

**IN THE COMMON PLEAS COURT OF
OTTAWA COUNTY, OHIO**

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| Louise Terry, et. al., | : | Case No. 00-CVC-217 |
| | : | |
| Plaintiff, | : | Judge Paul C. Moon |
| | : | |
| v. | : | <u>DECISION AND ORDER</u> |
| | : | |
| Ottawa County Board of Mental Retardation and Developmental Delay, et. al., | : | |
| | : | |
| Defendants. | : | |

* * * * *

{¶1} This cause comes before the Court upon Defendant’s **Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim** and Memorandum in Support, filed February 2, 2004. Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim was filed March 8, 2004. Defendants’ Reply Memorandum in Support of their Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim was filed March 15, 2004. Plaintiffs’ Notice of Supplemental Authority was filed June 24, 2004, and Defendants’ Memorandum in Response to Plaintiffs’ Notice of Supplemental Authority was filed July 6, 2004.

{¶2} This matter is before the Court on Defendants’ motion to bar the testimony of Jonathan A. Bernstein, M.D.¹ This case concerns Plaintiffs claims for personal injuries stemming from exposure to alleged “mold and other irritants found in the Buckeye building due to the negligence of the Defendants.”² The Plaintiffs contend that Defendants negligently failed to properly maintain the Buckeye building and allowed mold and other irritants to develop, causing certain Plaintiffs to suffer respiratory and other medical problems.

{¶3} The issue before the Court is whether Dr. Bernstein’s testimony regarding the cause of the Plaintiffs’ personal injuries, allegedly resulting from exposure to mold and other irritants, satisfies the standards of Federal Rules of Evidence 702 and related case law including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³ and its progeny. According to the standards set forth in Federal Rules of Evidence 702, this Court cannot grant the admissibility of Dr. Bernstein’s expert testimony because it (1) is not based upon sufficient facts or data, (2) it is not a product of reliable principles and methods, and (3) he has not applied the principles and methods reliably to the facts of the case. Also, for the reasons stated herein, this Court concludes that Dr. Bernstein’s testimony lacks, as to the proximate cause of Plaintiffs’ personal injuries, a methodology satisfying *Daubert* because: (1) Dr. Bernstein failed to adhere to an established methodology for differential diagnosis by not ruling in the suspected causes and by not ruling out other possible causes; (2) he failed to support his conclusions regarding a correlation between exposure to mold, irritants, and allergic reactions and the mold and irritants in the building as the

¹ Defendants have also filed separate motions for (1) Summary Judgment, (2) Motion in Limine to Exclude Evidence of Plaintiffs’ Medical Expenses, (3) to Withdraw Admissions, (4) Exclude Evidence and Testimony Relating to a Microbial Assessment Survey Conducted by Hygienetics Environmental Services, (5) Objections to the Admissibility of Hearsay Medical Records, and (6) Leave to Amend Answer to Add Affirmative Defense to Conform with the Evidence. Plaintiffs have also filed motions to (1) strike portions of the cross examination conducted by defense counsel during the pre-recorded testimony of various treating physicians, and (2) Exclude the Testimony of Ronald Gots, M.D., Ph.D.

² Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment, at 2.

³ *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786.

proximate cause of Plaintiffs ailments, (3) he relied solely on temporal causation to arrive at his conclusions, and (4) he failed to present a review of the literature to support his conclusions on this case. Because of these unsupported and untested conclusions, which represent the entirety of Dr. Bernstein's contribution to the Plaintiffs' complaints, his testimony is inadmissible for failing to even approach the standards of expert witness testimony.

I. BACKGROUND

{¶4} Plaintiffs include 15 employees of the Ottawa County Board of Mental Retardation and Developmental Delay ("Ottawa County MR/DD"), and their spouses. Plaintiffs Louise Terry, Kathleen Taylor, Jennifer Reynolds, Bonnie Dray, Madaline Rice, Alan Sennich, Trudy Rider, Ann Chio, Fran Szabo, Beverly Roberts, Garnett La Fountain, Vincent Crabtree, Jackie Bast, Michelle Willoughby, and Jean Snavelly, who were employees of Ottawa County MR/DD allege personal injuries stemming from exposure to "mold and other irritants found in the Buckeye building."⁴ These Plaintiffs contend that Defendants' negligence in maintaining the Buckeye building allowed mold and other irritants to develop, causing respiratory and other medical problems. Plaintiffs Daniel Terry, William Reynolds, Charles Rider, Jeffrey Chio, Fred Szabo, John Bast, Rex Willoughby, and John Snavelly are all spouses of Plaintiff employees and seek compensatory damages for "loss of companionship, care, guidance, support, services, assistance, attention, protection, advice and counsel provided by their spouses as well as mental anguish."⁵

{¶5} Defendants W.W. Emerson Company, Leonard A. Partin, John J. Caputo, Jr., Northcoast Property Management Company and Lake Investments, Inc., (collectively

“Defendants”), allegedly owned, leased, and/or managed the Buckeye building in which Plaintiffs worked from 1995 to August 24, 2004, and which is where the injury is alleged to have occurred.

{¶6} Plaintiffs worked out of several suites in the Buckeye building, which was leased to Ottawa County MR/DD by the W.W. Emerson Company. W.W. Emerson Company is an Ohio Company whose officers are Leonard A. Partin (president) and John J. Caputo, Jr. (secretary/treasurer). Northcoast Property Management Company is alleged to have been responsible for maintenance of the property and the agent for Northcoast Property Management Company is Lake Investments, Inc. The owners of Lake Investments, Inc. include Leonard A. Partin and John J. Caputo, Jr.

{¶7} Plaintiffs allege that several employees, including administrators of the Ottawa County MR/DD complained to Mr. Partin and Mr. Caputo on several occasions about the poor condition of the Buckeye building. Plaintiffs allege that the Defendants were aware of the poor condition of the building but did not take any reasonable steps to “put and keep the premises in a fit and habitable condition,” and to “maintain in good working order and condition all plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, supplied or required to be supplied.”⁶

{¶8} Plaintiffs allege that Ottawa County MR/DD Human Resources Director Daniel Pfahl complained to Mr. Partin and Mr. Caputo on several occasions about the poor condition of the Buckeye building. Mr. Pfahl complained of water leaks, windows leaking and not shutting

⁴ Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment, at 2.

⁵ Second Amended Complaint, at ¶ 38.

⁶ Second Amended Complaint, at ¶21.

properly, problems with the fire doors, the poor condition of the heating and air conditioning units, the lack of ventilation, and leaks in the restrooms.⁷

{¶9} Plaintiffs assert that “mold was visible on the walls by the windows and around the electrical outlets in Suites B and D,”⁸ and that there was “black residue on the ceilings vents in Suite C, in the women’s restroom, and in the vent in an office on Suite D.”⁹ As well, Plaintiffs assert that “mold was apparent in Suite C on the wall,” and that “the carpeting in Suite D and Suite A had large spots in it that grew darker and darker.”¹⁰ Because Mr. Partin used the Buckeye building from 1981 to 1997, Plaintiffs assert that he was aware of the building’s condition. Plaintiffs also assert that Mr. Caputo was aware of problems with the windows.¹¹

{¶10} Various problems with moisture and leaking water were brought to the attention of Mr. Caputo and Mr. Partin by Mr. Pfahl or Plaintiffs. In a July 1999 letter, Mr. Pfahl informed Defendants that “we have had a lot of leakage during high winds and rain and it appears that rotting wood may be part of the problem” and specifically requested that the Defendants inspect the soffits of the building.¹² Mr. Pfahl also spoke on several occasions with Mr. Caputo and Mr. Partin concerning the “ill-fitting windows” in the Buckeye building.¹³ According to Plaintiffs, “water leaked through the windows when it rained and pooled on the floor.”¹⁴ Plaintiffs also alleged that the rainwater “collected between the walls, resulting in rot,” and that the “windows were drafty, rattled when it was windy.”¹⁵

⁷ See Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 2 (Statement of the Facts).

⁸ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 11.

⁹ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 11.

¹⁰ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 11.

¹¹ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 9.

¹² Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 6.

¹³ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 8.

¹⁴ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 8.

¹⁵ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 8.

{¶11} Plaintiffs allege that they repeatedly brought maintenance problems to the attention of Defendants noting “dampness and wetness on the floor of the ladies room,” that the “toilet in the ladies room leaked and attempts to repair it did not solve the problem of the wet floor.”¹⁶ According to Plaintiffs, it was later determined that the water on the floor of the bathroom came out of the wall, leaving puddles that the employees would keep mopping up with paper towels, and that the “refill valves in both women’s restrooms would not close automatically,” and requests for repairs were frequently made.¹⁷ Further, Plaintiffs noted that the wall in the men’s restroom was always wet, and that “there was a puddle * * * that employees would keep mopping up with paper towels.”¹⁸

{¶12} In addition to water in the restrooms, Plaintiffs assert that water was found on the floor in several suites on several occasions. In 1998, the floor of Suite A was wet, as was the “insulation in that storage area” and “water marks ran down the wall to the floor.”¹⁹ Records stored in this suite were wet. In 1998, Plaintiff Reynolds brought to the attention of Mr. Caputo, problems with moisture in the adjacent Suite D, pointing out a “clock warping while hanging on an interior wall, * * * water running down the wall in the back area,” and a “damp odor in the building.”²⁰ In 1999, the carpet and other records were found soaked in Suite D. Later in 1999, Plaintiff Terry brought to Mr. Caputo’s attention, a large water stain in the ceiling that ran down the wall in Suite C, but was told that “there was a problem, but that he had repaired it so there was nothing to worry about.”²¹ In 2000, water was found in Suite A, and that the “entire floor

¹⁶ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 10.

