

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

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 Motion of Defendants Lake Investments, Inc., John Caputo, Leonard Partin, Northcoast Property Management Company, and W.W. Emerson Company for **Summary Judgment** and Memorandum in Support filed February 2, 2004. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment was filed March 8, 2004. Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment was filed March 1, 2004. Plaintiffs' Notice of Supplemental Authority was filed June 24, 2004. Defendants' Memorandum in Response to Plaintiffs' Notice of Supplemental Authority was filed July 6, 2004. Defendants' Notice of Supplemental Authority in Support of Defendants' Motion

for Summary Judgment was filed August 6, 2004. Plaintiffs' Reply to Defendants' Notice of Supplemental Authority in Support of Their Motion for Summary Judgment was filed August 17, 2004. Defendants' Second Supplemental Notice of Authority in Support of Defendants' Motion for Summary Judgment was filed December 17, 2004. Plaintiffs' Motion to Strike was filed December 21, 2004.¹ Defendants' Response to Plaintiffs' Motion to Strike was filed December 29, 2004. Plaintiffs' Reply Contra Defendants' Response to Plaintiffs' Motion to Strike was filed December 29, 2004, and Defendants' Response to Plaintiffs' Reply Contra was filed January 3, 2005.²

{¶2} This matter is before the Court on Defendants' Motion for Summary Judgment, which presents to this Court for consideration whether no genuine issues of material fact exist by which Defendants can meet the standards for establishing that Defendants were not negligent as a matter of law; whether there exists a genuine issue of material fact concerning the handling of the Plaintiffs' complaints about the mold and leaks in the Buckeye building and the remediation of the Buckeye building, which precludes granting summary judgment in favor of the Defendants on Plaintiffs' claims of negligence.

{¶3} 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

¹ Plaintiffs' Motion to Strike asserts that "Defendants' untimely and impermissible motion, response, and 'supplemental authority' memorandum" should be stricken because Defendants are "attempting to circumvent (1) this Court's rules; (2) the Ohio Rules of Civil Procedure, (3) the law of the case to correct their errors, and (4) in order to make blatant attacks on Plaintiffs' counsel," at 1. This Court has reviewed the record, all pleadings and exhibits in the light most favorable to the Plaintiffs. See Standard of Review within this 'Decision and Order' at 3, and ¶ 7.

² Defendants have also filed separate motions for (1) Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim (to bar the testimony of Dr. Bernstein), (2) Motion in Limine to Exclude Evidence of Plaintiffs' Medical Expenses, (2) to Withdraw Admissions, (3) Exclude Evidence and Testimony Relating to a Microbial Assessment Survey Conducted by Hygienetics Environmental Services, (4) Objections to the Admissibility of Hearsay Medical Records, and (5) 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 (3) Exclude the Testimony of Ronald Gots, M.D., Ph.D.

negligence of the Defendants.”³ 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.

{¶4} This Court finds that there are no genuine issues of material fact in dispute and holds that Defendants are entitled to judgment as a matter of law on all counts. Plaintiffs fail to present a claim for negligence because they failed to establish proximate causation.

I. STANDARD OF REVIEW

{¶5} Under Civ.R. 56(C), summary judgment is appropriate when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party.⁴

{¶6} The moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record that support the requested judgment.⁵ If the moving party discharges this initial burden, the party against whom the motion is made then bears a reciprocal burden of specificity to oppose the motion.⁶ Moreover, it is well

³ Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment, at 2.

⁴ *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St. 3d 367, 369-370, 696 N.E. 2d 201, Citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 1995 Ohio 286, 653 N.E. 2d 1196, paragraph three of the syllabus; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 117, 522 N.E.2d 489, 505.

⁵ *Vahila v. Hall* (1997), 77 Ohio St. 3d 421, 430; see also *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293, 662 N.E.2d 264 (“the moving party cannot discharge its initial burden under Civ.R.56 simply by making a conclusory assertion that the non-moving party has no evidence to prove its case”).

⁶ *Vahila v. Hall* (1997), 77 Ohio St. 3d 421; see also *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112.

settled that the party seeking summary judgment bears the burden of showing that no genuine issue of material fact exists for trial.⁷

{¶7} In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion.⁸

{¶8} The burden of establishing that no genuine issues of any material fact remain to be litigated is on the party moving for summary judgment.⁹ Once a party moves for summary judgment and has supported his or her motion by sufficient and acceptable evidence, the party opposing the motion has a reciprocal burden to respond by affidavit or as provided in Civ.R. 56(C), setting forth specific facts explaining that a genuine issue of material fact exists for trial.¹⁰ In accordance with Civ. R. 56(E), “a nonmovant may not rest on the mere allegations or denials of his pleading but must set forth specific facts showing there is a genuine issue for trial.”¹¹ The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial.¹²

II. BACKGROUND

{¶9} Plaintiffs include 15 employees of the Ottawa County Board of Mental Retardation and Developmental Delay (“Ottawa County MR/DD”), and their spouses. Plaintiffs

⁷ *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 91 L. Ed. 2d 265, 106 S. Ct. 2548; *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112, 115, 526 N.E.2d 798; *Dresher v. Burt* (1996), 75 Ohio St. 3d 280.

