclaim against AvalonBay alleging personal injuries and property damages based on their belief that dangerous levels of mold caused them to develop respiratory illness and rendered the apartment uninhabitable.

Justice Thayer Fremont-Smith heard AvalonBay's motion for partial summary judgment on the Hamilton children's claim that they suffered from the negligent infliction of emotional distress, after which he concluded that: "[T]he undisputed facts indicate . . . no evidence of substantial physical symptomology . . ." (See Ruling of Judge Thayer Fremont-Smith, dated May 31, 2006.)

Justice MacLeod-Mancuso heard AvalonBay's *Daubert* motion which sought to exclude Hamiltons' expert witnesses from testifying. The judge allowed that motion, thereby now exposing the barrenness of Hamilton's counterclaim. Until that decision had been rendered, however, the Hamiltons' advancement of their counterclaim was arguably appropriate because, at the time, "tests [had] revealed the presence of mold [and t]wo experts, found to be qualified by this Court to give expert testimony, [had] informed the Hamiltons and [*10] their counsel that the mold in their unit caused their illness." (See Hamilton's opposition memorandum at page 3.) For these reasons, I cannot find that the claims advanced in this second litigation phase violated *G.L.c. 231, Section 6F* and must also deny AvalonBay's request for attorneys fees in the sum of \$156,460.50.

c. The Third Litigation Phase: The Hamiltons' Obstinace

Where this Court draws the line, however, is in the Hamiltons' unreasonable continuation of this legal nullity (for "obstinace or avarice")⁴ after the Court has found their experts unqualified to testify on the issue of causation. They forced AvalonBay to draft, file, and argue a motion for summary judgment on the Hamilton's counterclaims; they compelled it to needlessly prepare for trial; they imposed burdens of substantial and expensive legal work. Equally important, they squandered this Court's limited resources. All of these wasteful expenditures of time, money and resources were directly and solely attributable to the indefensible intransigence of the Hamiltons and their counsel. In this third phase of litigation, AvalonBay asserts that it incurred \$23,875 in legal fees, of which the Court approves \$22,470. [*11] The accompanying Recapitulation (created by the court and marked "G") itemizes those approved fees.

4 See *Fronk v. Fowler*, 456 Mass. 317, 336, 923 N.E.2d 503 (2010).

* Editor's Note: The referenced attachment has not been reproduced.

SPECIFIC FINDINGS OF FACT ON AVALONBAY'S REQUESTS

As to those requested by AvalonBay:

ALLOWED as to Requests numbered 1 through 6, 7 (as to the first and third sentences thereof), 8, 9, 10 and 11.

DENIED as to Request numbered 7 (second sentence only) and 12.

As to those requested by the Hamiltons:

Not applicable; none requested.

II. DISCUSSION

A. Introduction

General Laws c. 231, §6F, provides that:

Upon motion of any party in a civil action . . . the Court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the . . . counterclaims, whether of a fixed, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith . . . [T]he Court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims.

Under [*12] this statute, attorneys fees may be recovered from any party or attorney if the claim is "wholly insubstantial, frivolous, and not advanced in good faith." *Tilman v. Brink*, 74 Mass. App. Ct. 845, 852, 911 N.E.2d 764 (2009).

The Supreme Judicial Court has described actions not in good faith as those "interposed for any improper purpose, such as to cause . . . needless increase in the cost of litigation." *Hahn v. Planning Board of Stoughton*, 403 Mass. 332, 337, 529 N.E.2d 1334 (1988). An absence of good faith can be found when a person "knows of or has reason to know" that his claim or defense lacks any substantial, factual or legal support. *Pinto v. Trust Ins. Co.*, 2004 Mass. Super. LEXIS 347, 2004 WL 2341345, 1 (Mass. Super. 2004). When a claim is not supported by any evidence, the claimant's subjective belief does not prevent a finding that the claim was not advanced in good faith. *Massachusetts Adventura Travel, Inc. v. Mason*, 27 Mass. App. Ct. 293, 297, 537 N.E.2d 609 (1989). In determining what is a reasonable amount of attorneys fees under the statute, the factors to be considered include "The ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged [*13] for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by controversy, and the results secured." *In re: Estate of King*, 455 Mass. 796, 920 N.E.2d 820 (2010). To this end, we address the necessary factors under *G.L.c. 231, §6F* to assess the reasonableness of this fee request.

