

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TRICIA MASON, et al.,
Plaintiffs-Appellants,

v.

WASATCH PROP. MGMT., INC., et
al.

Defendants-Appellees

2 CA-CV No. 2008-0162
2 CA-CV No. 2008-0165

KAITLYN MORRIS, et al.,
Plaintiffs-Appellants,

v.

WASATCH PROP. MGMT., INC., et
al.

Defendants-Appellees

Cause Nos. C20035581
consolidated with
C20041766;
C20024299 consolidated
with
C20024542

APRIL ABAD, et al., ALICIA
STEWART, et al.

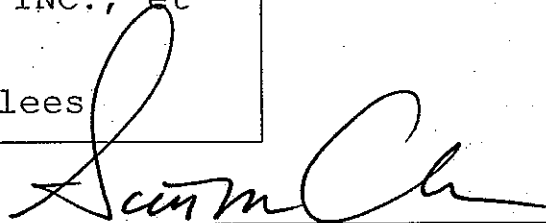
Plaintiffs-Appellants,

v.

WASATCH PROP. MGMT., INC., et
al.

Defendants-Appellees

BRIEF OF AMICUS CURIAE
NATIONAL APARTMENT
ASSOCIATION



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STATEMENT OF THE CASE

The National Apartment Association (hereinafter, the "NAA") adopts by reference the Statement of the Case submitted by Defendants-Appellees, including, among others, Wasatch Property Management, Inc. (hereinafter, "Wasatch").

ISSUES PRESENTED FOR REVIEW

Although Plaintiffs-Appellants raise several issues for review, this brief is confined to only one: whether the trial court erred in its determination that certain evidence submitted by Plaintiffs did not meet the standards set by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and similar decisions of this Court.

STATEMENT OF FACTS

The Amicus Parties adopt by reference the Statement of the Facts submitted by Wasatch. The Amicus Parties offer the following additional Statement of Facts.

The National Apartment Association

The NAA, based in Arlington, Virginia, is the leading advocate for quality rental housing. The NAA is a federation of 167 state and local affiliated

associations, representing more than 36,000 members that are responsible for more than 5.7 million apartment units nationwide. It is the largest broad-based organization dedicated solely to rental housing.

As a service to its members, the NAA and its affiliates conduct and sponsor educational seminars on topics ranging from mold prevention and fair housing, to state-specific legal issues that affect apartment owners and managers. NAA also operates and maintains a lease program in forty-one (41) states, utilizing a template that is amended to comply with each state's laws. The NAA Lease is the most widely used residential lease in the country, with more than fifty-six (56) million pages sold each year. To ensure that its leases comply with various state laws, NAA closely monitors legislation in each state and relies on legal opinions of experienced local counsel. As a result of the work associated with maintaining the validity of its products and services, NAA is the premier repository for research and knowledge of the legal issues pertaining to the residential multifamily

housing industry.

The Rental Housing Market

Approximately 81.2 million people, or one-third of the United States' population, live in apartment homes. The apartment industry employs more than a half million people, and the current estimated value of U.S. rental housing stock is \$2 trillion.

The most prominent, professional businesses in the rental housing industry are members of NAA. These include large corporations, REITS, and private partnerships that offer rental housing to the American public.

ARGUMENT

Expert testimony on scientific subjects is admissible only when it satisfies Rules 702 and 703 of the Arizona Rules of Evidence and the requirements set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923). See *State v. Fields*, 201 Ariz. 321, 325, 35 P.3d 82, 85 (2001). Under Arizona law the party offering expert testimony bears the burden of proving that the scientific principles and techniques that are

the subject of the testimony have gained "general acceptance" in the relevant scientific community before being admitted into evidence. *State v. Superior Court (Blake)*, 149 Ariz. 269, 718 P.2d 171 (1986). The offering party's burden under *Frye* and Arizona law is not met by the presentation of testimony from a small group of experts who believe the new theory is reliable or acceptable. Rather, the court must be shown the larger scientific community generally accepts the procedure as reliable. *State ex rel Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982) (*Supplemental opinion, Feldman, J.*). For the reasons set forth below, Plaintiffs-Appellants cannot establish a causal connection between exposure to mold and their adverse health conditions in light of the generally accepted scientific studies that demonstrate no causal link. As a result, their claims must fail.