¹⁷ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 10.

¹⁸ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 10.

¹⁹ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 11.

²⁰ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 12.

²¹ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 13.

was wet.”²² According to Plaintiffs, the “standing water in Suite A was ‘shop-vacuumed’ but the carpeting was not cleaned or fully dried.”²³ Afterwards, the “sour, musty smell” became “stronger and more noticeable” and “dark spots on the carpet were obvious and were getting larger over time.”²⁴

{¶13} Plaintiffs assert that a “foul smell of mildew permeated the air” in the Buckeye building from the time they began working there in 1996 to the time they vacated the building in August of 2000.²⁵ Plaintiffs assert that Mr. Caputo had walked through the Buckeye building numerous times and was fully aware of the conditions of the building.²⁶ In 2000, The Ottawa County MR/DD Safety Committee conducted its annual inspection and noted water damage and “general complaints among the staff of headaches.”²⁷ Following a “deep cleaning” by the Defendants, employees were not as ill, but when discoloration in the carpet and on the walls reappeared, Plaintiff Louise Terry contacted the Ottawa County Health Department “regarding the employees’ concerns about their health.”²⁸

{¶14} On September 8, 2000, Foley Occupational Health Consulting (“FOHC”) conducted a survey of the air at the Buckeye building. Four indoor air samples were collected and tests reflected the presence of *actinomyces*, *Chaetomium*, *Acremonium*, *Stachybotrys chartarum*, *Aspergillus versicolor*, and *Penicillium*.²⁹ No outdoor air samples were collected for

²² Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 16.

²³ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 16.

²⁴ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 16.

²⁵ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 14.

²⁶ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 17.

²⁷ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 16.

²⁸ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 18.

²⁹ Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Exclude and Testimony Relating to the October 2000 Testing Conducted by Hygienetics Environmental Services, Inc., at Exhibit 2 (Letter dated September 15, 2000, from E.D. Foley (FOHC) to Dr. Dan Pfahl). See, Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671, at 1; Deposition of Ronald Gots, M.D., Ph.D., Exhibit 3 (Letter dated November 9, 2000 from E.D. Foley to Ms. Joan Szuberla).

comparison. The consultant noted that one fungi, *Stachybotrys chartarum*, may be the causative agent for the symptoms expressed by the employees working in the Buckeye building.³⁰ While acknowledging that the *Stachybotrys chartarum* was measured in very low concentrations, “this organism has been known to cause symptoms in humans that include dermatitis, flu-like symptoms, fatigue, and diarrhea and may also affect the immune system.”³¹

{¶15} Because Defendants had “not addressed the noted maintenance concerns” and “upon learning from the Ottawa County Health Department that they had observed mold growth along the wall, on the carpeting in the offices and on the floor,” the Ottawa County MR/DD vacated the building.³² Shortly thereafter, Plaintiffs filed this cause of action on September 25, 2000.

{¶16} Plaintiffs retained the services of Hygienetics Environmental Services, Inc. (“Hygienetics”) to conduct a microbial assessment survey at the Buckeye building. On October 18, 2000, Mr. Clint Jones, a Certified Industrial Hygienist conducted the microbial survey.³³

{¶17} The Hygienetics survey found mold contamination in the building. Specifically, the survey found several types of molds present: *Cladosporium*, *Stachybotrys chartum*, *Penicillium*, *Aspergillus versicolor*, and *Alternaria alternate*.³⁴ Significantly, however, the Hygienetics survey concluded only that “there is a probable correlation in the complaint

³⁰ Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Exclude and Testimony Relating to the October 2000 Testing Conducted by Hygienetics Environmental Services, Inc., at Exhibit 2 (Letter dated September 15, 2000, from E.D. Foley (FOHC) to Dr. Dan Pfahl).

³¹ Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Exclude and Testimony Relating to the October 2000 Testing Conducted by Hygienetics Environmental Services, Inc., at Exhibit 2 (Letter dated September 15, 2000, from E.D. Foley (FOHC) to Dr. Dan Pfahl).

³² Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 18.

³³ Defendants’ Motion to Exclude and Testimony Relating to the October 2000 Testing Conducted by Hygienetics Environmental Services, Inc. (unmarked exhibit).

³⁴ Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671, at 14-16.

symptoms to symptoms associated with organisms detected during the FOHC and the Hygienetics survey.”³⁵

{¶18} Subsequent to vacating the Buckeye building in August 2000 and after having filed this action, Plaintiffs retained the services of Jonathan A. Bernstein, M.D. (“Dr. Bernstein”) to opine as to the causation of Plaintiffs’ illnesses.³⁶ According to Plaintiffs, Dr. Bernstein has concluded that “the plaintiffs are suffering from building related illness due to poor ventilation, filtration and humidity control that resulted in an accumulation of mold, mold by-products and other air particles resulting in Plaintiffs’ clinical manifestations.”³⁷

{¶19} Defendants have objected to the admission of Dr. Bernstein’s testimony, arguing that “Plaintiffs have apparently switched their theory of recovery and now claim that their various maladies are the result of ‘sick building syndrome.’”³⁸ Defendants assert that Dr. Bernstein’s testimony regarding a “casual relationship between Plaintiffs’ symptoms and their exposure to mold and/or irritants must be excluded because it does not meet the evidentiary standards required for expert opinion testimony pursuant to Ohio Rules of Evidence and controlling case law.” Thus, “any comment or argument concerning such a theory should likewise be prohibited.”³⁹

{¶20} Defendants seek to exclude Dr. Bernstein’s testimony as to specific causation for Plaintiffs for failure to adhere to the principles enunciated in *Daubert* because the “opinions which Dr. Bernstein expressed in his report and deposition reveal a total lack of diagnostic

³⁵ Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671, at 22.

³⁶ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 2.

³⁷ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 2. See

³⁷ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 14; Deposition of Jonathan A. Bernstein, M.D., 55:1-25.

³⁸ Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, at 3.

³⁹ Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, at 3.

testing or methodology.”⁴⁰ Defendants contend that Dr. Bernstein has failed, as part of his differential diagnosis, to rule-in or rule-out various allergens or irritants “allegedly found in the building.”⁴¹ And Defendants assert that Dr. Bernstein failed to rule-out, as to all Plaintiffs, the other commonly found allergens as potential causes for Plaintiffs’ injuries.⁴² Defendants also claim that Dr. Bernstein has failed to rule-in any of the molds (*Actinomyces*, *Bacillus*, *Cladosporium*, *Stachybotrys chartum*, *Penicillium*, *Aspergillus versicolor*, and *Alternaria alternate*) found at the Buckeye building as causes for Plaintiffs’ injuries because he did not test Plaintiffs’ response to these molds or “other irritants common in everyday life.”⁴³ Plaintiffs, however, argue that “whether Dr. Bernstein personally conducted the testing on the Plaintiffs is immaterial to his use of documented test results and their medical records to formulate his opinion.”⁴⁴

{¶21} In addressing Defendants’ motion to exclude the testimony of Dr. Bernstein, this Court has reviewed the record, all pleadings, exhibits and the relevant case law.

II. ANALYSIS

A. Standard of Review

{¶22} In the absence of Ohio case law on this specific topic, this Court relied on *Miller v. Bike*,⁴⁵ and Ohio Appellate Courts addressing the admissibility of expert testimony. In *Miller*, the Ohio Supreme Court applied Evid. Rule 702 and *Daubert* to determine whether expert

⁴⁰ Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, at 6.

⁴¹ Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, at 8.

⁴² Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, at 9.

⁴³ Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, at 9.

⁴⁴ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 8.

testimony should be admitted, and focused “on whether the principles and methods [the expert] employed to reach his conclusion are reliable, not whether his conclusions are correct.”⁴⁶ Ohio Evid.R. 702(C) expressly requires that an expert’s testimony be based on “reliable scientific, technical, or other specialized information,” and “as to evidence regarding a ‘test, procedure or experiment,’ reliability must be shown both as to the test generally (that is, the underlying theory and the implementation of the theory),⁴⁷ and as to the specific application.⁴⁸ The Staff Note to the 1994 Amendment suggests that the United States Supreme Court’s decision in *Daubert*, may be particularly instructive to Ohio courts because of the similar focuses of Fed.R.Evid. 702 and Ohio Evid.R. 702.

{¶23} In applying *Miller*, the Ohio Supreme Court adopted the factors, set forth in *Daubert*, to be considered in evaluating whether “expert scientific testimony is admissible if it is reliable and relevant to the task at hand.”⁴⁹ Both the United States Supreme Court in *Daubert* and the Ohio Supreme Court in *Miller* emphasized that none of the factors is determinative, but that “the focus is ‘solely on principles and methodology, not on the conclusions they generate.’”⁵⁰

{¶24} In *State v. Nemeth*,⁵¹ the Ohio Supreme Court again applied *Daubert*, explaining that “relevant evidence based on valid principles will satisfy the threshold reliability standard for the admission of expert testimony,” emphasizing that the “credibility to be afforded these principles and the expert’s conclusions remain a matter for the trier of fact.” Thus, the reliability

⁴⁵ *Miller v. Bike* (1998), 80 Ohio St. 3d 607, 1998 Ohio 178, 687 N.E.2d 735, 1998 Ohio LEXIS 3.

⁴⁶ *Miller v. Bike* (1998), 80 Ohio St. 3d 607, 1998 Ohio 178, 687 N.E.2d 735, 1998 Ohio LEXIS 3.

⁴⁷ Evid.R. 702(C)(1) & (2).

