NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 07-27-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TRICIA MASON, a minor, by and through Teresa Johnson (Mother); ROBIN PETERS; LYNICIA WEARY, a minor, by and through Robin Peters (Mother): BRITTNEY PETERS, a minor, by and through Robin Peters (Mother),

Plaintiffs/Appellants,

v.

EASTSIDE PLACE APARTMENTS, INC., an Arizona corporation; WASATCH PREMIER PROPERTIES, L.L.C., a Utah limited liability company; WASATCH POOL HOLDINGS, L.L.C., a Utah limited liability company; WASATCH POOL HOLDINGS IV, L.L.C., a Utah limited liability company; WASATCH PROPERTY MANAGEMENT, INC., a Utah corporation,

Defendants/Appellees.

THOMAS MORRIS, a minor, by and through Dawn Morris (natural mother); LYSSA MORRIS, a minor, by and through Dawn Morris (natural mother); KAITLYN MORRIS,

Plaintiffs/Appellants,

v.

No. 1 CA-CV 09-0155

DEPARTMENT B

MEMORANDUM DECISION

(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

EASTSIDE PLACE APARTMENTS, INC., an Arizona corporation; WASATCH PREMIER PROPERTIES, L.L.C., a Utah limited liability company; WASATCH POOL HOLDINGS, L.L.C., a Utah limited liability company; WASATCH POOL HOLDINGS IV, L.L.C., a Utah limited liability company; WASATCH PROPERTY MANAGEMENT, INC., a Utah corporation,

Defendants/Appellees.

DAVE and RACHAEL BULLIS, husband and wife; STEPHEN and NIKKI BULLIS, husband and wife; CANDYCE COLSTON, a minor, by and through Bettie Hanna (Mother); MICHAEL CONTI, a minor, by and through Lori Lynn Larson (Mother); SHAYANNA DUPREE, a minor, by and through Cassidi Smith (Mother); SHARLON ESMAY, an individual; ANGELIQUE FLORES, a minor, by and through Roy Flores (Father); ROBERT FLORES, by and through Roy Flores (Father); CASSANDRA FUTCH, a minor, by and through Farrell Futch (Father); SHARON FUTCH, an individual; BRITIAN HACKEBORN, a minor, by and through Kuuleme Stephens (Mother); BETTIE HANNA, an individual; ROY FLORES and FLORENTINA HOLLINGSWORTH, husband and wife; AMELIA KAME, an individual; MARCO KAME, an individual; JOHN and LORI LARSON, husband and wife; LUKE LARSON, a minor, by and through John Larson (Father); MONTEL MCKINLEY, a minor, by and through Florentina Hollingsworth (Mother); SABRINA MCKINLEY, a minor, by and through Florentina Hollingsworth (Mother); JONATHAN RUHOFF, a minor, by and through Sienna

Ruhoff (Mother); NATHANIAL RUHOFF, a minor, by and through Sienna Ruhoff (Mother); CASSIDI SMITH, an individual; KELSEY SMITH, a minor, by and through Cassidi Smith (Mother); JAMES and KUULEME STEPHENS, husband and wife; JACKLYN STEPHENS, a minor, by and through James Stephens (Father); JESSE STEPHENS, a minor, by and through James Stephens (Father); ALICIA SWIEGART, an individual; ELISA WORDEN, a minor, by and through Michael Worden (Father); GABRIEL WORDEN, a minor, by and through Michael Worden (Father); KIM WORDEN, an individual,

Plaintiffs/Appellants,

v.

WASATCH PROPERTY MANAGEMENT, INC., a foreign corporation; WASATCH POOL HOLDINGS, L.L.C., a foreign corporation; EASTSIDE PLACE APARTMENTS, INC., an Arizona corporation,

Defendants/Appellees.

ALICIA SWIEGART, on behalf of herself and CHAD TABOR, and as next best friend of Kaitlin Swiegart; NIKKI BULLIS, on behalf of herself and STEPHEN BULLIS, and as next best friend of Ezekiel Bullis,

Plaintiffs/Appellants,

v.

WASATCH PROPERTY MANAGEMENT, INC., a foreign corporation;

WASATCH POOL HOLDINGS, L.L.C., a foreign corporation; EASTSIDE PLACE APARTMENTS, INC., an Arizona corporation,

Defendants/Appellees.

Transferred from Court of Appeals, Division Two
Cause No. 2 CA-CV 08-0162
Cause No. 2 CA-CV 08-0165
(Consolidated)

Appeal from the Superior Court in Pima County

Cause No. C 2003 5518
Cause No. C 2004 1766
(Consolidated)

And

Cause No. C 2002 4299
Cause No. C 2002 4542
(Consolidated)

The Honorable John E. Davis, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Harold Hyams & Associates, P.C. — Tucson
By Harold Hyams
Attorneys for Plaintiffs/Appellants

And

Ahwatukee Legal Office, P.C. — Phoenix
By David Abney
Attorneys for Plaintiffs/Appellants

Polsinelli Shughart,P.C. — Phoenix
By Edward F. Novak
Carlyle (Cary) W. Hall III
Andrew B. Turk
Andrew S. Jacob

And

Rusing & Lopez, P.L.L.C. Tucson
By Todd M. Hardy
Attorneys for Defendants/Appellees

And

Kuhn Law Firm, P.L.L.C. Tucson
By Cynthia T. Kuhn
Attorneys for Defendants/Appellees

Law Offices of Scott M. Clark, P.C. Phoenix
By Scott M. Clark
Attorneys for *Amicus Curiae*
National Apartment Association

T I M M E R, Chief Judge

¶1 These consolidated appeals stem from four lawsuits asserting that owners and operators of Eastside Place Apartments ("Eastside") in Tucson caused health-related injuries to appellants, who were tenants (collectively, "Tenants"), by facilitating Tenants' exposure to toxic levels of mold in their apartments. After holding a *Frye*[1] hearing in one case, the trial court precluded testimony by Tenants' experts and eventually granted summary judgment in favor of appellees (collectively, "Landlord") in each lawsuit. These timely appeals followed.[2]

---

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[2] The *Abad* appeal, 2 CA-CV 2008-0165, concerns two cases consolidated by the trial court in C20024299. The *Mason* appeal, 2 CA-CV 2008-0162, concerns two cases consolidated by the trial court in C20035581. Many Tenants elected not to appeal the judgments in the *Abad* and *Mason* cases; as to these Tenants, therefore, the summary judgment is binding. Additionally, although Randy and Dell Loy Hansen, officers and directors of

For the reasons that follow, we affirm in part, reverse in part, and remand.

BACKGROUND

¶2 Eastside experienced problems with indoor mold, water intrusion, and deteriorated siding during the 1990s and the early part of this century. According to Tenants, although they complained daily to Landlord about the mold in 2001, Landlord failed to correct the situation. As a result, Tenants contend long-term exposure to the mold caused them to suffer health problems, including developmental disabilities, neurological deficiencies, asthma, and other respiratory problems. Additionally, Tenants claim two infants who died of sudden infant death syndrome ("SIDS"), actually died as a result of exposure to mold. In their complaints, Tenants sought compensatory and punitive damages based on allegations of Landlord's negligence, fraud, and intentional infliction of emotional distress, among other claims. During the course of the case, the court granted Landlord's motions for partial summary judgment on Tenants' claims for negligent and intentional infliction of emotional distress and their request for punitive damages.

---

appellees Wasatch entities, were defendants in the cases, they are not parties to this appeal.

