IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

CHARLES BRANDT and NANCY BRANDT,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 97C-10-132-RFS
v.	)	
	)	
ROKEBY REALTY COMPANY, *et al.*,	)	
	)	
Defendants.	)	

Submitted: March 17, 2006
Decided: July 7, 2006

MEMORANDUM OPINION

On Defendant's Motions to Exclude the Expert Testimony of Dr. Eckhardt Johanning, Dr. Vincent Marinkovich, Dr. W. Edward Montz and Mr. Joseph A. Miller
Denied as to Dr. Eckhardt Johanning. Denied as to Dr. Vincent Marinkovich.
Denied as to Dr. Edward Montz. Denied as to Mr. Joseph A. Miller.

Jeffrey M. Weiner, Esquire, of Fox Rothschild, LLP, Wilmington, Delaware for the Plaintiff.

David E. Wilks, Esquire, of Buchanan Ingersoll PC, Wilmington, Delaware for the Defendant Rokeby Realty Company

STOKES, J.

STATEMENT OF THE CASE

In this Personal Injury Action, Plaintiff, Charles Brandt ("Plaintiff" or "Brandt"),[1] seeks to recover for health and emotional problems he suffered allegedly because of the effects of mold growth in the ceiling tiles of the law office he occupied at Three Mill Road, Wilmington, Delaware, ("Three Mill Road") from 1990 to 1995. Plaintiff has presented four experts to testify to various issues regarding the mold found at Three Mill Road. The Court previously decided that an evidentiary hearing was necessary on this issue. Hearings were held in April and June of 2005, and testimony from each of the experts in question was taken.

Plaintiff offered four experts to testify concerning the health effects of inhaled mold as well as the type and concentrations of mold found on a ceiling tile taken from Plaintiff's Three Mill Road office. Defendant, Rokeby Realty Company ("Defendant" or "Rokeby") offered experts of its own to refute the testimony of Plaintiff's experts. At the conclusion of the hearing, Defendant renewed its Motions in Limine to preclude the testimony of each of Plaintiff's experts. It is on these Motions that this Court now rules.

Additionally, various other Motions put forth in this case had been tabled until this Court made a determination on the admissibility of Plaintiff's experts. These other Motions will also be listed and ruled on in this Memorandum Opinion. This Court has also ruled on other points which provide context to the opinion and are incorporated by reference. *See* Letter and Memorandum Opinions of September 8, 2004, and May 9, 2005, respectively.

I. Motions to Exclude the Expert Opinions

Defendant has made motions to exclude the testimony of Plaintiff's experts, Drs. Eckhardt Johanning and Vincent Marinkovich, primarily in regard to their opinions on issues of

[1] Brandt's spouse, Nancy Brandt, is also suing for damages for loss of consortium. For simplicity's sake, just Brandt and "Plaintiff" in the singular are referred to throughout.

causation. Rokeby also has made motions to exclude the testimony of W. Edward Montz, Jr., Ph.D. and Mr. Joseph A. Miller, a certified industrial hygienist, as speculation. Defendant argues that Dr. Montz and Mr. Miller used methods of evaluation which were not scientifically reliable.

1. Dr. Eckhardt Johanning

Rokeby claims that Dr. Johanning's testimony establishing the airborne mold at Three Mill Road as the cause of Plaintiff's injury fails to meet the standard set out in *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rokeby argues that, due to this failure, Dr. Johanning's testimony must be excluded. Specifically, Defendant avers that Dr. Johanning's opinions are not scientifically reliable, that he failed to perform the appropriate differential diagnosis, and that his testimony does not satisfy Delaware's "but for" legal causation standard.[2] On this final issue, Rokeby's contention is that the "record establishes that Dr. Johanning does not believe that but for an indoor source of mold at Three Mill Road, Mr. Brandt would not have sustained the injuries for which he seeks compensation here."[3]

Brandt responds that Dr. Johanning is a qualified expert whose opinion testimony has been found to be both admissible and reliable under the *Daubert* standard in many similar cases both in Delaware and other jurisdictions. Further, Brandt argues that Dr. Johanning performed an appropriate differential diagnosis, explained in his testimony, and that his testimony has satisfied the legal causation standard.

2. Dr. Vincent Marinkovich

Rokeby argues against admission of Plaintiff's next expert, Dr. Marinkovich, because it claims that his opinions "do not conform to the fundamental elements of science which he admits

[2] *See* Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006.
[3] Defendant's Reply Post Hearing Brief in Support of its *Daubert* Applications, March 17, 2006, p. 11.

to be true"[4] and that his opinions are based on "speculation, paranoia and junk science."[5] Rokeby also asserts that Dr. Marinkovich failed to perform an appropriate differential diagnosis in the same manner as Dr. Johanning, and further that Dr. Marinkovich ignored crucial, plain and conclusive evidence in conducting his differential diagnosis.

Brandt responds that Dr. Marinkovich has been a qualified expert witness on these issues in three other states and that not even the Defendant's own expert was willing to contest his scientific credentials. Further, Brandt points out that Defendant has offered no evidence to support the allegations that Dr. Marinkovich's opinions are junk science. Plaintiff also contests the allegation that Dr. Marinkovich's differential diagnosis was flawed and claims that the testimony clearly shows that Dr. Marinkovich performed a differential diagnosis with methods that were well within the *Daubert* guidelines.

3. W. Edward Montz, Jr., Ph.D.

Plaintiff's third expert is Dr. W. Edward Montz, Jr. Defendant objects to his testimony for three reasons. First, Defendant claims that Dr. Montz cannot prove that the mold on the ceiling tile was present or resulted in the airborne mold in Plaintiff's office between 1990 and 1995. Second, Defendant claims that Dr. Montz failed to account for the possibility that the airborne mold detected in Plaintiff's office in 1996 could have resulted from the heavily mold-laden air surrounding Three Mill Road. Third, Defendant avers that any conclusions drawn by Dr. Montz that were based on Mr. Miller's investigation were tainted by Mr. Miller's flawed methods.

Plaintiff contests Defendant's objections to Dr. Montz primarily on the basis that the challenges to his testimony go to weight and not to admissibility. To support this contention,

[4] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p. 21.
[5] *Id*.

Plaintiff cites another Delaware Superior Court case, *Atwell v. RHIS Inc.*, 2005 WL 195292 (Del. Super.), in which Dr. Montz testified in a similar manner.

4. Mr. Joseph A. Miller

Defendant's objection to the presentation of Mr. Miller's expert testimony is based on two separate considerations. First, like Dr. Montz, Mr. Miller cannot testify that the mold on the ceiling tile was present or resulted in airborne mold in Plaintiff's office between 1990 and 1995. Second, Defendant charges that Mr. Miller's investigatory methods were flawed, invalidating any conclusions drawn from them.

Plaintiff again contests Defendant's objections regarding the level of mold in the years of 1990 through 1995 as going to weight and not admissibility of the testimony. In contesting Defendant's objection based on Mr. Miller's alleged flawed investigatory methods, Plaintiff points to literature produced by Defendant's expert which invalidates Defendant's assertions.

DISCUSSION

The admissibility of expert testimony is well-established in Delaware law, and it is governed by Delaware Rule of Evidence ("D.R.E.") 702. D.R.E. 702 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise ...." D.R.E. 702 is the same as the corresponding Federal Rule, and "the Delaware Supreme Court has adopted the United States Supreme Court's holdings in *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael,* 562 U.S. 137 (1999) 'as the correct interpretation of Delaware Rule of Evidence 702.' *State v. Jones,* 2003 WL 21519842, at *2 (Del.Super.Ct.), *citing, M.G. Bancorporation, Inc. v. LeBeau,* 737 A.2d 513, 522 (Del.1999)." *State v. Vandemark*, 2004 WL 2746157, at *2 (Del. Super.). The

proponent of the proffered testimony must establish the "relevance, reliability, and admissibility by a preponderance of the evidence." *Minner v. American Mort. & Guar. Co.,* 791 A.2d 826, 843 (Del. Ch. 2000).

The law is well-established in Delaware that:

> the Court must analyze the proffered testimony in light of the following six factors before an expert may testify. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 593-594 (1993); *Nelson v. State,* 628 A.2d 69, 75 (Del.1993); *New Haverford Partnership v. Stroot,* 772 A.2d 792, 799 (Del.2001).
> (1) The witness is qualified as an expert by knowledge, skill, experience, training or education. D.R.E. 702.
> (2) The evidence offered is otherwise admissible, relevant and reliable. D.R.E. 401. D.R.E. 402.
> (3) The expert's opinion is based upon information "reasonably relied upon by experts in the particular field." D.R.E. 703.
> (4) The specialized knowledge being offered "will assist the trier of fact to understand the evidence or to determine a fact in issue…." D.R.E. 702.
> (5) The expert testimony will not create unfair prejudice, confuse the issues or mislead the jury. D.R.E. 403.
> (6) The probative value of the evidence upon which the expert relies substantially outweighs the risk of prejudice. D.R.E. 703.

Vandemark, 2004 WL 2746157, at *2-3.

Accordingly, under D.R.E. 104, the Judge is the gatekeeper and must ensure that any scientific, technical or other specialized testimony is relevant and reliable. *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999). More specifically, "[w]hen the 'factual basis, data, principles, methods, or their application' in an expert's opinion are challenged, the trial judge must decide if the expert's testimony 'has a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Id*. at 523. "These factors include whether a theory or technique can be and has been tested, whether it has been subjected to peer review and publication, whether, in respect to a particular technique, there is a high, known, or potential rate of error; whether there are standards controlling the technique's operation; and

whether the theory or technique enjoys general acceptance within a relevant scientific community." *Vandemark*, 2004 WL 2746157, at *3.

However, our Supreme Court has noted that, when looking at this analysis, and "determining reliability, factors illuminated in *Daubert* are meant to be helpful, not definitive, and may or may not be pertinent depending on the nature of the issue, an expert's particular expertise, and the subject of the testimony." *Norwood v. State,* 813 A.2d 1141 (Table), 2003 WL 29969, at *2 (Del.). The *Norwood* Court observed that the facts and testimony of the particular expert opinion did not lend themselves to peer review and reliability rates."[6] *Vandemark*, 2004 WL 2746157, at *3.

1. Dr. Eckhardt Johanning

Dr. Johanning received his medical degree from J. W. Goethe University in Frankfort, Germany in 1984. Since that time he has practiced medicine in the United States, first at a State University of New York hospital in Brooklyn, and then later at Mt. Sinai in New York. He is licensed in New York and has been certified in occupational medicine for the last fifteen years. He is a member of the American College of Occupational and Environmental Medicine, the American Academy of Family Physicians, the American Public Health Association as well as the International Commission in Occupational Health.