⁴⁸ Evid.R. 702(C)(3). See *State v. Bresson* (1990), 51 Ohio St. 3d 123, 554 N.E.2d 1330; *State v. Williams* (1983), 4 Ohio St. 3d 53, 4 Ohio B. Rep. 144, 446 N.E.2d 444. See, generally, 1 P. Giannelli and E. Imwinkelried, *Scientific Evidence* 1-2 (2d ed. 1993). Staff Note to July 1, 1994 Amendment of Evid.R. 702.

⁴⁹ *Miller v. Bike* (1998), 80 Ohio St. 3d 607, 1998 Ohio 178, 687 N.E.2d 735, 1998 Ohio LEXIS 3.

⁵⁰ *Miller v. Bike* (1998), 80 Ohio St. 3d 607, 611-612 quoting *Daubert* at 595.

⁵¹ *State v. Nemeth* (1998), 82 Ohio St.3d 202, 211, 1998 Ohio 376, 694 N.E.2d 1332

requirement under Evid.R. 702 “is a threshold determination that should focus on a particular type of scientific evidence, not the truth or falsity of an alleged scientific fact or truth.”⁵²

{¶25} In *Flinn v. Parcinski*,⁵³ the Seventh Appellate Court looked to the Federal Rules of Evidence and U.S. Supreme Court decisions in *Daubert* and *General Electric v. Joiner*,⁵⁴ when considering the admissibility of expert testimony. “Having found no requirement in the Ohio Rules of Evidence that assertions made but not proven have to be admitted into evidence as expert opinion,”⁵⁵ the Seventh Appellate Court concluded that “the trial court did not err in determining that his testimony as to causation was not reliable, scientific testimony and therefore, would not be considered an expert opinion on causation.”⁵⁶

{¶26} In *Valentine v. PPG Industries, Inc.*,⁵⁷ the Fourth Appellate Court acknowledged that “because of the lack of Ohio cases addressing the precise issue here (i.e. the admissibility of expert testimony that molds or other irritants caused Plaintiffs’ conditions),” it must look “to the Federal Courts for guidance.” The Fourth Appellate Court affirmed the trial court’s decision to exclude expert testimony, concluding that “*Daubert* and its progeny require a court to examine the rationale and methods behind the extrapolation to determine whether it is scientifically valid or whether the analytical gap is too wide.”⁵⁸ In the case *sub judice*, it is the reliability and the scientific validity of the expert opinion that are at issue.

{¶27} The Federal Rules of Evidence 104(A) provides Courts with the power to determine any “preliminary questions concerning the qualification of a person to be a witness * *

⁵² *State v. Nemeth* (1998), 82 Ohio St.3d 202, 211, 1998 Ohio 376, 694 N.E.2d 1332

⁵³ *Flinn v. Parcinski*, 7th Dist. No. 03CO53, 2004 Ohio 3032, *P23.

⁵⁴ *General Elec. Co. v. Joiner* (1997), 522 U.S. 136, 146, 139 L. Ed. 2d 508, 118 S. Ct. 512

⁵⁵ *Flinn v. Parcinski*, 7th Dist. No. 03CO53, 2004 Ohio 3032, *P23.

⁵⁶ *Flinn v. Parcinski*, 7th Dist. No. 03CO53, 2004 Ohio 3032, *P23.

⁵⁷ *Valentine v. PPG Industries, Inc.*, 4th Dist. No. 03CA17, 2004 Ohio 4521, 2004 Ohio App. LEXIS 4096.

⁵⁸ *Valentine v. PPG Industries, Inc.*, 4th Dist. No. 03CA17, 2004 Ohio 4521, *P29, n3, 2004 Ohio App. LEXIS 4096. See *Hall v. Baxter Healthcare Corp.* (D.Or. 1996), 947 F. Supp. 1387, 1396, 1400; *Moore v. Ashland Chem. Inc.* (C.A.5, 1998), 151 F.3d 269, 275.

* or the admissibility of evidence * * *.” In determining the admissibility of expert testimony, Courts rely on Federal Rule of Evidence 702, which provides: If 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

{¶28} In *Daubert*, the United States Supreme Court emphasized that “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable,” when applying Evid. R. 702.⁵⁹ Thus, conjecture or “subjective belief” or “unsupported speculation” will not suffice.⁶⁰ In performing this “gatekeeping” task, Courts must make a preliminary assessment of “whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”⁶¹ Courts generally consider four factors in determining whether the theory or technique is “scientifically valid”: (1) whether the theory or technique used by expert can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used; and (4) the degree of the method’s or conclusion’s acceptance within the relevant scientific community.⁶² This list of factors, however, is not exhaustive; Courts have considered other factors in assessing whether an

⁵⁹ *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579, 589.

⁶⁰ *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579, 590.

⁶¹ *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579, 592-3.

⁶² *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579, 593-94; *United States v. Dorsey* (4th Cir. 1995), 45 F.3d 809, 813.

expert's testimony is reliable.⁶³ These factors include: (1) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion⁶⁴ and (2) whether an expert has accounted for obvious alternative explanations.⁶⁵ As part of the second prong, Courts must determine whether the expert testimony is relevant to an issue in the case.⁶⁶ While the "scientifically valid" and the "relevance" prongs are distinct in their inception, the two prongs may overlap in a particular case. Thus, "a determination regarding the scientific validity of a particular theory requires not only an examination of the trustworthiness of the tested principles on which the expert opinion rests, but also an analysis of the reliability of an expert's *application* of the tested principles to the particular set of facts at issue."⁶⁷ These are the principles that govern this Court's assessment of Dr. Bernstein's opinions.

1. Whether Theory or Technique Has Been Tested

{¶29} The key issue with Dr. Bernstein's testimony is his failure to present any scientifically tested theory or technique. The Plaintiffs claim that Dr. Bernstein's testimony is an example of "differential diagnosis."⁶⁸ Dr. Bernstein himself, however, does not make such a claim, and the limited information provided by Dr. Bernstein indicates that had "differential

⁶³ See Fed. R. Evid. 702 Advisory Committee Notes, 2000 Amendments.

⁶⁴ See *General Elec. Co. v. Joiner* (1997), 522 U.S. 136, 146, 139 L. Ed. 2d 508, 118 S. Ct. 512 (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); see also *Schmaltz v. Norfolk & Western Ry. Co.* (N.D. Ill. 1995), 878 F. Supp. 1119, 1122, 1995 U.S. Dist. LEXIS 2685 ("The analytical gap between the evidence presented and the inferences to be drawn on the ultimate issue ... is too wide in the present case."); *Chikovsky v. Ortho Pharmaceutical Corp.* (S.D. Fla. 1993), 832 F. Supp. 341, 346 (citing the expert's ignorance of the amounts of Retin-A absorbed by the plaintiff, noting the absence of any established dose-response relationship for Vitamin A and birth defects, and finding that the expert's "analogies to research concerning Vitamin A and other Vitamin A derivatives is [sic] wanting").

⁶⁵ *Claar v. Burlington N.R.R.*, (9th Cir. 1994), 29 F.3d 499 (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).

⁶⁶ *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579, 591-92.

⁶⁷ *Cavallo v. Star Enterprise* (E.D. Va, 1995), 892 F. Supp. 756, 762-63, rev'd in part on other grounds, (4th Cir. 1996), 100 F.3d 1150.

⁶⁸ Plaintiffs' Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim, at 8.

diagnosis” been done in this case, the physical exams, medical histories, and clinical tests reviewed by Dr. Bernstein would be insufficient to reach a scientifically valid conclusion.

{¶30} Differential diagnosis is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated.⁶⁹ “A reliable differential diagnosis typically, though not invariably, is performed after ‘physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests,’⁷⁰ and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of those potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely.”⁷¹ This technique has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results.⁷² Courts addressing this issue have held that a medical opinion on causation based upon a reliable differential diagnoses is sufficiently valid to satisfy the first prong of the Fed. R. Evid. 702 inquiry; thus, a reliable differential diagnosis provides a valid foundation for expert opinion.⁷³

⁶⁹ M. Wintrobe, *Clinical Hematology* 708 (Lea & Febiger 8th ed. 1981). See *Cutlip v. Norfolk Southern Corp.*, 6th Dist. No. L-02-1051, 2003 Ohio 1862, 2003 Ohio App. LEXIS 1785 (“The Sixth Circuit has also characterized differential diagnosis as a ‘standard diagnostic tool’ in medicine.”); see *Glaser v. Thompson Med. Co., Inc.* (C.A. 6, 1994), 32 F.3d 969, 978. See generally 13 *Courtroom Medicine*, Ch. 8, *Cancer* (Matthew Bender).

⁷⁰ *Kannankeril v. Terminix Internatl., Inc.* (C.A.3, 1997), 128 F.3d 802, 807.

⁷¹ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257, 264., quoting *Kannankeril v. Terminix Internatl., Inc.* (C.A.3, 1997), 128 F.3d 802, 807. See *Landrigan v. Celotex Corp.* (1992), 127 N.J. 404, 605 A.2d 1079, 1088 (The trial court erred in excluding an epidemiologist's testimony that exposure to asbestos was the cause of the decedent's colon cancer.)

⁷² *Cutlip v. Norfolk Southern Corp.*, 6th Dist. No. L-02-1051, 2003 Ohio 1862, 2003 Ohio App. LEXIS 1785; *Brown v. Southeastern Penn. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.)* (3d Cir. 1994), 35 F.3d 717, 758; see *Heller v. Shaw Indus., Inc.* (3d Cir.1999), 167 F.3d 146, 154-55 (noting “that differential diagnosis consists of a testable hypothesis, has been peer reviewed, contains standards for controlling its operation, is generally accepted, and is used outside of the judicial context” (internal quotation marks omitted)); *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

⁷³ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257, 264. See *Benedi v. McNeil-P.P.C., Inc.* (4th Cir. 1995), 66 F.3d 1378, 1383-85 (holding that expert testimony by treating physician concerning cause of plaintiff's liver failure-acetaminophen combined with alcohol--was admissible despite the lack of epidemiological data); *General Electric Co. v. Joiner* (1997), 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508.

