SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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September 8, 2004

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Re: ***Brandt v. Rokeby Realty Company, et al.***
C.A. No. 97C-10-132-RFS

Dear Counsel:

Pending before this Court are summary judgment motions which need to be resolved. I wanted to have the benefit of transcripts of oral arguments for several of the motions. However, the court reporter is required to give criminal appeals priority. Given a heavy load, the transcripts will not be prepared in the near future. I want to move this case forward, and, for that reason, this letter opinion will address various motions following my review of the briefs and notes of the oral arguments.

## BACKGROUND

The plaintiff, Charles Brandt ("Brandt"), leased a suite to conduct a law practice. His office was on the second floor of a three story building at 3 Mill Road, Wilmington,

Delaware. When entering into the lease, the building was being constructed for commercial use.

Brandt occupied the space from 1990 through 1995. At the end of 1995, he moved out. At that time, Brandt was sick. The primary thrust of the complaint is the allegation that mold in the ceiling was of sufficient concentration and toxicity to cause a health problem. Brandt's claims are based upon negligence.

A number of defendants were sued: Rokeby Realty Company ("Rokeby"); the commercial lessor, Garret Van S. Copeland, the President of Rokeby ("Copeland"); Service Unlimited, Inc. ("Service") an air conditioning and heating company; and Merit Mechanical Company, Inc., another air conditioning and heating company ("Merit"). Merit replaced filters during the initial years after the building was constructed. Thereafter, Service performed preventive maintenance work on the heat pumps, including those supporting Brandt's office. All of the defendants have moved for summary judgment on various grounds which are discussed below.

Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the nonexistence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets its burden, the burden shifts to the nonmoving party to establish the existence of material issues of fact. *Id.* At 681. The court views the evidence in a light most favorable to the nonmoving party. *Id.* At 680.

Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and burden shifts, the nonmoving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. *Super. Ct. Civ. R. 56(e); Celotex Corp. V. Catrett,* 477 U.S. 317, 322-23 (1986). If material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

**Rokeby's Motion on Duty of Care**

Rokeby argues that it does not owe a duty of care to Brandt. Of course, there must be a duty to prevent injury in a negligence action. The concept of duty was addressed in one Superior Court decision as follows:

> "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person . . . ." In their hornbook, Professors Prosser and Keeton admonish their readers to resist the urge to blend the concepts of duty and standard of conduct when addressing the threshold legal issue of whether one party may be held legally accountable to another. "It is better to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation." Delaware courts have recognized the distinction as well.

*Kuczynski v. McLaughlin,* 835 A.2d 150, 153 (Del. Super. Ct. 2003) (citations omitted). Furthermore, the Court decides whether 'such a relationship exists between the parties that the community will impose a legal obligation upon one of the benefit of the other'. *Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988).

The parties agree that the lease between Rokeby and Brandt was subject to the Landlord Tenant Code. In a case involving mold, the Supreme Court found that the duty imposed by the Landlord Tenant Code to maintain a building in a safe and sanitary condition could be the source of a duty to maintain a negligence claim. *New Haverford P'ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001).

In other litigation between landlords and tenants, the Code has been referenced as reflecting or establishing a duty. In *Norfleet I v. Mid-Atlantic Realty Co., Inc.,* 2001 WL 282882 (Del. Super. Ct.) ("Norfleet I") Judge Witham observed that the Landlord Tenant Code was consistent with legal precedent. A landlord is required to maintain leased property in a reasonably safe condition and to make necessary repairs. The code comprises a "minimum, base-line duty." *Norfleet I* at * 7.

The law on this subject was also reviewed in *Powell v. Megee,* Del. Super. Ct., C.A. No. 02C-05-031, Stokes, J. (Jan. 23, 2004) Letter Op. at 3-4. Landlords have a duty to provide a safe unit fit for renting "at all times during the tenancy." *See* 25 Del.C. § 5305(a)(2). *See also Pierce v. Indian Landing Creek Properties*, 1991 WL 113580 (Del. Super. Ct.); *Hand v. Davis*, 1990 WL 96583, at *2 (Del. Super. Ct.); *Ford v. Ja-Sin*, 420 A.2d 184, 186 (Del. Super. Ct. 1980). The adoption of the Code permitted an action at common law for negligence, because it

> [extended] landlord liability under an ordinary negligence standard to all defects, latent or otherwise in the rental unit of which the landlord was aware or should have been aware which endanger the health, welfare or safety of the tenant or occupant during the term of the tenancy.

