

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

TRICIA MASON, et al.,  
Plaintiffs-Appellants,

vs.

WASATCH PROPERTY  
MANAGEMENT, INC., et al.,  
Defendants-Appellees.

KAITLYN MORRIS, et al.,  
Plaintiffs-Appellants,

vs.

WASATCH PROPERTY  
MANAGEMENT, INC., et al.,  
Defendants-Appellees.

APRIL ABAD, et al.,  
Plaintiffs-Appellants,

vs.

WASATCH PROPERTY  
MANAGEMENT, INC., et al.,  
Defendants-Appellees.

ALICIA SWIEGART, et al.,  
Plaintiffs-Appellants,

vs.

WASATCH PROPERTY  
MANAGEMENT, INC., et al.,  
Defendants-Appellees.

1 CA CV 09-0155

(Pima County Superior Court Cause  
Nos. C 2003 5581 *consolidated with C  
2004 1766*; C 2002 4299 *consolidated  
with C 2002 4542* )

APPELLANTS' RESPONSIVE  
BRIEF TO BRIEF OF AMICUS  
CURIAE - NATIONAL  
APARTMENT ASSOCIATION

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## I - Summary Statement

The only junk science in the issue of mold is the claim that mold does not cause illness. The belief that mold is harmful to our health goes back at least 3,500 years before the first lawsuit claiming it caused health damages. The Old Testament stated that if you have it in your home, get rid of it. If the mildew spreads the unclean item or property must be removed and destroyed. *Leviticus*, 13:47-59, 14:33-57. From the early 1900's to now, there has been an increasing body of scientific literature that connects mold with the injury and death of animals and people. (ROA #1850, Ex. 1). All the major governmental research bodies conclude that dampness and its accompanying mold play a part in a variety of physical and possibly emotional illness. Senator Kennedy commissioned the Government Accounting Office to do an investigation on mold. It uses the 2003-2004 IOM Report and expands upon it with more recent studies that have been generated. Whole streets of homes filled with mold have been razed in New Orleans. All of this points to dampness and its accompanying mold as being something which is associated with illness and is not good for you.

One does not need to be a rocket scientist to state that when you have too much of anything, it is not good for you. A 10 milligram dose of aspirin can for the most part be beneficial. Multiply that by a thousand times and the dose can

possibly kill you. This simple truism applies to the issue of mold. Yes, mold is all around us indoors and outdoors. But our exposure outdoors varies with the winds of the day and night. Indoors, where we eat and sleep, the atmosphere is more controlled, and if it is damp, mold and bacteria can proliferate at alarming rates which can harm you.

We also know that certain people have grave susceptibilities to different kinds of mold. This is no surprise to us here in Arizona. Valley Fever, the common name for coccidioidomycosis, is a fungus mold, endemic to our environment and when it is stirred up and breathed in it can cause harm. In southern Arizona Coccidioidomycosis (cocci) 'valley fever' is the most highly endemic of all areas in the United States (P. 4) for the fungus. Hundreds of thousands of people become infected annually. *Principles and Practice of Infectious Disease*, 3d Ed. Mandell et al. (1990) p. 200. About sixty percent are asymptomatic; forty percent develop symptoms with cough, malaise, fever, chills, weakness. About 5 percent develop a cavity or nodule in the lung; about 1/2 percent develop disseminated disease, which may involve almost any organ and can kill you. (P. 201). To argue that mold cannot cause illness in our state is disingenuous.

Dr. Goldstein, an allergist and immunologist for Appellants, performed a

simple epidemiological study and charted the illnesses of over 87 people who he examined. He found constellations of the following health complaints: fatigue, bloody noses, cough, runny noses, wheeze, asthma, and headaches that were greater than in the ordinary population. (Appendix 1) These complaints closely mirrored those found in a published study.

There has been a dangerous move afoot for corporations and monied interests to unreasonably attempt to influence the courts by means of unscrupulously inserting articles in "position papers" of certain medical journals and omitting conflict of interest statements which are then quoted by the same people who wrote them to support their unfounded conclusions in a courtroom. This Reply will point out two medical bodies that have been unfairly pushed and influenced to publish such "position papers" that have skirted the health issues presented by mold. It also shows how the courts have become specific targets for this misinformation.

Finally, the most succinct statement of the law on the admissibility of scientific evidence as it applies to this case is stated in Baroldy v. Ortho Pharm. Corp., 157 Ariz. 574, 760 P.2d 574 (1988).

"Plaintiffs needed only to show that the ...theory embodies one generally accepted scientific hypothesis of

causation to render it admissible; they did not need to establish that occlusion is the only theory of causation or that it commands universal acceptance. Ortho's expert witnesses have not disproven the theory but have merely created a conflict in the medical testimony that goes to the weight rather than the sufficiency of the evidence, and is properly resolved by the jury." P. 582-583.