B. Analysis of *G.L.c. 231, 6F* Factors

1. Time Spent

AvalonBay's time records were detailed, properly descriptive and complete; however, several adjustments are in order.

Its supporting affidavit reports that "[it has] redacted any and all time spent by attorneys other than [the affiant, Richard D. Weil] in order to make the request more reasonable . . ." This statement is almost entirely correct, but several time charges incurred by non-affiants were inadvertently included in the itemization submitted to the Court. Those charges included 1.6 hours expended on 9/16/09 by timekeeper "AMR," 1.0 hours on 9/22/09, 2.1 hours on 10/14/09, and 1.1 hours on 10/15/09 (all expended by timekeeper "EBS"), as well as 1.3 hours on 2/8/10 by timekeeper "RVD." I have also excluded as unnecessary courier charges of \$65.00 and \$109.99 incurred on 9/16 and 9/23/09, respectively.

In a [*14] prior Memorandum (*see* paper no. 54 at "F") [26 Mass. L. Rptr. 436], this Court expressly required, as a condition of Hamilton's opposition to AvalonBay's fee petition, that:

[They] . . . produce redacted copies of their own billing records on this case so that the Court may, in turn, evaluate the reasonableness of AvalonBay's request . . .

Hamiltons' counsel has implied in its opposition it did, in fact, maintain time records,⁵ but has failed, despite the Court's entreaty, to produce them. Indeed, in none of its eleven pages of opposition materials (*i.e.*, its six-page memorandum, two-page opposition, or three-page affidavit of counsel) do the Hamiltons challenge any specific time charged or expense incurred by AvalonBay. The inference is inescapable: the Hamiltons concede the reasonableness of AvalonBay's detailed legal fees and costs. Although AvalonBay's time charges are unchallenged, I have reviewed them independently and find them well-documented, reasonable and necessary (excepting several adjustments previously outlined).

⁵ As the Hamiltons' opposition memorandum states at page 3: "D'Angelo & Hashem, P.C. agreed to provide that representation on a contingency fee basis with the knowledge [*15] that this case operated on a fee-shifting basis."

2. Nature of the Case

After AvalonBay filed its single-count complaint, the Hamiltons asserted a Hydra-like counterclaim alleging mold exposure and claiming a constellation of medical

sequelae from which Paul, Matthew and Sandra Hamilton now claim to have suffered. Hamiltons' counsel claimed that these conditions were serious and permanent, and issued a settlement demand for \$1 million. This demand compelled AvalonBay to incur additional legal bills. While the ultimate result for AvalonBay was an unabashed success, the road to that result was difficult, torturous and expensive. Along this legal journey, at least three prior Superior Court session judges (and indeed, one Appeals Court judge) issued cautionary markers, but the Hamiltons (and their counsel) ignored these admonitions and obstinately insisted on proceeding into a needless affray.

3. Results Obtained

AvalonBay's extensive, but required, defense resulted in complete vindication. A first session judge granted its request for equitable relief; a second trimmed away those counts in which the Hamilton children claimed that AvalonBay had negligently inflicted emotional distress; and [*16] a third session judge eviscerated Hamiltons' counterclaim by finding that neither of their proffered experts had based their opinions on a scientifically accepted theory, leaving the Hamiltons utterly unable to prove their case.