{¶31} Differential diagnosis is particularly useful in proving specific causation in mold exposure cases because it takes into account the multitude of factors that affect the presence and severity of general injuries such as asthma and allergies.⁷⁴ Courts generally approve of a reliable differential diagnosis because it enjoys widespread acceptance in the medical community.⁷⁵ The only situations where courts exclude differential diagnosis testimony is when it does not conform to standard diagnostic techniques,⁷⁶ or when the expert opinion is based entirely on a plaintiff's medical complaints in anticipation of litigation.⁷⁷ When differential diagnosis is properly performed, however, no court has excluded it.⁷⁸ Differential diagnosis also passes muster under the reliability factors set forth by *Daubert*.⁷⁹ The theory that differential diagnosis can isolate causal factors of an injury is generally accepted as valid in the medical community, in accordance with the fourth factor of the *Daubert* standard.⁸⁰

{¶32} Plaintiffs assert that Dr. Bernstein's diagnosis of Plaintiffs' symptomology is based on differential diagnosis "using Plaintiff's medical records and the observation that there was a temporal relationship between the onset of symptoms and their exposure to the air in the Buckeye Boulevard Building."⁸¹

⁷⁴ C.S. Kanemoto, 26 Hawaii L. Review. 99, Scientific Expert Admissibility in Mold Exposure Litigation; Establishing Reliability of Methodologies in Light of Hawaii's Evidentiary Standard.

⁷⁵ C.S. Kanemoto, 26 Hawaii L. Review. 99, Scientific Expert Admissibility in Mold Exposure Litigation; Establishing Reliability of Methodologies in Light of Hawaii's Evidentiary Standard. See Margie Searcy-Alford, Guide to Toxic Torts § 10.03, at 7 (2003).

⁷⁶ See *Moore v. Ashland Chem., Inc.* (5th Cir. 1998), 151 F.3d 269, 277-279 (holding that the trial court did not abuse its discretion in excluding causation testimony based on differential diagnosis).

⁷⁷ See, e.g., *In re Paoli R.R. Yard PCB Litig.* 762 (3d Cir. 1994), 35 F.3d 717, (affirming the exclusion of two experts who "based their conclusion as to a plaintiff's symptoms solely on the plaintiff's self-report of illness in preparation for litigation.").

⁷⁸ See Joseph Sanders & Julie Machal-Fulks, The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law, *Law & Contemp. Probs.*, Autumn 2001, at 107, 120.

⁷⁹ *Kannankeril v. Terminix Internatl., Inc.* (C.A.3, 1997), 128 F.3d 802, 807.

⁸⁰ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257, 264. [insert Ohio case] See *Turner v. Iowa Fire Equip. Co.* (8th Cir. 2000), 229 F.3d 1202, 1208 ("The circuits reason that a differential diagnosis is a tested methodology, has been subjected to peer review/publication, does not frequently lead to incorrect results, and is generally accepted in the medical community.").

⁸¹ Plaintiffs' Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim, at 21.

{¶33} Arguing that Dr. Bernstein’s opinion is based on the “complete medical records of the plaintiffs,”⁸² and that “these medical records document physical examinations of the plaintiffs by their treating physicians,”⁸³ Plaintiffs also assert that these medical records contain “results of numerous laboratory tests, the medical histories supplied by the physicians and clinical observations and conclusions of the physicians themselves.”⁸⁴

{¶34} Defendants disagree, arguing that “the evidence establishes that Dr. Bernstein failed to follow this scientific method. Instead, Dr. Bernstein merely made a general assessment of Plaintiffs’ health and symptoms by briefly reviewing their medical records, and from that assessment, he generated his hypothesis that Plaintiffs suffered from irritant induced reactions allegedly indicative of Sick Building Syndrome/Building Related Illness.”⁸⁵ Defendants also assert that Dr. Bernstein failed to “test his hypothesis by controlling for other potential variables

⁸² Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 8. See Deposition of Jonathan A. Bernstein, M.D., at 4.

⁸³ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 8.

⁸⁴ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 8. See Deposition of Jonathan A. Bernstein, M.D., at 18-20, 37, 47-48, 75.

⁸⁵ Defendants’ Reply Memorandum in Support of Their Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 4.

Sick building syndrome (SBS) is defined by a set of symptoms that have no specific, clearly identifiable cause. In general, symptoms arise when the affected person enters the sick building and dissipate when the person leaves the building. The symptoms may also be reduced or eliminated by modifying the air circulation in a building. Symptoms of SBS include mental fatigue and headache; respiratory infections and cough; hoarseness of voice and wheezing; hypersensitivity reaction; erythema; eye, nose, and throat irritation; dry mucous membranes and skin; nausea; and dizziness. One of the problems of diagnosing and proving SBS is that the symptoms are not caused exclusively by poor indoor air quality. For example, poor lighting, noise, vibration, thermal discomfort, and psychological stress may cause similar reactions in certain people. See *Indoor Air Quality*, Proposed Rule, 59 Fed. Reg. 15,968, 15,970 (Apr. 5, 1994) (“OSHA Indoor Air Quality Proposal”), *withdrawn*, 66 Fed. Reg. 64,946 (Dec. 17, 2001).

Building related illness (BRI), a related but distinct malady, generally is characterized by an identifiable cause and specific, diagnosable medical conditions. Examples include Legionnaire's disease, respiratory allergies, nosocomial infections, humidifier fever, hypersensitivity pneumonitis, and specific conditions associated with chemical or biological substances, such as lead poisoning. Symptoms of BRI may not be alleviated when the affected person leaves the building. Generally mitigation requires removal of the source, which may be a mold or proliferation of a microbe in a building's air system, or in water-damaged furnishings or architectural features. *OSHA Indoor Air Quality Proposal*, 59 Fed. Reg. at 15,971.

The three primary causes of SBS and BRI are (1) indoor sources of air pollutants, (2) poorly designed, maintained or operated ventilation systems, and (3) unanticipated or poorly planned building uses. Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. Env'tl. Aff. L. Rev. 247, 341

relevant to each Plaintiff's situation in order to eliminate the factors which were not the probable cause of their symptoms.”⁸⁶

{¶35} Plaintiffs counter that “the fact that Dr. Bernstein did not directly examine each plaintiff or speak with them does not render his opinion unreliable.”⁸⁷ Plaintiffs also argue that “it is immaterial that Dr. Bernstein did not conduct or order any diagnostic testing of Plaintiffs, especially the allergy testing suggested by Defendants.”⁸⁸ Plaintiffs assert that “diagnostic tests for the plaintiffs were ordered by their treating physicians, as if these physicians felt the testing was appropriate for their proper treatment.”⁸⁹ Additionally, in *Cavallo v. Star Enterprise*,⁹⁰ the Eastern District Court of Virginia noted that “If other possible causes of an injury cannot be ruled out, or at least the probability of their combination to causation minimized, then the ‘more likely than not’ threshold for proving causation may not be met.” However, Plaintiffs have not provided this Court, within the *multiple* briefs filed, the types of diagnostic tests ordered by Plaintiffs’ treating physicians and utilized by Dr. Bernstein in his assessments. Nor have Plaintiffs provided this Court with the any diagnostic tests or other information used by Dr. Bernstein to rule in, or rule out, potential causes.⁹¹

{¶36} Dr. Bernstein has not provided this Court with a Report summarizing the basis for his conclusion that Plaintiffs were harmed by irritants present in the Buckeye building. Dr. Bernstein’s only summary of Plaintiffs’ injuries is a letter dated July 31, 2003 to Ms. Murray

(1998). Contaminants causing SBS and BRI vary widely. *See* OSHA Indoor Air Quality Proposal, 59 Fed. Reg. at 15,983-15,985.

⁸⁶ Defendants’ Reply Memorandum in Support of Their Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 4.

⁸⁷ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 8. *See Metro Life Ins. Co. v. Tomchick* (1999) 134 Ohio App.3d 765, 786, 732 N.E.2d 430, 1999 Ohio App. LEXIS 4415.

⁸⁸ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 8.

⁸⁹ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 8-9.

⁹⁰ *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 771.

⁹¹ This Court is unable to determine from the Plaintiffs’ Medical Abstracts what Dr. Bernstein considered as part of his assessment.

concerning the Plaintiffs and his conclusion that Plaintiffs “were suffering from building-related illness due to poor ventilation, filtration and humidity control.”⁹² Further, Dr. Bernstein opined that “this will or did result in accumulation of not only mold, but also mold byproducts, bacteria and other air particulates * * * resulting in many of these clinical manifestations.”⁹³ Dr. Bernstein noted that “all of these workers, with the exception of Kathleen Taylor-Peters, have improved since being removed from the workplace, indicating that this is most likely an irritant-induced response to the work environment.”⁹⁴ In a similar letter dated December 22, 2003, concerning Plaintiff Louise Terry, Dr. Bernstein opined that “Ms. Terry was suffering from building-related illness due to poor ventilation, filtration, and humidity control. This resulted by accumulation of not only mold but also mold byproducts, such as bacteria and other air particulates * * * resulting in many of these clinical manifestations.”⁹⁵ Dr. Bernstein notes that “Ms. Terry has improved since being removed from the workplace, indicating that this is most likely an irritant-induced response to the work environment.”⁹⁶ In both letters, however, Dr. Bernstein acknowledges that “the bacteria and other air particles * * * were not measured.”⁹⁷ It is clear that Dr. Bernstein relies entirely upon the temporal relationship in determining causation.