*Rosenberg v. Valley Run Apartments Assoc.*, Del. Super. Ct., No. 1143, 1973, Walsh, J. (April 29, 1976), Letter Op. At 3, *aff'd*, Del. Supr., No. 121, 1976 (May 17, 1977)

(referring specifically to the effect § 5303(a)(2) had on the common law approach).

At the time of the lease, the Landlord Tenant Code obligated a landlord to provide and maintain a fit rental unit. Section 5303(a) stated:

> (a) The Landlord shall at all times during tenancy:
>
> 1. Comply with all applicable provisions of any State or local statute, code regulation or ordinance governing the maintenance, construction, use of appearance of the rental unit and the property of which it is a part;
>
> 2. Provide a rental unit which shall not endanger the health, welfare or safety of the tenants or occupants and is fit for the purpose for which it is expressly rented;
>
> 3. Keep in a clean and sanitary condition all areas of his building, grounds, facilities and appurtenances which are maintained by the Landlord;
>
> 4. Make all repairs and arrangements necessary to put and keep the rental unit and the appurtenances thereto in as good condition as they were, or ought by law or agreement to have been, at the commencement of tenancy;
>
> 5. Maintain all electrical, plumbing and other facilities supplied by him in good working order; . . . .

Viewing the record in favor of Brandt as the nonmoving party, there was mold in the ceiling above his office. Tiles were found to have water damage. The area was near a heat pump and equipment which had overflowed. Evidence of water leaks were observed. Rokeby had control of the space. These circumstances implicate Code sections which impose a duty on Rokeby to supply and maintain a reasonably safe unit.

Nevertheless, Rokeby argues that it had no duty to warn Brandt about the mold. It contends that mold did not present a warning sign of health dangers under the state of scientific knowledge which existed in 1990 - 1995. This argument is not persuasive. In a

suit involving asthma triggered by high counts of mold in a house in 1992 - 1993, the Nebraska Supreme Court observed: "The list of publications which have addressed the presence of microbiological organisms and their relationship to asthma and allergies showed that the scientific community has generally accepted the principle that a connection exists between the presence of mold and health." *Mondelli v. Nebraska Homes Corporation,* 631 N.W.2d 846, 856 (Neb. 2001). The connection was referenced in *New Haverford P'ship,* 772 A.2d at 796-799.

Certainly, a landlord may be held liable for injuries to a tenant if a latent defect was not disclosed when the property was rented. *See Brandt v. Yeager*, 199 A.2d 768, 770-1 (Del. Super. Ct. 1964). Rokeby was responsible to maintain the common areas of the building, including its plumbing, mechanical, and heat pump components. If a landlord undertakes repairs and maintenance for a tenant, reasonable care must be used in undertaking those services. *See Sipple v. Kaye*, 1995 WL 654139, at *2 (Del. Super. Ct.). In *Sipple*, Judge Del Pesco considered the duty to warn "not as a separate cause of action . . . but rather as a means of effecting a more general duty." *Id.* While there may be a general duty to inspect and clean a heat pump and to replace moldy tiles which may not be safe, the duty to warn of the danger of mold would arise incidentally from a breach of these duties.

Defendants point out that in asbestos cases, defendants do not have a duty to warn about something they could not have known was dangerous. *See In re Asbestos Litigation*, 799 A.2d 1151, 1153 (Del. 2001); *Roche v. Lincoln Prop. Co.*, 2003 WL

22002716 at *6 (E.D. Va.), *rev'd in part, vacated in part* and remanded for lack of diversity jurisdiction, 373 F.3d 610 (4th Cir. 2004). Here, whether Rokeby, as a commercial landlord, had reason to know that the mold created a dangerous condition depends upon the appropriate standard of care which is discussed next. The motion on grounds of a lack of a legal duty, however, is denied.

Rokeby's Motion on Standard of Care

Rokeby contends that Brandt does not have sufficient evidence to show a standard of care was breached. The distinction between the duty to prevent harm and how that is to be measured is well established. Duty establishes the obligation; the conduct is evaluated by a legal standard of what is necessary to satisfy the obligation. *Kuczynski*, 853 A.2d at 153, *quoting Samhoun v. Greenfield Constr. Co.,* 413 N.W.2d 723, 726 (Mich. Ct. App. 1987). ("In Prosser's terms . . .[i]t is apparent that resolution of the 'duty' issue determines the existence and not the nature or extent of the actor's obligation. Although somewhat interrelated, those latter concepts are more properly considered in the evaluation of the actor's conduct in relation to the general and specific standards of care.") (citations omitted.)