⁸ *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St. 3d 45; *Harless v. Willis Day Warehousing* (1978), 54 Ohio St. 2d 64; *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356, 358-359, 604 N.E.2d 138 (Doubts must be resolved in favor of the nonmoving party).

⁹ *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340; *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 120.

¹⁰ *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

¹¹ *Chaney v. Clark Cty. Agricultural Soc.* (1993), 90 Ohio App. 3d 421, 629 N.E.2d 513.

¹² *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St. 3d 108, 111, 570 N.E.2d 1095; *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322-323.

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.”¹³ 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.”¹⁴

{¶10} 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.

{¶11} 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

¹³ Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment, at 2.

¹⁴ Second Amended Complaint, at ¶ 38.

Company is Lake Investments, Inc. The owners of Lake Investments, Inc. include Leonard A. Partin and John J. Caputo, Jr.

{¶12} 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.”¹⁵

{¶13} 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 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.¹⁶

{¶14} Plaintiffs assert that “mold was visible on the walls by the windows and around the electrical outlets in Suites B and D,”¹⁷ and that there was “black residue on the ceiling vents in Suite C, in the women’s restroom, and in the vent in an office on Suite D.”¹⁸ 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.”¹⁹ Because Mr. Partin used the

¹⁵ Second Amended Complaint, at ¶21.

¹⁶ See Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 2 (Statement of the Facts).

¹⁷ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 11.

¹⁸ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 11.

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

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.²⁰

{¶15} 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.²¹ Mr. Pfahl also spoke on several occasions with Mr. Caputo and Mr. Partin concerning the “ill-fitting windows” in the Buckeye building.²² According to Plaintiffs, “water leaked through the windows when it rained and pooled on the floor.”²³ Plaintiffs also alleged that the rainwater “collected between the walls, resulting in rot,” and that the windows were drafty, rattled when it was windy.”²⁴

{¶16} 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.”²⁵ 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.²⁶ Further, Plaintiffs noted that

²⁰ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 9.

²¹ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 6.

²² Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 8.

²³ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 8.

²⁴ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 8.

²⁵ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 10.

²⁶ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 10.

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."²⁷

{¶17} 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."²⁸ 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."²⁹ 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."³⁰ In 2000, water was found in Suite A, and that the "entire floor was wet."³¹ According to Plaintiffs, the "standing water in Suite A was 'shop-vacuumed' but the carpeting was not cleaned or fully dried."³² Afterwards, the "sour, musty smell" became "stronger and more noticeable" and "dark spots on the carpet were obvious and were getting larger over time."³³

{¶18} 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 2000.³⁴ Plaintiffs assert that Mr. Caputo had walked through the Buckeye building

²⁷ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 10.

²⁸ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 11.

²⁹ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 12.

³⁰ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 13.

³¹ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 16.

³² Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 16.

³³ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 16.

³⁴ Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 14.

numerous times and was fully aware of the conditions of the building.³⁵ 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.”³⁶ 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.”³⁷

{¶19} 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*.³⁸ No outdoor air samples were collected for 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.³⁹ While acknowledging that the *Stachybotrys chartarum* was measured in very low concentrations, the Consultant asserted “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.”⁴⁰

³⁵ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 17.

³⁶ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 16.

³⁷ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 18.

³⁸ 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).

³⁹ 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).

⁴⁰ 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).

{¶20} 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.⁴¹ Shortly thereafter, Plaintiffs filed this cause of action on September 25, 2000.

{¶21} 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.⁴²

{¶22} 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 alternata*.⁴³ Significantly, however, the Hygienetics survey concluded only that “there is a probable correlation in the complaint symptoms to symptoms associated with organisms detected during the FOHC and the Hygienetics survey.”⁴⁴

{¶23} 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.⁴⁵ According to Plaintiffs, Dr. Bernstein has concluded that “the plaintiffs are suffering from building related illness due to poor ventilation,

⁴¹ Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 18.

⁴² Defendants’ Motion to Exclude and Testimony Relating to the October 2000 Testing Conducted by Hygienetics Environmental Services, Inc. (unmarked exhibit). See Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671, at 1.