**Contemporary Scientific Evidence Does Not Support A
Causal Link Between Exposure to Mold and the Alleged
Adverse Health Conditions of Plaintiffs.**

It is well known within the medical community that

there is no generally accepted scientific evidence establishing a causal link between exposure to mold and the adverse health effects alleged by the plaintiffs. The issue of causation for Plaintiffs-Appellants' alleged injuries¹ has been studied by several scientific institutions, all of which have concluded there is no scientific basis for establishing a causal link between exposure to mold and the development of negative health impacts in individuals.

Some of the leading scientific institutions that have published statements or studies to this effect include the Institute of Medicine of the National Academy of Sciences, the American Society for Microbiology, the Centers for Disease Control and Prevention, the American Industrial Hygiene Association, the National Institute of Occupational Safety and Health, and the American College of Allergy, Asthma, and Immunology. In light of these scientific

¹ Plaintiffs-Appellants alleged injuries include: a disabled, developmentally delayed child; permanent neurological deficiencies; headaches; memory loss; long term asthma; long term respiratory problems; gastrointestinal problems; a variety of other short term respiratory problems, and death of two infants.

studies, it is generally accepted that no causal relationship between mold exposure and injuries to health has been proven.

The seminal report on the health effects of exposure to mold is a report released by the Institute of Medicine of the National Academy of Sciences. The paper, entitled *Damp Indoor Spaces and Health*, was released in 2004. The intention of the study, conducted by pediatricians, epidemiologists, and toxicologists, was to provide a full analysis of the impact of exposure to mold on human health. Institute of Medicine, *Damp Indoor Spaces and Health* (2004) at p. 2. The scientists reviewed hundreds of scientific studies and found a "lack of valid quantitative exposure-assessment methods and knowledge of which specific microbial agents may primarily account for the presumed health effects." *Id.* at p. 6. Though the report found a possible *association* between certain health issues such, as nasal and throat tract symptoms, cough, and wheezing and the presence of mold, the panel of scientists found there to be *no adverse health effects*

that could be established as causally related to the exposure of mold or damp environments. *Id.* at p.9. In fact, the committee specifically concluded that there is *inadequate or insufficient evidence* to determine even whether an *association* exists between neuropsychiatric symptoms, gastrointestinal tract problems, and lower respiratory illness in otherwise healthy adults, and only *limited evidence* suggesting an *association* between asthma development (for all ages) and lower respiratory illness in otherwise healthy children and mold exposure. Therefore, even as the Institute's report conclusively states that no adverse health effects are established as casually related to the exposure to mold, it states that there is limited evidence to even show an association between Plaintiffs-Appellant's injury claims and exposure to mold.

Of further note, in a peer-reviewed report published by the American Society of Microbiology in 2003, Drs. Kuhn and Ghannon evaluated 450 mold and health studies and concluded that there is no objective

evidence of serious illness resulting from the exposure to mold. American Society of Microbiology, *Indoor Mold, Toxigenic Fungi, and Stachybotrys Chartarum: Infectious Disease Perspective* (2003) at p. 164. In order to address the issue of indoor-mold related illness, Kuhn and Ghannon stated the need for more studies using proper epidemiologic techniques and control groups. The report also concluded that studies that purported to show a causal connection between mold and adverse health effects suffered from serious methodological flaws, making their findings inconclusive. *Id.*

The American Industrial Hygiene Association Journal (AIHAJ) has published an article that concluded more research is needed before the scientific community could state that exposure to mycotoxins produces adverse health effects. *AIHAJ* 62:644-648 (2001), at p. 645 and p. 647. Reaching a similar conclusion to the Institute of Medicine report cited above, the *AIHAJ* article states that a review of scientific scholarship suggests that there is insufficient data to conclude

that exposure to mycotoxins (which can sometimes be produced by mold) is "causally related to symptoms or illness among building occupants." *Id.* at p. 647.