Rokeby argues that since the maintenance of a large office building requires special skill, the burden is on Brandt to establish the relevant standard of care through expert testimony. Rokeby points out that Brandt's experts, W. Edward Montz, Jr., Ph.D. ("Montz") and Joseph A. Miller ("Miller"), a certified industrial hygienist, testified that between 1990 and 1995 there were "no accepted standards for levels of indoor exposure

to mold." In addition, Rokeby maintains that Montz, Miller, and Brandt's two medical experts, are not qualified to assess the standard of care of a commercial landlord regarding mold in the leasing of premises. Accordingly, without expert testimony showing a standard, Rokeby asserts that Brandt cannot establish an essential element of his case.

As previously cited, Delaware Courts have found, "[t]he duty of the landlord is to maintain the premises in a reasonably safe condition, and to undertake any repairs necessary to achieve that end." *Norfleet I* at *6 *citing*, *Hand v. Davis,* 1990 WL 96583, at *2 (citations omitted). This duty "extends to defects the landlord is aware of or should be aware of through reasonable inspection of the rental unit." *Id*.

In this regard, Rokeby cites *Norfleet v. Mid-Atlantic Realty Co.,* 2001 WL 695547 (Del. Super. Ct.) ("*Norfleet II*") in support of the idea that maintaining a commercial building involves special knowledge, thus an expert is required to establish the standard of care. In *Norfleet II,* the court found that an expert would be helpful, and in that case, required; the reason being, that in order to prove common law negligence it is necessary to show the landlord had a duty to act above and beyond the minimum requirements of the Landlord-Tenant law. Because the landlord-tenant relationship is regulated, it was helpful to have an expert familiar with the local practices and standards.[1] *Norfleet II* at *4-6. The *Norfleet II* court, referencing another case, *Miley v. Harmony Mill Ltd. P'ship*,

[1] The Court in *Norfleet* required that the expert be familiar with local standards. In *New Haverford P'ship v. Stroot*, 772 A.2d 792, (Del. 2001), the Supreme Court refused to find abuse of discretion when a trial court permitted the testimony of an expert as to a national standard of care for building maintenance, safety, and cleanliness which applied to Delaware as well.

803 F. Supp. 965 (D. Del. 1992), refused to find that landlords were professionals for negligence duty purposes, but chose to hold the status of expert testimony in landlord tort cases to a similar standard, noting, "[a]s a general rule the standard of care applicable to a professional can only be established through expert testimony." *Norfleet II, citing, Weaver v. Lukoff,* Del.Supr., No. 15, 1986, McNeilley, J. (July 1, 1986), ORDER at 1. While the Landlord Tenant Code may establish a duty, it does not set forth specific standards of conduct, *see Powell v. Megee* at 5. There, expert testimony was required to show the standard of care expected of a reasonably prudent property manager.

In response, Brandt provided Environmental Protection Agency ("EPA") guidelines regarding microbiologicals and chemicals in the indoor airstream, published in 1991. Viewing the facts in the light most favorable to him, Brandt has also shown that Rokeby was responsible for plumbing, mechanical, and electrical work in the law office. While EPA guidelines are helpful, they are still just guidelines and do not establish a standard of care.

Brandt also provided the Heat Pump Manufacturer's Maintenance Instructions which discusses mold and might be helpful in establishing a standard. The version of the Instructions is from August 1997. Mold was not referenced until the latest printing which cannot be used to establish a standard of care for 1990-1995. The old manual does suggest when the heat pump air filter and condensate pan and drain should be checked and cleaned, but does not mention mold at all. (Defendants' Reply Memorandum, Exhibit G at 10.)

Brandt argues that expert testimony is not necessary. Where matters are within the common experience of jurors, expert testimony is not required. For example, the fact that people cut corners is commonly known and does not require expert testimony in a faulty landscaping design case. *See Ward v. Shoney's, Inc.*, 817 A.2d 799, 803 (Del. 2003). Jurors know that different dimensions of steel compromise the structural integrity of buildings and do not need specialized testimony to show that buildings may collapse from a defect of this nature. *See City of New York v. Turner-Murphy Co.,* 452 S.E.2d 615, 618 (S.C. Ct. App. 1994). Likewise, common sense would permit a fact finder to decide an architect had notice of flooding when advised that his proposed building was two feet lower than recent flooding. S*ee Seiler v. Levitz Furniture, Co.,* 367 A.2d 999, 1008 (Del. 1976).

The Brandt case is complex. What is required of commercial landlords to satisfy a duty to provide and maintain a reasonably safe rental unit in 1990 - 1995 where mold and water damage occur? Stating the question provides the answer. The subject is beyond the common knowledge and experience of jurors. Without guidance from an appropriate standard, the jury would be merely speculating about this important aspect of the case.