Logerquist v. McVey, 196 Ariz. 470, 1 P.3d 113 (2000) and Lohmeier v. Hammer, 214 Ariz. 57, 148 P.3d 101 (App. 2006) follow it faithfully. It stands for the central proposition that courts should not become entangled in these kinds of disputes and that juries are in the best position to determine them. This case is a poster child for *Logerquist* because it shows what can happen when a court becomes too involved in the science and other parts of the case, causing the justice system to tilt. This court must rectify that error.

**II- IOM Report Findings Actually Accepts that Mold Can Be a Cause of a Variety of Injuries Including Suffocation**

The Appellees frame this report by magnifying some portions and minimizing or ignoring others to fit into their defense. The IOM however reports in its executive summary that scientific analysis in the lab as well as scientific

analysis in the body demonstrate adverse immunotoxic, neurologic, respiratory and dermal responses after exposure to specific toxins, bacteria, molds or their products. (ROA #1068 Ibid. yy p. 23); that the size and the extent of the mold/water damage is assumed to be associated with higher potential exposure (Ibid. aa) along with the amount of time that the water damage has been allowed to remain (ibid. bb p. 21); that homes with visible mold often have higher concentrations of it (ibid. gg); that molds can produce poisons (mycotoxins) which can facilitate the growth of bacteria which can also have toxic and inflammatory effects (ibid. g p. 20) that there is sufficient evidence between asthma symptoms; wheeze, cough and mold (Ibid. m); that it is likely that people are being exposed to multiple agents in a damp indoor environment (Ibid. i). It specifically also reports that what seems to be allergic affects of mold/bacteria is found in non allergic persons (ibid. tt) and that outcomes not generally associated with allergic responses including nervous system membranes of the respiratory and digestive tracts have been reported in people who work or live in buildings that have microbial growth (ibid. uu). It also reports an association between damp indoors and upper respiratory symptoms (ccc. P. 24) and lower respiratory symptoms (id. Ccc) including cough (fff, hhh, iii); the IOM reports that high level exposure to microbe agents may trigger an irritant response (ibid. jjj p. 24), shortness of breath

(ibid.mmm p. 25) and that it wants more research on affects of mold on enfant hemorrhage in the lung (ibid. o p. 20).In short, damp spaces and mold is not something that is good for you.

There is nothing about the IOM report that lessens Appellants' experts' scientific and medical positions of causation,-- just the opposite. The report emphasized that people who live or work in moisture laden damp premises, are subject to the same kind of illnesses from the mold, bacteria, and other organic particles found in damp premises that appellants complained about in this case where there were horrific levels of mold and bacteria that went to the top of the chart, and that further research needs to be pursued in this area. It did not pretend omniscience with respect to illnesses induced by dampness, moisture, mold, bacterial or other products. It just presented itself as a useful guide but made no attempt to be the final conclusive word on the subject. Although there is still uncertainty as to what amounts of specific organic substances are released, everyone agrees that neglect causes damp households and creates dangerous health conditions where mold , bacteria, gases ,and perhaps other organic substances cause illness. Ongoing research is quantifying it.

Dr. Harriet Ammon, a senior toxicologist ( and one of the nine committee members who wrote the IOM report, said in her affidavit (ROAM #343) that the



report was never meant to determine the legal measure for scientific causation of mold and/or bacteria induced injuries. ROAm # 343 p.8-9. Dr. Stetszenbach who was one of a handful of reviewers for the IOM report testified to the trial court that the IOM Report was misinterpreted. With respect to the sections that talk about “insufficient data to make direct correlations between some health effects and mold exposure,” she believes that this does not mean there is “no correlation.” It actually means that there haven’t been enough studies and as a result, there is simply insufficient data. Tr\_3/20/06 at 58.

**III- IOM Report Warns Of Its Expiration Date**  
**and Not To Apply It to Individual Cases**

The Institute of Medicine panel of 9 principal investigators including two medical doctors explicitly stated it was beyond the scope of its mandate to review all mold literature. The IOM committee said that the report should not be used to determine the likelihood of an *individual* person’s problems being associated with or caused by exposure to mold. (ROA #1068) The panel restricted itself to saying only that its finding of sufficient evidence of a causal relationship can only cause the outcome, at least in *some* people under *some* circumstances. (ROA #1068, 21 u.). It further underlined this principle of non-determination, effectively removing itself from pronouncements on high risk environments (such

as ours), by stating that clinical studies and case reports of health responses of individuals to mold often address unusual or unusually high potential exposures that are not representative of those experienced in homes. ( Ibid. zz) so that it relied only on large epidemiological studies. It emphasized that its findings were not set in stone when it concluded that research on fungi and other dampness-related agents is burgeoning, with important new papers constantly being published.