4. The Amount of Damages

AvalonBay filed a simple one-count trespass complaint. The Hamiltons responded with a blizzard of a counterclaim, alleging:

Count I--Breach of the Warranty of Habitability;

Count II--Breach of the Warranty of Covenant of Quiet Enjoyment;

Count III--Failure to Make Adequate Repairs in violation of the State Sanitary Code;

Count IV--Breach of the Warranty of Quiet Enjoyment--Abuse of Process;

Count V--Violation of *G.L.c. 186, Section 18*--Retaliatory Eviction;

Count VI--Negligent Infliction of Emotional Distress;

Count VII--Interference with the Warranty of Quiet Enjoyment;

Count VIII--Breach of Contract;

Count IX--Violation of *G.L.c. 93A, Section 9*;

Count X--Negligence;

Count XI--Violation of the State Sanitary Code Regulations; and

Count XII--Violation of *G.L.c. 184, Section 18*.

Hamilton's stratagem substantially increased AvalonBay's risk of exposure and suddenly metastasized into a \$1 million settlement demand. AvalonBay was forced to expend significant legal [*17] time and costs.

5. Hourly Rate

AvalonBay's counsel's hourly billing rate of \$300, reduced for purposes of this fee petition from \$315, is both modest and reasonable, given the level of skill and experience of the attorney involved. Moreover, for ease in calculation, attorney Weil has waived the many time charges incurred by firm attorneys other than him.

6. Experience, Reputation and Ability of the Attorney

The billing attorney, Steven D. Weil, was highly skilled and well-seasoned. He began his 24-year professional career laboring as a staff attorney for the South Middlesex Legal Services during which he represented tenants. He has served as an associate at the highly-respected law firm of Griffin and Goulka, as a partner at Cohen & Fierman, and presently, as a stakeholder at his law firm. He concentrates on civil litigation and real estate matters and represents management companies such as AvalonBay, the Dolben Company, and Forest City Management, Inc.

Attorney Weil's time spent on this matter was disciplined, appropriate and reasonable.

7. Necessity for Services.

This case consumed six years, forcing AvalonBay's attorneys to expend time from December 23, 2003 through at least February [*18] 11, 2010,⁶ clearly diverting them from other cases and tasks.

6 Undoubtedly, time was also expended after this date, but this is the last entry on the fee petition.

C. The Hamiltons' Opposition

Hamilton's counsel predicts that a favorable decision for AvalonBay here would unleash a parade of horrors:

Employment lawyers would not be able to afford to take cases . . .

Consumer lawyers would not be able to fight rip-offs . . .

Lawyers for military veterans would no longer be able to pursue claims . . .

Civil rights lawyers would be unable to take discrimination cases.

(See defendant's opposition memorandum at page 3.)

"The list goes on," he continues.

Hamiltons' counsel's attempt to clothe himself in the mantle of such principles finds no support in the facts of this case. Fee-shifting statutes in consumer protection, employment law, veterans' matters, and civil rights cases are not only laudable, but necessary and appropriate. Hamilton's counsel's criticism misses the mark. The legislature has also established a fee-shifting statutory mechanism for those cases utterly devoid of merit. This is such a case. Indeed, this truth emerged in open court when this judge quizzically asked their counsel [*19] what continued to motivate the Hamiltons to pursue this matter despite the utter absence of expert testimony and an inability to meet an essential element of their case. Hamilton's counsel answered, *with a smirk*, "attorneys' fees."

A case advanced in "good faith" cannot be predicated on cynicism and gamesmanship: it must be prosecuted for proper purposes, with the client's interests paramount, and the attorneys fee, secondary. As poignantly observed by Appeals Court Justice Sikora in *City Rentals, LLC v. BBC Co., Inc.*, 79 Mass.App.Ct. 559, 947 N.E.2d 1103 (2011), it was now apparent that "the fee tail was wagging the damages [litigation] dog."

7 In *City Rentals*, the Court offered that the comment appeared "at first blush" to apply to that case, but upon further analysis, was determined inapt.

As this Court stated in its previous Memorandum of Decision (*see* paper no. 54 at "F"), fee-shifting statutes are well-intended efforts to level the legal playing field for those of modest means and station in life. But regrettably, some litigants have twisted them into something never intended: setting up a lottery game in which the interests of the attorney in obtaining a windfall for needlessly-generated attorneys [*20] fees have become the driving litigational force, rendering the clients' interests secondary. This is wrong. While fee-shifting statutes are obviously the creation of the legislature, the responsibility for policing them falls upon judicial shoulders.