¶3 At Landlord's request, the trial court held a lengthy *Frye* hearing in the *Abad* case in 2006 to determine whether (1) Tenants' experts' opinions that the health injuries allegedly sustained by Tenants could be caused by exposure to indoor mold were generally accepted in the relevant scientific/medical communities, and (2) the experts collected and tested mold samples according to generally accepted scientific principles. By the conclusion of the hearing, the court also was considering Landlord's renewed motion for summary judgment based on the record developed at the *Frye* hearing, Tenants' motion to file a seventh-amended complaint, and evidentiary-related motions. The court ruled on July 14, 2006, in relevant part, as follows:

(1) The court struck the telephonic testimony of Dr. James Dahlgren because Tenants' counsel had provided him with a transcription of another expert's *Frye* hearing testimony in violation of Arizona Rules of Evidence ("Rule") 615, and Dr. Dahlgren had referred to materials to facilitate his testimony in violation of Rule 612.

(2) After considering expert testimony and documentation presented by all parties, the court concluded that "the generally accepted position of the relevant scientific/medical community is that indoor exposure to mold could have the effect of exacerbating pre-existing asthma. Indoor exposure to mold would not cause the other health effects

and damages claimed by [Tenants] in this case according to the generally accepted view of the relevant scientific/medical community." Consequently, the court ruled that Tenants could not present expert evidence contrary to this conclusion.

(3) The court sustained Landlord's evidentiary objections to the testing and collection procedures utilized by Tenants' experts, Steven Barnes, Dr. Richard Lipsey, and Dr. Mark Sneller. The court found that Tenants had failed to establish foundation and chain of custody for the samples sufficiently to permit admission of the testing results; Tenants failed to demonstrate their experts followed recognized protocols in gathering the samples; sampling and testing done in 2003 and 2004 could not be extrapolated to 2000 and 2001, the relevant time periods; and Dr. Sneller failed to adequately document his sampling conducted in 2001. The court further refused to admit exhibits offered by Tenants to cure evidentiary deficiencies.

(4) The court granted summary judgment in favor of Landlord on all claims "for health injuries except those for exacerbation of pre-existing asthma documented by admissible medical testing and based upon exposure to mycotoxin and/or mold that occurred in apartments that were timely and properly tested and sampled."

(5) Because the court's above-described rulings impacted Tenants' pending motion to amend the complaint, the court deferred its ruling on that motion until the parties could supplement their briefing on the issue.

¶4 In a ruling entered September 18, the court stated its *Frye* ruling had permitted the parties to pursue some health-related claims due to mold and had invited clarification of what health claims remained in the context of Tenants' pending motion to amend the complaint. According to the court, the Tenants failed to document and support the existence of such claims. The court therefore found that any additional amendments to the complaint would be futile and denied Tenants' motion to amend on that basis and, alternatively, because they had sought the amendment with undue delay. Based on the denial of the motion to amend the complaint and the prior *Frye*-related rulings, the court granted summary judgment against Tenants on all claims.

¶5 In a ruling in the *Mason* case entered December 17, 2007, the court adopted its rulings in the *Abad* case and granted summary judgment in favor of Landlord on all claims. On August 11, 2008, the court entered final judgment in favor of Landlord in both cases. Tenants timely appealed, and we consolidated the appeals.[3]

[3] After initiation of the appeals in Division Two of this court, the court transferred the appeals to Division One.

DISCUSSION

I. Application of *Frye*

¶6 Following the paradigm established by *Frye* to determine the admissibility of expert testimony that relies on new scientific tests or techniques, Arizona courts require the proponent of such evidence to establish its reliability by demonstrating it has gained general acceptance and recognition in the relevant scientific community.[4] *State ex rel. Romley v. Fields,* 201 Ariz. 321, 325, ¶ 11, 35 P.3d 82, 86 (App. 2001). Our supreme court delineated the applicability of *Frye* as follows:

> *Frye* is applicable when an expert witness reaches a conclusion by deduction from the application of novel scientific principles, formulae, or procedures developed by others. [*Frye*] is inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research. In the latter case, the validity of the premise is tested by interrogation of the witness; in the former case, it is tested by inquiring into general acceptance.

Logerquist v. McVey, 196 Ariz. 470, 490, ¶ 62, 1 P.3d 113, 133 (2000). We review the trial court's exclusion of expert testimony for an abuse of discretion. *State v. Speers*, 209

---

[4] In 2010, the legislature enacted Arizona Revised Statutes ("A.R.S.") § 12-2203, which changes the *Frye* model for admitting expert testimony. See 2010 Ariz. Sess. Laws, ch. 302 (2nd Reg. Sess.) (effective July 28, 2010). We express no opinion concerning the applicability of this provision to the cases before us.

Ariz. 125, 129, ¶ 13, 98 P.3d 560, 564 (App. 2004). In doing so, however, we conduct a de novo review to decide whether a scientific principle used as a basis for expert opinion is generally accepted in the scientific community. *State v. Garcia*, 197 Ariz. 79, 83, ¶ 20, 3 P.3d 999, 1003 (App. 1999) (citation omitted).

¶7 Before addressing the substance of the experts' opinions, we consider Landlord's contentions that (1) *Frye* required Tenants to show initially that the relevant theory of general medical causation – indoor mold exposure *can* cause non-asthma-related illnesses and infant death – was generally accepted in the medical community before Tenants' experts could testify regarding specific medical causation – indoor mold exposure *did* cause non-asthma-related illnesses and infant deaths in this case, and (2) courts apply *Logerquist's* inductive/deductive inquiry only to opinions of specific causation.[5] According to Landlord, because Tenants failed to

[5] At oral argument before this court, Landlord's counsel argued for the first time that *Logerquist* was inapplicable because that case involved "unscientific" opinions and the court exclusively directed its holding to such opinions. We disagree. The *Logerquist* majority stated its decision did not turn on whether the precluded expert testimony in that case was "scientific" or "unscientific." 196 Ariz. at 490, ¶ 62, 1 P.3d at 133; *see also id.* at 498, ¶¶ 100-02, 1 P.3d at 141 (McGregor, J. dissenting) (recognizing that majority opinion applies to expert scientific testimony). Moreover, subsequent decisions from this court applied *Logerquist* to expert scientific testimony. *See, e.g., Lohmeier v. Hammer*, 214 Ariz. 57, 63, 64, ¶¶ 21, 25, 148 P.3d

demonstrate that their experts' medical causation opinions were generally accepted in the medical community, the court properly precluded them without considering *Logerquist*.

¶8 The pre-*Logerquist* cases relied on by Landlord do not support its contentions. In *State v. Plew*, 155 Ariz. 44, 46, 745 P.2d 102, 104 (1987), the supreme court considered criteria developed in *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983), regarding testimony about the reliability of eyewitness identification to determine whether the trial court erred by refusing to admit expert testimony regarding the impact of cocaine intoxication on human behavior. Although one consideration was whether the expert opinion conformed to "a generally accepted explanatory theory," the court did not mention *Frye* and did not draw a distinction between general and specific medical causation. *Id.*

¶9 *Baroldy v. Ortho Pharmaceutical Corp.*, 157 Ariz. 574, 760 P.2d 574 (App. 1988), applied *Frye* in a products liability lawsuit but did not draw the distinction advocated by Landlord. Plaintiff's expert witnesses relied on the "occlusion theory" of bacteria growth to opine that a diaphragm used by the plaintiff caused her to suffer toxic shock syndrome. *Id.* at 581, 760 P.2d at 581. Two other experts reached the same conclusion without

---

101, 107, 108 (App. 2006) (biomechanical analysis); *State v. Lucero*, 207 Ariz. 301, 305, ¶ 19, 85 P.3d 1059, 1063 (App. 2004) (effects of marijuana).

relying on the occlusion theory. *Id.* at 582, 760 P.2d at 582. The diaphragm's manufacturer argued the trial court erred by allowing all plaintiff's expert testimony on causation because the occlusion theory was not generally accepted by the relevant scientific community, as required by *Frye* for admission. *Id.* After expressing doubt that *Frye* applied to a "scientific hypothesis of causation," the court concluded plaintiff had demonstrated general acceptance of the theory, nonetheless. *Id.* at 581-82, 760 P.2d at 581-82. Significantly, the court also stated that plaintiff's expert causation testimony based on grounds other than the occlusion theory was admissible regardless of the relevant community's acceptance of that theory. *Id.* at 582, 760 P.2d at 582. In sum, *Baroldy* applied *Frye's* general acceptance requirement to a theory of causation only if relied upon by the expert; it did not require general acceptance of the theory if the expert reached the same conclusion by other means.