⁴³ Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671, at 14-16.

⁴⁴ Hygienetics Environmental Services, Inc., Microbia Assessment Survey, 140 Buckeye Blvd., Port Clinton, Ohio. October 18, 2000. Hygienetics Project Number 3500.671, at 22.

⁴⁵ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 2.

filtration and humidity control that resulted in an accumulation of mold, mold by-products and other air particles resulting in Plaintiffs' clinical manifestations."⁴⁶

{¶24} In addressing Defendants' Motion for Summary Judgment, this Court has reviewed the record, all pleadings, exhibits and the relevant case law.

II. ANALYSIS

A. Negligence

{¶25} In order to establish a cause of action in negligence, Plaintiff bears the burden of proving that (1) Defendant owed a duty of reasonable care towards the Plaintiffs; (2) that the defendant breached its duty of reasonable care; and (3) that the Plaintiffs suffered injuries proximately caused by the breach.⁴⁷ Plaintiffs argue that Defendants failed to discharge their duty to another in that their conduct was excessive and without due regard for the safety of others [the Plaintiffs]. Plaintiffs alleged that Defendants' conduct was negligent *per se* and in all other ways negligent.

1. Duty of Care

{¶26} This Court must first consider whether the Defendants owed a duty of care to the Plaintiffs. "The amount of care required of a person to establish whether he has discharged his

⁴⁶ Plaintiffs' Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim, at 2. See

⁴⁶ 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.

⁴⁷ Prosser & Keeton on the Law of Torts § 30, at 146-65 (W. Page Keeton et. al. eds., 5th ed. 1984). *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285, 423 N.E.2d 467; 1981 Ohio LEXIS 578, 21 Ohio Op. 3d 177; *Fischer v. Dairy Mart Conv. Stores* (1991), 77 Ohio App. 3d 543, 551, 602 N.E.2d 1204; 1991 Ohio App. LEXIS 4234; *Wilburn v. Cleveland Elec. Illum. Co.* (1991), 74 Ohio App. 3d 401, 406, 599 N.E.2d 301; 1991 Ohio App. LEXIS 2381. See, *Di Gildo v. Caponi* (1969), 18 Ohio St. 2d 125, 247 N.E.2d 732, 1969 Ohio LEXIS 385, 47 Ohio Op. 2d 282; *Feldman v. Howard* (1967), 10 Ohio St. 2d 189, 226 N.E.2d 564, 1967 Ohio LEXIS 391, 39 Ohio Op. 2d 228; *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 180, 472 N.E. 2d 707, 710. See,

duty to another is variously referred to as the ‘amount of caution,’ the ‘degree of care’ or the ‘standard of conduct’ which an ordinarily careful and prudent person would exercise or observe under the same or similar circumstances.”⁴⁸

{¶27} Whether a duty exists depends largely on the foreseeability of the injury to one in the plaintiffs’ position. “* * * Only when the injured person comes within the circle of those to whom injury may reasonably be anticipated does the defendant owe him a duty of care.”⁴⁹ As Plaintiffs were employees of Ottawa County MR/DD, and Ottawa County MR/DD was leasing the office space from Defendants, the Defendants could clearly foresee that lack of caution on their part could reasonably be anticipated to cause injury to Plaintiffs.

{¶28} In *Stackhouse v. Close*,⁵⁰ The Ohio Supreme Court stated, “A lessor of a building out of possession and control is not liable to the tenant or other person rightfully on the premises for their condition, in the absence of deceit or of any agreement or *liability created by statute*.” (Emphasis added).⁵¹

{¶29} In *Caldwell v. Eger*,⁵² The Ohio Supreme Court noted “it is the well settled general rule that the duties and liabilities of a landlord to persons on the leased premises by the license of the tenant are the same as those owed to the tenant himself. For this purpose they

also, *Kauffman v. First-Central Trust Co.* (1949), 151 Ohio St. 298, 306, 85 N.E.2d 796, 800, 1949 Ohio LEXIS 477, 39 Ohio Op. 137.

⁴⁸ *Di Gildo v. Caponi* (1969), 18 Ohio St. 2d 125, 127. See *Thompson v. Ohio Fuel Gas Co.* (1967), 9 Ohio St. 2d 116; *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367; *Soltz v. Colony Recreation Center* (1949), 151 Ohio St. 503; *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584; *Davison v. Flowers* (1930), 123 Ohio St. 89; Prosser on Torts (3 Ed.) 146, Section 30; 2 Restatement of Torts 2d 4, Section 281.