In a report entitled, *A Scientific View of the Health Effects of Mold*, a panel of scientists, including toxicologists and industrial hygienists stated that years of intense study have failed to produce any causal connection between exposure to indoor mold and adverse health effects. U.S. Chamber of Commerce, *A Scientific View of the Health Effects of Mold* (2003) at p. 64 and p. 65. The report also concludes that in other than individuals with severely impaired immune systems, indoor mold is not a cause of infections, and "current scientific evidence does not support the idea that human health has been adversely affected by inhaled mold toxins in home, school, or office environments." *Id.* at p. 65. In fact, when speaking of their report, the authors note that "science has confirmed common sense" since mold is not some rare, exotic material but is everywhere, making up twenty-five (25) percent of the earth's biomass. The

authors note further that if mold were extremely toxic, one could expect to see epidemics wherever people are exposed to the highest levels of mold - vacation spots and outdoor camps, for example. U.S. Chamber of Commerce, *The Growing Hazard of Mold Litigation* (2003) at p. ii-iii.

The Centers for Disease Control and Prevention (CDC) provides information about certain health effects related to mold exposure. The CDC states on its website that mold may, or may not, cause nasal stuffiness, throat irritation, cough, wheezing, eye irritation, and skin irritation in people sensitive to mold. According to the CDC, people with weakened immune systems may experience lung infections if exposed to mold. However, the CDC reports that no causal connection between mold exposure and other negative health results, such as, but not limited to, acute idiopathic pulmonary hemorrhage among infants, memory loss, and lethargy has been proven. A copy of the relevant portion of the CDC website can be accessed at http://www.cdc.gov/mold/dampness_facts.htm. Thus,

according to the pre-eminent medical agency of the United States government Plaintiffs-Appellants' alleged injuries in the instant case cannot be casually connected to exposure to mold.

In another journal, the Texas Medical Association's Council on Scientific Affairs published a paper entitled, *Black Mold and Human Illness*. The report concluded that adverse health effects from molds in water-damaged buildings are not supported by peer-reviewed reports in medical literature. *Texas Medicine, Black Mold and Human Illness* (2002) pp.53-56.

Similarly, a study conducted by Dr. Emil Bardana, Jr., M.D., and others of the Oregon Health & Science University, which was published in the *Annals of Allergy, Asthma, & Immunology*, retrospectively reviewed fifty (50) individuals who claimed compensation for "toxic mold disease" and found alternative medical and/or psychiatric explanations for every one of the fifty (50) claims. *Annals of Allergy, Asthma and Immunology*, vol. 95, no. 3 (2005) p. 239-246. Dr. Bardana was quoted at the release of the study, stating

"Based on our findings, no case definition is possible for so called "toxic mold syndrome." American College of Allergy, Asthma, & Immunology website - <http://www.acaai.org/public/NR/Fungal.htm>.

As noted in the reports and studies described above, the consensus of the scientific community is that insufficient evidence exists to find that exposure to mold causes the adverse health effects alleged by the Plaintiffs-Appellants. As experts who are significant in both number and expertise oppose and disagree with Plaintiffs-Appellants' theory of causation, the generally accepted view of the relevant scientific/medical community supports Defendants-Appellees' position that there is no proven causal link between exposure to mold and adverse human health effects. Thus, lawsuits based on allegations of a causal connection between mold and adverse health effects, such as the instant case, are not supported by generally accepted scientific theories.

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**Plaintiff-Appellants Fail to Meet the *Frye* Standards
for the Admissibility of Evidence**

In previous years, before the scientific studies cited above were conducted, a wave of litigation based on claims that mold causes adverse health effects was allowed to go forward to trial. However, because of the research articulated in reports like the Institute of Medicine's *Damp Indoor Spaces and Health*, the scientific community's generally accepted view is that no causal link exists between mold and adverse health effects in otherwise healthy individuals. As a result, courts around the country have refused to admit expert testimony purporting the existence of such a causative effect. In essence, courts are catching up with the science.

The rule set forth in *Frye* is that while a court will admit into evidence expert testimony deduced from a "well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it

belongs." *Frye*, 293 F. at 1014. Arizona courts require a *Frye* hearing in order to determine whether the proposed expert testimony, and the tests or techniques on which the testimony is based, is generally accepted by the pertinent scientific community. *State v. Fields*, 201 Ariz. 321, 325, 35 P.3d 82, 85 (2001). Moreover, if a particular test or application is likely to have a strong effect in resolving a matter in controversy, the technique is also subject to *Frye*. *Id.* Because contemporary scientific evidence does not establish a causal link between exposure to mold and the alleged adverse health effects of the Plaintiffs-Appellants, their expert testimony on this issue fails to meet the standards for admissibility under *Frye*. *Frye*, 293 F. at 1014.