Dr. Johanning's expertise on toxic mold has been sought by agencies both in the United States and abroad, including the Center for Disease Control, the Ontario Ministry of Health and the World Health Organization ("WHO"). He is the author of dozens of published works that are peer reviewed. Further, his writings concerning issues which touch this case date back more

[6] The *Norwood* Court was writing about an expert opinion that concerned the commercial nature of a drug transaction.

than a decade, some written for such notable organizations as the WHO in Geneva and for publication in such periodicals as the New England Journal of Medicine.[7]

Dr. Johanning also has presented and lectured on mold-related illnesses since the early 1990s all across the country and in half a dozen foreign countries on three continents. He is currently the Medical Director of the private Fungal Research Group Inc. as well as Adjunct Instructor at the Mt. Sinai School of Medicine in New York.

Dr. Johanning has been qualified as an expert to testify on these issues in previous cases both in Delaware and in other jurisdictions. This Court also finds as a threshold matter that Dr. Johanning is qualified to testify as an expert in the area of mold allergies and exposure based on his knowledge, skill, experience, training and education.

Defendant has objected to the admissibility of Dr. Johanning's testimony on several grounds. Defendant's first assertion is that Dr. Johanning's opinions are not scientifically reliable. The second is that Dr. Johanning failed to perform the appropriate differential diagnosis. Finally, Defendant claims that Dr. Johanning's testimony does not satisfy the legal causation standard because Dr. Johanning does not believe that but for an indoor source of mold at Three Mill Road, Mr. Brandt would not have sustained the injuries for which he seeks compensation here.

[7] Notably: "*Health and Immunology Study following exposure to toxigenic fungi (Stachybotrys atra) in a water damaged office environment*; *Building-related illnesses associated with moisture and fungal contamination – current concepts*; *Stachybotrys revisited*; *Toxicity screening of materials from buildings with fungal indoor air quality problems (Stachybotrys chartarum)*; *Clinical experience and results of a sentinel health investigation related to indoor fungal exposure*; *Fungi and bacteria in indoor environment: Health effects, detection and remediation*; *Airborne Fungi and Mycotoxins (Health effects)*; *Fungal and related exposures*; *Toxigenic Fungi and Health – Observation in an Occupational and Environmental Health Clinic*; *Fungi and Indoor Health*; *Mycotoxin and Indoor Health*; and *Professional clean-up of hazardous fungi, molds and microbials in buildings after flooding and water leaks*. (citations omitted)" Brant Appendix p. 723-728.

a. Scientific Reliability

Defendant initially charges that Dr. Johanning's opinions are not scientifically reliable by explaining that his testimony is inconsistent. Defendant states that although "Dr. Johanning originally opined that Plaintiff exhibited toxic, infectious and allergic effects associated with mold inhalation, he has abandoned large portions of those opinions and now contends only that plaintiff is allergic to mold."[8] However, Defendant cites no evidence of the alleged inconsistencies. Further, even assuming Defendant's argument is correct, the Court disagrees that these assertions are somehow mutually exclusive. In fact, the testimony shows that allergies to mold may develop, and often become more severe, with repeated exposure. Therefore, it seems that a consistent thread runs through any testimony relating to the negative effects of mold inhalation on the Plaintiff that resulted in a final opinion of a mold allergy. As the Defendant has the responsibility to show the nature of the inconsistencies it asserts, and Defendant has offered no citation to show where these alleged inconsistencies occurred, the Court finds this issue to have no merit.

Rokeby does provide the case of *Podrasky v. T&G, Inc.*, 2004 WL 2827710 (Del. Super.), in support of its assertion that Dr. Johanning's opinions should be considerably doubted. However, the facts of that case are completely different and comparison with this case is difficult. In *Podrasky*, neither of the "experts" were deemed to have the knowledge, education, training or experience to qualify as experts as to the matter on which they testified. Additionally, in that case, the defendant was able to cite specific, mutually exclusive testimony to show that the expert opinions had changed drastically. The Judge in that case noted that "the inconsistencies found by the Court between the experts' report, depositions and affidavits raise

[8] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p. 16.

an independent concern for reliability." *Podrasky*, 2004 WL 2827710, at *9. The Judge noted further that, "the most troubling of these shifting opinions concerns the fundamental basis of the experts' fire causation opinion." *Id*. Ultimately, due to the many distinguishing factors between that case and the present one, *Podrasky* offers Defendant no support for its argument.

Defendant goes on to assert that the more compelling reasons for exclusion of Dr. Johanning's testimony are the numerous substantive shortcomings in his conclusions. In this regard, Defendant cites Dr. Johanning's testimony to show that, contrary to his stated conclusions, he has unwittingly, logically proven that Three Mill Road cannot possibly be the cause of Plaintiff's injuries. Again, the Court is unable to agree with Defendant's reasoning.

Defendant avers that Dr. Johanning stated definitively that Three Mill Road should be excluded as a possible cause of Plaintiff's injuries.[9] In making this claim, Defendant cites to Dr. Johanning's testimony during the *Daubert* hearing. It is true that in the cited pages, the testimony shows that Dr. Johanning believes that *some* of Plaintiff's symptoms exhibited prior to his occupancy at Three Mill Road were similar to those found after the occupancy. However, the testimony does not in any way show that Dr. Johanning believes that "plaintiff's experience at Three Mill Road should be excluded as a possible cause of plaintiff's claimed injuries. *Quod erat demonstratum*."[10] Even assuming, *arguendo*, that Defendant's point follows the testimony, it still does not address Dr. Johanning's further testimony. This evidence directly contradicts Defendant's assertion,[11] as well as supporting the possibility that the tenancy at Three Mill Road substantially worsened a pre-existing condition.

[9] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p. 16-17.
[10] *Id.* at 17.
[11] Dr. Johanning's *Daubert* Hearing Testimony, June 29, 2005, Defendant's Appendix p. C.242.

Defendant then challenges the scientific reliability of Dr. Johanning's testimony in six specific ways. Defendant claims that: (1) the air samples were obtained too long after Plaintiff's occupation of the Three Mill Road office; (2) there is no evidence of when the mold first appeared on the ceiling tile found by Mr. Miller; (3) there is no evidence to support the theory that the mold could have traveled into Brandt's office through an air handling device; (4) there are no "normal" or background or airborne mold levels in Brandt's office or from a complaint free area of Three Mill Road; (5) the high concentration of outdoor mold at Three Mill Road must exclude an indoor source of contamination; and (6) the experts cannot prove unsafe levels of mold in 1990.

These six factors relating to scientific reliability with which Defendant takes issue are practically interrelated. For the most part, the objections deal with a lack of available evidence as to the levels of the mold in the Three Mill Road office during the Plaintiff's occupancy. It is true that the testing of the ceiling tile did not occur until seven months after the occupancy ended. It is also true that exact dates for when specific types of mold first appeared in the building and at what concentrations are impossible to specify. Further, there is no disputing that no available evidence conclusively proves that there were unsafe levels of mold in the building in 1990. However, Plaintiff does not contest any of the facts, and there is evidence that Dr. Johanning took these issues into account when forming his expert opinion.

Interestingly, Defendant quotes *Jazairi v. Royal Oaks Apartment Associates., L.P.*, C.A. No. 04-91-BAE (S.D. Ga., June 23, 2005) in support of its argument that Dr. Johanning's testimony should be excluded. In *Jaziari*, the Federal Court found that Dr. Johanning's testimony failed to meet the *Daubert* standard and his testimony was therefore excluded. However, the bases for the exclusions were issues which are not applicable in this case.

In *Jazairi*, the issue was that Dr. Johanning was "unable to establish through scientifically acceptable methodology that Jazairi was injured by the molds contained within her Royal Oaks apartment…." *Jazairi*, at 11. In that case, there was no nexus between the specific molds confirmed in the plaintiff's apartment and her illness. In fact, the only relevant evidence showed that Jazairi was tested for allergies to the molds confirmed to be in her apartment, and the test results were negative. In such circumstances, the Court noted that "some other objective evidence must be produced to demonstrate causation. For example, …if test results indicate that her body reacts acutely to those specific molds…then she still might be able to establish causation through an accepted scientific methodology despite the absence of specific exposure data." *Id*. at 12-13. In the present case, the definitive link between the type of mold found in the Three Mill Road office, and the injuries to Plaintiff, creates the connection that was missing in *Jazairi*.

The Federal Rules of Evidence on these issues are identical to their Delaware counterparts. Rule 402 dictates that all relevant evidence is admissible unless otherwise provided by law. The definition of "relevant evidence" is found in Rule 401, which defines it as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Bowen v. E.I. Du Pont De Nemours and Co.*, 2005 WL 1952859, *8 (Del. Super.). Additionally, as noted above, expert testimony is governed by Rule 702 in conjunction with Rule 104.

This Court has noted that where "the question of admissibility is a close one, exclusion of the expert evidence is not appropriate where cross-examination, the presentation of contrary evidence and careful instruction regarding the burden of proof will insure that the jury is not

misled or confused" *Bowen v. E.I. Du Pont De Nemours and Co.*, 2005 WL 1952859, *8 (Del. Super.) (*citing Daubert*, 526 U.S. at 596). Further and specifically in relation to its gatekeeping role for scientific evidence, this Court has said, "it is not necessary that the judge decide the admissibility of scientific evidence with the degree of certainty required in scientific circles. Rather, Rule 104 only requires the judge to find that the expert's reasoning and methodology is scientifically valid by a preponderance of the evidence. The focus of the inquiry must be on the actual principles and methodology, not on the applicable conclusions generated as a result." (Footnotes and citations omitted). *Id*., at *9.

In jurisprudence dating back almost a half century, our Supreme Court dealt with the issue of admissibility of expert medical testimony dealing with probable causal connection to injury in *General Motors Corp. v. Freeman*, 164 A.2d 686, 688-89 (Del. 1960). That case dealt with the connection between an industrial accident and the eventual loss of Plaintiff's vision. In it, the Court stated:

> It is undoubtedly correct, as the Superior Court stated, that the etiological factors involved in the initiation and progress of a detachment of the retina are not matters which fall within the common experience and capability of lay persons, nor within their capacity to judge in the absence of expert medical assistance. We do not agree, however, with defendant's contention, or with the authorities which he cites, that the causal connection must in all such cases be proved solely by the testimony of medical experts to the extent that the causal connection amounts to a 'probability' that the injury was the result of the trauma. We agree that an award cannot stand on medical testimony alone, if the medical testimony shows nothing more than a mere possibility that the injury is related to the accident. See cases cited in Annotations to 135 A.L.R. 516, Sufficiency of Expert Testimony to Establish Causal Relationship Between Accident and Physical Condition or Death. But this does not mean that in every case the testimony of medical experts must show at least a probability that the injury was caused by the trauma. If the testimony of these experts should show that the injury was possibly the result of the trauma and such testimony is supplemented by other credible evidence tending to show that the injury occurred directly after the trauma and without interruption, we think that such evidence would be sufficient to sustain an award. It has been

> so held by the appellate courts in a number of states (citation footnoted).[12] We do not believe that the distinction between the use of the words 'possible' and 'probable', and other words of a similar import, should be followed too closely. See 2 Larson Workmen's Compensation Law, § 80.32. It is a matter of general knowledge among those of us who are at all familiar with the testimony of physicians that at times one doctor will use words denoting 'possibility' while another may use words denoting 'probability' when actually they mean the same thing. We think that such testimony should be considered in the light of all the evidence, particularly where the injury occurred directly and uninterruptedly after the trauma.