⁴⁹ *Drew v. Gross*, 112 Ohio St., 485, 489, 147 N.E., 757. See *Ford v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 107 Ohio St., 100, 140 N.E., 664; 29 Ohio Jurisprudence, 419, 420; *Gedeon v. East Ohio Gas Co.* (1934), 128 Ohio St. 335, 338, 190 N.E. 924, 926; 70 Ohio Jurisprudence 3d (1986) 51, Negligence, Section 11.

⁵⁰ *Stackhouse v. Close* (1911), 83 Ohio St. 339, 94 N.E. 746, paragraph one of the syllabus.

⁵¹ See, also, *Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St.2d 20, 23, 22 O.O.3d 152, 154, 427 N.E.2d 774, 777 (noting that the “breach of a duty imposed by statute has been one exception to the landlord’s immunity from tort claims”).

⁵² *Caldwell v. Eger* (App. 1929), 8 Ohio Law Abs. 47.

stand in his shoes. * * * The guest, servant, etc., of the tenant is usually held to be so identified with the tenant that this right of recovery for injury as against the landlord is the same as that of the tenant would be had he suffered the injury.”⁵³ In *Shump v. First Continental-Robinwood Associates*,⁵⁴ the Ohio Supreme Court emphasized that it does not “distinguish between the duties a landlord owes to a tenant and the duties a landlord owes to other persons lawfully upon the leased premises.”

{¶30} The proposition that a landlord owes the same duties to persons lawfully upon the rental property as the landlord owes to the tenant is not unique to Ohio. Restatement of the Law 2d, Property (1977), Sections 17.6 and 19.1, and 2 Restatement of the Law 2d, Torts, (1965), Sections 357, 358, and 419, do not distinguish between the duties that a landlord owes a tenant and the duties that the landlord owes others upon the leased property with the consent of the tenant.⁵⁵

{¶31} Defendants’ reliance on *Alberty v. J.C. Partners, Ltd.*, is mistaken. The Eighth Appellate Court noted that *Shump v. First Continental-Robinwood Associates*, “is easily distinguished from the case at hand,” and held that “If the landowner gives the entrant privilege to use his land ‘as a mere personal favor to the individual’ and where the entrant’s ‘presence upon the land is solely for his own purposes, in which the landowner has no interest,’ the entrant is a licensee.”⁵⁶ Here, Plaintiffs are tenants, and not licensees.

⁵³ *Caldwell v. Eger* (App. 1929), 8 Ohio Law Abs. 47, quoting 16 Ruling Case Law (1917) 1067, Section 588. See *Defiance Water Co. v. Olinger* (1896), 54 Ohio St. 532, 538, 44 N.E. 238, 239; *Davies v. Kelley* (1925), 112 Ohio St. 122, 146 N.E. 888, paragraph two of the syllabus; *Harrison v. Struich* (App. 1935), 19 Ohio Law Abs. 374, 377.

⁵⁴ *Shump v. First Continental-Robinwood Associates* (1994), 71 Ohio St. 3d 414, 1994 Ohio 427, 644 N.E. 2d 291, 1994 Ohio LEXIS 2924.

⁵⁵ See Annotation (1952), 25 A.L.R.2d 598, 616; Annotation (1952), 64 A.L.R.3d 339.

⁵⁶ See *Patete v. Benko* (1986), 29 Ohio App. 3d 325, 505 N.E.2d 647.

{¶32} As the Ohio Supreme Court in *Shump* noted “it is improper to treat a tenant’s guest as a licensee with regard to a landlord and to hold that a landlord merely owes a tenant’s guest the duty to refrain from wanton or willful misconduct.”⁵⁷ Thus, the Court affirmed its earlier decision in *Stackhouse v. Close*,⁵⁸ clearly holding that a landlord may be held liable to a tenant’s guest for the breach of a statutory duty imposed upon the landlord. For the foregoing reasons, this Court holds that Defendants owe the same duties to Plaintiffs lawfully upon the leased premises as the landlord owes to the tenant.