⁹² Deposition of Dr. Bernstein, at 14-15, Defendant’s Exhibit B (Letter dated July 31, 2003, from Dr. Bernstein to Ms. Murray). See Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, Exhibit C.

⁹³ Deposition of Dr. Bernstein, at 14-15, Defendant’s Exhibit B (Letter dated July 31, 2003, from Dr. Bernstein to Ms. Murray). See Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, Exhibit C.

⁹⁴ Deposition of Dr. Bernstein, at 14-15, Defendant’s Exhibit B (Letter dated July 31, 2003, from Dr. Bernstein to Ms. Murray). See Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, Exhibit C.

⁹⁵ Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, Exhibit C (Letter dated December 22, 2003, from Dr. Bernstein to Ms. Murray Re: Louise Terry).

⁹⁶ Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, Exhibit C (Letter dated December 22, 2003, from Dr. Bernstein to Ms. Murray Re: Louise Terry).

⁹⁷ Deposition of Dr. Bernstein, at 14-15, Defendant’s Exhibit B (Letter dated July 31, 2003, from Dr. Bernstein to Ms. Murray); Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, Exhibit C (Letter dated December 22, 2003, from Dr. Bernstein to Ms. Murray Re: Louise Terry).

{¶37} Plaintiffs contend that Dr. Bernstein's conclusion that their symptoms were caused by exposure to molds or irritants is supported by use of documented test results and Plaintiffs' medical records to formulate his opinion.⁹⁸ According to Plaintiffs, "these medical records contain the results of numerous laboratory tests, the medical histories supplied by the patients and the clinical observations and conclusions of the physicians themselves."⁹⁹ Further, Plaintiffs assert that in addition to his review of the Plaintiffs' medical records (Abstracts), Dr. Bernstein reviewed the results of the Hygienetics survey on the air sampling of the Buckeye building, which broke down the specific levels of the various molds found throughout the building.¹⁰⁰

{¶38} During his deposition, Dr. Bernstein stated "with respect to the constellation of symptoms, not having examined these people, I believe that, to a reasonable degree of medical certainty -- that's what I understand is 51 percent -- that these symptoms were related to their work environment."¹⁰¹ Further, Dr. Bernstein stated that he based his conclusions "on their symptoms occurring while they were in the workplace and improving while they were outside of the workplace, and not having long-term related problems, that they aren't having these problems and so forth."¹⁰²

{¶39} Dr. Bernstein's reliance on the Hygienetics survey is also misplaced because this report notes only that "there is a probable correlation in the complaint symptoms to symptoms associated with organisms detected during the FOHC and the Hygienetics survey."¹⁰³

⁹⁸ See Plaintiffs' Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim, at 8. See also, *Miller v. Bike* (1998), 80 Ohio St. 3d 607, 1998 Ohio 178, 687 N.E.2d 735, 1998 Ohio LEXIS.

⁹⁹ Plaintiffs' Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim, at 8.

¹⁰⁰ Deposition of Jonathan A. Bernstein, M.D., at 12.

¹⁰¹ Deposition of Jonathan A. Bernstein, M.D., at 57:10-15.

¹⁰² Deposition of Jonathan A. Bernstein, M.D., at 57:15-19.

¹⁰³ Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671, at 22.

Furthermore, Dr. Bernstein is not a toxicologist¹⁰⁴ and does not assert that he has any knowledge of the levels required for these various molds to become toxic or of the levels required for the molds to affect the Plaintiffs.¹⁰⁵ Thus, he does not establish a direct nexus between the levels of exposure to the mold and any subsequent illnesses that affected the Plaintiffs, nor does he establish a direct nexus between the level of exposure to any of the “markers” in the air and any subsequent illnesses that affected the Plaintiffs.¹⁰⁶

{¶40} Dr. Bernstein fails to address how his consideration of the various tests, (i.e., blood test results, the CAT scan results, the MRI results, and the X-rays that some of the Plaintiffs’ physicians may have ordered), contributed to his determination that Plaintiffs’ symptoms came about as a result of their exposure to molds or other irritants.

{¶41} Here, as in *Cavallo v. Star Enterprise*,¹⁰⁷ this Court has “scrupulously attempted to walk this fine line: analyzing the experts’ adherence to the scientific methodology, while declining to weigh the evidence before it. Significantly, nothing in the Court’s review and analysis of this issue required any scientific training. Rather, the Court did nothing more than use the customary legal tools of logical reasoning to carry out its gatekeeping function.”¹⁰⁸

{¶42} In the case *sub judice*, various Plaintiffs’ medical histories, as provided to Dr. Bernstein, reveal that several Plaintiffs had demonstrated similar symptoms prior to moving into

¹⁰⁴ See Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at Exhibit 1 (Curriculum Vitae of Jonathan A. Bernstein, M.D.).

¹⁰⁵ See Deposition of Jonathan A. Bernstein, M.D., at 50-54.

¹⁰⁶ Deposition of Jonathan A. Bernstein, M.D., at 39-40.

¹⁰⁷ *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 771.

¹⁰⁸ Emphasizing that “proper application of Daubert simply does not require that district judges be trained scientists,” Judge T.S. Ellis, III, noted that while he has an “undergraduate degree in science, almost 35 years has passed since [he has] had any professional involvement with science.”¹⁰⁸ Moreover, he noted that the “Court’s clerks are both blissfully innocent of any scientific training.”¹⁰⁸ He further acknowledged that the “Court’s application of these customary legal tools may ultimately be deemed erroneous, the error would stem from flawed legal reasoning and not from lack of scientific training.” *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 771.

the Buckeye building.¹⁰⁹ Dr. Bernstein has not provided any means to show that those symptoms worsened because of allergies or irritants in the Buckeye building.

{¶43} The admissibility of Dr. Bernstein’s reliance on temporal causation as the determinative factor in his analysis is suspect because “it is well settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method and is therefore insufficient to satisfy the requirements of [Evid. R] 702.”¹¹⁰

{¶44} Further, it is undisputed that certain Plaintiffs were allergic to one or more allergens. Ms. Chio was allergic to Penicillin, different types of molds and cat fur.¹¹¹ Defendants allege that other Plaintiffs smoked, or otherwise had other allergies.¹¹² Yet, Dr. Bernstein did not rule in, or rule out these allergens or irritants, relying only on the temporal causation as the basis of his diagnosis. As Dr. Bernstein asserts, his diagnosis is based on Plaintiffs’ “symptoms occurring while they were in the workplace and improving outside of the workplace, and not having long-term related problems, that they aren’t having these problems and so forth.”¹¹³

{¶45} The Hygienetics survey revealed that *Chaetomium*, *Acremonium*, *Stachybotrys chartarum*, *Aspergillus versicolor*, and *Penicillium*, which were found to be present by FOCH, and *actinomycetes*, gram-negative bacteria, *Endotoxin*, *Cladosporium*, *Alternaria alternate*, *Penicillium* and *Stachybotrys chartarum*, were present within the Buckeye building; however,

¹⁰⁹ See Affidavit of Margaret M Murray, Exhibit 1 (Medical Records Abstracts), Filed April 15, 2004.

¹¹⁰ *Schmaltz v. Norfolk & Western Ry. Co.*, (N.D. Ill. 1995), 878 F. Supp. 1119, 1122.

¹¹¹ Plaintiffs’ Memorandum Contra Defendants’ Motion to Amend Answers to Pleadings to Add Affirmative Defense of Collateral Estoppel and Response to Defendants’ Second Supplemental Notice of Authority in Support of Defendants’ Motion for Summary Judgment, at Attachment “Chio” – Letter dated November 7, 2000, from Karl S. Fernandes, M.D., F.C.C.P, Pulmonary & Critical Care Specialists, to Daniel Cadigan, M.D., Re: Ann Chio.

¹¹² Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, at 21, Exhibit F. See Affidavit of Margaret M. Murray, Exhibit 1 (Medical Records Abstracts), Filed April 15, 2004 (i.e., Medical Abstracts of Plaintiffs Rice & Taylor).

Dr. Bernstein is unable to rule in any as a potential cause because he did not directly test any of the Plaintiffs for a reaction to any mold.¹¹⁴ Moreover, Dr. Bernstein acknowledged that he does not consider mycotoxins to be an allergen.¹¹⁵ As such, Dr. Bernstein apparently did not require the Plaintiffs to undergo laboratory testing which would reveal if Plaintiffs had developed antibodies to an immunochemically-related fungi, if Plaintiffs had, in fact been exposed to fungi. Also, it is not known whether Plaintiffs' treating physicians required their patients to undergo this laboratory testing and if Dr. Bernstein relied upon such test results.

{¶46} As well, Dr. Bernstein is unable to rule in any other irritants as a potential cause because he did not directly test any of the Plaintiffs for a reaction to any other irritants. It is also not known whether Plaintiffs' treating physicians tested their patients for reactions for any other irritants and if Dr. Bernstein relied upon such test results. Upon being asked if that was his conclusion in this case, Dr. Bernstein replied "I don't know what -- I don't know -- I would suspect that these people got better."¹¹⁶ The United States District Court for the Southern District of Texas in *Flores v. Allstate Tex. Lloyd's Co.*,¹¹⁷ quoted the Fifth Circuit Court in *Moore v. Ashland Chemical, Inc.*,¹¹⁸ when it concluded that "*Daubert* requires a district judge considering admission of scientific evidence to determine whether the evidence is 'genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.'"¹¹⁹

¹¹³ Deposition of Jonathan A. Bernstein, M.D., at 57.