In the interest of justice, rather than enter summary judgment, Brandt must provide expert opinion on the standard of care within 90 days. At that time, Brandt shall also provide the substance of the facts and opinions of any expert and summary of grounds for each opinion. If Brandt fails to do so, summary judgment shall be entered. Should Brandt be able to do so, Rokeby shall have an additional 90 days to obtain its expert

opinion and to exchange the same information. The parties may depose any expert on this subject.

Service's Motion on Standard of Care

Service performed preventive maintenance work at the office building from 1994 - 1996. While working on a heat pump, Service discovered that a ceiling tile near Brandt's office showed water damage. Tiles in Brandt's office were later found to have mold which allegedly affected his health.

In this regard, one of Service's employees, Anthony Renda, reported finding two water saturated tiles. He also found tiles had been placed on top of each other in the space above the ceiling (the plenum). It appeared that damaged tiles were discarded over new ones. It is disputed whether that reflected sloppy workmanship or represented an effort to have the older tiles absorb water leaks. Nevertheless, drain lines in two heat pumps near Brandt's office were pitched uphill which caused water to overflow in the condensate pans. Mr. Renda reported the existing condition of the pipe to Rokeby.

Brandt does not have expert testimony to shed light upon what is reasonably expected of a professional in similar circumstances. Where negligence is charged against a person or firm in a trade, the jury is instructed that:

DUTY OF A PROFESSIONAL

> [Plaintiff] has alleged that [defendant] was negligent in [the alleged negligent conduct]. One who undertakes to render services in the practice of a profession or trade is always required to exercise the skill and knowledge normally held by members of that profession or trade in good standing in communities similar to this one.

> If you find that [defendant] held [itself] out as having a particular degree of skill in [its] trade or profession, then the degree of skill required of [defendant] is that which [it] held [itself] out as having.

The following authorities support this instruction:

*Tydings v. Lowenstein*, 505 A.2d 443, 445 (Del.1986); *Seiler v. Levitz Furniture, Co.,* 367 A.2d 999, 1007-08 (Del. 1976); *Sweetman v. Strescon Indus., Inc.,* 389 A.2d 1319, 1324 (Del. Super. Ct. 1978). *See also* Restatement (Second) Of Torts § 299A (1965).

Service is an experienced heating, ventilation, air conditioning, and maintenance company. Its employees are required to have specialized qualifications and expertise. Service has the status of a trade and is required to exercise a specialized degree of care. *See Ruddy v. Moore*, 1997 WL 717790, at 8 (Del. Super. Ct.) (expert testimony presented concerning HVAC installation). *John Day Co. v. Alvine & Assoc.,* 510 N.W.2d 462, 466 (Neb. Ct. App. 1993) (professional standard applies to designing HVAC systems). Without expert testimony, jurors would be forced to surmise about the particular degree of skill and how to measure it against Service's functions under the circumstances of this case.

Brandt argues that the mistake by Service was obvious and thus within the common knowledge of jurors to determine negligence. Brandt quotes specifications on the equipment, EPA guidelines, and testimony from Mr. Renda as supporting the position that no expert testimony is necessary.

The specifications and EPA guidelines may be evidence of a standard should professionals regard and interpret them as such. *See Toll Bros., Inc. v. Considine*, 706

A.2d 493 (Del. 1998) (Occupational Safety and Health Act (OSHA) regulation may be relevant as standards bearing upon allegedly negligent conduct of general contractor, but violation of regulations is not negligence *per se*); *Norfleet II* at *6 (finding experts may use applicable codes, statutes, and regulations in a limited fashion to help establish standard of care, but not to prove negligence *per se*).

Concerning Mr. Renda, he testified at his deposition that:

Q: That prompts a question on my part. Was it part of your preventive maintenance to examine for mold that may have – to look for mold?

A: Yes. It would be, yes.

Q: Where would you look for the mold?

A: In the condensate pan, in the condensate overflow pan, or subsequently, anything associated with the heat pump, where there would be mold.

Q: If you had observed overflow from the condensate pan, would you look at the ceiling tiles to see if there was mold there? Was that part of your function?

A: To assess the damage, therefore, looking at them, yes.

Q: What damage would you be assessing?

A: Ceiling tile, the ceiling tile and associated supports.