The trial court conducted an exhaustive *Frye* hearing and considered testimony and scientific articles submitted by the parties. Contrary to appellants' assertion (Brief, pp. 59-61), the trial court did not rule that "universal acceptance" of a scientific principle was a prerequisite to

admissibility. Instead, it held the plaintiffs to their burden of proving that the expert testimony must have gained "general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000).

The Court found that the testimony of Drs. Camargo, Wasseman, and Cohen cited the Institute of Medicine's study that concluded that the only associative effect that mold has on human health is the exacerbation of pre-existing asthma. That study, although authored in 2004, still represents the generally accepted view of the scientific community. By contrast, the plaintiffs' expert conceded a lack of peer reviewed articles supporting plaintiffs' theories of causation of wrongful death. Moreover, the plaintiffs' samples were not assembled in accordance with established methods and protocols. Furthermore, samples collected in 2003 and 2004 were then used to extrapolate back in time to describe prior conditions despite the fact plaintiffs' own expert testified that extrapolation was

not possible.

Acting on this record, the trial court properly ruled that the expert testimony did not meet the *Frye* standard.

Other states that have applied the *Frye* rule to facts similar to the instant matter have reached the same conclusion. For example, in *Fraser v. 301-52 Townhouse Corp.*, 2008 NY Slip Op 10208 (N.Y. App. Div. 1st Dep't 2008) the New York appellate court held that while there is general agreement that exposure to mold or damp indoor conditions is associated with adverse health effects such as lethargy and upper respiratory complaints, association is not the same as an established causal connection. *Id.* at *1-2. The court, citing the Institute of Medicine report, *Damp Indoor Spaces and Health*, found that the plaintiffs failed to establish general acceptance in the relevant scientific community of the causal connection between exposure to mold and adverse health effects. *Id.* at *1-2. Like the alleged injuries in *Fraser*, the cause of the alleged health effects of Plaintiff-Appellants

is not generally accepted by the scientific community to be exposure to mold.

In *Leboeuf v. Safeguard Ins. Co.*, 2007 NY Slip Op 52214U (N.Y. Sup. Ct. 2007), the trial court, applying the *Frye* rule, held that the defendants were entitled to judgment as a matter of law because their expert testimony, which was based on scientifically-reliable methodology, showed no causal connection between exposure to "toxic mold" and the plaintiffs' alleged injuries. *Id.* at *3-4. Notably, the defendants' experts cited the Institute of Medicine Report, *Damp Indoor Spaces and Health*. *Id.* at *2. The plaintiffs in *Leboeuf* alleged breathing and respiratory injuries similar to the ones alleged by Plaintiffs-Appellants.

A federal court in Arizona rejected proffered expert testimony in a mold case because of the plaintiff's failure to satisfy the admissibility standards under *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995). In a strikingly similar case, the U.S. District Court of Arizona ruled that plaintiff's expert testimony did not meet the *Daubert*

standard and entered judgment for the defendants in *Killian v. Equity Residential Trust*, 2004 U.S. Dist. LEXIS 23939 (D. Ariz. July, 27 2004). That judgment was later affirmed by the Ninth Circuit, *Killian v. Equity Residential Trust*, 191 Fed. Appx. 537 (9th Cir. Ariz. 2006). The plaintiff claimed that she suffered neurological impairments similar to those suffered by the Plaintiffs-Appellants in the instant matter. *Killian* 2004 U.S. Dist. LEXIS 23939 at *2. The trial court agreed with the Institute of Medicine's report that concluded a lack of scientific evidence of an association between mold exposure and neurological disorders. *Id.* at *3.

In *Gaudette v. Conn Appliances, Inc.*, 2007 Tex. App. LEXIS 7315 (Tex. App. Beaumont Sept. 6, 2007), a Texas appellate court, upheld a summary judgment order on the grounds that it is generally accepted in the scientific community that there is no evidence to support a causal link between adverse health effects and exposure to mold. *Id.* at *19-20. The court cited the Institute of Medicine's report referred to herein.

as well as the Texas Medical Association's Council on Scientific Affairs paper, and the CDC. *Id.* at *9-11. Though the court in *Gaudette* applied a rule of evidence established by *Daubert*, the analysis of whether the current state of scientific evidence supports a causal connection between mold exposure and adverse health effects is essentially the same to the test provided in *Frye*. After examining the available scientific research, the *Gaudette* court found no such causal link exists. *Id.* at *19-20.