#### **IV- Recent Government Funded Reports Indicate**

##### **Greater Connection of Mold With Respiratory and Other Diseases**

Dr. Lawrence Fisk (writer of the IOM Report) at the famous National Lawrence Livermore Laboratory was commissioned to do a government funded statistical *Meta analysis* of the 2004 IOM Report on respiratory outcomes. (ROAM 343) A meta analysis acts as a magnifying glass to ferret out scientific analysis that otherwise cannot be done and in this case found, using this analysis, that the statistical risk of contracting upper and/or lower respiratory diseases including asthma, from exposure to mold were increased from anywhere from 30% to 50% and in some cases up to 80% . A followup sister study by Dr. Fisk *Public Health and Economic Impact of Dampness and Mold* , Mudarri & Fisk, Indoor Air 17:226-235 (2007) (Appendix 2) attributes 21% of all asthma cases

attributable to mold. Thus 4.6 million cases are estimated to be attributable to dampness and mold exposure in the home at a cost of \$3.5 billion annually.

A very recent statistical meta analysis, addressed the subject of mold from a different direction. It determined that people with pre-existing asthma have a greater susceptibility to getting sick from being exposed to aspergillus mold. See: *aspergillus hypersensitivity and allergic bronchopulmonary aspergillosis in patients with bronchial asthma: a systematic review and meta-analysis*, *Int. J. Tuberc Lung Dis.* 2009 August ;13(8) 936-44. (this mold is found in great quantities at the Eastside premises in various appellants apartments ).

Senator Edward Kennedy in 2007 commissioned the Government Accounting Office to do a comprehensive study on Mold. (Appendix 3) .This report was published in September 2008 and stated “enough is known that federal agencies have issued guidance to the general public about health risks associated with exposure to indoor mold and how to minimize mold growth and mitigate exposure.”(p. i Appendix 3).It found that ‘the Department of Health and Human Services and the Centers for Disease and control and Prevention (CDC) concluded that “excessive exposure to mold contaminated materials can cause adverse health effects in susceptible persons regardless of the type of mold or the extent of contamination. “ It provided areas where research has been completed and still

other areas where it is ongoing. It found ‘Many studies associate Indoor mold with adverse Health effects but cite the need for additional research.’ ( Appendix 3, p. 11)

The GAO report cited several reviews published subsequent to the 2003 IOM study which made stronger associations than the original IOM report. The American Academy of Pediatrics stated in 2006 that epidemiologic studies consistently support a causal relationship between mold and upper respiratory tract symptoms. (Appendix 3, p. 13) They also concluded that a plausible link exists between acute pulmonary hemorrhage in infants and exposure to certain toxins that some mold produce. (Appendix 3, p. 5). Another review stated the association between acute idiopathic pulmonary hemorrhage in infants and exposed to mold is strong enough to justify removing them from moldy environments or cleaning up these spaces. T.G. Nuesslein, N. Teig, and Ch.H. Rieger, *Pulmonary haemosiderosis in infants and children* Paediatric Respiratory Reviews, Vol. 7 No. 1(2006) and another review reiterated this recommendation. R.A. Etzel”*Indoor and outdoor air pollution: Tobacco smoke, moulds and diseases in infants and children* International Journal of Hygiene and Environmental Health Vol 210 No. 5 (2007). (Appendix 3). The GAO also published completed and ongoing studies. (Appendix 3). This does not demonstrate a “junk science”.

## **V- Appellants' Cases Are Similar Based On Respiratory Complaints**

In the instant case, the residents complaints were multiple and varied in severity, but most commonly elicited were cough(49%, rhinitis (44%), wheeze(31%) and headache(41%) by Dr. Goldstein. With the exception of headaches, the symptoms were determined in the 2004 Institute of Medicine report, to have an association with living and working in mold contaminated environments. Comment by Dr. Goldstein (Correspondence, JACI, Vol. 118 # 3 Sept. 2006,p.760-761. The Appellants David Bullis suffered headaches and fatigue (ROA 1067 p.51-52 ; Candyce Colston had daily nosebleeds, recurring strep and excessive coughing ROA 1067 p. 46; Sharlon Esmay experienced aggravation of lung problems, sinus problems, ROA 1067 # 47 ; Sharon Futch had headaches, shortness fo breath, fatigue, dizziness and achiness ROA 1031 Para. 43, ROA 1068 para. 40, ROA 1067 p. 49. Her daughter Cassandra suffered from cough, asthma, fatigue ROA 1068 Para. 3 Ex. 3) Bettie Hanna had congestion and coughing all night; ROA 1068 Para.3 Ex. 3. Andra Jackson had severe headaches ROA 458 Para. 45; Kalisha Williams suffered from upper respiratory infections; Kevin Williams had sore throats and ear infections ROA 1031' Para. 58.; Amelia Kama spit up blood, experienced headaches several times a week; ROA 1067 par. 3 Ex. 3, ROA 458 p. 46; Marco Kame had headaches, diarrhea and dizzy spells

ROA 458 Para. 46;

Jon Larson had pneumonia, nosebleeds, nausea, and difficulty breathing  
ROA 1068 Para. 3 Ex. 3; Michael Conti was diagnosed with asthma ROA 1031  
Para 65, ROA 1068 para. 3. ex. 3; Luke Larshon had pneumonia; Roa 1031 Para.  
66; Robin Peters suffered, cough, headaches, night sweats, memory loss, styes,  
congestion (ROAm 342 para.348-356; Brittany Peters suffered nosebleeds,  
scratchy throat, froggy voice, bronchitis, headaches ROAm 342 Para. 357-361.