The point has been eloquently made by a lawyer of another era:

There is a vague popular belief that lawyers are necessarily dishonest. I say *vague*, because when we consider to what extent *confidence*, and *honors* are reposed in, and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty, is very distinct and vivid. Yet the expression is common--almost universal. Let no young man, choosing the law for a calling, for a moment yield to the popular belief. Resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.⁸

8 "Abraham Lincoln's Notes for a Law Lecture" from *An Honest Calling: The Law Practice of Abraham Lincoln*. Mark Steiner, p. 3. *See also* 10 *Collected Works of Abraham Lincoln* 20 [*21] (Roy P. Basler ed., 1953-1990).

CONCLUSION

Although AvalonBay's legal fee of \$9,025 to file the trespass action and \$156,460.50 to defend itself against Hamilton's counterclaim were both reasonable and necessary, I cannot find that before Justice MacLeod-Mancuso's decision rendered on April 29, 2009 (*i.e.*, the first and second litigation phases), the Hamiltons' conduct was wholly insubstantial, frivolous, and not advanced in good faith as required by *G.L.c. 231, Section 6F*. However, after that decision was issued, I must, and do, so find.

ORDER

For the foregoing reasons, the defendant-in-counterclaim AvalonBay's motion for attorneys fees is ALLOWED in the sum of \$22,470. The responsibility for paying this sum shall be divided equally between Paul Hamilton, individually, and the law firm of D'Angelo & Hashem, P.C.; that is, \$11,235 shall be borne by the defendant Paul Hamilton, and \$11,235 by the law firm of D'Angelo & Hashem, P.C.

Such payment shall be made within ninety (90) days of the date of this Order, with a copy of the certified or treasurer's check directed to the attention of this Court.

BY THE COURT,

DENNIS J. CURRAN

Associate Justice

September 8, 2011

FILED
COURT OF APPEALS
DIVISION II

2013 JUN 18 PM 1:22

STATE OF WASHINGTON

BY Ca
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

BONNY M. BOLSON,

Appellant,

v.

HAYDEN G. WILLIAMS and DONITA C.
WILLIAMS, individually and on behalf of the
marital community comprised of HAYDEN G.
and DONITA C. WILLIAMS; WILIAMS &
SCHLOER, CPAs, P.S., a Washington
professional service corporation,

Respondents,

No.44073-3-II

DECLARATION OF SERVICE

THE UNDERSIGNED, hereby declares as follows:

1. That I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, an employee of Campbell, Dille, Barnett and Smith, over the age of 18 years, not a party to the above-entitled action and competent to be a witness therein.
2. That on the 17th day of June, 2013, she caused a copy of the following documents:

(1) Respondent's Response Brief and Declaration of Service to be served on the parties listed below by the method(s) indicated:

Court of Appeals Division II
David Ponzoha, Clerk/Administrator
950 Broadway, Suite 300
Tacoma, WA 98402

regular first class U.S. mail
 facsimile at 206-389-2613
 Fed-Express/overnight delivery
 personal delivery via ABC Legal Messengers
 via electronically to: **coa2filings@courts.wa.gov**

Victor Joseph Torres
Vreeland Law PLLC
500 108th Ave. N.E., Ste 740
Bellevue, WA 98004-5544
 regular first class U.S. mail
 facsimile
 Fed-Express/overnight delivery
 personal delivery via ABC Legal Messengers
 via electronically to **victor@vreeland-law.com**

DATED this 17th day of June, 2013.



Donita G. Deck

Donita Deck

From: Coa2Filings <coa2filings@courts.wa.gov>
Sent: Monday, June 17, 2013 2:10 PM
To: Donita Deck
Subject: Receipt Confirmation from Division 2 Court of Appeals

Received in the Court of Appeals, Division 2.