¹¹⁴ Although Plaintiffs assert that "Diagnostic tests for the plaintiffs were ordered by their treating physicians, as these physicians felt the testing was appropriate for their proper treatment." It is not clear, however, whether the treating physicians actually ordered allergy testing to rule-in or rule-out allergens, or even that Dr. Bernstein relied upon these certain diagnostic tests. Moreover, with 15 Plaintiffs, it has not been made clear whether all Plaintiffs were subjected to allergy testing, or what factors, unique to each Plaintiff was considered by Dr. Bernstein in arriving at his diagnosis.

¹¹⁵ Deposition of Jonathan A. Bernstein, M.D., at 33.

¹¹⁶ Deposition of Jonathan A. Bernstein, M.D., at 36: 11-13.

¹¹⁷ *Flores v. Allstate Tex. Lloyd's Co.*, 229 F. Supp. 2d 697 (D. Tex., 2002)

¹¹⁸ *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998), citing *Rosen v. Ciba-Geigy Corp.*, 78 F3d. 316 (7th Cir. 1996).

¹¹⁹ *Flores v. Allstate Tex. Lloyd's Co.*, 229 F. Supp. 2d 697 (D. Tex., 2002), quoting *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998), citing *Rosen v. Ciba-Geigy Corp.*, 78 F3d. 316 (7th Cir. 1996).

{¶47} Dr. Bernstein testified that he has a “database of over 250 patients,”¹²⁰ who exhibit the “constellation of symptoms” that he accepts as “validly related to building related illnesses.”¹²¹ Dr. Bernstein states that he has conducted “nosologic classification assessments trying to look at the database and trying to see what the statistical association is between symptoms.”¹²² Further, Dr. Bernstein asserts that “when you start looking at the histories – and this is just putting it all into a database and doing linear regression analysis, we can see strong relationships between those – these types of more bizarre symptoms * * *.”¹²³ However, Dr. Bernstein fails to explain how the specific exposure to the molds in the Buckeye building is similar in quantity and duration to the patients studied in the database.

{¶48} Again, Dr. Bernstein provides no scientific basis to rule in, as part of a differential diagnosis, the molds or irritants in the Buckeye building. Dr. Bernstein has not determined that Plaintiffs were not allergic to *Actinomyces*, *Bacillus*, *Cladosporium*, *Stachybotrys chartum*, *Penicillium*, *Aspergillus versicolor*, or *Alternaria alternate*; thus, these molds cannot be ruled in to the analysis for Plaintiffs’ symptomology. Dr. Bernstein has not provided any skin endpoint titration test revealing that Plaintiffs were allergic to those molds; therefore, the molds cannot be ruled in as the suspected causes for her allergy and asthma symptoms.¹²⁴ In addition, the literature relied upon by Plaintiffs fails to establish a link between a particular level of exposure and their symptoms; Plaintiffs take a leap of faith and conclude that because general causation

¹²⁰ Deposition of Jonathan A. Bernstein, M.D., at 60:1.

¹²¹ Deposition of Jonathan A. Bernstein, M.D., at 60: 1-8.

¹²² Deposition of Jonathan A. Bernstein, M.D., at 60: 13-16

¹²³ Deposition of Jonathan A. Bernstein, M.D., at 60: 23-25, 61: 1-4.

¹²⁴ Here, skin endpoint titration testing could have been used to determine if the Plaintiffs were allergic to weeds (Lambs Quarters, Wormwood Sage, S. Ragweed, E. Plaintain, Sheep Sorrel, and Pigweed), to Bermuda and Timothy grasses, to all trees (Elder, Sycamore, Cottowood, Oak, Ash, Hickory, Birch, and Elm), to several organisms (Farinae Mite, Cockroach, Cat, and Pt. Mite), to A. Dust and to a few molds (*Alternaria*, *Candida*, and *Stemphylium*). Significantly, the skin endpoint titration test could have included *Actinomyces*, *Bacillus*, *Cladosporium*, *Stachybotrys chartum*, *Penicillium*, *Aspergillus versicolor*, and *Alternaria alternate* (the molds found in the Buckeye building).

exists, then specific causation must also exist, without regard to the levels of exposure. There is no support in the scientific literature for this causation theory.¹²⁵

{¶49} In *Kannankeril v. Terminix Internatl., Inc.*,¹²⁶ the Third Circuit Court of Appeals noted that while a doctor “does not have to employ all of the many techniques available to him in order for his analysis to be reliable,”¹²⁷ a “systematic comparison and contrasting of the clinical findings” is necessary to obtain a valid differential diagnosis. The First Circuit Court of Appeals, in *Baker v. Dalkon Shield Claimant’s Trust*,¹²⁸ agreed, noting that “identifying a medical ‘cause’ by narrowing down the more likely causes until the most likely culprit is isolated,” is an essential application of a differential diagnosis.

{¶50} In the case *sub judice*, Dr. Bernstein’s differential diagnosis is scientifically invalid and unreliable. Dr. Bernstein fails to rule in the molds found in the Buckeye building - specifically *Chaetomium*, *Acremonium*, *Stachybotrys chartarum*, *Aspergillus versicolor*, and *Penicillium*, which were found to be present by FOCH,¹²⁹ and *actinomycetes*, gram-negative bacteria, *Endotoxin*, *Cladosporium*, *Alterneria alternate*, *Penicillium* and *Stachybotrys chartarum*, which were found to be present by Hygienetics¹³⁰ - as possible causes for Plaintiffs’ symptoms.

¹²⁵ *Roche v. Lincoln Prop. Co.* (E.D. Va. 2003), 278 F.Supp.2d 744, 2003 U.S. Dist. LEXIS 23361.

¹²⁶ *Kannankeril v. Terminix Internatl., Inc.* (C.A.3, 1997), 128 F.3d 802, 807.

¹²⁷ See, also, *Hardyman v. Norfolk & Western Ry Co.* (C.A.6, 2001), 243 F.3d 255, 260-261 (defining “differential diagnosis” in a similar fashion); *Baker v. Dalkon Shield Claimant’s Trust* (C.A.1, 1998), 156 F.3d 248, 252 (differential diagnosis involves “identifying a medical ‘cause’ by narrowing down the more likely causes until the most likely culprit is isolated”).

¹²⁸ *Baker v. Dalkon Shield Claimant’s Trust* (C.A.1, 1998), 156 F.3d 248, 1998 U.S. App. LEXIS 24499

¹²⁹ Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Exclude and Testimony Relating to the October 2000 Testing Conducted by Hygienetics Environmental Services, Inc., at Exhibit 2 (Letter dated September 15, 2000, from E.D. Foley (FOHC) to Dr. Dan Pfahl). See, Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671, at 1; Deposition of Ronald Gots, M.D., Ph.D., Exhibit 3 (Letter dated November 9, 2000 from E.D. Foley to Ms. Joan Szuberla).

¹³⁰ Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671.

{¶51} Dr. Bernstein failed to rule out any irritants that might be present in the Buckeye building or in Plaintiffs’ homes – as possible causes for Plaintiffs’ symptoms. Indeed, Dr. Bernstein noted that he could not tell specifically which irritant agent was causing the irritant-induced response, and that he could only tell from the environmental report that there were some “markers” in the air.¹³¹ Further, Dr. Bernstein conceded that the “markers”¹³² may not have been the irritants, but only “markers for the problems with the overall air quality.”¹³³

{¶52} Dr. Bernstein or Plaintiffs’ primary physicians, did not methodically test Plaintiffs’ susceptibility to any of the molds, toxins or other allergens or irritants. Testing was haphazard, depending on each primary physician’s decisions for their patient, rather than attempting to find common causes for the symptoms of the Plaintiffs as a group. Although Dr. Bernstein “identified certain markers in the environmental results that indicated problems in the air quality,”¹³⁴ he could not “isolate a single specific chemical that he could say with certainty was the sole culprit.”¹³⁵ But Plaintiffs argue that “the state of the art and costs involved limited the information that could be ascertained from these test results,”¹³⁶ and that “these test results are the most scientifically accurate data available to Dr. Bernstein, and basing an opinion on this type of data, in spite of its recognized limitations does not render the opinion unreliable.”¹³⁷ Plaintiff’s reliance on this data, however, is misplaced because it does not assist Dr. Bernstein in ruling in or ruling out possible causes for Plaintiffs’ symptoms, however accurate it may be.

¹³¹ Deposition of Jonathan A. Bernstein, M.D., at 39: 20.

¹³² Deposition of Jonathan A. Bernstein, M.D., at 39: 20.

¹³³ Deposition of Jonathan A. Bernstein, M.D., at 39: 20-23.

¹³⁴ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 9.

¹³⁵ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 9. See Deposition of Jonathan A. Bernstein, M.D., at 39.

¹³⁶ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 9.

¹³⁷ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 9.

{¶53} Dr. Bernstein fails to rule out the Plaintiffs’ potential allergies to cats, dust mites, grasses, weeds, and trees as potential causes for the Plaintiffs’ symptoms. Defendants argue that Dr. Bernstein did not “conduct any testing to determine whether various allergens or irritants common in the air, such as pet dander, grass, trees, etc., were the cause of Plaintiffs’ symptoms.”¹³⁸ Dr. Bernstein admits that no testing was conducted for the levels of irritants in the building:

Q. You talk about mold, mold byproducts, bacteria and other air particulars. Are those the irritants?

A. SO₂, NO₂, ozone, carbon monoxide, other types of, you know, VOCs.

Q. For this particular case?

A. These were not measured.

Q. Okay.

A. But these go into air quality.¹³⁹

{¶54} Assuming arguendo that Dr. Bernstein properly ruled in the various molds found in the Buckeye building, he failed to rule out any of the other allergens to which the Plaintiffs were sensitive. The medical records available to Dr. Bernstein suggest that several Plaintiffs were allergic to multiple allergens.¹⁴⁰ Therefore, as part of the second portion of a differential diagnosis methodology, Dr. Bernstein should have excluded the remaining allergens, or at least minimize the probability of the contribution of the remaining allergens to the Plaintiff’s symptomology.¹⁴¹

¹³⁸ Defendants’ Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim and Memorandum in Support, at 8.