Lynica Weary suffered chest pains, wheezing, Shortness of Breath,  
depression, congestion, memory loss and fatigue ROAm 342 P. 367-373;  
Angelique Flores suffered from pneumonia, bronchitis, and brain damage as a  
result of a bad intubation at the hospital ROA 1031, Para. 69, ROA 1067 p.60,  
ROA 1068 Para 4, Ex. 4; Robert Flores suffered difficulty breathing and  
nosebleeds, headaches and pneumonia ROA 1067 P. 48,59-60; Sabrina McKinley  
suffered severe headaches, nosebleeds, coughs, fatigue and dizziness ROA 1031;  
para. 70-71 Roa 1067 Para. 59-60; Montel McKinley suffered pneumonia ROA  
1031 Para. 72, ROA 1067 p. 48,60, ROA 1068 para. 3 ex. 3. Sienna Ruhoff had  
constant fatigue, bronchitis ROA 1031 para. 85, Roa 458 Para 51; Jonathan and  
Nathaniel Ruhoff had constant runny noses, ear infections ROA 1031 Para. 86;  
ROA 1068 para.3 ex. 3. James Stephens started choking when falling asleep, had

clogged sinuses and trouble breathing; ROA 1031 para 93-94; ROA 458 Para. 54, ROA 1067 Para 62.; Jacklyn and Jesse Stephens suffered body aches, congestion and headaches ROA 1031 Para 92 ROA 1068 para. 3 Ex. 3; Kuuleme Stephens suffered depression, fatigue, nausea, headaches and her son had nosebleeds almost every morning ROA 1031 para. 95; ROA 458 Para 54; Alicia Sweigart had severe headaches and nosebleeds ROA 1031 Para. 108 ROA 1067 P.53; Kim Worden suffered from fatigue, memory problems, recurring strep throat, flu like symptoms, cough ROA 1031 Para. 114, ROA 1068 Para. 3 Ex. 3, Gabrielle Worde suffered Fever strep, ear infections ROA 1068 para. 3 ex. 3; Elisa Worden suffered cold, fevers, congestion, strep ; Tricia Mason suffered headaches, congestion, vomiting coils ROAm 342 Para 325-327 Cassidi Smith suffered Sinus Congestion, fatigue, sneezing, cough, ROA 1068 para. 3 ex. 3; Kelsey Smith suffered cough, wheezing, pneumonia, vomiting, fever Roa 1068 para. 3 ex. 3; Thomas Morris had constant daily bloody nose, developed chronic sinusitis ROAm 342 para 382; Kaitlin Morris became continuously sick and suffered pneumonia, scarlet fever and bronchitis, asthma and sinusitis ROAm 342 para. 383-385 and of course the death of two babies from respiratory distress; .

It is obvious that there is a constellation of illnesses here that revolve mainly around respiratory distress which is noted in the scientific literature.

Presumably the Chamber of Commerce and the National Association is not putting forth a conspiracy theory among these many people who were injured while they were in contact with mold.

**VI - Defense Minded Parties Are Distorting the  
Science by Influencing the Literature**

Two 'Position Papers' which are supposed to represent the organizations in which they appear, have Defense minded fingerprints all over them and they should be disregarded. The stories behind them would fit the plot of *an Erin Brockovich* melodrama, and it is likely that they were written specifically so that they could be used by defense experts to support their positions inside the courts.

**A- Adverse Human Health Effects Associated with Molds  
in the Indoor Environment- 2003 ACOEM Statement**

The ACOEM "American College of Occupational and Environmental Medicine" is an organization that champions the health and safety of workers, workplaces and environments.

In early 2002 the ACOEM president handed a directive to Jonathan Borak, to develop a position statement on indoor mold <sup>1</sup>

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<sup>1</sup>Most of this information in this section was provided from an article by Dr. James Craner in the Int J Occup Environ Health pgs. 283-297. [All citations pertaining to that article will be designated first by "C" p. \_\_ ] C p.286. (Appendix 4)



A Doctor Borak was placed in charge of recruiting experts to provide a paper on the indoor effects of mold. . Instead of soliciting ACOEM members to write the paper ( there are about 7,000 medical doctor members), or seeking Occupational and Environmental physicians in or out of the United States to write the paper, Dr. Borak approached a Ph.D, Bryan Hardin to be the lead author. Dr. Hardin was about to join another Ph.D Dr. Bruce Kelman to work with him at Kelman's firm Global Tox. C p. 287. Dr. Kelman, a toxicologist, had been retained previously by big tobacco to question the legitimacy of some anti smoking studies.