More recently, our Supreme Court also dealt with these issues in the context of another mold case. In *New Haverford Partnership v. Stroot*, 772 A.2d 792 (Del. 1999), Dr. Johanning was the medical expert who testified that the Plaintiff had "suffered from allergies and asthma since childhood. As a result she has required hospitalization and strong medications, such as prednisone, periodically. But the frequency and severity of her medical problems increased significantly after she moved to Haverford Place." *Stroot*, at 796. In that case, it was Dr. Johanning's opinion that "the high concentration of toxic mold at Haverford Place significantly and permanently increased the severity of Stroot's asthma." *Id*. He also testified that Plaintiff "developed an allergy to Penicillium and permanent upper respiratory problems as a result of her exposure to the same molds." *Id*.

In *Stroot*, the defendant made similar arguments to those made in the present case. The landlord argued that the expert opinions were deficient in several respects: pertinently, that the expert "did not scientifically eliminate other possible causes of Stroot's cognitive deficits" and that none of the experts "took air pressure readings or otherwise determined the air flow within

[12] *DeFilippo's Case*, 284 Mass. 531, 188 N.E. 245; *Josi's Case*, 324 Mass. 415, 86 N.E.2d 641; *Glen L. Wigton Motor Co. v. Phillips*, 163 Okl. 160, 21 P.2d 751; *Atkinson v. United States Fidelity & Guaranty Co.*, Tex.Civ.App., 235 S.W.2d 509; *Blackfoot Coal & Land Corp. v. Cooper*, 121 Ind.App. 313, 95 N.E.2d 639; *Indiana Power & Water Co. v. Miller*, 73 Ind.App. 521, 127 N.E. 837; *Industrial Comm. v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293; *Schroeder v. Western Union Telegraph Co.*, Mo.App., 129 S.W.2d 917; *Moritz v. Interurban St. Ry. Co.*, Sup., 84 N.Y.S. 162; *Drew v. Industrial Comm.*, 136 Ohio St. 499, 26 N.E.2d 793; *Witt v. Witt's Food Market*, 122 Pa.Super. 557, 186 A. 275; *Hartford Accident & Indemnity Co. v. Industrial Comm.*, 64 Utah 176, 228 P. 753.

the apartment … none of the experts had a scientific basis on which to conclude that the excessive mold found in 1994 was present in 1992 and … none of the experts had a proper foundation on which to base an opinion on causation." *Id*., at 798.[13]

In responding to these allegations, the Supreme Court said at page 799:

> Plaintiffs' experts conducted all of their investigations and obtained all of their physical evidence in 1994. They had not visited Haverford Place or examined either plaintiff before that time. Nonetheless, the experts opined that the excessive mold found in 1994 also was present in 1992 and contributed to plaintiffs' injuries. Landlord argues that, since there was no testing in 1992, plaintiffs' experts had no reliable basis on which to opine about 1992 conditions. This argument ignores the fact that plaintiffs were able to provide factual information about the conditions in 1992; that Stroot's increased health problems began in 1992; and that the water damage and mold levels observed in 1994 were the result of long term water problems in the buildings. While the experts' opinions about 1992 conditions may not have been as well supported as their opinions about 1994 conditions, they were still within the realm of scientific reliability and the trial court acted within its discretion in allowing them.

This case involves similar circumstances. There is evidence to show that moldy tiles previously had been removed from the building, that there had been tenant complaints about the air quality in the building, and that testing by Batta Environmental Associates, Inc, was initiated. Further, Plaintiff provided factual information about the 1990 conditions, his health problems were a concern in 1990, and there was significant water damage to his office in 1990. Throughout the course of Plaintiff's tenancy he reported that he observed numerous dirty-looking and water-damaged ceiling tiles that Defendant was slow to replace.[14] As a result, the time lag between the illness and the expert testing of Three Mill Road goes to the weight of the

[13] These claims incorporate five of the six numbered arguments (Nos. 1,2,3,4, and 6) that Defendant makes in this case. *See supra*, (1) the air samples were obtained too long after Plaintiff's occupation of the Three Mill Road office; (2) there is no evidence of when the mold first appeared on the ceiling tile found by Mr. Miller; (3) there is no evidence to support the theory that the mold could have traveled into Brandt's office through an air handling device; (4) there are no "normal" or background or airborne mold levels in Brandt's office or from a complaint free area of Three Mill Road; … and (6) the experts cannot prove unsafe levels of mold in 1990.

[14] Plaintiff's Answering Brief in Opposition to Defendant's Motions In Limine, March 2, 2006, p.3.

expert opinions, and not the admissibility. As the Court in *Jazairi*, notes, "it would be unusual for a person to order air sampling of her apartment when her leasor admitted to the presence of mold and agreed to remediate it." *Jazairi*, at 12, (referencing *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 260 (4th Cir. 1999)). Here, the continual replacement of ceiling tiles at Three Mill Road and associated actions taken by Rokeby during the course of Plaintiff's tenancy evidence knowledge of a mold problem for a jury to assess.

Defendant's allegation of a lack of "normal" or background airborne mold levels from a complaint free area of Three Mill Road as a reason to find the expert testimony inadmissible is also unpersuasive. Our Supreme Court reasoned in *Stroot*, that the totality of the facts warranted that these issues go to weight and not admissibility. *See Stroot*, at 800. Furthermore, this Court agrees with the Court in *Jazairi*, that "while such evidence may be optimal, the lack of such evidence may be overcome if plaintiff can (1) demonstrate by circumstantial evidence that she likely was exposed to mold in quantities capable of causing her injuries and (2) establish through a valid scientific process that her injury was caused by exposure to that type of mold." *Jazairi*, at 11.[15]

Rokeby's other evidentiary complaints also lack merit. There is sufficient evidence in the record to allow for an opinion that mold could have traveled into Brandt's office through an air handling device. As Plaintiff points out, the Defendant's HVAC contractor stated that "this ceiling space is a common return air plenum and we are sucking the air from the ceiling space

[15] It was the second prong of this test that Plaintiffs were unable to meet in *Jazairi*. However, in the present case, Brandt is able to establish that the mold found in the office is the same mold that caused his injury.

into the unit, so therefore, any contamination that is in the ceiling space is going to end up in the unit on the coil surface and at the diffuser per the Swab Test results."[16]

Finally, assertion that the outdoor mold levels were higher than the indoor level is not, as Defendant claims, dispositive evidence that Plaintiff's injuries could not have been caused by the mold found in the Three Mill Road building. Dr. Johanning goes into detail to explain why he believed outdoor mold could not be the source of Plaintiff's injuries.[17] Again, this evidence goes to the weight of the expert testimony, and not to the admissibility.

For the foregoing reasons, this Court finds that Defendant's arguments that the expert opinions of Dr. Johanning should not be allowed for lack of scientific reliability are not persuasive.

b. Differential Diagnosis

Defendant then claims that Dr. Johanning failed to perform the appropriate differential diagnosis. Rokeby claims that the pertinent facts relating to a differential diagnosis in this case are the same as those laid out in *Bowen*, 2005 WL 1952859 and *Roche v. Lincoln Property Co.*, 278 F. Supp. 2d 744 (E.D. Va. 2003). Defendant concludes that because in those cases the expert testimony was excluded, it should likewise be forbidden here.

However, in *Bowen*, the Court wrote that the "decision to exclude Dr. Howard as a witness in Emily Bowen's case was based in the first instance on DRE 702's requirement that the witness be 'qualified'." *Bowen*, at *11. It was due to the fact that Dr. Howard was not qualified to perform the appropriate differential diagnosis that the testimony relating to it was

[16] Plaintiff's Answering Brief in Opposition to Defendant's Motions In Limine, March 2, 2006, p.9 (citing Brandt Appendix p.229-230).
[17] Dr. Johanning's *Daubert* Hearing Testimony, June 29, 2005, Defendant's Appendix p. C.67-68, 72-77, and 184.

inadmissible, not because of how the method was performed.[18] The testimony of the expert in *Bowen* was further inadmissible due to the fact that Dr. Howard, after opining on issues outside his stated area of expertise, "admitted that his theory has never been tested, peer reviewed or otherwise subject to professional scrutiny." *Id*. at *10.

As Defendant correctly notes, the *Bowen* Court laid out the standard for a properly conducted differential diagnosis. Defendant quotes *Bowen*, stating:

> In order to establish the cause of a condition, an expert must not only be able to state the cause of a condition, the witness, or the party offering the testimony must also be able to exclude the other possible/putative causes. In scientific circles, this is known as performing a differential diagnosis. *Id*.

Defendant then asserts that "Dr. Johanning failed to consider other potential causes or explanations for plaintiff's complaints...[and]…leapt immediately and clung steadfastly to the diagnosis which would result in recovery for plaintiff in this litigation."[19] However, the *Bowen* Court, after the above statement on differential diagnoses, went on to define the term. Quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 260 (4th Cir. 1999), the Court wrote at page 262 that a differential diagnosis:

> …is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. A reliable differential diagnosis typically, though not invariably, is performed after "physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptom and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those which can not be excluded is more likely. *Bowen*, at 10. (Citing *Westberry*, 178 F.3d 257). *See also, Long v. Weider Nutrition Group Inc.*, 2004 WL 1543226, at *6 (Del. Super.) (other citations omitted).

[18] The Court wrote "Dr. Howard admits that he is not a geneticist and has no training, education, or experience generally, or specifically, as to CHD7, he is not qualified to via DRE 702 to opine relative to any interaction between CHD7 mutation and Benlate. Nor *can he* perform a valid differential diagnosis excluding CHD7 or genetics as a cause of the injuries visited upon Emily Bowen under the circumstances." (emphasis added) *Bowen*, at *11.

[19] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.18.

In the present case, Dr. Johanning took a medical history and a physical examination of the Plaintiff. There were also clinical tests done, including laboratory tests. The other possible causes of mold exposure were considered in light of a totality of other information, including Defendant's different living situations, the other mold found in his house, and the available information regarding Plaintiff's previous exposure to mold, other illnesses known to have occurred in the building, as well as Plaintiff's known allergies to certain molds, the onset and severity of his symptoms in relation to his time spent at Three Mill Road and the fact that those specific molds were then found at Three Mill Road.