¶10 Our review of *Logerquist* likewise fails to reveal support for Landlord's position. The plaintiff in that case alleged her pediatrician sexually abused her when she was a child. 196 Ariz. at 472, ¶ 3, 1 P.3d at 115. She sought to introduce expert testimony that severe trauma, like sexual abuse, could cause a child to suppress the memory of it but recall the event accurately in later years; she did not seek to

introduce expert testimony that *she* suppressed the memory of sexual abuse and later recalled it accurately. *Id.* Thus, *Logerquist*'s holding was made in the context of screening a general causation opinion rather than a specific causation opinion.

¶11 Summing up, Tenants were not required to demonstrate that each expert's opinion was generally accepted in the relevant scientific or medical community in order to satisfy *Frye*. Rather, Tenants were required to demonstrate general acceptance *only* when the expert arrived at a conclusion "'by applying a scientific theory or process based on the work or discovery of others.'" *Id.* at 480, ¶ 30, 1 P.3d at 123 (quoting *State v. Hummert*, 188 Ariz. 119, 127, 933 P.2d 1187, 1195 (1997)). If the experts based their opinions on their own experiences, observations, and studies, Tenants were not required to show general acceptance; "'[s]uch evidence need only meet the traditional requirements of relevance and avoid substantial prejudice, confusion, or waste of time.'" *Id.* at ¶¶ 30-31 (quoting *Hummert*, 188 Ariz. at 127, 1 P.3d at 123). Whether such opinions are in accord with generally accepted theories of causation held by other experts goes to the weight of the opinions rather than their admissibility. *See Baroldy*, 157 Ariz. at 583, 760 P.2d at 583 (noting diaphragm manufacturer's experts did not disprove occlusion theory but

merely created a conflict in medical testimony that goes to weight and is properly resolved by the jury). With these principles in mind, we examine the court's ruling.

¶12 Tenants sought to introduce expert testimony from medical doctors Gerald Goldstein, Dennis Hooper, and Vincent Marinkovich[6] that Tenants' exposure to mold at Eastside caused their injuries. The trial court applied *Frye* and precluded all Tenants' medical causation opinions except those opining that indoor exposure to mold could exacerbate pre-existing asthma. The court did not rest its ruling on the processes employed by each expert to reach his opinion. Rather, after considering the testimony of all experts and comparing medical publications, the court concluded "[i]ndoor exposure to mold would not cause the other health effects and damages claimed by plaintiffs in this case according to the generally accepted view of the relevant scientific community."

¶13 We agree with Tenants that the court misapplied *Frye* to preclude all these experts' opinion testimony. The doctors did not base their opinions on "scientific principles, formulae, or procedures developed by others." *See Logerquist*, 196 Ariz. at 490, ¶ 62, 1 P.3d at 133. Rather, with exceptions not

[6] Sometime after the *Frye* hearing, Dr. Marinkovich passed away.

material here,[7] they relied on their own examinations, experiences, and studies as physicians to reach their conclusions. According to *Logerquist*, this type of expert testimony is not subject to *Frye* but is governed instead by Rules 702 and 703. *Id*. at 477-78, ¶ 23, 1 P.3d at 120-21; *see also Lucero*, 207 Ariz. at 305, ¶ 17, 85 P.3d at 1063 (concluding *Frye* inapplicable to forensic toxicologist's opinion that defendant impaired by marijuana at time of collision as opinion based on knowledge and experience rather than novel scientific principles); *Baroldy*, 157 Ariz. at 582, 760 P.2d at 582 (holding medical expert testimony based on absence of other reasonable

---

[7] Dr. Goldstein's opinion that mold can produce mycotoxins was based on his review of studies conducted by others. Landlord does not contest that this opinion is generally accepted by the relevant scientific community, however. In fact, the Institute of Medicine report advanced by Landlord as the "gold standard" in the area of indoor mold exposure recognizes that indoor mold can produce mycotoxins under certain circumstances. Committee on Damp Indoor Spaces and Health, Board on Health Promotion and Disease Prevention, Institute of Medicine of the National Academies, *Damp Indoor Spaces and Health* 7 (National Academies Press 2004).

Dr. Hooper relied on a procedure for testing for mold developed by others; Landlord does not contest on appeal that this procedure is generally accepted in the relevant scientific community, however.

In addition to his own examinations and testing, Dr. Marinkovich relied on an outside study known as the "Cleveland study," which is not generally accepted in the relevant scientific and medical communities, although it was not the primary basis for his opinions but merely verified them. Thus, the lack of acceptance of the study does not mandate preclusion of Dr. Marinkovich's opinions, although the court may properly preclude testimony about the study's conclusions.

explanation for plaintiff's illness and timing of use of allegedly defective product not subject to exclusion under *Frye*). Indeed, unlike scientific-process evidence such as DNA testing, the examination-based opinion of a medical doctor does not carry the aura of infallibility that *Frye* was designed to screen before submission to a jury. *See Fields*, 201 Ariz. at 327, ¶ 19, 35 P.3d at 88 (noting *Logerquist* endorsed idea that *Frye* inapplicable to expert medical testimony); *see also* Paul F. Eckstein, Samuel A. Thumma, *Novel Scientific Expert Evidence in Arizona State Courts*, 34 Ariz. Att'y 16, 18 (June 1998) ("The *Frye* test is limited to 'new, novel or experimental scientific evidence' that rests on 'scientific legitimacy,' rather than 'common knowledge' or personal opinion.").

¶14 The trial court erred by focusing only on whether the experts' medical opinions were generally accepted in the relevant scientific community and failing to consider the import of the manner in which they reached those opinions, as *Logerquist* directs. Based on the foregoing discussion, the court mistakenly precluded opinions offered by Drs. Goldstein, Hooper, and Marinkovich pursuant to *Frye* alone. In light of our decision, we need not consider Tenants' arguments that the court erred by holding a *Frye* hearing and that their experts' causation theories and testing methods are generally accepted in the relevant scientific communities.

¶15 Tenants also sought to introduce at the *Frye* hearing telephonic testimony from medical doctor James Dahlgren that mycotoxins[8] produced by mold can cause injury, Tenants could have suffered neurological injuries if exposed to mold at Eastside, and tests performed by other experts called by Tenants were generally accepted procedures in the relevant medical communities. The court struck Dr. Dahlgren's testimony because Tenants' counsel had provided the doctor with a copy of Dr. Marinkovich's *Frye* hearing testimony in violation of Rule 615,[9] and Dr. Dahlgren had referred to materials as he was testifying to assist his testimony in violation of Rule 612.[10] Tenants argue the court erred in this ruling because (1) Dr. Dahlgren's opinions were not subject to *Frye* and the court should not have conducted the hearing, and, alternatively, (2) any violations of

---

[8] Webster's defines "mycotoxin" as "a toxic substance produced by a fungus and [especially] a mold. Webster's Ninth New Collegiate Dictionary 783 (1990).