2. Defendant Breached its Duty of Care

{¶33} In the case *sub judice*, Plaintiffs assert that Ohio Building Code, “which has been adopted by Ottawa County,” is to establish uniform minimum requirements for the * * * maintenance of buildings * * * such requirements shall relate * * * to the safety and sanitation of buildings for their intended uses and occupancy.”⁵⁹ Further, Plaintiffs assert that the Ohio Building Code controls the “alteration, repair, addition, and change of occupancy of any existing

⁵⁷ See *Shump v. First Continental-Robinwood Associates* (1994), 71 Ohio St. 3d 414, 1994 Ohio 427, 644 N.E. 2d 291, 1994 Ohio LEXIS 2924 (The Supreme Court of Ohio rejected the reasoning of *Rose v. Cardinal Industries, Inc.* (1990), 68 Ohio App.3d 406, 588 N.E.2d 947, and *Seiger v. Yeager* (1988), 44 Ohio Misc.2d 40, 542 N.E.2d 1119, stating: “We do not believe that the Landlords and Tenants Act of 1974, R.C. Chapter 5321, alters this well-settled common-law principle. ‘Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.’” *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 90 N.E. 146, paragraph three of the syllabus. See, also, *Bresnik v. Beulah Park Ltd. Partnership, Inc.* (1993), 67 Ohio St.3d 302, 304, 617 N.E.2d 1096, 1098. Thus, the obligations imposed upon a landlord under R.C. 5321.04 would appear to extend to tenants and to other persons lawfully upon the leased premises. R.C. 5321.12 states: “In any action under Chapter 5321 of the Revised Code, any party may recover damages for the breach of contract or the breach of any duty that is imposed by law.”)

⁵⁸ *Stackhouse v. Close* (1911), 83 Ohio St. 339, 94 N.E. 746, paragraph one of the syllabus. *Marqua v. Martin* (1923), 109 Ohio St. 56, 141 N.E. 654, paragraph one of the syllabus

⁵⁹ O.A.C. Section 4101:1-1-01-101.3. See Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 20-21.

structure.”⁶⁰ There is no doubt that the purpose of this building code is to protect any individual in a building from harm. Therefore, Plaintiffs were within the class of persons intended to be protected by the regulation, and their injuries were a type of harm against which the regulation was intended to guard.

{¶34} In *Shump*, the Ohio Supreme Court held that a landlord may not shift to an independent contractor the responsibility of complying with laws designed for the physical safety of others, emphasizing that “such duties are nondelegable.”⁶¹ Restatement of the Law 2d, Property, (1965), Section 19.1, provides: “A landlord who employs an independent contractor to perform a duty which the landlord owes to his tenant to maintain the leased property in [a] reasonably safe condition is subject to liability to the tenant, and to third persons upon the leased premises with the consent of the tenant, for physical harm caused by the contractor's failure to exercise reasonable care to make the leased property reasonably safe.” 2 Restatement of the Law 2d, Torts, (1965), Section 424, states: “One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.”

3. Plaintiffs Suffered Injuries Proximately Caused by the Breach

{¶35} In the case *sub judice*, the inconclusive nature of mold and other “irritant” injuries poses significant causation problems for Plaintiffs, distinguishing it, in considerable respects,

⁶⁰ O.A.C. Section 4101:1-1-02-102.6. See 1202.4, 1403.2, 100.3.3.1.8, 1009.04, 3401.02, and 115.1, which Plaintiffs cite as applicable to the case *sub judice*. See also, Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, at 20-21.

⁶¹ *Shump v. First Continental-Robinwood Associates* (1994), 71 Ohio St. 3d 414, 1994 Ohio 427, 644 N.E. 2d 291, 1994 Ohio LEXIS 2924.

from the traditional tort construct. Mold and other irritant cases (i.e., sick building syndrome and building-related illness) require a prima facie showing of negligence in order to establish liability for injuries.⁶² Here, Dr. Bernstein asserts that Plaintiffs “were suffering from building-related illness * * *.”⁶³

{¶36} Under the causation prong, the Plaintiff must prove that the Defendant negligently allowed moisture intrusion and that the moisture resulted in mold growth, or, Plaintiff must prove that Defendant negligently allowed the introduction of other irritants into the Buckeye building. 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.⁶⁴ Contaminants causing SBS and BRI vary widely.⁶⁵

⁶² See, e.g., *Mondelli v. Kendel Homes Corp.* (Neb. 2001), 631 N.W.2d 846, 852-53 (analyzing a mold construction defect case using the traditional elements of negligence).

⁶³ 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); 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.

⁶⁴ Arnold W. Reitze, Jr. & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. Env’tl. Aff. L. Rev. 247, 341 (1998).

⁶⁵ OSHA’s 1994 indoor air quality proposal cited the following sources of contaminants:

- Formaldehyde from wood products such as particle board, plywood, pressed-wood, paneling; carpeting and backing; furniture and dyed materials; urea-formaldehyde insulating foam; and some cleaners and deodorizers; and press textiles;
- Volatile organic compounds including alkanes, aromatic hydrocarbons, esters, alcohols, aldehydes, and ketones from solvents and cleaning compounds; buildings materials such as paints, glues, caulks, and resins; spray propellants; fabric softeners and deodorizers; unvented combustion sources; dry-cleaning fluids; some fabrics and furnishings; building and roofing materials; waxes and polishing compounds, binders and plasticizers;
- Toxic organic compounds from pesticides;
- VOCs and particulates from office equipment such as computers and laser printers;
- Microbial contaminants in HVAC systems, building materials that have become water-soaked including fiberglass insulation in air handlers, furnishings, fabrics, ceiling tiles, carpeting, humidifiers with stagnant water, drip pans in HVAC systems, and drainage pans in refrigerators;
- Droppings from infestations of pests such as rodents and birds; and
- Pollens from plants.