Contrary to Defendant's assertions, there is no evidence that Dr. Johanning "discounted the importance of Dr. Weinstein's records,"[20] or that "he did not consider and exclude other sources of mold exposure in plaintiff's experience."[21] In fact, the testimony of Dr. Johanning to which Defendant cites to make this point is quite the contrary. Dr. Johanning clearly explains that he did have knowledge of the mold in Plaintiff's house, and exactly why he felt that it was not a cause of his injuries.[22] It is clear during cross-examination that Defendant disagrees with Dr. Johanning's opinion of that evidence. However, Defendant's disagreement with Dr. Johanning's ultimate conclusion is not grounds for his disqualification as an expert witness in this case.

Defendant asserts that the lack of a proper differential diagnosis discounts any conclusions an expert may draw regarding causation. This argument also was made in *Stroot*, when dealing with very similar facts. The Supreme Court noted in *Stroot*, that:

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[20] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.18.
[21] *Id*.
[22] Dr. Johanning's *Daubert* Hearing Testimony, June 29, 2005, Defendant's Appendix p. C.184-185.

> The same is true for the asserted failure to eliminate other possible causes of plaintiffs' health problems. Johanning testified that he followed the scientifically accepted procedure of obtaining a medical history and a detailed questionnaire from the plaintiffs. He then ruled out other possible causes of plaintiffs' health problems by reviewing that information together with the blood test results and the data collected from the apartment buildings. The foundation for an expert's causation opinion need not be established with the precision of a laboratory experiment. The facts here support the trial court's decision to admit the causation opinions.[23]

An expert may rely on available data in order to draw inferences and conclusions, limited only by D.R.E. 703's mandate the evidence be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . ." This requirement enables the Court to evaluate and ensure the trustworthiness of the underlying data on which the expert relies. *Head v. Lithonia Corp.*, 881 F.2d 941 (10th Cir. 1989). "What is necessary is that the expert arrived at his . . . opinion by relying upon *methods* that other experts in his field would reasonably rely upon in forming their own, possibly different opinions. . . ." *Id.*, *quoting*, *Osburn v. Anchor Laboratories*, 825 F.2d 908, 915 (5th Cir. 1987).

Just as in *Stroot*, the facts of this case show that the differential diagnosis performed was within the guidelines laid out by *Daubert* and its progeny. Furthermore, as is noted below, this Court's decision that the differential diagnosis was sufficiently conducted supports the following decision to admit the causation opinions.

c. Legal Causation

As the differential diagnosis is the foundation of the legal causation argument, the two issues are understandably intermingled. However, in this case Defendant also claims that Dr. Johanning is "unable to establish that but for the ceiling tile at Three Mill Road, plaintiff would

[23] *Stroot, at 800.*

not have experienced his claimed injuries. Any opinions Dr. Johanning may offer on causation are therefore irrelevant, unreliable and inappropriate for presentation to the jury."[24]

Defendant cites to Dr. Johanning's testimony at the *Daubert* Hearing on June 29, 2005, to support its argument. This Court again is unable to agree with Defendant's one-sided interpretation of the supporting documents. Clearly, the totality of Dr. Johanning's opinion testimony explains that the heavy exposure to mold that Plaintiff experienced while at Three Mill Road either caused, or caused the exacerbation of, Plaintiff's current allergy to mold. It is impossible for Dr. Johanning to speculate that this allergy would *never* have occurred "but for" the ceiling tile at Three Mill Road because this would require unattainable knowledge of where Plaintiff would be and what possible allergens to which he may be exposed in the future. It is also unnecessary for Dr. Johanning to draw such a conclusion.

Furthermore, the form of Defendant's question distorts the "but for" causation analogy. In order to meet the causation standard, Dr. Johanning need not opine that had Plaintiff never set foot in Three Mill Road he *never* would have experienced his claimed injuries at any point in his lifetime. All that must be determined is that but for his *actual* exposure to the mold at Three Mill Road, Plaintiff would not have *then* contracted the injuries that are the subject of this litigation.[25] This question was clearly asked and answered during Dr. Johanning's testimony on redirect. The record shows:

> Q: But for the exposure of Mr. Brandt to mold, the Stachy, Alternaria, Aspergillius, at Three Mill, would you expect Mr. Brandt to have had the problems, the symptom[s] that he has today?
> A: If he wouldn't have had these exposures. Let me clarify your question.
> Q: If he hadn't had those exposures at Three Mill –

[24] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.20.
[25] Defendant's form of the "but for" causation theory is difficult to accept. To understand why it cannot be a usable standard, one must simply put it in a more routine litigation context. In a car accident case resulting in a death, Defendant's standard of but for causation would require that the plaintiff shows that but for the car accident, the victim *never* would have died.

A: He wouldn't have these problems.
Q: Thank you.[26]

In light of this clear testimony to the ultimate conclusion, based on a reliable differential diagnosis, Dr. Johanning's causation opinions are admissible.

For the foregoing reasons, this Court finds that the expert testimony of Dr. Eckhardt Johanning relating to the cause, nature and extent of Plaintiff's claimed injuries is admissible in this case.

2. Dr. Vincent Marinkovich

Dr. Marinkovich also is presented as an expert in the area of mold and fungal hypersensitivity and his testimony also is related to causation. Dr. Marinkovich has been a practicing physician for over forty years since receiving is M.D. from Harvard Medical School in 1959. He then completed both his internship and residency at Johns Hopkins University in Baltimore.

Dr. Marinkovich started teaching medicine at the California Institute of Technology in 1964 before becoming an instructor at Stanford Medical School in 1965. He has continued teaching at Stanford throughout the duration of his medical career, rising to the level of Clinical Associate Professor, Emeritus, in 2003, a position he continues to hold. He was also formerly the Director of the Allergy-Immunology service at the Children's Hospital at Stanford Medical School. He is a member of over a dozen professional associations, most for over three decades, including the American Medical Association, the American Academy of Allergy, the American Board of Allergy, the West Coast Allergy Society and the Institute of Functional Medicine.

Dr. Marinkovich is also the author of many peer reviewed, published works in this area. His writings concerning issues which touch this case date back more than two decades, and

[26] Dr. Johanning's *Daubert* Hearing Testimony, June 29, 2005, Defendant's Appendix p. C.242.

primarily concern studies and presentations and these issues to other physicians, with no eye towards litigation.[27] He has developed and patented an in-vitro method for determining allergic hypersensitivity as well as a blood test to replace the common "scratch tests" for allergies by isolating the Allergen-Specific IgE antibody in the blood.

Dr. Marinkovich also has presented and lectured on food mold allergies all across the country for the last seven years for the Institute for Functional Medicine. In 2003, he was invited to speak at the annual meeting of the American Academy of Allergy Asthma and Immunology in San Diego.

Dr. Marinkovich has been qualified as an expert to testify on these issues in previous cases in other jurisdictions, including California, Minnesota and Oregon. Neither the Defendant nor the Court could find a case in which a court found that Dr. Marinkovich was not qualified as an expert. Accordingly, this Court finds as a threshold matter that Dr. Marinkovich is qualified to testify as an expert in the area of mold allergies and exposure based on his knowledge, skill, experience, training and education.

Defendant put forth three major premises for the exclusion of Dr. Marinkovich's testimony. Defendant first asserts that Dr. Marinkovich's opinions do not conform to the fundamental elements of science which he admits to be true. Defendant then declares that Dr. Marinkovich failed to perform an appropriate differential diagnosis. Specifically, that "he failed properly to consider and account for: (1) the time of the onset of plaintiff's symptoms; (2) other exposures to mold in plaintiff's experience; and (3) other potential medical conditions that

[27] Notably: "*Application of the MAST Immunodiagnostic System to the Determination of Allergen-Specific IgE*; *Simultaneous Determination of Total IgE and Allergen Specific IgE in Serum by the MAST Chemiluminescent Assay System*; *Distribution of Food and Mold-Specific IgG in Normal Population*; *The Immunopathology of Hypersensitivity Reactions in Bioaerosols, Fungi and Mycotoxins: Health Effects, Assessment, Prevention and Control*; *Serum Sickness as a Clinical Model for Food Intolerance in New Trends in Allergy.* "Brant Appendix p. 850-851.

account for plaintiff's symptoms."[28] Third, and finally, is the allegation that Dr. Marinkovich's opinions are inconsistent with the body of generally accepted medical and scientific literature.

a. Opinions Do Not Conform to the Fundamental Elements of Science

Defendant asserts that "Dr. Marinkovich's opinions do not conform to the fundamental elements of science which he admits to be true."[29] Defendant first claims that one of the fundamental truths of allergy is that "cessation of exposure to the causative environmental results in a cessation of symptoms."[30] However, Defendant offers no scientific citation or support for this "fundamental truth," which is refuted by both the testimony of Dr. Johanning and Dr. Marinkovich.[31] Defendant then avers that "Dr. Marinkovich did not see the plaintiff for the first time until 1998 – a full three years after plaintiff had left Three Mill Road for the last time. Nevertheless, Dr. Marinkovich testified that plaintiff's symptoms had not improved in that period of time." Although Defendant does cite to the *Daubert* Hearing testimony to support this assertion, the referenced testimony does not support Defendant's argument.

Defendant has overstated the testimony. The pertinent part of Dr. Marinkovich's testimony to which Defendant cites reads as follows:

> Q: You first saw Mr. Brandt in 1998, right?
> A: Yes.
> Q: Three years after he left Three Mill Road?
> A: Yes.
> Q: And he wasn't better was he?
> A: I think he may have been better than he was when he was actually in the place. I mean he came to the meeting, which at times I think he was unable to do. So I think he was fluctuating,

[28] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.23.
[29] *Id.* at p.21.
[30] *Id*. at 22.
[31] Both Doctors asserted in their testimony that the severity of the symptoms will lessen, but that the prolonged exposure could cause heightened sensitivity to mold. This could result in the onset of allergy symptoms to foods that had previously not caused symptoms as well as to lower dose exposures found outside the primary causative environment.

> because he was still heavily colonized, and that was the basis for his illness at the time I first saw him. [32]

Although counsel for Defendant certainly asserts that Mr. Brandt had not improved in the three years since leaving Three Mill Road, Dr. Marinkovich unambiguously says the contrary. Further evidence that Dr. Marinkovich's above answer did not mean that Mr. Brandt's condition had not improved, is evident from the continuation of the testimony, which reads:

> Q: If he were better, Doctor, do you think he would fly clear across the country to see you?
> A: If he were better and not well? He might have, yes.
> Q: But you don't know whether –
> A: Well, what motivates a person to come see me, I can't argue that.
> Q: I just want to know what your opinion is, sir, on his condition. Was he better in '98 than he was in '95 when he was still in the building or don't you know?
> A: I think he was worse when he was actually in the building. [33]

This response is clear and unambiguous. Dr. Marinkovich does not believe that Plaintiff's condition did not improve in the three years after leaving Three Mill Road. This incorrect assertion is the premise for Defendant's argument that Dr. Marinkovich's opinions do not conform to the fundamental elements of science, and this Court therefore finds such argument to be without merit.