[9] Rule 615 states, in relevant part, that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." An exception exists for persons "whose presence is shown by a party to be essential to the presentation of the party's cause." The court did not rule that Dr. Dahlgren was such a person.

[10] Rule 612 states, in relevant part, that "[i]f a witness uses a writing to refresh memory for the purpose of testifying, . . . an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

Rules 612 and 615 did not warrant the sanction imposed. We disagree.

¶16 Dr. Dahlgren did not exclusively rely on his own examinations or studies in formulating his opinions; rather, according to his testimony, he relied on scientific principles developed by others. Additionally, Landlord presented evidence that Dr. Dahlgren's testing methods were new and novel. Accordingly, his testimony was subject to scrutiny under *Frye*, and the trial court did not err by conducting a *Frye* hearing to consider his opinions. *Logerquist,* 196 Ariz. at 490, ¶ 62, 1 P.3d at 133.

¶17 We review the court's decision to strike Dr. Dahlgren's testimony as a sanction for violating Rules 612 and 615 for an abuse of discretion. *Hmielewski v. Maricopa County*, 192 Ariz. 1, 4, ¶ 13, 960 P.2d 47, 50 (App. 1997). We do not discern such error. The court permitted Dr. Dahlgren to testify telephonically as a courtesy. As the court noted, although Tenants' counsel "should have scrupulously [e]nsured that Dr. Dahlgren's telephonic testimony complied with all rules of evidence and procedure . . . [i]nstead, [Tenants'] counsel attempted to gain an unfair advantage in presenting telephonic testimony because Dr. Dahlgren could not be seen by opposing counsel and the Court." The court further found that Tenants gained an unfair advantage, which impacted Landlord's ability to

effectively cross-examine Dr. Dahlgren, and that the matter only came to light through Landlord's voir dire. In light of the purposeful nature of Tenants' counsel's acts and the impact on Landlord, the court was justified in striking Dr. Dahlgren's testimony from the *Frye* hearing.

¶18 In conclusion, the trial court erred by precluding the testimony of Drs. Goldstein, Hooper, and Marinkovich pursuant to *Frye* alone. The court did not err by vetting Dr. Dahlgren's testimony under *Frye* and then striking that testimony.

II. Other evidentiary rulings

A. Mold sampling and testing

¶19 At the *Frye* hearing, Tenants introduced expert testimony from Steven Barnes, Dr. Richard Lipsey, and Dr. Mark Sneller regarding testing of indoor mold samples taken from Eastside. At the conclusion of the hearing, the trial court sustained Landlord's objections to these experts' mold testing and collection procedures, and precluded any opinion testimony based on this testing. Tenants argue the trial court erred in this ruling for multiple reasons. We review a trial court's evidentiary rulings for an abuse of discretion, and we will generally affirm the ruling unless there is "a clear abuse or legal error and resulting prejudice." *Lohmeier*, 214 Ariz. at 60, ¶ 6, 148 P.3d at 104.

Sampling and testing in 2001

¶20 Dr. Sneller testified about sampling and testing of indoor mold taken from some Tenants' Eastside apartments in 2001. Citing Rules 403, 702, and 703, the trial court precluded this testimony from future proceedings because Dr. Sneller had failed to follow established protocols and methods to collect and preserve the highly unstable mold samples or "adequately document when, how, where and for what duration sampling occurred." Tenants challenge this ruling, contending they sufficiently established Dr. Sneller's chain-of-custody and methodology protocols and any deficiencies went to the weight of the evidence rather than its admissibility.

¶21 Putting aside *Frye* considerations, scientific testing evidence is additionally subject to ordinary foundational showings, including that the expert used a proper technique and accurately recorded results. *State v. Tankersley*, 191 Ariz. 359, 366, ¶ 21, 956 P.2d 486, 493 (1998). "If . . . testing procedures are so seriously flawed that the results are rendered unreliable, the trial court should not admit the evidence. . . . Once an adequate foundation is established, however, complaints of laboratory error or incompetence are considered by the trier of fact in assessing the weight of the evidence." *Id.*

¶22 The record supports the trial court's conclusion that Dr. Sneller's collection and preservation procedures were so seriously flawed that his opinions based on the results were

inadmissible. Dr. Sneller agreed that protocols are necessary when taking mold samples. These protocols include meticulously labeling and sealing samples, ensuring no intermingling of samples, uniformly storing samples, and using appropriate chain-of-custody documents. Despite acknowledging the importance of protocols, Dr. Sneller demonstrated a lack of organization and detail in documenting the collection, storage, and shipping of mold samples taken from Eastside.

¶23 During the collection process, Dr. Sneller often failed to document who collected the samples, the date the samples were taken, the apartments the samples were taken from, and whether he used a template on swab samples. Dr. Sneller also admitted "there was extensive confusion" whether the sample results listed for the family of one infant who died were collected from apartment 2142 or apartment 2144. Finally, Dr. Sneller confirmed he took outdoor air samples using a five-minute collection time although the Aerotech Laboratory, which tested the samples, required a ten-minute collection protocol because "the shorter the time period . . . that you run the air sampling, the less mold spores will be captured."

¶24 Dr. Sneller also could not consistently state whether he refrigerated samples, where the samples were stored, or how long the samples were stored. He did not follow a protocol for the time that samples were held before he viewed them. Dr.

Sneller further failed to indicate flow rates for some of the samples he collected. As a consequence, Dr. Linda Stetzenbach, of the University of Nevada Las Vegas laboratory, notified Dr. Sneller she was unable "to calculate the number of spores per cubic meter or the quality form units per cubic meter because . . . no flow rates or sampling times were listed."

¶25 During the shipping process, Dr. Sneller frequently failed to record how the samples were packaged, whether he used ice or other packaging materials, the dates he shipped the samples to laboratories, the method of transportation, and how long the samples were in transit.

¶26 The court had further reason to be concerned regarding the accuracy of Dr. Sneller's testimony. He misplaced some of the data he collected in the case and therefore had to omit it from his exhibits. Dr. Sneller also admitted that although he had originally testified in his deposition that he created a timeline concerning one apartment in 2001, he actually created the document in 2005.

¶27 Landlord's expert witness, Coreen A. Robbins, who holds a Ph.D. in environmental health sciences and is a certified industrial hygienist, testified Dr. Sneller failed to follow generally accepted protocols in industrial hygiene

practice.[11] She further stated Dr. Sneller did not make appropriate chain-of-custody forms for his samples, which "calls into question the reliability of the resulting data." Dr. Robbins ultimately opined that the samples obtained by Dr. Sneller could not be "relied upon in forming opinions regarding the indoor exposures" to mold and that the practices he employed were not in accordance with the generally accepted standards in the practice of industrial hygiene.

¶28 Based on the foregoing evidence, the trial court acted within its discretion to preclude Dr. Sneller's opinion testimony, as Tenants failed to establish sufficient foundation to admit the evidence. The accumulation of missing information and errors in Dr. Sneller's collection, storage, and shipping procedures were not inconsequential flaws in the chain of custody that merely affected the weight of the evidence. *See State v. Morales*, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. 1991). Rather, it demonstrated systemic problems serious enough to make the ultimate test results unreliable and therefore inadmissible. *Tankersley*, 191 Ariz. at 366, ¶ 21, 956 P.2d at 493.

---

[11] Tenants contend Dr. Robbins only described her preferences for collecting and testing data and did not opine on general industry standards. We disagree. Dr. Robbins clearly related general industry standards.