Granted that the preventive maintenance function required Mr. Renda to look for mold when servicing equipment, does the standard require that the area be tested? What is the standard if the affected area was not immediately above Brandt's office? How does

the discovery of conditions at different sites measure into the calculation? Does the standard require a report to Brandt as a tenant or only to Rokeby as a landlord? Does the nature and degree of observed damage affect the standard? How would EPA guidelines and equipment specifications be considered?

The mere presence of mold is not conclusive. Brandt reports that mold is everywhere, and "there are over 100,000 species of mold on earth, of which 200 are allergenic, and approximately 50 are toxic to human health." Brandt's Mem. in Opp'n. to Rokeby's Mot. for Summ. J. as to Existence of a Hazardous Condition at 111, ¶ 1. Under these circumstances, Service's neglect - whatever that may be - is not so obvious as to permit a jury to decide whether a standard of care was breached.

Like the Rokeby motion, in the interest of justice, summary judgment will not be entered. Brandt must provide expert opinion on the standard of care within 90 days. At that time, Brandt shall also provide the substance of the facts and opinions of any expert and summary of grounds for each opinion. If Brandt fails to do so, summary judgment shall be entered. Should Brandt be able to do so, Service shall have an additional 90 days to obtain its expert opinion and to provide Brandt with the same kind of information. The parties may depose any experts on this subject.

Merit's Motion for Summary Judgment

Merit presents several grounds in support of its motion.

Merit Mechanical provided HVAC (heating ventilation and air conditioning) services to the property from August 8, 1990 until March of 1993. According to Brandt,

Merit also installed the Water Source Heat Pump. The services provided were limited preventive maintenance and consisted primarily of changing the air filters on all water source heat pumps *four* times per year, "[cleaning] sump, strainer and cabinet of both cooling towers, [inspecting] fans, shaft and controls, grease bearings and [adjusting] water level *once* per year;" and "[inspecting] mechanical room including pumps, boilers, piping and controls *once* per year." Merit Mechanical Co.'s Mot. for Summ. J., Ex. C (Proposal for Services) (emphasis added) ("Merit's Mot.").

Merit alleges that there is insufficient evidence to establish a prima facie case of negligence. It argues that Brandt has failed to show any breach of a duty by any act or omission by Merit that caused a leak of water or mold contamination.

In response Brandt has again provided the EPA guidelines (1991) and the Heat Pump Manufacturer's Maintenance Instructions (1997) to show that a service technician must look for mold. Again the Maintenance Instructions (1997) were updated after the period in question in this case (1990-1995); they originally did not reference mold. A service technician (for Service Unlimited), Mr. Renda (see Brandt's Mot. in Opposition to Merit, Ex. C), testified that the service technician has a responsibility to examine for mold as part of preventive maintenance. He claims this would include inspecting the ceiling tiles.

In *Centex-Rooney Constr. Co. V. Martin County*, 706 So.2d 20, 25 (Fla. Dist. Ct. App. 1997), in upholding a jury verdict in favor of the county in a breach of contract action, the court found that the county had sufficiently established that Centex did not

properly supervise the construction:

> First, it proved that Centex's construction defects caused moisture problems in the buildings, resulting in extensive mold growth. Centex's own employees acknowledged that its subcontractors' defective installation of the EIFS system and windows led to extensive water infiltration and resultant mold growth. Second, the County established through expert testimony that, because of this moisture, the buildings were infested with two highly unusual toxic molds. Third, several experts attested to the accepted scientific principle linking exposure to these two molds with health hazards.

Problems with the HVAC system were admitted substantial defects in the whole construction process which eventually caused excessive humidity and led to the growth of toxic molds.

In *Foster v. Denton Indep. Sch. Dist.,* 73 S.W.3d 454 (Tex. Ct. App. 2002), the court found a manufacturer and installer of an HVAC system had no duty to ensure air did not contain microbial agents. The duties of Honeywell were similar to those of Merit - for example, they were to change the filters four times a year. Foster alleged Honeywell was responsible for her mold sickness because it allowed standing water under the school building to become infested with mold. *Id.* at 466. The court decided that Honeywell could not have foreseen and was not responsible for the fact that the standing water could have become contaminated. Using a risk-utility balancing test, it determined there was no duty:

> We believe the balancing of the factors relevant in determining whether a duty exists would establish that Honeywell had no duty to ensure that standing water under a building on which it maintains HVAC units could not become contaminated with mold and fungi that could at some point in the future be sucked up by the equipment it is installing and distributed throughout the building. In this case, it would be extremely detrimental to

> merchants such as Honeywell to require them to guarantee the absence of future contamination of the air by microbiological growth under and around the customer's building.