Based on the above misunderstanding, Defendant further claims that Dr. Marinkovich tries to make up for the shortcomings in his own flawed testimony "with the suggestion that mold must have 'colonized' in plaintiff's nasal cavity [although] he failed to perform an *extraordinarily simple, short, painless, inexpensive, non-invasive and foolproof procedure* to determine whether plaintiff had, in fact, been colonized." (emphasis added).[34] Defendant ignores

[32] Appendix to Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.A:186.
[33] *Id*. at A:186, 187.
[34] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.22.

Dr. Marinkovich's lengthy explanation as to why he believes this procedure is not at all "foolproof," and why he did not believe it was necessary to perform it, nor a more invasive procedure in light of the totality of the circumstances. Instead, Defendant cites to the testimony of its own expert, Dr. Richard Hamill, as to why it was both a necessary and foolproof procedure. Defendant also ignores the fact that Dr. Marinkovich's assertions that Plaintiff was colonized does not contradict his argument that Plaintiff was better, but not cured, three years after leaving Three Mill Road. In fact, colonization would support the argument that Brandt was not yet cured, even though he had left his exposure to the arguably causative environment.

This Court finds no support for the assertion that Dr. Marinkovich's testimony does not conform to the fundamental elements of science which he admits to be true. Accordingly, the Court finds that Defendant's conclusion on this issue, that Dr. Marinkovich's causation opinions must fail *Daubert* scrutiny, to be unsupported by the testimony. For the foregoing reasons, the Court therefore finds no reason for the exclusion of his testimony on this basis.

b. Differential Diagnosis

While arguing for the exclusion of Dr. Marinkovich's testimony for failure to perform an appropriate differential diagnosis, Defendant contends that "Dr. Marinkovich's differential diagnosis is flawed in the same manner as Dr. Johanning's."[35] Specifically, Defendant alleges that Dr. Marinkovich "failed to properly consider and account for: (1) the time of the onset of plaintiff's symptoms; (2) other exposures to mold in plaintiff's experience; and (3) other potential medical conditions that account for plaintiff's symptoms."[36] Defendant therefore concludes that the opinion testimony is inherently unreliable.

[35] *Id*. at 23.
[36] *Id*.

Defendant avers that because Dr. Marinkovich agrees that the date of the onset of symptoms is an important consideration when forming an opinion on causation and that he is unable to prove that the onset of symptoms coincides with Plaintiff's occupancy of Three Mill Road, it shows that "Dr. Marinkovich's causation testimony is manifestly unreliable."[37] After considering the matter this Court cannot agree.

A differential diagnosis, as has been explained in relation to Dr. Johanning's opinion, *supra*, requires a determination of a "medical problem by eliminating the likely causes until the *most probable one* is isolated….and generally is accomplished by determining the possible causes for the patient's symptom and then eliminating each of these potential causes until reaching one that cannot be ruled out *or determining which of those which can not be excluded is more likely*." (emphasis added).[38] As such, the lack of one important consideration is not a bar to Dr. Marinkovich performing an acceptable differential diagnosis.

In order to determine the conclusion of Dr. Marinkovich's differential diagnosis, Rokeby's counsel first asks him, "Have you reached an opinion, sir, to a reasonable degree of medical….probability, that it was the mold at the Three Mill Road which colonized in Mr. Brandt to the exclusion of any other mold to which he has been exposed?"[39] To this, Dr. Marinkovich replied, "I agree. To a reasonable degree of medical probability, that's what happened."[40] After asking and receiving an answer, Defendant spends the remainder of the examination refuting this determination.

However, Defendant again misstates Dr. Marinkovich's testimony in the *Daubert* Hearing by asserting that "Dr. Marinkovich acknowledged that if plaintiff had exhibited his

[37] *Id*. at 24.
[38] *Bowen*, at 10. *See also, Long v. Weider Nutrition Group Inc.*, 2004 WL 1543226, at *6 (Del. Super.).
[39] Dr. Marinkovic's *Daubert* Hearing Testimony, p. 169-70.
[40] *Id*. p.170

symptoms before moving into Three Mill Road, a cause other than Three Mill Road must be found for those problems."[41] Defendant goes on to claim that Dr. Marinkovich acknowledged that Plaintiff had exhibited his symptoms between 1983 and 1989,[42] again concluding that Three Mill Road cannot possibly be the cause of Plaintiff's injury.

Dr. Marinkovich's testimony actually states that he believes that it would be necessary to exclude Three Mill Road as the cause of Plaintiff's injuries if he had all of his injuries, together, in the same way before moving to Three Mill Road. The pertinent area of testimony reads as follows:

> Q: Okay, if Mr. Brandt had all of those conditions that you described before, that entire constellation of conditions that he complains of in this case, if he had each of those conditions before he ever moved to Three Mill Road, you'd have to look for another cause of those conditions, would you not, sir?
> A: You mean if he had them all together in exactly the same way?
> Q: That's right, sir.
> A: Yes, you'd have to look for another cause.

Dr. Marinkovich goes on to say that "I think his conditions after Three Mill Road were so unique, and especially the cognitive changes and the fatigue, that I think it was causal. Now he may have had other problem [sic] before that, like a tendency to rhinitis that was aggravated by it. So some of the conditions may have been aggravated, others caused by the situation at the workplace."[43]

At no time does Dr. Marinkovich ever say that he thought Brandt ever had exhibited the same symptoms in the same way and to the same degree prior to 1991. However, Defendant argues that "Dr. Marinkovich then acknowledged that plaintiff exhibited these symptoms

[41] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.25.
[42] *Id*.
[43] Dr. Marinkovic's *Daubert* Hearing testimony, p. 169-70.

[extreme fatigue, severe nasal problems, and cognitive changes] between 1983 and 1989."[44] As support for this assertion, Defendant cites to pages 235-36 of Dr. Marinkovich's *Daubert* Hearing testimony. However, in these pages of testimony referring to Plaintiff's medical conditions from 1983-89, there is no mention of Plaintiff having cognitive changes.

As a result of this clear evidence in the record, Defendant's assertion that "the plain and undeniable facts establish that plaintiff suffered all the symptoms for which he now seeks compensation long before his firm was ever a tenant at Three Mill Road," is unsupported.[45] Dr. Marinkovich's testimony cannot be excluded on this basis.

Defendant next claims that Dr. Marinkovich ignored plain and conclusive evidence that Plaintiff had been exposed to mold in locations apart from and predating his tenancy at Three Mill Road. This claim seems to be based upon the supposition, inherent throughout Defendant's brief, that Plaintiff's experts have, through tunnel vision, ignored all other possible reasons and possibilities when coming to their causation opinions.

Defendant again has overstated the plain evidence on which he relies in support of this assertion. Dr. Marinkovich clearly explained his reasoning for ruling out the sources of mold Defendant asserts as alternative causes of Plaintiff's injuries. Dr. Marinkovich does not cavalierly state that "he does not concern himself with *anything* that may have happened to plaintiff before he started treating him."[46] Quite to the contrary, Dr. Marinkovich states that he "looked at some [medical] records and [Brandt] wrote out some stuff for me, too, that I was able to look at, chronologically wrote out what had happened to him and who had looked at him and

[44] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.25.
[45] *Id*.
[46] *Id*. at 26.

what doctors he had seen."[47] The method of a proper differential diagnosis is to *consider* other possible causes, which was clearly done in this case. The fact that Defendant would give more weight to the different issues it raises in diagnosis than it asserts Dr. Marinkovich did is no reason to find that the differential diagnosis is inadequate.

Further, it is a mischaracterization to say that "Dr. Marinkovich admitted he never made any attempt to learn about Plaintiff's other exposures to mold."[48] Specifically, Defendant notes Plaintiff's exposures to outdoor mold and the mold that was in Brandt's house. However, Dr. Marinkovich clearly explained why he did not believe the outdoor mold could be the cause of Plaintiff's injury.[49] Further, he obviously was aware that Plaintiff already had tried to remove himself from possibly moldy living environments and that had not helped his symptoms.[50] Again, Defendant's disagreement with the weight Dr. Marinkovich gave this evidence is not a reason to find it inadmissible.

The third and final problem Defendant finds with Dr. Marinkovich's differential diagnosis is that there was no consideration of other medical explanations for Plaintiff's complaints. In support of this assertion Defendant refers back to the arguments it made regarding the inadmissibility of Dr. Johanning's testimony. Specifically, that Dr. Marinkovich's conclusions are not based in science and other possible explanations for Plaintiff's problems exist and were left unconsidered. These arguments were considered by the Court and dismissed in reference to Dr. Johanning's testimony. Defendant has provided no further evidence that either Dr. Marinkovich or Dr. Johanning did not *consider* other explanations, and therefore this issue has already been reviewed and decided in this opinion.

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[47] Dr. Marinkovic's *Daubert* Hearing testimony, p. 187-188.
[48] *Id*. at 26.
[49] Dr. Marinkovic's *Daubert* Hearing testimony, p. 190-191.
[50] *Id*. at 242-244.

c. Inconsistency with the Body of Generally Accepted Medical and Scientific Literature.

Defendant's final contention concerning Dr. Marinkovich's testimony is that he "espouses views in this matter that find no support in mainstream generally accepted medical and scientific literature."[51] Unfortunately, it is difficult for the Court to ascertain which of Dr. Marinkovich's views Defendant asserts find no support in the scientific literature, as Defendant has offered only the broad assertion quoted above. Defendant goes on to assert that when Dr. Marinkovich is confronted with the "fact" that his views are inconsistent with the body of scientifically accepted literature, he makes two contentions: "(1) that scientific study and literature is somehow unnecessary and that his views should simply be accepted; or (2) that the body of medical literature is tainted by a conspiracy among the Center of Disease Control, other governmental officials, academicians at leading universities and, of course, the insurance industry. Those ravings – *ipse dixit* theory on the one hand and paranoid delusion on the other – provide scant support for opinions that have been openly rejected by serious and independent investigators in the mainstream literature."[52]

Defendant again declines to cite to the testimony to support these claims. The Court is unable to find any support for the assertion that Dr. Marinkovich feels that scientific study is somehow unnecessary. Quite to the contrary, Dr. Marinkovich discusses a multitude of different studies and their results in his testimony, including some he has himself conducted.[53]

Defendant's next assertion, that Dr. Marinkovich believes the entire body of medical literature is tainted by a widespread conspiracy led by the insurance industry, is an exaggeration

[51] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.27.
[52] *Id*.
[53] Dr. Marinkovich's *Daubert* Hearing Testimony, June 29, 2005, Defendant's Appendix, Notably: p. A. 10-12, 22-25, 26-28, 126-127, 132-133, 142, 148.

of the testimony. Defendant again declined to offer any cited support from the testimony to sustain this view. However, this Court has the benefit of having listened to the testimony, as well as having reviewed the transcript. It is clear from this investigation that Dr. Marinkovich disagrees with the conclusions of certain studies done by certain groups.[54] In his testimony, the doctor is very clear in his explanations as to why he believes the studies of certain groups should be given less weight than the studies of other groups. He also clearly identifies studies which come to conclusions with which he agrees, and explains why he agrees with those studies.[55] Further, it is clear to the Court that Dr. Marinkovich is in disagreement with certain studies done by certain groups, for certain reasons, not with the entire field of medical research. Clearly, there is a dispute between Dr. Marinkovich and the study Defendant cites commissioned by the Institute of Medicine.

