

## 'Cornell' Accepts Causal Connection Between Toxic Mold and Injury

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The New York Appellate Division's recent decision in *Cornell v. 360 W. 51st Street Realty*<sup>1</sup> significantly alters the toxic mold litigation landscape and has important implications for landlords and contractors. The decision facilitates personal injury claims by building residents against landlords and contractors involving exposure to indoor mold and dampness.

Before *Cornell*, defendant landowners relied on *Fraser v. 301-52 Townhouse Corp.* to exclude plaintiffs' expert causation testimony and ultimately obtain summary judgment. In *Fraser*, the proffered scientific literature failed to demonstrate general acceptance of the theory that building dampness and mold cause respiratory ailments. And absent quantitative evidence regarding the plaintiffs' level of exposure to the alleged damp and moldy conditions, the plaintiffs failed to prove that the extent of their exposure was sufficient to cause their illness.<sup>2</sup>

Post-*Fraser*, courts read the case as a categorical rejection of toxic mold personal injury claims. But *Cornell* changed this. On the basis of two additional studies cited by the plaintiff's expert, the *Cornell* court described the causal relationship between mold and the plaintiff's injuries as "undisputed." The court also explained that *Fraser* does not require quantitative evidence of the plaintiff's exposure to mold; rather, it only requires that the plaintiff's expert use reliable methods in forming an opinion as to whether mold exposure caused the plaintiff's physical symptoms.<sup>3</sup>

This shift in case law will make it easier for residents to submit expert causation testimony and successfully assert toxic mold personal injury claims against their landlords. Correspondingly,

landlords will find it more difficult to preclude this causation testimony and, therefore, more difficult to avoid these claims on summary judgment.

### Personal Injury Claims

**Claim Elements.** A plaintiff alleging personal injury from toxic mold exposure must prove two types of causation. First, the plaintiff must establish general causation—that building dampness and mold are generally capable of causing the plaintiff's alleged illness. Then, the plaintiff must demonstrate specific causation—that the specific plaintiff's level of exposure to dampness and mold was sufficient to cause the alleged illness.<sup>4</sup> Expert opinion evidence is needed to support both causal theories.<sup>5</sup> To be admissible, this expert opinion evidence must satisfy the Frye standard.

**'Frye' Standard.** The Frye standard for admissibility requires novel scientific evidence to be "generally accepted as reliable within the relevant scientific community." The proponent of the evidence bears the burden to establish "general acceptance."<sup>6</sup> This burden, however, arises only after the opponent of the proffered evidence makes a prima facie case that the evidence is not generally accepted in the relevant scientific community.<sup>7</sup>

### 'Fraser'

In *Fraser*, a married couple and their infant child brought suit against their former apartment building owners, alleging personal injuries caused by damp and moldy apartment building conditions. Specifically, the plaintiffs claimed to suffer respiratory problems, rash, and fatigue. The defendants sought to preclude the plaintiffs' expert testimony on both general and specific causation.<sup>8</sup>

After a Frye hearing, the court found the causal theory underlying the expert testimony unsupported by the scientific literature on record and held therefore that the testimony was precluded. The court stated, however, that its "holding [did] not set forth any general rule that dampness and mold [could] never be considered the cause of a disease, only that such causation [had] not been demonstrated by the evidence presented by the plaintiffs [in *Fraser*]."<sup>9</sup>

**General Causation.** As to general causation, the court noted that "none" of the cited scientific literature could be considered evidence that damp or moldy indoor environments cause respiratory illness. Rather, the evidence indicated a general agreement on the "association" of indoor dampness

and mold with respiratory illness, but that this "association" was not strong enough to constitute "causation."<sup>10</sup>

In attempting to establish general causation, plaintiffs' expert Eckardt Johanning relied on two studies, neither of which sufficiently supported his theory. The first described only the "association" between a water-damaged building and respiratory ailments.<sup>11</sup> The authors also acknowledged that the risk of "participation bias" limited the study, which was based on voluntary responses to a questionnaire. The second study Johanning relied on focused on childhood asthma, an issue that the court noted was not relevant to the case.<sup>12</sup> Ultimately, Johanning failed to establish the "general acceptance of [plaintiffs'] view that indoor dampness and mold are capable of causing [the] plaintiffs' health problems."

**Specific Causation.** The plaintiffs also failed to demonstrate specific causation. Their experts did not specify the level of dampness or mold exposure needed to cause the plaintiffs' alleged ailments. In the absence of this threshold limit, the plaintiffs could not prove that they were exposed to a level of dampness or mold sufficient to cause their injuries. Nor did the plaintiffs even offer a reliable measurement of the level of dampness or the level of mold in their former apartment.<sup>13</sup> The court held that Johanning's method of differential diagnosis was an inadequate substitute for quantitative proof.