See OSHA Indoor Air Quality Proposal, 59 Fed. Reg. at 15,983-15,985.

{¶37} Plaintiff must then show the consequences of the mold or irritant contamination, including physical symptoms, because they claim personal injuries. Proof of causation is especially critical for plaintiffs litigating personal injury mold or other irritant claims because scientific expert testimony is usually the only evidence available to correlate mold or irritant exposure with the plaintiff's injury.⁶⁶

{¶38} In *Minner v. American Mortgage & Guaranty Co.*,⁶⁷ employees working for Discover Card in a building leased from American Mortgage & Guaranty Co. alleged that they suffered illness as a result of building conditions. Based on the court's analysis of the expert testimony offered, plaintiffs complained of multiple ailments, including multiple chemical sensitivity, sick building syndrome, chronic fatigue syndrome, fibromyalgia, reactive airway dysfunction syndrome, and toxic encephalopathy. As in this case, the Superior Court of Delaware in *Minner* applied the standard for admission of scientific testimony established in *Daubert*.⁶⁸

{¶39} The *Minner* court, while not denying the possibility of circumstances where building-related illness can be diagnosed, held that SBS is not "a medically valid diagnosis."⁶⁹ The court acknowledged that both chronic fatigue syndrome and fibromyalgia are a scientifically valid diagnoses; however, it excluded expert testimony that the building caused plaintiffs' CFS or fibromyalgia as without a valid scientific foundation because it did not identify a causative

⁶⁶ David F. Blundell, *Proliferation of Mold and Toxic Mold Litigation: What is Safe Exposure to Airborne Fungi Spores Indoors?* 8 *Env'tl. Law.* 389, 394 (2002).

⁶⁷ *Minner v. American Mortgage & Guaranty Co.* (Del. Super. Ct. 2000), 791 A.2d 826, 2000 Del. Super. LEXIS 99.

⁶⁸ *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786.

⁶⁹ *Minner v. American Mortgage & Guaranty Co.* (Del. Super. Ct. 2000), 791 A.2d 826, 851.

factor (except a temporal one) and did not eliminate other potential factors not related to the building, such as smoking, obesity, depression, medication, and alcohol consumption.⁷⁰

{¶40} The mere fact that two events correspond in time does not mean the two necessarily are related in any causative fashion.⁷¹ The Fifth Circuit in *Moore v. Ashland Chem., Inc.*,⁷² held that “in the absence of an established scientific connection between exposure and illness, or compelling circumstances such as those discussed in *Cavallo v. Star Enterprise*,⁷³ the temporal connection between exposure to chemicals and an onset of symptoms, standing alone, is entitled to little weight.” Additionally, in *Cavallo v. Star Enterprise*,⁷⁴ the District Court 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.”

⁷⁰ *Minner v. American Mortgage & Guaranty Co.* (Del. Super. Ct. 2000), 791 A.2d 826, 854-855.