Defendant seems to be asserting that the Institute of Medicine study is the definitive work of the scientific and medical community and any disagreements with its findings amount to no more than "theory on the one hand and paranoid delusion on the other."[56] As this Court has previously noted, one of the determinative factors a judge must decide when ruling on the admissibility of expert testimony is "whether the theory or technique enjoys general acceptance within *a relevant* scientific community. (emphasis added)." *Vandemark*, 2004 WL 2746157, at *3. All the Defendant has managed to show is that there is a split in the scientific community between medical doctors, specifically allergists and immunologists on the one side and government experts and Ph.D.'s on the other.[57] Dr. Marinkovich has given ample evidence that

[54] For example, *Id*. at 123-125, 130-133, 137-138, 148-149, 154.
[55] *Id*. at 142, 148-149, 151, 219-224.
[56] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.27.
[57] Dr. Marinkovich's *Daubert* Hearing Testimony, June 29, 2005, Defendant's Appendix, p. A. 113, 123-125.

his theory is supported by other allergists and immunologists in the medical community for his opinion to be admitted.

For the foregoing reasons, this Court finds that the expert testimony of Dr. Vincent Marinkovich relating to the cause, nature and extent of Plaintiff's claimed injuries is admissible in this case.

3. W. Edward Montz, Jr., Ph.D.

Defendant objects to the testimony of Plaintiff's third expert, Dr. Montz, of Indoor Air Solutions ("IAS"), for three separate reasons. First, Defendant claims that Dr. Montz cannot prove that the mold on the ceiling tile was present or resulted in the airborne mold in Plaintiff's office between 1990 and 1995. Second, Defendant claims that Dr. Montz failed to account for the possibility that the airborne mold detected in Plaintiff's office in 1996 could have resulted from the heavily mold-laden air surrounding Three Mill Road. Last, Defendant avers that any conclusions drawn by Dr. Montz that were based on Mr. Miller's investigation were tainted by Mr. Miller's flawed methods.

The first of these issues already has been fully discussed above in relation to Drs. Johanning and Marinkovich. In accordance with *Stroot*, Plaintiff has provided factual information about the conditions at the Three Mill Road office, his health problems were noted in 1990 and continued throughout the course of his tenancy, and there was significant water damage to his office in 1990. Further, there were similar illnesses occurring to other tenants throughout the building during this time. Throughout the course of Plaintiff's tenancy he reported that he observed numerous dirty looking and water-damaged ceiling tiles which

Defendant was slow to replace.[58] As a result, the time lag between the illness and the expert testing of Three Mill Road goes to the weight of the expert opinions, and not the admissibility.

The second assertion is that Dr. Montz failed to consider and exclude other potential sources of mold. Specifically, Defendant concentrates on a moldy shower curtain and the levels of outdoor mold at the time of the testing. The testimony shows that Dr. Montz certainly was aware of the shower curtain and the levels of outdoor mold when he testified.

One purpose of Dr. Montz's testimony is to provide a scientific expert opinion to show that it was possible for the mold found in the ceiling to be responsible for Plaintiff's injuries. In his testimony, he explained why he rules out the outdoor air and the moldy shower curtain as causes of Plaintiff's injury. In coming to his conclusions, Dr. Montz states that he relies upon information taken from Dr. Marinkovich and Brandt. An expert is allowed to base his expert opinions in part on information taken from other experts. In this case, Dr. Marinkovich and Dr. Johanning already had performed differential diagnoses that created the hypothesis that the mold was coming from somewhere in the Three Mill Road office. Dr. Montz's testimony shows that there is further scientific evidence to support this hypothesis.

This Court previously ruled in another case in Delaware involving similar facts that Dr. Montz's testimony is useful and admissible. In *Atwell v. RHIS, Inc.*, 2005 WL 1952929, *2 (Del. Super.), this Court stated:

> Because Plaintiffs allege in their Complaint that they suffered from microbial contamination, any testimony concerning the source of such contamination would be relevant in this case. As such, Dr. Montz's testimony would assist the trier of fact in helping to explain the source of the microorganisms and the fact that excessive moisture in the home could have caused the growth and spread of these organisms. In addition, Dr. Montz, as a zoologist, is qualified to testify as to the possible toxicity of the microorganisms he found at the house. His education, training and experience as a zoologist and toxicologist

[58] Plaintiff's Answering Brief in Opposition to Defendant's Motions In Limine, March 2, 2006, p.3.

> give him sufficient authority to testify to the type of microbial contaminants found in the house and their likely effect on human beings in general.

The Defendant is free to challenge Dr. Montz's conclusions on cross-examination, as well as to point out that there are other sources of mold in the building and the surrounding air. Dr. Montz at no time denies these facts, he only disputes their relevance. However, his testimony is based on the totality of his knowledge, taken from the evidence, Plaintiff, and other experts in this case. He clearly was aware of the moldy shower curtain and the outdoor air. This Court has noted that where "the question of admissibility is a close one, exclusion of the expert evidence is not appropriate where cross-examination, the presentation of contrary evidence and careful instruction regarding the burden of proof will insure that the jury is not misled or confused" *Bowen v. E.I. Du Pont De Nemours and Co.*, 2005 WL 1952859, *8 (Del. Super.) (*citing Daubert*, 526 U.S. at 596).

Defendant's final assertion is that the flawed methods Mr. Miller employed render those conclusions of Dr. Montz, which rely on the evidence Mr. Miller obtained, unreliable. As is discussed below, this Court finds that Mr. Miller's methods were acceptable and therefore finds this argument unpersuasive.

For the foregoing reasons, Dr. Montz's testimony, including his opinion that the mold that caused Plaintiff's injuries came from the ceiling tile, is admissible. Defendant's Motion is denied as to Dr. Montz.

4. Mr. Joseph A. Miller

Defendant's objection to the presentation of Mr. Miller's opinion testimony is based on two separate considerations. The first of these considerations is that, Mr. Miller, just like all of Plaintiff's experts, cannot prove that the mold on the ceiling tile was present or resulted in airborne mold in Plaintiff's office between 1990 and 1995. As is noted above, this issue has

been discussed in relation to all of Plaintiff's experts. The issues Defendant has with this testimony go to weight and not to admissibility, and Defendant's Motion on this basis is denied.

Second, Defendant charges that Mr. Miller's investigatory methods were flawed, invalidating any conclusions drawn from them. Specifically, it attests that Mr. Miller failed to take air samples from a complaint free area of Three Mill Road, that he never determined the "normal" levels of indoor and outdoor mold, nor did he do any "airflow dynamic testing."[59]

These are essentially the same issues Defendant raised in relation to Dr. Montz. However, Mr. Miller does not testify about the level of mold in other areas of Three Mill Road, nor does he testify about "normal" mold levels either inside or outside the building. In relation to the "dynamic airflow testing," Mr. Miller clearly explains why he did not believe such a procedure would be either helpful or necessary.[60] Mr. Miller conducted a targeted investigation on the basis of the differential diagnoses conducted by Drs. Johanning and Marinkovich. His testimony, like the testimony of Dr. Montz, is simply supportive of the hypothesis that the mold in Brandt's Three Mill Road office could be the cause of his injuries. As with each of Plaintiff's other experts, cross-examination, the presentation of contrary evidence and careful instruction regarding the burden of proof will cure any problems Defendant has with the testimony. It would not be appropriate to exclude the testimony as a whole because it would assist the trier of fact in understanding the basis of Plaintiff's case.

For the foregoing reasons, Mr. Miller's testimony, including his opinion that the mold that caused Plaintiff's injuries came from the ceiling tile, is admissible. Defendant's Motion is denied as to Mr. Miller.

[59] Defendant's Opening Post Hearing Brief in Support of its *Daubert* Applications, January 17, 2006, p.13.
[60] Mr. Miller *Daubert* Hearing Testimony, April 20, 2005, p.129.

II. Defendant's Motion for Summary Judgment as to Proximate Causation

Defendant's Motion for Summary Judgment as to Proximate Causation is based upon the assertion that Plaintiff has not established the necessary "but for" causation that is required under Delaware law. This Motion was tabled pending the completion of the *Daubert* Hearings conducted in this case last year. The issues raised in this Motion were renewed and discussed in the context of each of Plaintiff's experts above.

For the foregoing reasons, already discussed in this opinion, Defendant's Motion for Summary Judgment as to Proximate Causation is denied.

III. Defendant's Motion for Summary Judgment Regarding Standard of Care

The crux of Defendant's Motion for Summary Judgment Regarding Standard of Care is that a Motion on this issue would require specialized expert testimony concerning a standard of care for landlords in Delaware during the period from 1990 through 1995 when Plaintiff was an occupant of Three Mill Road. Defendant concluded that without such testimony, Plaintiff is unable to establish an essential element of his cause of action. In a Memorandum Opinion on May 9, 2005, this Court ruled that Plaintiff's expert, Mr. Carl Borsari was qualified to testify on this issue on Plaintiff's behalf.

For the foregoing reasons, Defendant's Motion for Summary Judgment on the issue of Standard of Care is denied.

IV. Defendant's Motion for Summary Judgment Regarding Punitive Damages

In a Motion for Summary Judgment Regarding Punitive Damages, Defendant argues that there are no facts in the record to support the requisite state of mind for an award of punitive damages. The Court feels that there are sufficient facts for which a jury can return an award on this basis.

Brandt argues that when a landlord intentionally or maliciously neglects his civil obligations, punitive damages may be in order. In response, Rokeby claims that Brandt has failed to meet his burden of showing any facts supporting his allegations of recklessness. After reviewing the facts of this case, the Court finds there has been sufficient evidence presented on the issue of Rokeby's recklessness, that there remains a material issue of fact in dispute, and that this issue should be submitted to the trier of fact to determine.

The issue of whether punitive damages should be awarded is one normally left to the jury. *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 527 (Del. 1987). The Supreme Court stated in *Jardel*:

> The penal aspect and public policy considerations which justify the imposition of punitive damages require that they be imposed only after a close examination of whether the defendant's conduct is "outrageous," because of "evil motive" or "reckless indifference to the rights of others." Restatement (Second) of Torts § 908, comment b (1979). Mere inadvertence, mistake or errors of judgment which constitute mere negligence will not suffice. *Id*. It is not enough that a decision be wrong. It must result from a conscious indifference to the decision's foreseeable effect.