Sampling and testing in 2003 and 2004

¶29 Barnes and Dr. Lipsey testified about sampling and testing of indoor mold taken from some Tenants' Eastside apartments in 2003 and 2004, two or more years after these tenants had moved from the complex. The court precluded the experts' testimony at any trial because "[e]xperts for both parties concur[red] that the later sampling cannot be extrapolated back in time to document exposure to mold or mycotoxin." Tenants argue the court erred in this ruling for various reasons, which we address in turn.

¶30 Tenants first contend that because the court previously denied Landlord's motion for partial summary judgment urged on the basis of its "no-extrapolation" argument, the court violated the law of the case by reaching a contrary decision in the context of the *Frye* hearing. The law-of-the-case doctrine operates in this context as a procedural policy against horizontal appeals rather than as a substantive limitation on the court's authority. *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278, 860 P.2d 1328, 1331 (App. 1993). In deciding that a question of fact mandated denial of the motion for partial summary judgment, the court did not rule that the 2003 and 2004 testing evidence would be admitted at trial. Thus, after hearing extensive testimony on the subject and making credibility determinations of expert witnesses at the

Frye hearing, the court was entitled to rule on Landlord's foundational objections without constraint. *Id.* at 279, 860 P.2d at 1332 (holding law of case doctrine not applied if prior decision did not actually decide issue in question).

¶31 Tenants also argue Landlord was estopped from asserting its position because it prevented sampling in 2001 by expert John Terranova after he made a visual inspection. Landlord disputes this version of events, pointing to a letter to Tenants' counsel in July 2001 welcoming inspection of Tenant-occupied apartments for the purpose of taking samples. Tenants do not assert they raised this issue during or after the *Frye* hearing and fail to cite any ruling or even any evidence presented at the *Frye* hearing that supports its position. The scant evidence cited by the parties was presented in summary judgment proceedings, which are not the subject of this appeal. We are not required to scour eleven days of hearing transcripts to find evidence and any rulings related to Tenants' estoppel argument; for this reason alone, we reject it. *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 119, 412 P.2d 47, 55 (1966) (noting party failed to cite portion of transcript in support of facts and stating court is not required to search extensive record to discern such support).

¶32 Tenants finally argue the trial court erred in its ruling because they demonstrated that 2001 mold levels could be

extrapolated from the 2003 and 2004 results, and any deficiencies in the extrapolation methodology went to the weight of the evidence rather than its admissibility. Pursuant to Rule 703, an expert's opinion based on facts or data is admissible if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *See also Florez v. Sargeant,* 185 Ariz. 521, 527, 917 P.2d 250, 256 (1996) (citation omitted) (holding trial court must prevent the admission of expert opinions if there is any serious question of admissibility of underlying facts or data pursuant to Rule 703); Rule 703 comment. The issue before us is whether the trial court correctly concluded that mold sampling and testing performed two or more years after Tenants moved from Eastside was not the type of data reasonably relied upon by experts in the field in assessing indoor mold levels at the time Tenants lived at Eastside.

¶33 Our review of the *Frye* hearing reveals support for the trial court's ruling. Dr. Robbins testified "[y]ou can't take a sample in 2003 and extrapolate back to 2001, it's just not possible." She based her opinion on the fact that too many variables could occur during the interim period that would affect mold levels. Dr. Robbins further testified that it is generally accepted in the field of industrial hygiene, and

specifically in the area of sampling, that extrapolation to an earlier time period is not possible.

¶34 None of Tenants' experts contradicted Dr. Robbins on the extrapolation issue. Dr. Lipsey was the only Tenants' expert who addressed the issue. He testified that his testing in 2003 exposed indoor mold levels of a "sick building" but admitted he could not extrapolate what the levels of mold were in 2001, the relevant time frame. Although he indicated an estimate was possible, he did not offer one or provide a methodology for doing so. Dr. Lipsey could only rely on Dr. Sneller's data and the 2003 test results to infer that Landlord had not remediated the apartments during the interim period, as Landlord represented. He further admitted, however, he was unaware of what occurred at the apartments from 2001 until the testing in 2003, including knowing the levels of temperature and humidity, which affect mold growth.

¶35 This case is distinguishable from *Broderick v. Coppinger*, 40 Ariz. 524, 526, 14 P.2d 714, 715 (1932), which held that when the condition of machinery involved in an accident is at issue, "it must, of course, appear that it was in substantially the same condition at the time of the test as at the time of the accident." The court then stated that the possibility of outside access to the machine in the interim period would not render the test results inadmissible but would

go to the weight of the evidence. *Id.* at 526-27, 14 P.2d at 715. Unlike a machine, which can remain unchanged over a period of time, however, the experts agreed that mold is a living thing that can change over time with variable conditions.

¶36 In light of the above-described testimony, the trial court acted within its discretion by concluding that test results of mold sampled two or more years after 2001 were not the type of data reasonably relied on by experts in the field in calculating mold levels for 2001. Because Rule 703 requires such general reliance as a condition for admitting opinions based on facts or data, the court properly sustained Landlord's objections to the opinions offered by Mr. Barnes and Dr. Lipsey.[12] As a consequence of our decision, we need not address the parties' other arguments concerning the foundation for these opinions, including the propriety of the trial court's exclusion of exhibit 2.

Exhibits 5 and 37

¶37 During the *Frye* hearing, Tenants moved for admission of exhibit 5, which consisted of copies of Aerotech Laboratory notes and its chain of custody forms partially completed by Dr.

---

[12] We are not persuaded to reach a different result in light of *New Haverford Partnership v. Stroot*, 772 A.2d 792, 799 (Del. 2001), which held the trial court did not err by admitting similar expert testimony. As the Delaware court noted, the matter was discretionary to the court and the record supported the court's ruling. *Id.* In this appeal, the trial court acted within its discretion by reaching a different conclusion.

Sneller. According to Tenants, the trial court erred by refusing to recall Dr. Sneller to allow him to lay foundation, refusing to permit Tenants to introduce deposition testimony, refusing to redact inadmissible portions of the exhibit, and failing to rule on the motion after Tenants filed an affidavit from Aerotech supporting admission. We reject these contentions. The portion of the transcript cited by Tenants shows the court explicitly allowed them to lay foundation for the exhibit through Dr. Sneller, but he was unable to do so. The cited transcript pages do not reflect any discussion or rulings on deposition testimony, redaction, or an affidavit, and we therefore reject Tenants' claim of error on these bases. *Linsenmeyer*, 100 Ariz. at 119, 412 P.2d at 55. Finally, contrary to Tenants' position, the court ruled on the request to admit exhibit 5 by sustaining Landlord's "objections to all other exhibits [Tenants] reference in their memorandum dated June 6, 2006," which included exhibit 5. *See* Ruling entered July 14, 2006, p. 11.

¶38 After the conclusion of the *Frye* hearing, Tenants moved to reopen the hearing and supplement the record with exhibit 37, a compilation of documents concerning the chain of custody of samples taken from Eastside. The court denied the motion, ruling:

> The exhibit is untimely and lacking basic foundational requirements. It would be inconsistent with the interests of justice and judicial economy to allow the [Tenants'] attorney additional opportunities to make the record he failed to make at the *Frye* hearing . . . . [Exhibit 37] contains a hodgepodge of materials. Some lack any foundation, some were previously ruled inadmissible, and all are untimely.

Tenants argue only that the court erred because it initially ruled the exhibit admissible and "reversed course . . . without making further factual findings." Tenants fail to cite the portion of the record reflecting the court's initial admission of the exhibit, and we do not find such support; we therefore reject this argument. *Linsenmeyer*, 100 Ariz. at 119, 412 P.2d at 55. Regardless, we do not discern any error in the court's refusal to reopen the already-lengthy hearing to permit Tenants to introduce additional evidence. *See McCutchen v. Hill,* 147 Ariz. 401, 406-07, 710 P.2d 1056, 1061-62 (1985) (holding courts have broad discretion in ruling on request to reopen evidence); Rule 611(a) ("The court shall exercise reasonable control over the mode and order of . . . presenting evidence so as to . . . (2) avoid needless consumption of time . . . .").