⁷¹ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257. See *Heller v. Shaw Indus. Inc.* (3d Cir. 1999), 167 F.3d 146. See, e.g.: *Moore v. Ashland Chem., Inc.* (5th Cir. 1998), 151 F.3d 269, 278 (en banc) (in absence of established scientific connection between exposure and illness, or compelling circumstances, temporal connection between exposure to chemicals and onset of symptoms, standing alone, is entitled to little weight); *Cerna v. South Fla. Bioavailability Clinic, Inc.* (Fla. Dist. Ct. App. 2002), 815 So. 2d 652, 654-655 (Fla. Dist. Ct. App. 2002) (expert testimony was based primarily on temporal proximity between ingestion of erythromycin and cetirizine and legal blindness and was methodologically unsound); *Donovan v. Bioject, Inc.*, C8-00-1112, 2001 Minn. App. LEXIS 253, at *6-*7 (fact that plaintiff's arm was injured after she received a shot with a Biojector was insufficient to prove that a defect in the Biojector caused injury); *Trach v. Thrift Drug Inc.* (2000), 46 Pa. D & C. 4th 231, 258 (although there was evidence that plaintiff's visual problems occurred for first time shortly after his ingestion of Doxepin, temporal connection is not legally sufficient to prove causation); *Wynacht v. Beckman Instruments, Inc.* (E.D. Tenn. 2000), 113 F. Supp. 2d 1205, 1207-1210 (expert's causation opinion was based solely on temporal relationship between chemical spill from lab analyzer and plaintiff's symptoms, falling short of Daubert reliability); *Hannan v. Pest Control Servs., Inc.* (Ind. Ct. App. 2000), 734 N.E.2d 674, 682 (experts were relying on mere temporal coincidence of pesticide application and plaintiffs' alleged and self-reported illness, and such relationship is insufficient to establish prima facie case on element of causation); *Ferrell v. McDonald's Corp.* (2002), No. 05-01-00838-CV, 2002 Tex. App. LEXIS 5954, at *16-*20 (experts' causation opinions lacked scientific reliability, where diagnosis of RADS was based on close temporal association between onset of problem and exposure to fire suppression agent, and experts did not perform differential diagnosis and admitted to 300 other possible causes but did not negate them); *Wooley v. Smith & Nephew Richards, Inc.* (S.D. Tex. 1999), 67 F. Supp. 2d 703, 710 (noting that many courts have dismissed opinions such as plaintiff's expert, which infer causation from temporal relationship between pain and pedicle screw implantation surgery).

⁷² *Moore v. Ashland Chem., Inc.* (5th Cir. 1998), 151 F.3d 269, 278 (en banc).

⁷³ *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756.

⁷⁴ *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 771.

{¶41} Plaintiffs acknowledge that “causation cannot be based solely on a temporal relationship between exposure and symptoms.”⁷⁵ However the basis of their claim rests upon their assertion that Plaintiffs got sick in the Buckeye Building and got better when then left. Plaintiffs assert that the “strength of a temporal relationship is one factor in the determination of whether an expert has good grounds for his or her conclusion.”⁷⁶ In the materials filed by the Plaintiffs, however, no additional scientifically valid evidence or testimony related to proximate cause is presented to support the relationship which led them to pursue further investigation of the molds and irritants in the building. In other words, the temporal relationship was sufficient to indicate that further testing be done, but not sufficient to meet the Court’s requirement of proximate cause. Proximate cause in this case would require specific testing of the Plaintiffs for those molds and irritants found in the Buckeye building. A valid differential diagnosis would show what caused Plaintiffs’ symptoms and what did not.

{¶42} Although Plaintiffs do not claim that the presence of molds found during the FOHC and Hygienetics surveys may be the causative agent for the symptoms expressed by the Plaintiffs, this Court is mindful of the FOHC survey noting the presence of *Stachybotrys chartarum*, and its assertion that it may be the causative agent for the symptoms expressed by the employees working in the Buckeye building.⁷⁷ While acknowledging that the *Stachybotrys chartarum* was measured in very low concentrations, the Consultant asserted “this organism has been known to cause symptoms in humans that include dermatitis, flu-like symptoms, fatigue,

⁷⁵ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 11.

⁷⁶ Plaintiffs’ Memorandum in Opposition to Rule 104(A) Motion Concerning Plaintiffs’ Exposure Claim, at 11.

⁷⁷ 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).

and diarrhea and may also affect the immune system.”⁷⁸ In addressing the lack of a threshold level by which one can accurately assess the level of exposure required to produce the onset of Plaintiffs’ symptoms, the Fourth Circuit Court in *Westberry v. Gislaved Gummi AB*,⁷⁹ noted that “while precise information concerning the exposure necessary to cause specific harm to humans and exact details pertaining to the plaintiff’s exposure are beneficial, such evidence is not always available, or necessary, to demonstrate that a substance is toxic to humans given substantial exposure and need not invariably provide the basis for an expert’s opinion on causation,” *the expert’s methodology must also be reliable*. The Fourth Circuit Court noted that other Circuits have excluded an expert’s causation testimony where it is based on an unreliable differential diagnosis. In excluding Plaintiff’s expert testimony, the Fourth Circuit Court relied largely on district court opinions from other circuits.⁸⁰ Here, this Court previously held that Plaintiff’s expert, Dr. Bernstein, did not conduct a valid differential diagnosis, and that the temporal relationship presented in Dr. Bernstein’s testimony between the presence of mold and other irritants found in the Buckeye building is not reliable, and therefore is not relevant and must be excluded under *Daubert*.

{¶43} In the case *sub judice*, without reliable expert testimony linking Plaintiffs’ exposure to the specific molds or other irritants in the Buckeye building to their specific injuries, the jury could only speculate, based on a loose temporal relationship and not scientific fact that a

⁷⁸ 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).