Id. at 529. In order to find a defendant reckless, there must be an actual or constructive awareness of one's conduct and "a realization of its probable consequences, while negligence lacks any intent, actual or constructive." *Id*. at 530.

> Two significant elements must be present for recklessness to exist. The first is the act itself . . . . The second, crucial element involves the actor's state of mind and the issue of foreseeability, or the perception the actor had or should have had of the risk of harm which his conduct would create. The actor's state of mind is thus vital.

Id.

Viewing the facts in the light most favorable to Brandt, there are several allegations which could result in the inference that Rokeby's conduct was intentional or malicious. The president of Rokeby, Garrett Copeland ("Copeland"), made a disparaging comment about

Brandt. Although the remark was made after Brandt vacated the office, it is probative of the landlord's state of mind. Also, there is evidence that Rokeby was aware of the unhealthy state of Brandt's offices, yet nothing was done about it. Moreover, there is evidence that other tenants complained of the air quality and that at least one tenant's rent was abated as a result of her complaints.

Copeland was Rokeby's agent. While representing the interests of Rokeby, Copeland made a comment about the state of the office and the possible health concerns. Pursuant to principles of agency law, "[p]unitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if: (a) the principal authorized the doing and the manner of the act, or . . . (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act." Restatement (Second) of Agency § 217 C (1958).

> The basis of an award of punitive damages has been variously described as malice, hatred, spite, a conscious desire to cause injury, intentional, willful or outrageous conduct, evil motive, conscious or reckless indifference to the rights of others, and an "I don't care" attitude. Under these standards, the actor's state of mind is critical in determining any entitlement to an award of punitive damages. A plaintiff will rarely be able to present direct evidence of the defendant's state of mind at the time of the conduct in question. In many cases, however, the conduct itself and the circumstances immediately surrounding it may warrant an inference of reckless, wilful or wanton conduct. Such state of mind might also be inferred from evidence of the plaintiff's prior behavior toward persons other than the plaintiff.

David L. Finger & Louis J. Finger, *Delaware Trial Handbook* § 22:2 (1994). A landlord has exposure to compensatory and punitive damages where tenants' complaints of serious heath problems are ignored. There is precedent that a landlord's responsibility to heed the complaints of its tenant should not be taken lightly. *See* 25 *Del. C*. § 5302. This Motion is denied.

V. Defendant's Motion for Summary Judgment Regarding Hypersensitivity to Mold

Defendant argues that the claimed injury, "fungal hypersensitivity" is an unusual, hypersensitive and idiosyncratic reaction to the mold. It claims that in order to be liable for failure to warn, the substance must be one to which an appreciable number of people are allergic, and the Defendant must have knowledge of, or should have had knowledge of, presence of the substance and the danger of it. Defendant cites several cases about rarity of reactions to various products, along with an American College of Occupational and Environmental Medicine study, in which it is estimated that only about 10% of the population has allergic antibodies to fungal antigens and that of these, only 5% are likely to show clinical illness. It also states that the articles cited by Dr. Marinkovich either are irrelevant to "fungal hypersensitivity," or conclude that the causes of it are unknown or that they are unreliable. Thus, according to Defendant, Brandt has not shown an appreciable number of people are affected by fungal hypersensitivity. In addition, Defendant argues that even if enough people are affected by fungal hypersensitivity, given the state of the art at the time of the alleged mold contamination, it was not scientifically possible for Rokeby to have known of its danger.

In his Memorandum in Opposition, Brandt argues that Defendant's claims fail because it has made no showing that Brandt's illness is idiosyncratic. In addition, he states that the lease contained an express warranty of quiet enjoyment and that express warranties may be breached when there is harm to an allergic or unusually susceptible plaintiff. He quotes the Defendant's expert, W. Curtis White to show that, based upon his standards, fourteen of the sixteen tests taken at Three Mill Road produced results marginal for hypersensitive individuals, and eleven produced results commensurate with causing problems for a significant number of individuals.

He notes that some of the other tenants complained of poor air quality, though Defendant argues this fact is inapposite because they did not complain of mycotoxins and they did not develop fungal hypersenstivity. Brandt points out that he may have been the only one to test his office for mold contamination and that another tenant, Borin, had test results that also showed abnormal results in relation to mold counts. Still another tenant, Barbara McCloskey, also developed a sensitivity to mold. Brandt also argues that developing hypersensitivity to mold is a risk to the entire general population. Finally, he claims that people have always known, "at least as far back as the Old Testament," that unsanitary conditions, such as chronic dampness and mold and bacteria infestation, are unhealthy. He goes on to point out that in personal injury cases, the defendant must take the plaintiff as he finds him.

DISCUSSION

1. Plaintiff's idiosyncratic illness

Summary judgment must be denied because there remains a material issue of fact as to the idiosyncratic nature of "fungal hypersensitivity." The Defendant claims that it is an allergy that develops over time due to overexposure to mold. Whether or not any one person develops a hypersensitivity or allergy to fungi depends upon various factors, including that person's predisposition to developing allergies. In *Roche*, while addressing the issue of specific causation, the court cited the New York City Department of Health and Mental Hygiene's *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*. The guidelines come to a similar conclusion and the court noted that:

> the *Guidelines* make clear that whether a particular individual develops symptoms when exposed to molds depends on a variety of factors: 'the nature of the fungal material (e.g., allergenic, toxic, or infectious), the amount of exposure, and the susceptibility of exposed persons. Susceptibility varies with the genetic predisposition (e.g., allergic reactions do not always occur in all individuals), age, state of health, and concurrent exposures.' *Id*.

It appears that if the level of the mold spore counts were high enough and of the right variety, any person could have developed a hypersensitivity to fungi. The claim is that it is not the allergy which comes first but the exposure to the molds, which causes the hypersensitivity. *See* Vincent Marinkovitch, *Fungal Hypersensitivity: Pathophysiology, Diagnosis and Therapy* at www.anapsid.org/cnd/files/marinkovitch.pdf. *See also Liska v. Travelers Property Casualty Corp.*, 2004 WL 504699 (Mass Super. Ct.) (Dr. Johanning performed blood tests from which it was determined that plaintiff's reaction to molds was consistent with prolonged exposure to mold which ultimately resulted in hypersensitivity).

In this regard, Defendant has presented no conclusive evidence to show Brandt was predisposed to or had already developed an allergy to mold. It has presented no clear evidence to show that Brandt's hypersensitivity to mold existed before his exposure to the Three Mill Road. *Cf. West-Mills v. Dillon Co.'s*, 859 P.2d 382, 386 (Kan. Ct. App. 1993) (medical evidence showed that workers' compensation claimant's hypersensitivity to mold spores in the work place were a result of the alteration of her immune system in early childhood which made her more susceptible to outbreaks of rashes and blisters); *Ames v. Phillips Builders, Inc.*, 1997 WL 718433 (Tenn. Ct. App.) (summary judgment upheld when plaintiffs were unable to establish breach of a duty by home builder when the level of actinomycetes in the condominium were below the acceptable level and plaintiff began having medical problems before moving in). Nor has it presented any other evidence that Plaintiff was unusually susceptible to mold allergies. Further, it has not presented conclusive evidence that Brandt's fungal hypersensitivity is so rare that Rokeby could not have, as a matter of law, been aware of the risk.

Rokeby cites the American College of Occupational and Environmental Medicine, in which it is estimated that only about 10% of the population has allergic antibodies to fungal

antigens and that of these, only 5% are likely to show clinical illness. It uses these numbers to show that an insufficient number of people have allergies to mold, such that it could not have foreseen Brandt's reaction. It cites to the products liability rule that a warning is required only when a substantial number of persons are allergic. Rokeby then cites several products liability cases in which it was found that an insignificant number of persons were affected by the ingredient. In each case the number is extremely small: one out of 1,000,000 products sold (which would be the equivalent of .0001%), 3 instances out of 225,000,000 sold (.0000013%), reactions in .6 to 1.9 out of 100,000 persons in the general population (.0006 to .0019%), and four reported complaints out of 7,000,000 applications of the product sold (.0000571%). *See* Defendant's Reply Brief, citing respectively, *Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517 (7th Cir. 1988); *Mountain v. Procter Gamble Co.*, 312 F.Supp. 534 (E.D. Wis. 1970), *Simeon v. Doe*, 618 So. 2d 848 (La. 1993); *Booker v. Revlon Realistic Prof'l Prods., Inc.*, 433 So. 2d 407 (La. Ct. App. 1983). Ignoring for a moment the fact that all of these cases are products liability cases,[61] 5% is not an insignificant proportion of people to become clinically ill from mold

[61] The products liability cases also contemplate that the products in question are otherwise harmless to the general population, or are not "unreasonably dangerous." *See* 63A Am. Jur. 2d *Products Liability* § 1453 (1997) ("[T]he manufacturer of *a reasonably safe product* generally [has] been held not liable for damages where the basis of the injury was an allergy, hypersensitivity, or unusual susceptibility on the part of the user." (Emphasis added)); Restatement (Second) of Torts § 402A ("any product in a defective condition *unreasonably dangerous* to the user" (emphasis added)). Whether or not the condition in Brandt's case was either of these is a jury question. To some extent the issues of the idiosyncracy of a reaction and determining whether there is a hazardous condition or if a product is unreasonably dangerous overlap. They seem to be opposite ends of a continuum; but, it is not clear from the products liability cases if the conclusion that a plaintiff's reaction is not idiosyncratic, coincides with the finding that the product is unreasonably dangerous, or where along that continuum a duty arises. *See, e.g., Prager v. Allergan, Inc.*, 1990 WL 70875, at *4 (N.D. Ill.) ("Prager submits evidence that his reaction was the result of the product's toxicity, not his own hypersensitivity. Even if Prager's injury were caused by an allergic reaction, Allergan may have had a duty to warn. Where the seller knows of the danger to a substantial number of the population, it must provide a meaningful warning.") Some cases merely discuss idiosyncracy. *See Jones v. General Motors Corp.*, 939 P.2d 608, 612 (Or. Supr. 1997) (discussing only idiosyncracy); *Knight v. Just Born, Inc.*, 2000 WL 924624, at * 8 (D. Or.) (discussing the issues of idiosyncracy and unreasonably dangerous defect separately). Others discuss idiosyncracy within the context of the consumer expectation test or determining whether a product is unreasonably dangerous. *See Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 753 (Wisc. Supr. 2001) ("[W]e conclude that [the 'idiosyncratic rule'], properly interpreted, reflects that in cases involving unusually rare idiosyncratic reactions, the injured party typically cannot show that his or her injury was sufficiently common to

exposure. *See Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 752-55 (Wis. Supr. 2001) (holding that latex gloves could be deemed a defective and unreasonably dangerous product when they caused an allergic reaction in 5 to 17% of consumers); *Ray v. Upjohn Co.*, 851 S.W.2d 646, 655 (Mo. Ct. App. 1993) (finding Plaintiff sufficiently established chemical manufactured by defendant was unreasonably dangerous when 5% of the population exposed to the isocyanates in the chemical will acquire permanent asthma). *See also Stinson v. DuPont de Nemours and Co.*, 904 S.W.2d 428, 431 (Mo. Ct. App. 1995) (relevant number was 7% of the population).