As cited previously, the question of duty is a fact driven determination based upon the relationship between the parties. The concept of duty "incorporates the notion of foreseeability" and traditionally has been explained as follows:

> Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

*See Kuczynski,* 835 A.2d at 154.

The critical circumstance in this case involve water exposure with the growth and spread of mold. The record shows that the building was newly constructed in 1990. Merit's work was minimal, mostly changing air filters on heat pumps. The significant evidence, developed through discovery, establishes water damage to one or more ceiling tiles in the vicinity of the heat pump around Brandt's office. This discovery occurred after the end of Merit's contract in March of 1993. The timing of the intrusion is unknown, and the record does not show a foreseeable condition of harm to trigger a duty by Merit. *See Brandt's Mem. in Opp'n. To Service Unlimited's Mot. for Summ. J.*, ¶ 1(e). In this context, as in *Foster*, Merit should not have the responsibility of a guarantor.

Moreover, on the subject of Merit's liability, Brandt had no idea why Merit was sued as shown in this deposition exchange:

> Q: Before you sued . . .

A: No . . .

Q: Before you sued Merit Mechanical, did you make a good faith effort on your own part to determine what, if anything, it did and how it related to your claims?

A: No, I have to confess I did not. Sorry to tell you that but it's the truth.

Viewing the record in favor of Brandt, Merit did not have a duty to prevent injury given its limited involvement with the building. Nor does Brandt offer any expert opinion about the standard of care and any deviation by Merit. As discussed in the other motions, expert opinion is necessary.

Summary judgment, therefore, is entered in favor of Merit.

Copeland's Motion on Personal Responsibility

Copeland has moved for summary judgment on the basis that he cannot be found liable as President, and as a shareholder of Rokeby Realty, for negligence under the Personal Participation Doctrine. Brandt has also brought a claim against Copeland under an implied contract theory, but Copeland asserts that he cannot be individually liable for the lease signed by him on behalf of Rokeby Realty.

Whether or not Brandt can sue Copeland is not a question of piercing the corporate veil, but rather is one of Copeland's personal participation in a tort. The Personal Participation Doctrine stands for the idea that an officer of a corporation can be held liable for his own wrongful acts. "Corporate officers cannot be shielded from tort liability by claiming that the actions were done in the name of the corporation."

*Heronemus v. Ulrick*, 1997 WL 524127, at *2 (Del. Super. Ct.), *quoting*, *Camacho v. 1440 Rhode Island Ave. Corp*., 620 A.2d 242 (D.C. 1993).

In order to be found liable under this doctrine, a corporate officer must have more than mere knowledge. *T.V. Spano Building Corp. v. Dep't of Natural Resources and Environmental Control*, 628 A.2d 53, 61 (Del. 1993). Brandt must show that the officer "directed, ordered, ratified, approved, or consented to" the tortious act. *Id*. Judge Herlihy, in *Heronemus*, interpreted this finding of the Supreme Court to mean an officer can only be liable for misfeasance or "active negligence." *Heronemus* at *2. "They will not be held liable for nonfeasance or the omission of an act which a person ought to do." *Id*.

Brandt has not met his burden of showing that a genuine issue of material fact exists as to Copeland's personal liability for Brandt's injuries under a tort theory of liability. The evidence shows that Copeland said something crude in 1996 (Pls.' Mem. in Opp'n. at 4-5). Yet the remark was spoken after Brandt left the premises. Furthermore, no evidence shows that Copeland took any affirmative actions which harmed Brandt. He may have known about health complaints, but mere knowledge is insufficient for liability. Brandt has not shown either, that Copeland was the one who ordered or approved of any of Service's work regarding the heat pumps. Claims based on the failure to warn, inspect or repair, or implement and supervise indoor air quality programs for common areas affected by mold are acts of nonfeasance.

Whether or not Copeland can be found liable under a contract theory depends on

agency law and the capacity in which he signed the lease for Rokeby. On the Brandt & Dalton Lease (Pls.' Mem., Ex. D at 26), Copeland signed by the designation "Attest:", and the word "Landlord" is in type below his signature. The first paragraph of the lease states, "THIS AGREEMENT . . . between Rokeby Realty Company . . . , and Brandt & Dalton . . . ." The abbreviation for president appears next to his signature as well as on two riders contained in the lease.

According to the Restatement (Second) of Agency, an agent cannot be found liable for a contract he signed on behalf of the principal as long as somewhere in the contract it is made clear that it is between the principal and a third party:

> An unsealed written instrument, in one portion of which there is a manifestation that the agent is acting only for the principal, is interpreted as the instrument of the principal and not of the agent, although in other portions of the instrument or in the signature the agent's name appears without designation.