Dr. Kelman's business was the business of testifying on behalf of defendant-builders, developers, realtors, home and property insurers, employers, and landlords involving mold-related health and exposure claims. (C287). It was never revealed why Dr. Hardin and Dr. Kelman were chosen to write this 'position paper'-- allegedly representing the interests and beliefs of its 7,000 physician members C p. 287. Dr. Hardin had not written any peer reviewed articles in the area of mold nor had he published on any occupational or environmental medicine topic in the preceding decade.C p. 287. He was not even an ACOEM member! Nor was Dr. Kelman. Dr. Borak offered Dr. Hardin an endorsement from

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ACOEM to foster his new consulting career with Dr. Kelman. Dr. Kelman's focus was on dismissing mold poisons as a toxicological hazard by depicting scientific theory as untenable and implausible. Several years earlier, in 2000, he had written a review article published as a minority opinion disagreeing with the American Industrial Hygiene Association's majority recommendation for mold remediation—arguing that mold was not a valid health hazard c 287.

Aside from this 2000 review article, none of Dr. Kelman's previous publications dealt with mold or any other aspect of Industrial air quality. Prior to ever writing the ACOEM paper, Dr. Kelman had been actively involved as a defense litigation witness. (c 287-288.) When asked by the Wall Street Journal in 2006 why Dr. Hardin and Dr. Kelman had been chosen—he said that he wanted an author with no established background record of litigation related to mold!! (c 288.)

Dr. Kelman, who apparently never did bench science i.e. work in a lab with animals and mold, used an article by a Dr. Rao which measured the amount of mold poison that when infused directly into Charles River Rats lungs, caused an effect. Based on this one experiment whose purpose was not even to show the effect of the mold poison on human lungs, Dr. Kelman added some government statements on the amount of mold which one ate, to have an effect. Combining

these two disparate studies, Dr. Kelman postulated that no adult, child or infant could ever be affected by mold mycotoxins. If one considers that it is a very complicated process to extrapolate a single rat study to human beings, it is easy to realize how Dr. Kelman's hypothesis is junk science. In fact, one judge ruled that such a leap was impossible and threw it out.

Along with Dr. Kelman, Dr. Andrew Saxon was recruited as the third author to write the ACOEM position statement. He too was not a member of ACOEM but he did have impressive credentials as a professor at UCLA medical school. But he had never done any original research on air quality or mold. Prior to being retained as an author, he testified with a co-author of the GlobalTox article 2000 article as a defense expert in a mold case. One month after he was retained he confirmed that he was a medical expert in eight cases for the defense and none as a plaintiff's expert. In fact, Dr. Saxon admitted that he had been actively serving as an expert witness in mold litigation exclusively on behalf of defendants since 1999. Although Dr. Borak was approached by other environmental medicine experts about participating, apparently he believed that these three would be wholly disinterested and objective in their position review. It is noteworthy that of the peer reviewers who reviewed the article, none had ever previously published any peer reviewed articles (p.289).

One of the reviewers however did start out his criticism by stating “...the tone of this paper seems to be dismissive. The tone will have to be changed from the first paragraph which reads like a defense report for litigation. (C 289.)

Incredibly, the ACOEM position paper never included the conflict of interest statement divulging that this team was in actuality a stealth mold defense organ. This was blasted by the Wall Street Journal. (App. 5)

Just two months after the ACOEM article was published, Dr. Kelman was paid \$40,000 to write a “lay version” of the article by the U.S. Chamber of Commerce’s Institute for Legal Reform, partnering with the Center for Legal Policy of the Manhattan Institute, a conservative think-tank. c 293. This was based on the first draft of the ACOEM paper which became “The scientific view of the health effects of mold” and which the Appellees Amicus cites. One of the purposes of this paper was to write an article “*that would be more assessable, for example, to judges.*” Depo of Bruce Kelman, Kelman , Global Tox Inc. v. Sharon Kramer July 22, 2008 p.259-260. (Appendix 6). It was written as a promotional piece—to be read by judges—among others. Most interesting is the fact that Dr. Saxon did not know he was even included as an author on the article, because he had not written it, but apparently that did not bother him.

Q “When the lay version of the ACOEM paper was printed by the

Institute for Legal Reform, the ACOEM again did not have any conflict of interest waiver on your part, did it?

A I have no idea. I've never seen that version. I'll call it the nonscientific piece that has my name on it."

Q "From your view, did you make any efforts despite anyone calling you or anything else to make sure a conflict of interest waiver was included with the lay version put out by the Institute for Legal Reform

A "No, because I didn't even know my name was on it." Deposition of Dr. Saxon, Hake v. Coleman Homes, Inc. et al VIV 02-1272-PHX-FJM . Nov. 16 2006 p.74, Appendix 7.)

In its article "Amid Suits over Mold, Experts Wear Two Hats" , January 9, 2007, The Wall Street Journal stated : "The (ACOEM) paper has become a key defense tool wielded by builders, landlords and insurers in litigation. It has also been used to assuage fears of parents following discovery of mold in schools. One point that rarely emerges in these cases: The paper was written by people who regularly are paid experts for the defense side in mold litigation.\*\*\*The dual roles show how conflicts of interest can color debate on emerging health issues and influence litigation related to it."(Appendix 5).