¹³⁹ Deposition of Jonathan A. Bernstein, M.D., at 39.

¹⁴⁰ See Affidavit of Margaret M. Murray, Exhibit 1 (Medical Records Abstracts), Filed April 15, 2004.

¹⁴¹ See *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 771, 1995 U.S. Dist. LEXIS 9836.

{¶55} At his deposition, on October 21, 2003, Dr. Bernstein admitted, through questioning by Defense counsel, that he was not able to isolate the cause of the Plaintiffs' allergic reactions:

Q. What was – do you have an opinion in this case as to what was causing the irritant-induced response?

A. Specifically?

Q. Yeah.

A. No.

Q. I mean, one agent? No, I can't tell you specifically. I can tell you from just looking at the environmental report that there was some, you know, markers that things were in the air. But that in itself may not be – that may not have been the – those may have just been markers for the problems with the overall air quality.¹⁴²

{¶56} In response to a question by Defendant's attorney, Dr. Bernstein acknowledged that he has not evaluated the Plaintiffs for exposure to irritants outside the workplace,¹⁴³ stating that he has "not evaluated these people."¹⁴⁴ Dr. Bernstein agreed that "one could possibly set up a challenge, if they had rhinitis symptoms, in doing a nasal peak expiratory flow rates,"¹⁴⁵ but argues that "you would have to make sure they're controlled properly and that they would be valid. And that's difficult, because how do you control for irritant exposures? There's a lot of people who are looking at specific subthreshold challenges to irritants, but how do you mask

¹⁴² Deposition of Dr. Bernstein, at 39.

¹⁴³ Deposition of Jonathan A. Bernstein, M.D., at 42-47

¹⁴⁴ Deposition of Jonathan A. Bernstein, M.D., at 47.

¹⁴⁵ Deposition of Jonathan A. Bernstein, M.D., at 48: 1-3.

odors when you're doing challenges? How do you keep the patient unbiased and so forth?"¹⁴⁶ Thus, Dr. Bernstein asserts that his diagnosis "largely depends on [Plaintiffs'] history, the types of symptoms, their improvements out of the workplace, worsening getting in the workplace, getting better – self limiting nature in most of these subjects."¹⁴⁷ He further asserts that his "clinical experience, seeing hundreds and hundreds of these types of patients, and knowing how the classical course of how people do in and out of the workplace or home * * *"¹⁴⁸ supports his conclusion, however, his own testimony reveals his awareness that a conclusion based upon a general assessment is not the same as a scientifically valid, controlled test.

{¶57} Defendants contend that Dr. Bernstein did not have all the information necessary to exclude all of the other allergens from his differential diagnosis. Dr. Bernstein's deposition, conducted after he received all of the information and was able to digest the medical records and test results, fails to set forth, in any detail, the factors that supported Dr. Bernstein's ruling out the remaining allergens and leaving the molds or irritants found in the Buckeye building as the sole cause of Plaintiffs' symptomology.

{¶58} Dr. Bernstein's testimony is similar to that of the allergist in *Roche v. Lincoln Property Co.*¹⁴⁹ In *Roche*, the Eastern District Court of Virginia barred the allergist's testimony on *Daubert* grounds because it found that the allergist's "testimony is based on conflicting facts, conflicting reports and literature, fails to rule-in and rule-out several potential allergens, and relies solely on temporal relation; thus his differential diagnosis is unsupported and unreliable."¹⁵⁰

¹⁴⁶ Deposition of Jonathan A. Bernstein, M.D., at 48: 8-15.

¹⁴⁷ Deposition of Jonathan A. Bernstein, M.D., at 48: 16-19.

¹⁴⁸ Deposition of Jonathan A. Bernstein, M.D., at 48: 21-24.

¹⁴⁹ *Roche v. Lincoln Prop. Co.* (E.D. Va. 2003), 278 F.Supp.2d 744, 2003 U.S. Dist. LEXIS 23361.

¹⁵⁰ *Roche v. Lincoln Prop. Co.* (E.D. Va. 2003), 278 F.Supp.2d 744, 751-52 (enumerating ten major flaws of the allergist's methodology).

{¶59} Dr. Bernstein's testimony is also similar to that of the internist in *Ballinger v. Atkins*.¹⁵¹ In *Ballinger*, the Eastern District Court of Virginia barred the internist's testimony on *Daubert* grounds because the expert had conceded that there were multiple causes for the plaintiff's memory loss besides the brain damage: "[the internist] includes among those other possible causes sugar intolerance, latent hypoglycemia, psychiatric disorder, bowel disorder or even an intestinal parasite."¹⁵²

{¶60} Similar to the situation in *Ballinger*, several Plaintiffs in this case have allergies beyond the molds found in the Buckeye building. Dr. Bernstein's differential diagnosis fails to account for these alternate explanations, and this Court finds that his testimony is suspect and unsupported by science.

{¶61} In addition to failing to exclude obvious alternate causes, Dr. Bernstein acknowledged that he "would not be able to testify * * * as to when and where each specific exposure occurred."¹⁵³ Thus, Dr. Bernstein's differential diagnosis is unsupported by the record and is scientifically invalid. As stated in the Abstract of a publication co-written by Dr. Bernstein which was provided by the Plaintiff, "a systematic clinical approach for evaluating persons with suspected building-related respiratory illness is warranted."¹⁵⁴

{¶62} In his deposition, Dr. Bernstein referred to literature relating to irritant induced response and sick-building syndrome he had read and on his previous experience with sick-building syndrome patients.¹⁵⁵ However, he did not refer to any specific literature, suggesting

¹⁵¹ *Ballinger v. Atkins* (E.D. Va. 1996), 947 F. Supp. 925, 1996 U.S. Dist. LEXIS 19259.

¹⁵² *Ballinger v. Atkins* (E.D. Va. 1996), 947 F. Supp. 925, 928.

¹⁵³ Deposition of Jonathan A. Bernstein, M.D., at 75: 16-19.

¹⁵⁴ Plaintiffs' Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim, Exhibit 3, D. Trout, J. Bernstein, K. Martinez, R. Biagini, and K. Wallingford, *Bioareosol Lung Damage in a Worker with Repeated Exposure to Fungi in a Water-Damaged Building*, Abstract at www.mold-survivor.com/bioareosol_lung_damage_in_a_work.htm.

¹⁵⁵ See Deposition of Jonathan A. Bernstein, M.D., at 55.

that Defendants go into “Entrez PubMed”¹⁵⁶ where there is a “whole preponderance of literature.”¹⁵⁷ Dr. Bernstein also acknowledged that he did not “specifically do a literature review and pull articles to review” in preparing his report,¹⁵⁸ and that he “wasn’t planning on doing any additional [research],” but that he was “constantly pulling literature on – in this area, regarding building-related illness.”¹⁵⁹

{¶63} In his deposition, Dr. Bernstein answered questions related to his previous experiences serving as an expert witness to a legal proceeding. It is telling of the present case that Dr. Bernstein classified his most recent case as one involving “ideopathic [sic] environmental intolerance,”¹⁶⁰ with ‘idiopathic’ serving as a medical euphemism for ‘unknown or obscure.’¹⁶¹ In an article sponsored by the Harvard Medical School, Dr. Robert H. Schmerling defined ‘idiopathic’ as a “disease arising from itself” and that it is one of many ways of saying “I don’t know.”¹⁶²

{¶64} Dr. Bernstein failed to present any articles concerning the molds found in the Buckeye building and their effects on humans. Nor did Dr. Bernstein present any articles concerning irritants or sick-building syndrome or building-related syndrome. Although Plaintiffs contend that “Dr. Bernstein has testified that there is published, peer reviewed literature

¹⁵⁶ United States National Library of Medicine, <http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?db=PubMed>. *Entrez* is the integrated, text-based search and retrieval system used at NCBI for the major databases, including PubMed, Nucleotide and Protein Sequences, Protein Structures, Complete Genomes, Taxonomy, and others.

¹⁵⁷ Deposition of Jonathan A. Bernstein, M.D., at 49.

¹⁵⁸ Deposition of Jonathan A. Bernstein, M.D., at 12-13.

¹⁵⁹ Deposition of Jonathan A. Bernstein, M.D., at 13.

¹⁶⁰ Deposition of Jonathan A. Bernstein, M.D., at 10:19-20.

¹⁶¹ Merriam-Webster Medical Dictionary (2002). Also, TheFreeDictionary.com, www.encyclopedia.thefreedictionary.com/idiopathic, defined ‘idiopathic,’ as “Among the medical establishment, the term idiopathic has come to be a euphemism for ‘I don’t know’ – a so called ‘two-dollar’ word. In his article, *Central Nervous System Processing in Idiopathic Scoliosis*, Jerry Larson called ‘idiopathic’ a “two-dollar word meaning “we don’t know why.” www.somatics.de/Scoliosis.html.