In *Roche v. Lincoln Prop. Co.*, 278 F. Supp. 2d 744, 759-760 (E.D. Va. 2003), the court noted that while molds can have an adverse health effect on a person such as coughing or exacerbated asthma, there are no established standards to determine whether exposure to particular levels of mold causes a specific adverse health reaction. *Id.* Though the court applied the *Daubert* standard of admissibility of expert testimony, the analysis and finding by the court that there is a lack of scientific evidence to support a claim that a certain level of mold exposure triggers a specific

adverse health effect is the same as the instant case. To date, no such evidence of causation exists.

In *Young v. Burton*, 567 F. Supp. 2d 121, 139 (D.D.C. 2008), the US District Court for the District of Columbia held that "mold illness" was not a generally-accepted illness in the medical community and that the scientific community did not agree that exposure to mold causes illness, as the plaintiffs' "experts" postulated. *Id.* Though the court applied *Daubert*, the analysis of the state of medical community's view as to the existence of "mold illness" is the same for the purposes of the instant matter. In fact, NAA cannot find any peer-reviewed scientific evidence that supports a causal link between mold and the adverse health effects alleged by the Plaintiff-Appellants.

In *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 336 (Md. 2007), the court held that the defendants were entitled to a *Frye* hearing to establish whether or not "sick building syndrome" was caused due to the exposure to toxic mold. The court reasoned that the

plaintiffs' expert testimony that mold caused sick building syndrome should be tested at a *Frye* hearing to conformed with generally accepted principals. *Id.* In the instant matter, a proper *Frye* hearing was held to determine whether the methods employed by the expert conducted, and given the dearth of evidence supporting claims that mold causes the injuries alleged by the Plaintiffs-Appellants, the decision of the trial court must be affirmed.

**Claims Based on Junk Science Should Fail as a
Matter of Public Policy.**

Claims of physical injuries attributed to the presence of mold in housing have been the basis for an explosion of litigation over the past twenty (20) years. In 2003, the Insurance Information Institute estimated that 10,000 mold-related suits were pending nationwide; a 300 percent increase since 1999. Mold litigation represents significant risks to providers of rental housing as evidenced by a recent jury award of \$3.3 million to a plaintiff who blamed her illnesses on her exposure to mold in her rental home. *Minium v.*

Pillar Communities LLC, et al., No. CV-2004-014906(Ariz. Super. Ct. Maricopa City).² Litigation and judgment awards based on junk science harm the apartment industry, and greatly increase the cost of housing for residents.

The scientific studies, described herein, debunk the notion of a causative effect between the presence of mold and the wide-ranging health-related damages claimed in these cases. Because Plaintiffs-Appellants base their claims on faulty science, and it is generally accepted in the scientific community that no causal link between mold and poor health can be demonstrated, the decision of the trial court should be affirmed on public policy grounds.

CONCLUSION

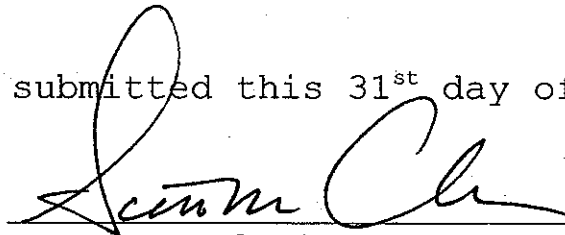
The *Frye* standard excludes expert testimony that does not satisfy its test because of the risk that a jury would give improper weight to such evidence. *State v. Superior Court of Cochise*, 149 Ariz. 269, 710 P.2d 171 (1986). The mere fact that plaintiffs were

² Unlike the extensive *Frye* hearing conducted by the trial court in this case, no such hearing was conducted in *Minium v. Pillar Communities, supra*.

able to identify and retain witnesses with training in science to support their claims does not automatically result in the admissibility of that testimony. The trial court appropriately focused upon whether their theories had gained acceptance within the scientific, and not the legal communities. *State of Arizona v. Court of Appeals*, 197 Ariz. 79, 3 P.3d 999 (1999). In this case, they have not.

We urge the Court to affirm the trial court ruling below.

Respectfully submitted this 31st day of August 2009.



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