Dr. Saxon admitted that between 2003 and 2006 his billable expert consulting for mold defense work in litigation exceeded \$1 million. (c293).

Except for the fact he has caused so much damage to so many people, it would be almost hilarious that Dr. Kelman's own extrapolations and mathematical jumbings, which he presents in his ACOEM position statement would never pass the *Frye* test. No independent scientific group of doctors have ever performed any analysis using Kelman's figures or who stated that such computations to support his bizarre extrapolations concluding that mycotoxins cannot cause illness in humans. ( ROA # Memorandum on Frye Motions p. 18-20) When asked whether this was anything more than a hypothesis, Dr. Kelman was unable to state any corroborative scientific body had tested and duplicated his mathematical jumbings.

B) *The Medical Effects of Mold Exposure (Position Paper)*

American Academy of Allergy and Immunology February 2006

The second example used by the Appellees in the instant case, and also cited in this brief by the National Apartment Association is the above article. Dr. Saxon plays a very important role in this "position statement" as well. Dr. Saxon conscripted Dr. Jay Portnoy, the head of the Children's Hospital Allergy and Immunology Center in Kansas City Missouri to write a section of the article about

the affects of mold as an irritant. Dr. Portnoy's draft on this section, was supportive of the irritative connection between mold and medical problems. Dr. Saxon did not like that. Dr. Portnoy was not willing to change his position according to Dr. Saxon's agenda. (ROA 1850, p. 19-22). Dr. Portnoy saw an agenda which was very anti-mold and biased, denying the possibility of there being harmful effects from mold on human health. p. 20 citing depo. p. 22,23. This was contrary to Dr. Portnoy's position that indoor mold has increasingly become recognized as a significant health problem with the sickest people apparently located near the most heavily contaminated rooms. Id. p. 27-28 depo. Dr. Saxon said he would do the rewrite himself. Without Dr. Portnoy's consent, his name was included as an author on the article. To say the least, this is a totally unethical action. (ROA #1850) Moreover, in a replay of the ACOEM position statement, this was a rushed article, which the members of the organization were not given an opportunity to review. Dr. Portnoy stated that usually, when a journal body accepts a position statement for publication, there is a more comprehensive vetting of it by various people than an ordinary article Id. p. 40-41 depo. However only three days passed between revision and its receipt for publication Id. p. 48. There was absolutely no conflict of interest statement published in this paper either, and it caused such an uproar, that the board of the journal provided a chance for

members of the organization to voice their dissatisfaction and concern. A copy of this correspondence is attached (Appendix 8) with underlinings and references to the responses, to wit: (Authors are the writers of the position statement.)

- 1) Mycotoxins when injected into humans cause: nausea, vomiting, drowsiness, mental confusion ( p. 760)
- 2) Stachybotrys mycotoxins grow in buildings where people suffer health problems and it is inhaled by people in the buildings
- 3) Dr. Goldstein took history of 93 Eastside Residents whose complaints of cough, rhinitis, wheeze were all associated with the 2004 IOM report.
- 4) Several carefully performed clinical studies in subjects exposed in school, office buildings, a courthouse and homes implicated stachybotrys, alternaria, Aspergillus, Penicillium, Cladosporium. As a comment, these molds were found in highly elevated measurements in Appellants apartments.
- 5) Mold toxicity is real and should not be downplayed.
- 6) The authors of this article have selected from the literature tenuously supported articles and ignore the mountain of evidence that refutes their conclusions.



- 7) The authors rejected peer reviewed literature without discussion
- 8) The authors make no reference to Mayo studies on chronic sinusitis and mold.
- 9) Recent developments on chronic sinusitis were not cited in this supposedly "state of the art" review.
- 10) The authors cite their medical conclusions based on an editorial they previously wrote .
- 11) Withholding crucial scientific information calls intentions of the authors into question.
- 12) When anyone writes a position paper, we question whose ox is being gored.
- 13) Questions whether this paper and the ACOEM paper who were written by Dr. Saxon had a separate agenda.
- 14) "We suspect your interpretation of what is and what is not supported by scientific evidence might, at least in part, represent an agenda for the defense."
- 15) "There is much evidence supporting illness caused by water damaged, moldy, or damp indoor spaces."
- 16) Common Construction materials permit growth of toxigenic fungi and

mycotoxin production.

- 17) Water damaged buildings have a distinct fungal ecology than outdoor molds or non-water damaged buildings. The human effects of these water indicator fungi might have overlap with outdoor fungal diseases yet are distinct.
- 18) Preliminary studies (including studies for USC and Mt Sinai) have shown neuropsychologic aberrations in patients exposed to mold.
- 19) Mold has been found to reside in the upper and lower airways of many persons with chronic respiratory disease.
- 20) Mold growth is accompanied by bacteria growth and potentially inflammatory bacterial products
- 21) “The claim by the AAAAI position paper to “review the state of the science of mold related disease is questioned because many important studies are not considered, and those considered are often accepted or rejected without evidence based discussion. Apparent statements of fact are not supported by any references, or are supported only by reference to an author’s 1 page editorial, an outdated article, or an article with negative results, while ignoring positive results from the same and other authors.”