Restatement (Second) of Agency § 157 (1958).

The concept is emphasized in the tentative draft of the Restatement (Third) of Agency:

> When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal,
> (1) the principal and the third party are parties to the contract; and
> (2) the agent is not a party to the contract unless the agent and third party agree otherwise.

Restatement (Third) of Agency § 6.01 (T.D. No. 4 2003).

Similarly, the court in *Brown v. Colonial Chevrolet Co.*, 249A.2d 439, 441-2 (Del. Super. Ct. 1968) found that officers usually are not personally liable for a corporate contract as long as they do not act to bind themselves individually.

Viewing the record in favor of Brandt, Copeland is not personally liable for any breach of the lease. He signed the lease as an agent of Rokeby. The lease clearly reflects his representative capacity. Furthermore, Brandt has not alleged that the corporate veil be pierced as to this issue, nor is it likely that the facts of this case would support the rigorous standard for doing so. *See Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003) ("To state a 'veil-piercing claim,' the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors.").

Copeland's Motion for Summary Judgment is granted.

Rokeby's Motion in Limine Regarding Spoliation of Evidence

This motion regards a ceiling tile which is the alleged source of mold contamination. It was removed from Brandt's office and stored for approximately two months. It was sent to Brandt's medical expert, Dr. Eckhardt Johanning. Thereafter, it was shipped to Germany for testing and subsequently returned to Brandt. Rokeby claims that the tile was destroyed, and its experts cannot examine this critical piece of evidence. The Court is requested to sanction Brandt for the loss of evidence by entering judgment against him.

A party, anticipating litigation, has an affirmative duty to preserve relevant evidence. *In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000). A litigant who destroys relevant evidence may be sanctioned by the court, and if that destruction is willful, in bad faith or intended to prevent the other side from examining the evidence, the

court may dismiss the case or enter default judgment. *Id.* The relevant test for determining whether to impose sanctions takes into consideration three factors:

> (1) the degree of fault and personal responsibility of the party who destroyed the evidence;
> (2) the degree of prejudice suffered by the other party; and
> (3) the availability of lesser sanctions which would avoid any unfairness to the innocent party while, at the same time, serving as a sufficient penalty to deter the same type of conduct in the future.

*Id.*

When considering degree of fault, it must be clear that a party intended to thwart its opponent's ability to try its case. *Id.* However, Delaware law does not require the spoliation to be intentional for an adverse inference to be drawn. *Burris v. Kay Bee Toy Stores*, 1999 WL 1240863, at *1 (Del. Super. Ct.). When looking at prejudice, "the court should take into account whether that party had a meaningful opportunity to examine the evidence in question before it was destroyed." *In re Wechsler*, 121 F. Supp. 2d at 416.

On January 19, 1996, Indoor Air Solutions, Inc. ("IAS") removed the ceiling tile from Brandt's office. It was placed in a labeled air tight plastic bag. IAS' consultant, Miller, stored it. On January 23, 1996, Brandt sent a letter to Copeland informing him that the tile had been removed by IAS (Pls.' Ex. N). On February 5, 1996, Brandt sent a letter to Copeland advising him that Stachybotrys mold had been found on two ceiling tiles by way of wipe samples. (Pls.' Ex. O). Included in the IAS report, provided to Copeland and Rokeby on February 13, 1996, was a letter indicating that the tile had been removed. The tile was shipped to Dr. Johanning on March 29, 1996 and was later shipped to Professor Gareis in Germany for testing on April 18, 1996. The tile was

returned to Brandt's counsel on or around May 5, 2003.

The tile was first requested in Dr. Johanning's deposition on August 26, 2002. The request was renewed in his continued deposition on January 17, 2003. Another request was made on April 4, 2003. Brandt responded that a box containing the remains of the tile had been returned from Germany. What is left of the tile has been available for Rokeby to examine.

Here, Rokeby knew the tile was taken in January and February of 1996. Yet no request was made to preserve or examine it or to monitor or safeguard any testing of the material. The significance of the tile was obvious. Rokeby hired Dr. Curtis White of AEGIS Environments to examine Brandt's office on February 9, 1996.

On May 31, 1996, Dr. White reported that thirty-five microbiological tests at thirty-five sites were done in the building. Concerning microbiological contamination, he wrote: "The potential for triggering serious human reaction varies dramatically from species to species. Fungi such as Stachybotrys-atra, Aspergillus oryzae, and Aspergillus vesicolor are considered to be so dangerous that any presence is considered significant." Dr. White's report revealed an elevated air sample count for Brandt's office. It found that carpet samples had medium to heavy concentration of fungi. A ceiling space sample "show little or no contamination." Dr. White opined that ceiling tiles were not likely sources of contamination that could become airborne.

