

Excerpts of the Kelly ruling, April 14, 2006, Harold v. California Casualty Insurance

Entire Kelly Ruling available upon request.

Company in Sacramento County, case number O2AS04291. This Kelly-Frye ruling was in regard to the review paper entitled, "Risks from inhaled mycotoxins in indoor office and residential environments." Robbins Ca, Swenson IJ, Hardin BD. Coreen Robbins, Lonie Swenson, Bryan Hardin and Bruce Kelman are four of the six co-principals of Veritox, Inc. Bryan Hardin and Bruce Kelman are co-author of the ACOEM mold statement that is founded on the modeling theory as described below by Judge Kenney, presiding Judge in the Robbins Order, Kelly-Frye ruling.

Page 3: 19-27

THE COURT: The difficulties I had with her deposition transcript testimony, her expertise seems somewhat limited. Her testimony seems to reflect primarily a literature review. It does not seem to reflect actual experimentation. To the extent experimentation is reflected in her deposition testimony, it does seem to be substantially flawed by the inability or the failure to control for variables.

Also, when I reviewed the DHS repost from April of 2005, DHS, Department of Health Services was talking about the fact that they were unable to establish personal exposure levels at this point in time based on a lack of sufficient information, and yet Dr. Robbins is asking to take an even greater step and go beyond establishing, for example, a personal exposure level and jump to modeling, which is far more tenuous and far more unreliable even in establishing something that is as hard as a personal exposure level. So those are the difficulties I'm having with Dr. Robbins' testimony.

Page 4: 10-16

... I was at, at least initially, is I don't think I would allow Dr. Robbins to testify to – testify about animal studies that is to model. That is a huge leap. I don't see anything here that would justify letting her go to that length, particularly in light of where DHS is and DHS, in my mind, is at least at somewhat of the

forefront of these issues.

Page 6: 18-28 – Page 7: 1-5

Um, but responding to your particular issues, I can say she is not a toxicologist. Bruce Kellman, who works at GlobalTox, now Veritox, in her office is a toxicologist, and I'm sure he is more knowledgeable than she is on the specific toxicology issues, but um, you pointed out that it was a literature review only study. Um, I think, um, she has done two things.

She has reviewed the primary literature and we would offer her to, um, testify really to two aspects here. One is what does her view of the primary literature reveal kind of globally regarding how toxic, um, mold is – mycotoxins are. But in terms of this study, you're right, they were not in a laboratory themselves, they were simply relying upon laboratory studies that were done by others and based upon that they came up with this modeling study for extrapolation from animal to human purposes.

Page 8: 2-7 – Page 9: 8-21

THE COURT: The concern I had with regard to the animal studies was – was related to the modeling, to the extent that you have got her doing this literature review, coming up with a theory, postulating her theory, and then really having nothing to substantiate her theory with regard to the modeling other than the literature review. And I – I think that is a huge leap.

There is nothing there that is talking about the correlation between the humans and the animals. There is nothing there that is talking about the exposure pathways. One's inhalation is one's direct injection. There is nothing there talking about a control for the variables.

Um, and kind of the general sense in reading her deposition transcript was that there were a lot of assumptions that were being engaged in, and for me to allow her to testify about sort of the animal studies and the modeling results that she's postulating as a result of those is in many respects just an assumption based upon an

assumption based upon an assumption based upon a literature review.

Page 12: 17-19

Here I'm not hearing any of those things. I'm hearing essentially this jump from a literature review to a postulated model to a no harm result.

Page 13: 12-19

THE COURT: Well, I think that is a different issue. My fundamental problem is in looking at it from a Kelly Frye standpoint I just didn't see kind of a acceptance in the scientific community with regard to what she had done that would allow it to be sort of presented as such.

Page 14: 22-25

THE COURT: Well, because the difference here is a literature review in one thing. What she did is she jumped from a literature review to modeling to a result, all of which I think is very tenuous.

Page 28: 4-10

THE COURT: I can. With regard to Dr. Robbins relying upon her literature review and then jumping to animal studies and then jumping to modeling conclusions, my ruling there is she will not be allowed to present that. There is not a generally accepted view of that particular approach in the scientific community and so therefore it's inappropriate to present that to the jury.