- 23) What is the support for authors conclusion that threshold level of mycotoxins cannot be reached besides the ACOEM paper which references a rat study?
- 24) Questions whether any discussion or peer review took place and notes that an original author withdrew his name because his contributions were rewritten to reach unsupported conclusions.
- 25) Several other medical journals recently retracted articles and implemented procedures to disclose author' conflicts of interest because of postpublication revelations that impugned credibility.
- 26) "The authors are 2 Ph.D principals of a defense litigation support corporation and a physician who is an author of both the ACOEM and the Academy's mold statement. This physician also provides expert testimony for defense in mold litigation."
- 27) "Of the 83 references "reviewed" by the ACOEM, only one comes to the conclusion that human illness is" highly unlikely at best." It was written by an ACOEM author and fellow principals in the litigation defense support corporation. The finding of "highly unlikely at best" is based solely on the mathematic extrapolation from a single rat study and calculated by the litigation defense corporation

principals.”

- 28) That conclusion was found by the courts not to be based on sound scientific protocol to deduce absence of human illness.
- 29) Are the members of the Academy of the opinion that it is accepted scientific protocol for 2 influential medical associations to deduce that all human illness is “highly unlikely at best” and “its occurrence is Improbable” based solely on questioned math from a rodent study?”

### **VII-Fraser is Most Important for What the Dissent Says**

#### **And It Will be Subject to Automatic Appeal**

*Fraser v. 301-52 Townhouse Corp.* 57 A.D.3d 416 (N.Y. 2008) is truly most important for what the 13 page dissent states about the 3 page opinion. This case will go to automatic appeal before the Court of Appeals ( Appendix 9) once the property portion of the case is resolved.

This dissent comports with *Logerquist*. in stating the following:

- In response to the 2002 ACOEM paper: “Occupational and Environmental physicians involved in direct patient care and research disagree with the conclusion by ‘scientists’ with mostly theoretical or peripheral experience about these clinical

matters”

- “Defendants experts never identified how plaintiffs’ mold-measuring methodology was novel such that plaintiffs should have been required to establish general acceptance.” p. 11
- “Courts have warned against an over-restrictive use of Frye.
- “...a link between building dampness and illness is not the type of ‘theoretical speculation or...scientific ‘hunch’ that Frye hearings are designed to weed out.
- “... to the extent that this court has in recent history precluded expert testimony under *Frye*, it has based such decisions upon a complete *absence* of literature or studies supporting the claim.(cites omitted).Here, a *plethora* of peer reviewed articles supports plaintiffs’ claim.”
- “Differential diagnosis has been recently accepted by the Fourth Department as a generally accepted method for establishing specific causation in mold cases.
- “Dr. Johanning’s differential diagnosis was scientifically valid and the motion court articulated no basis for concluding otherwise.”

- “The fact that there were significant water intrusions into the subject apartment was apparently never in dispute.”
- “There is no requirement that the proponent of expert scientific opinion prove the ultimate theory of the case during a *Frye* hearing. Rather, he or she must only establish the basic reliability of the methodology utilized to reach that conclusion. As we recently held, any further challenges to an expert’s methodology and/or conclusions above and beyond its basic reliability are more “properly the subject of cross-examination at trial, as they go to credibility and to the weight to be given to the evidence.”
- “...the motion court usurped the function of the jury here and became the finder of fact, not as to whether or not plaintiffs’ theories and evidence satisfied the *Frye* and *Parker* tests, but of the ultimate question as to whether defendants were responsible for plaintiffs injuries.”

### **VIII - There Is Nothing Similar between Kilain and This Case**

In *Kilian v. JWE Management, et al.*, CV 2000-014108 Judge Fields

admitted testimony concerning mycotoxin caused immune toxicity and

neurobehavioral impairments, ruling that *Frye* did not apply “since the expert testimony does not rely on new scientific tests or techniques.” \*\*\* This type of evaluation or weighing of the evidence is clearly the province of the finder of fact under Arizona law citing *Logerquist v. McVey* ROA 1850 p.16-17.

*Kilian v. Equity Residential Trust* 3606894 (D. Ariz. July 27, 2004), concerned the apartment that Ms. Kilian moved to after she instituted the first case. Judge Martone heard all the evidence as a trial. Ms. Kilian never appeared for the trial and refused to make herself available to the court, the court held that even if it had reached a contrary conclusion with respect to *Daubert* her case would fail. “This case was not close....\*\*\*Plaintiff case is lacking in fundamental credibility. Much of the evidence showed that plaintiff was behaving unreasonably and with one eye on litigation. Her failure to even appear at trial, or to allow the court to come to her to weigh her credibility, confirms this court finding that this case is lacking in credibility.” The facts of the case mean everything.