¹⁶² Dr. Robert H. Schmerling, Harvard Medical School’ Consumer Health Information, Healthy Lifestyle section – What Your Doctor is Saying, “Sometimes It’s ‘I don’t know,’” www.intelhealth.com/IH/ihtIH/WSIHW000/35320/35328/34387.html.

recognizing the relationship between air quality and adverse health effects,”¹⁶³ he does not specifically cite any articles upon which he relies during his deposition or his correspondence concerning Plaintiffs.

{¶65} Plaintiffs assert, however, that the literature documents the health effect of irritants and supports Dr. Bernstein’s diagnosis. Plaintiffs argue that Dr. Bernstein is “personally involved in ongoing research on the health effects of air pollution,” and that “Defendant’s contention that there are other publications to the contrary merely presents a conflicting view that brings ‘the issue of credibility into play.’”¹⁶⁴ Further, Plaintiff asserts that “peer review and publication are not prerequisites to admissibility under *Daubert*, “while peer review may be helpful, it is not absolutely necessary for an opinion to be admissible.”¹⁶⁵

{¶66} Dr. Bernstein does not present any published articles to form an opinion that exposure to the specific levels of mold found in the Buckeye building¹⁶⁶ causes cognitive injuries or allergic reactions. Dr. Bernstein fails to provide any scientifically valid basis to support his reliance on these articles to his conclusions on specific causation, that Plaintiffs were not affected by the mold. As such, Dr. Bernstein’s diagnosis fails because he has not even identified the standards identifying the quantity of mold or irritants that are acceptable in indoor environments with respect to health.

¹⁶³ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 12. See Deposition of Jonathan A. Bernstein, M.D., at 49-50, 55.

¹⁶⁴ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 26, quoting *Miller v. Bike* (1998), 80 Ohio St. 3d 607, 613.

¹⁶⁵ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 13. See *Miller v. Bike* (1998), 80 Ohio St. 3d 607

¹⁶⁶ *Actinomycetes, Bacillus, Cladosporium, Stachybotrys chartum, Penicillium, Aspergillus versicolor, and Alternaria alternate.*

{¶67} Dr. Bernstein's lack of reference to and reliance upon peer-reviewed literature is disturbing. Plaintiffs, in their Brief in Opposition include numerous articles, only one of which Dr. Bernstein refers to in his deposition or his correspondence with Plaintiffs.¹⁶⁷

2. The Known or the Potential Rate of Error of the Method Used

{¶68} A differential diagnosis requires a process of elimination, that when properly done, can produce highly reliable results. Differential diagnosis is unlike standard quantitative scientific research because the former's validity is derived from the thoroughness of the elimination process, rather than rates of error. However, in this case, Dr. Bernstein's testimony indicates that the information available to him, and his assessment of that information, was too limited to approach a scientifically valid differential diagnosis. Thus, in the absence of an actual method, the potential rate of error is a moot point.

3. Degree of the Method's or Conclusion's Acceptance Within the Relevant Scientific Community

{¶69} It is clear that Dr. Bernstein does not follow a differential diagnosis methodology in formulating his opinion on proximate causation in this case. Dr. Bernstein relies primarily upon the temporal relation of the Plaintiffs' exposure to the alleged toxic molds or irritants to the onset and worsening of their physical problems to reach his opinion on proximate causation. This Court finds that Dr. Bernstein's primary reliance is neither supported by the record, nor does it meet the *Daubert* standards.

¹⁶⁷ Plaintiffs' Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim, Exhibit 3, D. Trout, J. Bernstein, K. Martinez, R. Biagini, and K. Wallingford, *Bioareosol Lung Damage in a Worker with Repeated Exposure to Fungi in a Water-Damaged Building*, Abstract at www.mold-survivor.com/bioareosol_lung_damage_in_a_work.htm.

{¶70} An opinion based primarily, if not solely, on temporal proximity does not meet *Daubert* standards.¹⁶⁸ In *Cavallo*,¹⁶⁹ the Court opined that “at bottom, [the expert’s] opinion is founded primarily on the temporal connection between the spill and the development of Ms. Cavallo’s symptoms, as well as on his subjective, unverified, belief that AvJet can cause the types of injuries from which Ms. Cavallo suffers. This is not the method of science.”¹⁷⁰ The Court emphasized that “it is well settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method and is therefore insufficient to satisfy the requirements of [Rule] 702¹⁷¹

{¶71} Plaintiffs assert, however, that “a reliable differential diagnosis provides valid foundation for a causation opinion, even where no epidemiological studies, peer reviewed published studies, animal studies, or laboratory data are offered in support of an opinion.”¹⁷² In *Westberry v. Gislaved Gummi AB*,¹⁷³ the defendant claimed that the doctor had no scientific literature on which to rely to “rule in” talc as a possible basis for plaintiff’s sinus condition, but the Court pointed out that it was undisputed that inhalation of high levels of talc irritates mucous membranes.¹⁷⁴

{¶72} The expert in *Westberry* was the plaintiff’s treating physician who had treated the plaintiff prior to his exposure to the talc in question. Also, the treating physician experimented

¹⁶⁸ See *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756.

¹⁶⁹ *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756.

¹⁷⁰ *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 773; See also, *Schmaltz v. Norfolk & Western Ry. Co.*, (N.D. Ill. 1995), 878 F. Supp. 1119, 1122.

¹⁷¹ *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 773; See also *Schmaltz v. Norfolk & Western Ry. Co.*, (N.D. Ill. 1995), 878 F. Supp. 1119, 1122. *In re Breast Implant Litig.* (D. Colo. 1998), 11 F. Supp. 2d 1217, 1238-39 (discussing how temporal relationship itself did not provide evidence of causation); *In re Swine Flu Immunization Prod. Liab. Litig.* (D. Colo. 1980), 533 F. Supp. 567, 567 (same); *In re "Agent Orange" Prod. Liab. Litig.* (E.D.N.Y. 1985), 611 F. Supp. 1223, 1249 (same).

¹⁷² Plaintiffs’ Memorandum in Opposition, at 19. (citing *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257).

¹⁷³ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257.

¹⁷⁴ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257, 264.

with keeping the plaintiff out of work and noticed that his sinus condition would improve when not working and would worsen when he returned to work.¹⁷⁵ In this case, Dr. Bernstein did not examine or treat the Plaintiffs. He was not treating the Plaintiffs either prior to their moving into the Buckeye building, or while they worked in the Buckeye building. The record does not demonstrate that Dr. Bernstein conducted the same or similar type of testing that Dr. Isenhower performed in *Westberry*.¹⁷⁶ Dr. Bernstein, in addition, fails to *provide* any scientific or medical explanation for his opinions. In *Westberry*, there was ample evidence before the court that the plaintiff had been exposed to severe concentrations of talc, which the court found to be a sinus irritant.¹⁷⁷ Here, Dr. Bernstein testified in his deposition that the Plaintiffs had been exposed to mold and “irritants;” however, not all mold spores are allergens and not all molds produce mycotoxins. The considerable difference between this case *sub judice* and *Westberry* is that Dr. Bernstein fails to provide an adequate methodology for his conclusions on proximate causation, and his primary reliance on temporal relationships is scientifically invalid. The mere fact two events correspond in time does not mean the two necessarily are related in any causative fashion.¹⁷⁸

III. CONCLUSION

{¶73} This Court concludes that Dr. Bernstein fails to provide any evidence that a particular mold or irritant in the Buckeye building “had a greater possibility than cigarettes, dust mites, fibers, [cat dander], * * * or any number of present environmental allergens, of causing

¹⁷⁵ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257, 265.

¹⁷⁶ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257.

¹⁷⁷ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257.

¹⁷⁸ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257.

health effects” in the Plaintiffs.¹⁷⁹ This Court holds that Dr. Bernstein failed to adhere to an established methodology. His sole reliance on temporal causation is insufficient to satisfy the requirements of *Daubert* and its progeny. Dr. Bernstein’s testimony is scientifically invalid. Accordingly, this Court excludes Dr. Bernstein’s testimony as to proximate causation for the Plaintiffs’ injuries as inadmissible. Dr. Bernstein’s testimony is not reliable, and therefore is not relevant and should not be admissible.

{¶74} Based on the foregoing, this Court finds Defendant’s Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim to be appropriate. Accordingly,

{¶75} IT IS ORDERED, ADJUDGED, and DECREED that Defendant’s Motion is GRANTED and Dr. Bernstein’s Testimony is barred.

{¶76} Clerk of Courts shall send copies of this Decision and Order to all parties of record or their counsel by regular U.S. Mail.

FEBRUARY 4, 2005

PAUL C. MOON, JUDGE

¹⁷⁹ *Flores v. Allstate Texas Lloyd’s Co.*, (S.D. Tex. 2002), 229 F. Supp. 2d 697, 702.

CERTIFICATE OF SERVICE

A copy of the foregoing "Decision and Order" was delivered by ordinary Mail, this 7th day of February, 2005, to the following:

Duane L. Galloway
Duane L. Galloway & Associates
538 Huron Ave.
Sandusky, OH 44870
Attorney for Plaintiffs Louise & Daniel Terry

Margaret M. Murray
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
P.O. Box 19
Sandusky, OH 44871-0019
Attorneys for Plaintiffs

Thomas J. Antonini
Corey A. Donovan
Robinson, Curphey & O'Connell
Ninth Floore, Four Seagate
Toledo, OH 43604
Attorney for Defendant John Caputo, Leonard Partin, Lake Investments, Northcoast Property Management & W.W. Emerson Co.

William F. Pietrykowski
Manahan Pietrykowski
125 Jefferson Street
Port Clinton, OH 43452
Attorney for Defendant John Caputo, Leonard Partin, Lake Investments, Northcoast Property Management & W.W. Emerson Co.