⁷⁹ *Westberry v. Gislaved Gummi AB* (4th Cir., 1999), 178 F.3d 257.

⁸⁰ See *Stasior v. Nat’l R.R. Passenger Corp.* (N.D. Il. 1998), 19 F. Supp. 2d 835 (holding that the ergonomist experts were qualified to testify as experts regarding causal connection between occupational risk factors and employee’s CTS but that their proffered testimony was not reliable under *Daubert*); *Magdaleno v. Burlington N. R.R. Co.* (D. Col. 1998), 5 F. Supp. 2d 899 (excluding expert causation testimony as conclusory and unsupported by scientific evidence); *McIntosh v. Union Pac. R.R.* (S.D. Iowa, 1998), No. 495CV90833 (excluding expert causation testimony for lack of objective methodology); *Dukes v. Illinois Cent. R.R. Co.* (N.D. Il. 1996), 934 F. Supp. 939 (same); *Bennett v. PRC Pub. Sector, Inc.* (S.D. Tex. 1996), 931 F. Supp. 484 (same).

causal relationship exists.⁸¹ Such an inference would be impermissible, particularly when no standards exist for the levels of mold. Plaintiffs' expert witness, Dr. Bernstein, whose testimony was declared inadmissible in part because it failed to include scientifically valid conclusions, was unable to identify any specific agent that was causing the irritant-induced response in Plaintiffs.

{¶44} Conway-Jones, in the article, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*,⁸² asserts that "toxic tort plaintiff[s] should not be penalized unjustly for the inherent uncertainty of medical diagnoses" and stresses that scientific expert witnesses proffered by toxic tort plaintiffs should be admissible to support plaintiff's causation argument "so long as such diagnoses are based on medically valid techniques or methodologies." Without expert testimony to prove causation, this case must be dismissed. Thus, as a result of the Dr. Bernstein's failure to conduct a valid, reliable differential diagnosis, Plaintiffs are precluded from adjudicating potentially valid claims.⁸³

{¶45} As discussed in this Court's Decision and Order concerning Defendants' Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim and Memorandum in Support, and based on the foregoing, Plaintiffs failed to establish proximate causation between any negligence on Defendants' part and their personal injuries. Therefore, for the reasons stated therein, this Court concludes that there are no genuine issues of material fact by which Plaintiffs can meet the standards for establishing that Defendants were negligent as a matter of law. Plaintiffs cannot show that they suffered injuries proximately caused by Defendants. As in *Cavallo*,⁸⁴ "there is insufficient evidence of causation to create a triable issue of fact for the jury."

⁸¹ See *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 771, 1995 U.S. Dist. LEXIS 9836.

⁸² Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. Rich. L. Rev. 875, 928 (2002).

⁸³ See Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. Rich. L. Rev. 875, 928 (2002).

⁸⁴ *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F. Supp. 756, 771, 1995 U.S. Dist. LEXIS 9836.

III. CONCLUSION

{¶46} As discussed in this Court's Decision and Order concerning Defendants' Rule 104(A) Motion Concerning Plaintiffs' Exposure Claim and Memorandum in Support, filed February 7, 2005, Plaintiffs failed to establish proximate causation between any negligence on Defendants' part and their personal injuries. Therefore, for the reasons stated therein, Defendants are entitled to summary judgment as a matter of law as to Plaintiffs' claim of negligence.

{¶47} Based on the foregoing, this Court concludes that Plaintiffs have failed to establish proximate causation between any negligence on Defendants' part and their personal injuries. As such, this Court finds Defendant's Motion for Summary Judgment to be appropriate. Accordingly,

{¶48} IT IS ORDERED, ADJUDGED, and DECREED that Defendants' Motion for Summary Judgment is GRANTED.

{¶49} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendants' (1) Motion in Limine to Exclude Evidence of Plaintiffs' Medical Expenses, (2) to Withdraw Admissions, (3) Exclude Evidence and Testimony Relating to a Microbial Assessment Survey Conducted by Hygienetics Environmental Services, (4) Objections to the Admissibility of Hearsay Medical Records, and (5) Leave to Amend Answer to Add Affirmative Defense to Conform with the Evidence, are DISMISSED as MOOT as a consequence of this Court's Decision in favor of Defendants' Motion for Summary Judgment.

{¶50} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs' 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., are DISMISSED as MOOT as a consequence of this Court's Decision in favor of Defendants' Motion for Summary Judgment.

{¶51} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this cause is DISMISSED.

{¶52} 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 7, 2005

PAUL C. MOON, JUDGE

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:

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