III. Motions for summary judgment

¶39 Prior to the *Frye* hearing, Landlord successfully moved for partial summary judgment on Tenants' claims for intentional and negligent infliction of emotional distress and their request

for punitive damages. Based on the *Frye* hearing record, the trial court granted Landlord's renewed request for summary judgment on Tenants' claims based on physical injuries. Tenants argue the court erred in each of these rulings.[13] We review the trial court's grant of summary judgment de novo. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7, 953 P.2d 168, 170 (1998). Summary judgment is warranted when the facts produced to support a claim or defense "have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Our task is to determine whether any genuine issues of material disputed fact exist and, if not, whether the trial court correctly applied the substantive law. *In re Estate of Johnson*, 168 Ariz. 108, 109, 811 P.2d 360, 361 (App. 1991).

A. Emotional distress

Intentional infliction of emotional distress

¶40 To prevail on its claim for intentional infliction of emotional distress, Tenants were required to prove that (1)

---

[13] Tenants also argue, without citations to the record or supporting authorities, that the trial court erred in striking the *Mason* Tenants' statement of facts. We decline to consider this argument. *See In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. 291, 299, ¶ 28, 18 P.3d 85, 93 (App. 2000) (holding court will not consider appellant's bald assertion made without elaboration or citation).

Landlord acted in an extreme and outrageous manner, (2) Landlord intended to cause emotional harm or recklessly disregarded a near certainty of causing such harm, and (3) Tenants suffered severe emotional distress. *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, 516, ¶ 11, 115 P.3d 107, 110 (2005) (citations omitted). The trial court ruled that Tenants failed as a matter of law to demonstrate the initial two elements, and partial summary judgment was warranted for that reason alone. Tenants argue the Landlord's intentional or reckless failure to properly address the mold problems at Eastside "all the while making profits at the [T]enants' expense," constituted extreme and outrageous conduct, and the court therefore erred in its ruling.[14] We disagree.

¶41 An action is "extreme and outrageous" if it "falls at the very extreme edge of the spectrum of possible conduct" and goes "beyond all possible bounds of decency, [so as] to be regarded as atrocious[] and utterly intolerable in a civilized community." *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 257, 619 P.2d 1032, 1035 (1980) (citations omitted); *see also* Restatement (Second) of Torts § 46(1) cmt. d (1965) ("Generally, the case is one in which the recitation of the facts to an

[14] Tenants do not repeat their argument made to the trial court that Landlord intentionally inflicted emotional distress by threatening to contact Child Protective Services about some Tenants.

average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'").

¶42 We agree with the trial court that Landlord's alleged failure to sufficiently remediate mold, while potentially tortiuous, did not fall within the narrow band of extreme conduct justifying a claim for intentional infliction of emotional distress. Although Landlord's acts and omissions may have lacked justification, Tenants do not point to any evidence of conduct so extreme as to go beyond all possible bounds of decency and that would arouse community resentment and outrage, as required to maintain a claim for intentional infliction of emotional distress. *Country Escrow Serv. v. Janes*, 121 Ariz. 511, 513, 591 P.2d 999, 1001 (App. 1979); Restatement (Second) of Torts § 46(1) cmt. d; *compare Watts*, 127 Ariz. at 257, 619 P.2d at 1035 (holding nursing home's neglect and failure to timely inform wife of husband's terminal illness was "unjustifiable," but did not rise to level of "extreme and outrageous" conduct); *Pankratz v. Willis*, 155 Ariz. 8, 18, 744 P.2d 1182, 1192 (App. 1987) (noting "[c]onduct may be otherwise tortious, and even illegal, and not be outrageous"); *Janes*, 121 Ariz. at 513, 591 P.2d at 1001 (holding landlord's wrongful eviction did not amount to extreme or outrageous conduct); *but see Thomas v. Goudreault*, 163 Ariz. 159, 167, 786 P.2d 1010, 1018 (App. 1989) (holding tenant could recover in tort for

emotional distress for landlord's alleged violations of the habitability provision of the Arizona Residential Landlord and Tenant Act).

¶43 Landlord's alleged actions and inaction in addressing the mold problem are markedly different from the actions of the employer sued in *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987), which Tenants cite in support of their position. In *Ford*, an employer failed to take action after an employee complained her supervisor had made sexually lewd advances, threatened her job, and even physically attacked her at a company picnic. *Id.* at 39-40, 734 P.2d at 581-82. Although the employee expressed fear and severe distress and asked for help on multiple occasions over the course of a year, the employer took no action except to issue a letter of censure against the supervisor. *Id.* at 40-41, 734 P.2d at 582-83. Under these circumstances, the supreme court concluded the employer acted outrageously and recklessly disregarded the near certainty the employee would experience emotional distress due to continued sexual harassment. *Id.* at 43, 734 P.2d at 585. Permitting an employee to continue sexually harassing and assaultive behavior against another employee cannot be equated with a landlord failing to properly remediate mold under circumstances like the one presented by the record in this case.

Negligent infliction of emotional distress

¶44 Arizona does not recognize a claim for negligent infliction of emotional distress in the absence of resulting physical injuries. *Gau v. Smitty's Super Valu, Inc.*, 183 Ariz. 107, 109, 901 P.2d 455, 457 (App. 1995); *DeStories v. City of Phoenix*, 154 Ariz. 604, 610, 744 P.2d 705, 711 (App. 1987). According to their response to Landlord's motion for partial summary judgment, Tenants claimed they suffered emotional distress as a result of witnessing injuries to people with whom Tenants had a close personal relationship ("bystander theory"). The trial court granted summary judgment to Landlord on this claim because although Tenants "suppl[ied] information about their physical health problems resulting from exposure to mold . . . [they] do not differentiate which if any, injuries resulted from the shock of witnessing injury to a closely related person. . . . If the injur[i]es are caused by mold, they could not have been caused by the emotional shock caused by the alleged negligent infliction of emotional distress."

¶45 Tenants first argue the trial court erred in its ruling because the law does not require that the conduct causing emotional distress also result in physical injury; it is enough that emotional distress is *accompanied* by physical injury. Thus, because Tenants suffered physical injury from mold

exposure, they contend they demonstrated a claim for negligent infliction of emotional distress under the bystander theory. We disagree. Our supreme court has clearly held that "[i]n order for there to be recovery for the tort of negligent infliction of emotional distress, the shock or mental anguish of the plaintiff must be manifested as a physical injury." *Keck v. Jackson*, 122 Ariz. 114, 115, 593 P.2d 668, 669 (1979); *see also* Restatement (Second) of Torts § 436A (1965) (providing no liability if conduct results in emotional disturbance alone without bodily harm). The trial court correctly ruled, accordingly, that Tenants were required to show physical injuries as a result of witnessing injuries to persons with a close relationship.[15]

¶46 Tenants next argue the court erred because they provided sufficient factual bases to demonstrate their claim. They concede their affidavits submitted to the court concerning

---

[15] Tenants briefly contend the trial court "erred in making no division between bystander derivative liability and actual illness" and that "[t]he court should have made specific findings as to each of the plaintiffs." We reject these contentions because (1) Tenants bore the burden of arguing and supporting their separate theories of liability to defeat summary judgment, *see Orme School*, 166 Ariz. at 310, 802 P.2d at 1009, and (2) the trial court was not required to make findings of facts, especially when neither party requested it to do so, *see Orkin Exterminating Co. v. Robles*, 128 Ariz. 132, 134, 624 P.2d 329, 331 (App. 1980) (holding trial court not required to make finding of facts pursuant to Arizona Rule of Civil Procedure ("ARCP") 52(a) when action was resolved by summary judgment). Notably, Tenants fail to identify on appeal which of them, if any, "presented derivative claims based on seeing illness and death of family members," and we are unable to make this identification.

lost possessions and fear of physical harm alone were not sufficient to withstand summary judgment but contend that when read with the deposition excerpts provided to the court, sufficient information existed to defeat summary judgment. We reject this contention for two reasons. First, the trial court struck the affidavits because they were identical, lacked specific supporting facts, and were conclusory. Tenants do not challenge this ruling on appeal. Second, Tenants fail to develop their argument by identifying which deposition testimony among the multiple excerpts provided the court demonstrated the requisite manifestations of physical injuries. *See In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. at 299, ¶ 28, 18 P.3d at 93.