### **IX - The *Logerquist* Rationale is the Most Practical One**

#### **For Deciding Scientific Causation Questions**

In Arizona, under *Logerquist* and *Lohmeier* trial courts are instructed to try not to insinuate themselves into determining the legitimacy of the scientific opinions unless it is absolutely necessary. They are supposed to tread gingerly and

decline to micro manage causation issues in order to give the jury broad latitude with which to make decisions. This is for good reason, otherwise in order for the court to choose the 'right' scientific conclusions, it must review a host of what may be differing legitimate scientific positions, and choose among them for what it believes to be the best one. To properly engage in this task, the court may have to become expert in examining and comparing various scientific articles from various angles regarding the subject matter in question. This is hard to do because the court does not have specialized scientific training to discern what is legitimate science both in witness presentation and journals, from what is not. Since the court is not trained it winds up, as it did in this case, choosing which expert to believe, and then defaults to the articles that those experts cited. This is exactly why Courts have to be extra cautious before they undertake *Frye* hearings and why prudence dictates that this court stick with the Rationale of the *Logerquist* rule and stay away from making these decisions unless someone proffers an ultimate test or procedure which promises to convey a simple and sometimes magic scientific analysis of 'cause'. In that kind of case, which is very unlike ours, the court should then closely analyze such an instrument of proof before allowing it to be given to the jury.

In this case, Appellees have placed and distorted the IOM Report as the



Gold Standard by which everything else is to be measured. But in real life Physicians do not turn to that source of information right away, if they do at all. For example, in *Evidence User guides to the Medical Literature, Ch. 4 Finding the Evidence* Ed Guyatt- 2d. Ed. American Medical Association 2008, a treatise that reflects the latest in medical research and evidence based resources which is a guide to the fundamentals of using medical literature in everyday patient care situations, doctors are instructed to turn to a number of journals including web based clinical queries in order to make evidence based medical decisions. There is not one single mention of this IOM report or any IOM report anywhere in this 836 page Users Guide to Medical Literature for determining medical causation. So just because a small group of experts, representing defense interests point to this does not really indicate how important it is to make medical decisions from any field of medicine including mold.

Even one of Appellees' main witnesses, Dr. Wasserman, said different opinions among scientists and physicians are not only permissible, since scientists and physicians disagree about everything, but disagreement is the state of the art (ROAM #343) (p.4 citing Ex. 3 p. 17 ) Expert medical opinion, he said, is not restricted, and the relevant medical community can consist of *various positions* on a particular scientific subject which may be based on plausible conclusions

supported by testing and evidence (ROAM 343 p.33-34). He also said he had not taken any surveys on what percentage of the medical community holds particular beliefs about mold causing illness. (ROAM 343, Ex. 3 p.14, 17, 33-34)

This is exactly the reason why Courts have to be extra cautious before they undertake *Frye* hearings and why prudence dictates that this court should stick with the Rationale of the *Logerquist* rule and why the trial court should have also and have avoided weighing the evidence in choosing who to believe.

If in *Lohmeier* the court speculates that perhaps more latitude should be given to the more educated trial judge rather than leaving these decisions to the commonsense judgment of a group of jury laymen, then our case is the banner child for just the opposite viewpoint. Perhaps the jury is a safety net for our legal system. Just as our democratic form of government has certain downsides, we nevertheless choose to follow it because it offers greater protections to the individual in an adversary situation to powerful interests than any other system; so too does the jury trial.

### CONCLUSION

We have seen in this case what happens, when the trial courts and in some cases appellate courts weigh all the scientific evidence and indiscriminately rely on experts who engineer their own scientific evidence, and through stealth tactics

insinuate it into the scientific literature for the purpose of persuading judges and juries of their own “junk science” positions. It is a shame that organizations like the Chamber of Commerce and the National Apartment Association are not accountable for their activities, and interfere with the true administration of justice. This court should not be deceived as some others have been and should grant a reversal.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 2009.

HAROLD HYAMS & ASSOCIATES, P.C.

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Harold Hyams, Esq.  
Attorney for Appellants

## CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief:

- Uses proportionately spaced type of 14 points or more, is double spaced using a roman font and contains 7,132 words, or
- Uses monospaced type of no more than 10.5 characters per inch and
- Does not exceed 40 pages (opening and answers briefs) or 20 pages (reply briefs).

Dated: November 9, 2009

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Harold Hyams  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

Harold Hyams hereby certifies that he is the attorney for Appellants in the above-captioned matter, and that on the 9<sup>th</sup> day of November, 2009 he caused to be mailed and/or hand-delivered the following:

1. Original and six copies of Appellants' Responsive Brief to Amicus Curiae Brief - National Apartment Association to:

CLERK OF THE COURT  
COURT OF APPEALS  
DIVISION ONE  
1501 WEST WASHINGTON  
PHOENIX, AZ 85007-3329

2. Two copies of the Appellants' Responsive Brief to Amicus Curiae Brief - National Apartment Association to:

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