With this background, summary or default judgment is not appropriate. As in *Schmid v. Milwaukee Electric Tool Corp.,* 13 F.3d 76, 79 (3d Cir. 1994), such a ruling

would be "far more serious than the spoliation inference." In that case, the Court reversed a district court's decision to exclude all of the evidence of an expert who took apart and reassembled a circular saw, such that the defect was gone afterwards. Moreover, in *Wechsler*, the court found it could not sanction Wechsler for not preserving his boat when the moving parties could have prevented its destruction. "Even though these parties might be prejudiced by the destruction of this evidence, this prejudice was avoidable. In short, the claimants had the opportunity and the ability to preserve the vessel, yet they failed to do so." *In re Wechsler*, 121 F. Supp. 2d at 418.

Here, Rokeby knew the tile was taken. It had a two month window of opportunity to object or to develop a procedure where both parties could have examined the tile or take part in its testing, recognizing that tests can be destructive. Rokeby knew the importance of the ceiling tile and the reported contamination. In February of 1996, Brandt reported this condition to Rokeby with supporting evidence from a laboratory.

Nevertheless, Rokeby did not ask that the tile be preserved. Rokeby relied upon Dr. White's work. Moreover, Montz reported that Rokeby had an "ugly" and adversarial tone with the findings of IAS about mold in Brandt's office. Rokeby was not looking to Brandt for information, and it did not seek to inspect the tile until the summer of 2002. One cannot adopt a certain attitude or position, and many years later claim a foul.

On this subject, Miller photographed the tile, and a video exists to show the state of Brandt's office in the ceiling area before the tile was removed. This evidence has been available to Rokeby. Because no effort has yet been made to examine the tile, it is not

known whether it actually has no testing value. Not only does Rokeby have alternatives, but also there can be no complaint about the use of results from destructive tests. In criminal cases, hard physical evidence is often destroyed in the prosecution of the most serious matters. *See* 29 Am. Jur .2d *Evidence* § 1006 (1994). Destructive testing is commonly done in civil litigation. *See* 23 Am. Jur. 2d *Depositions and Discovery* § 166 (2002).

Under these circumstances, Brandt was not at fault in destroying evidence. Brandt did not suppress evidence but rather had it tested in a recognized way. Any prejudice suffered by Rokeby is self-inflicted. It could have been avoided by prompt action after the tile was removed or by later testing the tile upon its return.

Rokeby's Motion in Limine Regarding Spoliation of Evidence is denied.

A telephone conference is scheduled for September 14th. At that time, please let me know if your expert witnesses can be available for a *Daubert* hearing on April 12th, 13th and 14th, 2005 or April 19th, 20th and 21st, 2005. Given the nature of the issues, an evidentiary hearing is desirable. When arguing the *Daubert* points, I would like the parties to state their positions with reference to at least the following cases: *Wynacht v. Beckman Instruments, Inc.*, 113 F. Supp. 2d 1205 (E.D. Tenn. 2000) (finding the ability to diagnose medical conditions is not the same as the ability to reliably determine their causes); *Liska v. Travelers Prop. Cas. Corp.*, 2004 WL 504699 (Mass. Super. Ct.) (holding differential diagnosis is an accepted methodology in the medical field); *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227 (Tex. Ct. App. 2002) (holding toxic tort cases

require proof of both general and specific causation about the affects of the toxic substances); *Graham v. Lautrec, Ltd.*, 2003 WL 23512133 (Mich. Cir. Ct.) (finding a causal connection between mold exposure and human health effects requires a reliable foundation); *Stevens v. Fennessy*, Mass. Super. Ct., C.A. No. 96-0403, Agnes J. (June 19, 2002) (Mem. Op.) (finding a qualified expert with reliable information can diagnose symptoms and determine their cause from the presence of mold); *Gifford v. Matajaka*, 2001 WL 819067 (Wash. Ct. App.) (finding that conflicts over the source or cause of harm from mold exposure should be decided by a jury rather than a judge through summary judgment). Also, for scheduling purposes, please inform me if your witnesses are available for trial during the weeks of September 12th, 19th, and/or 26th, 2005. Oral argument on the remaining motions will be heard at the *Daubert* hearing in April.

**IT IS SO ORDERED.**

Very truly yours,

Richard F. Stokes

RFS/cv
cc: Ms. Ellen Davis - NCC Prothonotary
Ms. Pat Thatcher