Furthermore, Brandt points out that in comparison to standards laid out by Defendant's expert W. Curtis White, fourteen of the sixteen tests taken at Three Mill Road produced results marginal for hypersensitive individuals, and eleven produced results commensurate with causing problems for a significant number of individuals. In addition, he notes that some of the other tenants complained of poor air quality. One tenant, Borin, had test results that showed abnormal results in relation to mold counts, and, according to Brandt, Barbara McCloskey, also had developed a sensitivity to mold. This evidence weighs in Brandt's favor that the conditions at the Three Mill Road office were sufficiently harmful to affect more than the most sensitive of tenants.

In sum, Plaintiff has presented sufficient evidence that there is an issue of material fact as to the idiosyncratic nature of his condition. There is a dispute as to whether the condition of Brandt's office was dangerous enough to affect even normal individuals. Moreover, even if the mycotoxins existed only at a level that would affect sensitive individuals, there is a dispute as to

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render the injury-causing product dangerous to an extent beyond that which the ordinary consumer would contemplate.").

whether there is a significant enough percentage of sensitive persons that could be affected, such that Brandt's condition would have been foreseeable by the Defendant.

2. Idiosyncracy, foreseeability and Landlord-tenant duties

Even if the Court were to decide that Brandt's reaction was idiosyncratic it still could not grant summary judgment in favor of the Defendant on this issue. Rokeby cites the Restatement (Second) of Torts[62] and W.R. Habeeb, Annotation, *Seller's or Manufacturer's Liability for Injuries as Affected by Buyer's or User's Allergy or Unusual Susceptibility to Injury from Article*, 26 ALR 2d 963 (1952), for the proposition that it does not have a duty to warn or to protect from harm because Brandt's "fungal hypersensitivity" is an idiosyncratic reaction. These sources, however, address the issue as it relates to a seller or manufacturer's liability in products liability cases. The rule in the Restatement, for example, is applicable to "any person engaged in the business of selling products for use or consumption." Restatement (Second) of Torts § 402A cmt. f (1965). It goes on to state:

> It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

Id.

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[62] *Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

Restatement (Second) of Torts § 402A cmt j (1965).

For public policy reasons it is the general consensus that a manufacturer or seller is not liable for the idiosyncratic allergic reactions of consumers. *See, e.g.*, 63A Am. Jur. 2d *Products Liability* § 1150 (1997) ("To exact an obligation to warn the user of unknown and unknowable allergies, sensitivities, and idiosyncracies would be for the courts to recast the manufacturer in the role of an insurer."). However, Rokeby's[63] relationship with Brandt was that of landlord and tenant. The relationship of Rokeby to Brandt is governed by Delaware Landlord/ Tenant law and the standards and tests laid out in the sources provided by Defendant are not directly applicable to this case.

What these sources do tell us, however, is that the issue of the idiosyncratic plaintiff is essentially an issue of foreseeability. *See, id*. ("If a manufacturer could have no foreknowledge of a plaintiff's allergic reaction to its product, the manufacturer does not have a duty to warn of such an unforeseeable risk."). Thus the question of whether Rokeby is responsible for the harm involved in this case, Brandt's reaction to the mold, is one of proximate causation or foreseeability. Generally speaking, "'[a]n event is foreseeable if a defendant should have recognized the risk of injury under the circumstances. It is irrelevant whether the particular circumstances were foreseeable.'" *Duphily v. Elec. Co-op., Inc.,* 662 A.2d 821, 829 (Del. 1995), *citing*, *Delaware Elec. Co-op., Inc. v. Pitts*, 633 A.2d 369 (Table),1993 WL 445474, at *4 (Del.). Defendant argues that it was Brandt's own hypersensitivity to the mycotoxins which was the proximate cause of his injuries and not Rokeby's negligence. The foreseeable risk, however, is a function of duty owed, or the relationship between the parties; the two are inextricably linked. *See, e.g.,*; *Murphy v. Owens-Corning Fiberglass Corp.*, 447 F.Supp. 557, 562 (D. Kan. 1977) ("[U]nder fundamental principles of tort law the risk of injury defines the duty to be obeyed . . .

[63] There is a material dispute of fact about the claimed dangerous effects of mold in the leased office.

."), *citing*, *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928). *See also*, W. Page Keeton, *Prosser and Keeton on Torts*, 280-81 (5th ed., West Publishing Co. 1984) (1941) (discussing the semantics of foreseeability and determining that whether one discusses it as a function of "duty" or "proximate cause" the question is still not answered whether the result was foreseeable).[64] The duty of a landlord to a tenant under Delaware law is different from the duty of a merchant to a consumer at common law. *See, e.g., Brower v. Metal Industries, Inc.*, 719 A.2d 941, 944-45 (Del. 1998) (applying Virginia law and noting that there is a distinction between the duties owed by manufacturers and by landlords). Delaware's Landlord Tenant Code superseded the common law negligence standard and it extended landlord liability. *See Powell v. Megee*, Del. Super. Ct., C.A. No. 02C-05-031, Stokes, J. (January 23, 2004), Letter Op. at 3-4 (citations omitted). "The 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 v. Mid-Atlantic Realty Co.*, 2001 WL 282882, at *6 (Del. Super. Ct.), *citing*, *Hand v. Davis*, 1990 WL 96583, at *2 (Del. Super. Ct.). Landlord liability extends "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." *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 18, 1977).[65]

[64] In so far as the defendant is held liable for consequences which do not lie within the original risk which the defendant has created, a strict liability without fault is superimposed upon the liability that is logically to be attributed to the negligence itself. It is simpler, and no doubt more accurate, to state the problem in terms of legal responsibility: is the defendant legally responsible to protect the plaintiff against such unforeseeable consequences of the defendant's own negligent acts? But to state the question in this manner is merely to make use of other words to ask it, and can of course provide no answer. Whether there is to be such legal responsibility is a matter of policy, of the end to be accomplished; and when we say, for example, that the defendant is or is not under a "duty" to protect the plaintiff against such consequences, "duty" is only a word with which we state our conclusion and no more. But at least to deal with the problem in terms of causation, or to talk of the "proximate," is merely to obscure the issue.

[65] According to the Restatement (Second) of Torts §402 A (1965), the liability of a seller or manufacturer is:

This Court has previously determined that Rokeby had a duty of care as a landlord to Brandt as its tenant.[66] The Standard of Care expected of Rokeby has been decided as well.[67] For the foregoing reasons, Defendant's Motion for Summary Judgment Regarding Hypersensitivity to Mold is denied.

VI. Defendant's Motion for Summary Judgment Regarding Plaintiff's Failure to Establish the Existence of a Hazardous Condition

Defendant's Motion for Summary Judgment Regarding Plaintiff's Failure to Establish the Existence of a Hazardous Condition is premised on the insufficiency of the Indoor Air Solutions testing and a lack of evidence showing that the mold in Plaintiff's office was hazardous to him. These two issues are also largely incorporated into Defendant's Motions to Preclude the Testimony of Dr. Montz and Mr. Miller as well as Defendant's Motions Regarding Proximate Causation and Standard of Care.

When looking at this issue in the light most favorable to Plaintiff, in light of the rulings of this Court in relation to the other outstanding issues dealt with in this Opinion, it is clear that the expert opinions of Drs. Johanning, Marinkovich and Montz, as well as the body of testimony regarding the mold found at Three Mill Road, create a question of fact that should be submitted to the jury.

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(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[66] September 8, 2004.
[67] May 9, 2005.

Defendant contends in its brief that "[t]here can, of course, be no question that the mold that plaintiff found inside Three Mill Road had its source outside Three Mill Road."[68] However, the experts on both sides have presented contrary opinions on this issue that have already been addressed in this opinion. There is a question of fact as to whether the mold that is alleged to have caused Plaintiff's injuries came from the repeated wetting of the ceiling tiles and the drywall inside the office, as well as Defendant's failure to remove the tiles, or if the mold was strictly from an outdoor source.

Defendant also asserts that there is no evidence to support the theory that the mold at Three Mill Road could cause Plaintiff's health problems. In support of this contention, Defendant points to the fact that the government still has not established common standards regarding indoor air quality. However, the lack of indoor air quality standards is not dispositive of the fact that the mold could not be responsible for Plaintiff's injuries. As noted earlier, there is ample testimony to create a fact question on this issue for a jury.

This summary judgment motion is dependant upon the preclusion of the expert testimony that allows Plaintiff to assert that the mold at Three Mill Road was the cause of his injuries. However, as noted above, the expert testimony to support such assertion has not been precluded in this case. Therefore, a question of fact exists and disposition of this issue on summary judgment is not appropriate.

For the foregoing reasons, Defendant's Motion for Summary Judgment Regarding Plaintiff's Failure to Establish the Existence of a Hazardous Condition is denied.

[68] Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment Regarding Plaintiffs' Failure to Establish the Existence of a Hazardous Condition, September 25, 2003, p. 4.

VII. Motion in Limine Regarding Indoor Air Solutions

The final outstanding Motion in this case is a Motion in Limine Regarding Indoor Air Solutions filed by former joint defendant, Service Unlimited. The Motion contests the findings of Indoor Air Solutions and asks that Dr. Montz and Mr. Miller be precluded from testifying. Defendant Service Unlimited previously was dismissed from this case in this Court's Memorandum Opinion of May 9, 2005. However, Defendant Rokeby effectively renewed this Motion arguing at the *Daubert* Hearing, and in its Post Hearing Briefs in Support of its *Daubert* Applications, that the testimony of Dr. Montz and Mr. Miller be excluded.

This issue has already been discussed and decided in this opinion. For the reasons stated in Section I, 3-4, *supra*, summary judgment on this issue is denied.

CONCLUSION

For the forgoing reasons, Defendant's Motions in Limine relating to the preclusion of the expert testimony of Mr. Miller and Drs. Johanning, Marinkovich and Montz are denied. Accordingly, Defendant's Motions for Summary Judgment regarding Proximate Causation, Standard of Care, Punitive Damages, Plaintiff's Hypersensitivity to Mold, and Failure to Establish the Existence of a Hazardous Condition, all of which were dependant in some manner on the granting of one or more of Defendant's Motions in Limine, also are denied.

IT IS SO ORDERED.

Original to Ms. Ellen Davis – NCC Prothonotary
cc: Ms. Pat Thatcher
David E. Wilks, Esquire
Jeffrey M. Weiner, Esquire