¶47 Tenants also argue the trial court erred by refusing to allow them to supplement the record with unintentionally omitted pages of exhibits after the hearing on the motion. Tenants fail to identify which pages among hundreds of pages of exhibits were originally omitted from Tenants' original statement of facts. *See id.* Regardless, we do not discern error. The trial court has discretion to permit or disallow supplemental filings after a hearing. *See 7-G Ranching Co. v. Stites*, 4 Ariz. App. 228, 231 n.1, 419 P.2d 358, 361 n.1 (1966) ("Whether to allow filing of affidavits after the hearing is within the discretion of the trial court."). Given the trial

court's prior order prohibiting such supplemental filings due to Tenants' "well-established pattern" of submitting them, the court did not abuse its discretion by denying the request.

B. Physical injuries

¶48 Tenants contend the trial court erred by granting summary judgment in favor of Landlord regarding Tenants' claims for physical injuries because they presented ample evidence of mold exposure and causation at the *Frye* hearing. The court granted the motion for summary judgment in light of its rulings precluding Tenants' experts from testifying regarding mold test results and causation of health problems. In light of our decision reversing the court's preclusion of three of Tenants' causation experts, we reverse the entry of summary judgment and remand for additional proceedings.

C. Punitive damages

¶49 The trial court granted summary judgment for Landlord on Tenants' request for punitive damages, reasoning Tenants' allegations, if proved true, did not evidence an "evil mind" justifying such damages. Tenants argue the trial court erred in this ruling because a reasonable jury could reach the opposite conclusion.

¶50 A court properly awards punitive damages in tort actions to punish the wrongdoer and deter others from acting similarly. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz.

326, 330, 723 P.2d 675, 679 (1986). These damages are appropriate only in the most egregious cases, however. *Id.* at 331, 723 P.2d at 680. Thus, a court may award punitive damages only if clear and convincing evidence exists that the tortfeasor possessed an "evil mind" while engaging in aggravated and outrageous conduct. *Id.* at 331-32, 723 P.2d at 680-81. A tortfeasor acts with an evil mind if it "should be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others." *Id.* at 330, 723 P.2d at 679 (citing *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986)). Mere gross negligence or even reckless disregard of circumstances does not support an award of punitive damages. *Volz v. Coleman Co.*, 155 Ariz. 567, 570, 748 P.2d 1191, 1194 (1987).

¶51 Our review of the record does not persuade us the trial court erred in its ruling. Distilled to its essence, the evidence presented by Tenants, viewed in the light most favorable to them, demonstrates Landlord substantially ignored the mold problem at Eastside and made anemic efforts to remediate it in order to maximize profits.[16] Although Tenants

---

[16] Tenants assert that Landlord "threatened" them, but they do not cite any portion of the record to support this assertion; we therefore disregard the assertion. *In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. at 299, ¶ 28, 18 P.3d at 93.

contend Landlord acted with an evil mind by consciously disregarding a substantial risk to others, they do not point to any evidence in this voluminous record suggesting Landlord was aware that failing to sufficiently remediate mold could cause severe health problems of the type alleged by Tenants. Even assuming Landlord’s acts and omissions constituted gross negligence or even recklessness, this evidence, without more, failed to support a conclusion that Landlord acted with an “evil mind” justifying punitive damages. *Compare Volz*, 155 Ariz. at 571, 748 P.2d at 1195 (concluding punitive damages not justified by stove manufacturer’s failure to recall stoves with defective caps or warn about defect as manufacturer merely negligent or grossly negligent), *with Hooper v. Truly Nolen of America, Inc.*, 171 Ariz. 692, 694-95, 832 P.2d 709, 711-12 (App. 1992) (affirming punitive damages against pest control service with longstanding knowledge that its employees routinely misapplied toxic chemicals in homes and which actively concealed this practice).

IV. Motions to amend complaint

¶52 Tenants argue the trial court erred by denying their motions to amend the complaint to (1) reassert wrongful death claims that had been accidentally dropped in the course of previously amending the complaint, and (2) adding Sienna Ruhoff as a plaintiff. We review the denial of a motion to amend the

complaint for an abuse of discretion. *Bishop v. Ariz. Dep't of Corrections*, 172 Ariz. 472, 474, 837 P.2d 1207, 1209 (App. 1992). The court acts within its discretion to deny a motion to amend "if it finds undue delay in the request, bad faith or a dilatory motive on the part of the movant, undue prejudice to the opposing party as a result of the amendment, or futility in the amendment." *Id.* at 474-75, 837 P.2d at 1209-10. Leave to amend should be granted liberally. *Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982).

Wrongful death claims

¶53 In September 2002, Tenants initiated the *Sweigert* case and asserted claims against Landlord for the wrongful deaths of two infants due to exposure to indoor mold. After Tenants amended the complaint twice, the court consolidated the case with the older *Abad* case in February 2003. In May, Tenants filed a third-amended complaint in the consolidated action adding new defendants; although the *Sweigert* Tenants were identified in the caption, the wrongful death counts were accidentally omitted from the complaint. Regardless, after this amendment, the parties conducted discovery concerning the wrongful death claims, retained applicable experts, and discussed the claims in settlement negotiations.

¶54 After being alerted to the omission in November 2005, Tenants moved to amend the complaint in January 2006 to reassert

the wrongful death claims and attached a proposed fourth-amended complaint. In a February ruling, the trial court described Tenants' delay in remedying the error as "inexplicable" but found the delay was not "undue" in the context of the lengthy case and granted Tenants' request to reassert the omitted claims. The court refused to accept the proposed amended complaint, however, because it also added plaintiffs and one defendant who were not part of the original complaint. Thereafter, in March and April, Tenants submitted three additionally proposed amended complaints that made changes beyond merely reasserting the wrongful death claims, and the court rejected them. Finally, at the court's direction, Tenants moved to file a seventh-amended complaint in May that reasserted the wrongful death claims and made other changes to purportedly conform to the evidence.[17] Landlord objected on multiple bases, including that the wrongful death claims should not be added because doing so would be futile in light of the evidence adduced at the *Frye* hearing, which had been ongoing. In September, after ruling on the *Frye*-related motions, the court

[17] No party cites to a sixth-amended complaint, and it is not readily found in the voluminous record. As the court denied an oral motion to amend the complaint presented at the hearing on Landlord's motion to strike, however, it appears Tenants presented a sixth-amended complaint at that hearing. It further appears that a new motion to amend was required only to the extent Tenants wished to amend the complaint for reasons beyond merely reasserting the previously alleged wrongful death claims.

denied Tenants' final attempt to amend the complaint for two reasons. First, the court reasoned its preclusion of expert opinion evidence that indoor exposure to mold could cause a "SIDS death" rendered the proposed amended complaint futile. Second, the court found that Tenants had acted with undue delay by repeatedly failing to correct the original omission as permitted and instead attempting to also correct other errors and omissions. The court found these actions were "undertaken in bad faith causing delay and prejudicing the efficient and orderly litigation of this case."

¶55 In light of our decision that the trial court erred by precluding expert opinion evidence on causation, *see supra* ¶¶ 13-14, the proposed amendment to reassert the original wrongful death claims is not futile. We also agree with Tenants that the trial court erred by denying the motion to amend based on undue delay to the extent Tenants sought to reassert the omitted wrongful death claims. The court found no undue delay in its February 2006 ruling and Tenants immediately attempted to submit amended complaints but were not successful in their efforts as they also requested other changes, which the court rejected. Although the court did not abuse its discretion by finding undue delay in Tenants' attempts to add new parties and allegations, in light of Tenants' timely attempts to reassert the wrongful death claims after all parties had litigated the claims, the

lack of any apparent prejudice to Landlord, and the charge to liberally allow amendments, the court erred by refusing to allow this amendment. We therefore reverse the portion of the judgment denying the motion to amend the complaint to the extent Tenants sought to reassert the original wrongful death claims erroneously dropped at the time Tenants filed their third-amended complaint.

Sienna Ruhoff

¶56 In their 2002 complaint initiating the *Abad* case, Tenants named Sienna Ruhoff as a plaintiff in her representative capacity as the mother of Jonathan Ruhoff and Nathaniel Ruhoff but did not name her as a plaintiff in her individual capacity. In April 2006, Tenants moved to name Ruhoff as a plaintiff, and the court denied the motion due to considerations of undue delay, futility, and resulting prejudice to Landlord. Tenants contend the trial court erred in its ruling because Ruhoff was omitted from the caption of the complaint due to clerical error, and she was entitled to relief therefore pursuant to ARCP 60(c).

¶57 Landlord argues we lack jurisdiction to consider the propriety of the court's ruling because Ruhoff did not appeal. Tenants do not respond to this contention in their reply. We agree with Landlord. Arizona Rule of Civil Appellate Procedure 8(c) requires that a notice of appeal "specify the party or parties taking the appeal." Because Ruhoff did not appeal in

her individual capacity, we lack jurisdiction to consider her challenge to the court's ruling. *Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, 423, ¶ 39, 224 P.3d 230, 239 (App. 2010) (holding court lacked jurisdiction to hear appeal of parties who did not file notice of appeal); *compare Udy v. Calvary Corp.*, 162 Ariz. 7, 10-11, 780 P.2d 1055, 1058-59 (App. 1989) (concluding omission of child's name from notice of appeal that listed parents in representative capacity was "technical error" that was not misleading or prejudicial and therefore did not prevent perfection of appeal).

V. Dismissal of Wasatch Premier Properties, L.L.C.

¶58 Tenants finally argue the trial court erred by dismissing Wasatch Premier Properties, L.L.C. ("Premier") from the *Sweigert* case. In ruling on a motion to dismiss for failure to state a claim, the trial court accepts as true the facts alleged in the complaint. *Newman v. Maricopa County*, 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App. 1991). "The motion should be denied unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (Citation omitted). We review the court's ruling de novo. *Jeter v. Mayo Clinic Arizona,* 211 Ariz. 386, 391, ¶ 18, 121 P.3d 1256, 1261 (App. 2005).

¶59 Premier is a limited liability company that is a member of Wasatch Pool Holdings, L.L.C. ("Pool Holdings"), which

in turn owns Eastside. Landlord moved to dismiss Premier from the *Sweigert* case alleging Premier is not subject to liability by merely holding membership in a properly named limited liability company. The trial court granted the motion on the basis of the expiration of the statute of limitations – a basis not urged by Landlord. Landlord concedes the court dismissed Premier for an improper reason but asks us to affirm regardless as dismissal was warranted for the reason urged to the trial court by Landlord.

¶60 Landlord persuasively argues Premier cannot be held liable merely because it is a member of Pool Holdings. Section 29-651, A.R.S. (1998), provides:

> Except as provided in this chapter . . . a member . . . of a limited liability company is not liable, solely by reason of being a member . . . for the . . . liabilities of the limited liability company whether arising in contract or tort, under a judgment, decree or order of a court or otherwise.

Nevertheless, we reject Landlord's contention because Tenants' complaint in the *Sweigert* case did not allege Premier is liable based on its ownership of Pool Holdings. Rather, Tenants alleged Premier "owned, operated, and/or managed" Eastside and "caused the events" underlying the lawsuit through its negligence, among other things, in failing to remediate mold. Thus, accepting the allegations of the complaint as true, as we

must, we cannot uphold the trial court's dismissal of Premier from the *Sweigert* case for the alternate basis urged by Landlord.[18] We therefore reverse the portion of the judgment dismissing Premier from the *Sweigert* case.

VI. Summary of holdings

¶61 The trial court misapplied *Frye* to preclude the expert opinion testimony of Drs. Goldstein, Hooper, and Marinkovich as, with exceptions not material here, they relied on their own examinations, experiences, and studies to reach their conclusions. The admissibility of this evidence, however, remains dependent on application of Rules 702, 703 and other rules of evidence. The court did not err by striking the testimony of Dr. Dahlgren. *See supra* ¶¶ 6-18.

¶62 The trial court acted within its discretion by precluding opinion testimony from Dr. Sneller. The accumulation of missing information and errors in Dr. Sneller's collection, storage, and shipping procedures affected the admissibility of the evidence rather than merely its weight. Further, the court did not err by precluding testimony from Barnes and Dr. Lipsey.

---

[18] In a footnote set forth in its motion to dismiss, Landlord recognized that Tenants had alleged negligent acts by Premier in their complaint but contended dismissal was proper as no one questioned that Premier was named solely because it owned Pool Holdings. Consequently, Landlord alternatively moved for summary judgment. Because Landlord failed to comply with ARCP 56(c), and its factual allegation was not supported by reference to the record, it was not entitled to relief on this basis.

The record supports the court's conclusion that test results of mold sampled two or more years after 2001 were not the type of data reasonably relied on by experts in the field in calculating mold levels for 2001. Finally, the court did not err by refusing to admit exhibits 2, 5, and 37. *See supra* ¶¶ 19-38.

¶63 The trial court correctly granted summary judgment to Landlord on Tenants' claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and Tenants' request for punitive damages. In light of our decision that the court erred by precluding opinion testimony from Drs. Goldstein, Hooper, and Marinkovich based solely on *Frye* principles, we reverse the court's grant of summary judgment on Tenants' physical injury claims. *See supra* ¶¶ 39-51.

¶64 In light of our decision that the court erred by precluding Drs. Goldstein, Hooper, and Marinkovich from testifying based solely on *Frye* principles, Tenants' motion to amend to assert a seventh-amended complaint was not futile. We also decide the court incorrectly ruled that Tenants proceeded with undue delay in attempting to amend their complaint to the extent they sought to reassert the wrongful death claims accidentally omitted from a prior amended complaint. The court did not err by denying the motion to amend the complaint in other ways. We do not decide whether the court correctly denied

the motion to amend to list Sienna Ruhoff as a plaintiff because she is not a party to this appeal in her individual capacity. *See supra* ¶¶ 52-57.

¶65 Landlord concedes the trial court erred by dismissing Premier from the *Sweigert* case based on expiration of the applicable limitations period. We disagree with Landlord that the court's ruling can be upheld, nonetheless, on alternate grounds. *See supra* ¶¶ 58-60.

CONCLUSION

¶66 For the foregoing reasons we affirm in part, reverse in part and remand for further proceedings consistent with this decision.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Patricia K. Norris, Presiding Judge

/s/
Maurice Portley, Judge