### 'Cornell'

*Cornell* is factually similar to *Fraser*, as both involve injuries allegedly caused by toxic mold exposure in the plaintiffs' apartment buildings.<sup>14</sup> In *Cornell*, the plaintiff lived in the subject apartment for six years before she began experiencing the alleged respiratory and allergic-type symptoms. Relying heavily on *Fraser*, the motion court in *Cornell* found that the plaintiff's causation theory failed the Frye standard and therefore granted summary judgment for the defendants.<sup>15</sup> The motion court acknowledged increasing public concern about the effects of mold on health, but stated that "the *Fraser* majority ha[d] resolved the issue of the sufficiency of the current epidemiological evidence to demonstrate causation," and that *Fraser* constrained it to hold that the plaintiff failed to prove general causation.<sup>16</sup>

But the New York Appellate Division reinstated the complaint, holding that the plaintiff's expert

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causation testimony "easily satisfied" the Frye standard.<sup>17</sup> The court quoted its own limiting language from *Fraser*, stating that *Fraser* did "not set forth any general rule that dampness and mold [could] never be considered the cause of a disease, only that such causation [had] not been demonstrated by the evidence presented by the plaintiffs [there]." In doing so, *Cornell* clarifies that no categorical exclusion of expert causation testimony in a toxic mold case exists.<sup>18</sup>

**General Causation.** The *Cornell* court heard much of the same expert testimony proffered in *Fraser*, yet reached the opposite conclusion. S. Michael Phillips, again testifying for the defendants, acknowledged that indoor mold can cause some of the plaintiff's alleged symptoms, but opined that mold did not cause the plaintiff's physical ailments, just as he did in *Fraser*.<sup>19</sup> But unlike in *Fraser*, where the court concluded that the experts for both parties agreed there was an "association" between physical ailments and damp and moldy building conditions, the *Cornell* court concluded that experts for both parties agreed that mold was "capable of causing" the plaintiff's alleged symptoms.<sup>20</sup>

Johanning, again testifying for the plaintiff, described mold as "a recognized cause of respiratory health complaints." In forming his opinion, Johanning relied on some of the same evidence that was held insufficient to support a theory of general causation in *Fraser*, but supplemented his analysis with two additional studies.<sup>21</sup>

The first study concluded, "[t]he preponderance of epidemiological data supports a link between exposure to dampness and excess mold growth and the development of aeroirritant symptoms."<sup>22</sup> The authors noted that other studies had found a "statistically significant relationship" between mold exposure and respiratory symptoms. The second study examined workers in a water-damaged building and found that "respiratory illnesses showed significant linear exposure-response relationships," and specifically that exposure to mold in floor and chair dust was associated with a twofold increase in post-asthma occupancy risk.<sup>23</sup> Primarily on the basis of these supplemental studies, the court concluded that the evidence "easily satisfied" the Frye standard, as it "demonstrate[d] a clear relationship" between mold exposure and respiratory illness.

Whereas the *Fraser* court found that the "association" between illness and indoor dampness or mold was insufficient to indicate a causal relationship,<sup>24</sup> the *Cornell* court held that the "association" supported by the supplemental evidence was sufficiently strong to constitute "causation."<sup>25</sup>

**Specific Causation.** The plaintiff also successfully established specific causation. The court found that the evidence confirmed the presence of mold in the plaintiff's former apartment, as well as that exposure to this mold caused the plaintiff's alleged physical symptoms. Importantly, the court held that the plaintiff need not quantify her exposure level to mold, as it is sometimes impossible to quantify the level of exposure to a toxin. Instead, the court required only that the expert use reliable methodology in reaching his conclusion.<sup>26</sup>

Johanning relied on the same differential diagnosis methodology used in *Fraser* to reach his specific causation conclusion in *Cornell*.<sup>27</sup> Based on his differential diagnosis, he stated, "with a reasonable degree of medical certainty, that the plaintiff's

irritative and allergic-type symptomatology was caused by exposure to building dampness and excessive and atypical mold exposure." He further stated there was "no question" that the damp and moldy conditions in the plaintiff's apartment building "had a host of deleterious effects" on her health.<sup>28</sup>

The motion court rejected Johanning's testimony, reasoning that *Fraser* had previously rejected his specific causation opinion based on a differential diagnosis. But the Appellate Division disagreed, opining that the court had never rejected differential diagnosis as unreliable methodology; instead, the court had rejected specific causation testimony based on a differential diagnosis when general causation had not been established.<sup>29</sup> Thus, the *Cornell* court's finding of general causation seems to support its finding of specific causation.

### Landlords and Contractors

To limit liability in light of *Cornell*, landlords and contractors should take proactive steps to identify and remedy mold issues so that tenants will be unable to bring claims based on long-term mold exposure. More importantly, if a landlord or contractor receives notice of such conditions, remedial measures must be implemented immediately even if it means relocating the tenant if the mold problem requires more extensive remediation.

In addition to addressing the underlying cause of building dampness related to the building's envelope or internal leaks, remedial measures might include hiring certified professionals/industrial hygienists to remove mold, sealing off problem areas until cleanup is complete, or even evacuating the entire area affected by the mold. The appropriate measure depends on the nature of the building and the severity of the moldy conditions, as well as any allegations of health problems related to the mold. Of particular concern are those tenants who may have compromised immune systems, the elderly or young children.

This proactive approach will enable landlords and contractors to minimize mold exposure among building residents. Studies indicate that symptoms potentially associated with mold exposure subside when the exposure ends,<sup>30</sup> and therefore, these remedial measures can also minimize the risk of adverse health effects.

If landlords and contractors fail to properly address moldy conditions, they could face lawsuits and, after *Cornell*, could be forced to pay personal injury damages. In addition to personal injury, residents might also bring claims for constructive eviction, breach of implied warranty of habitability, rent abatement, or even motions for class certification.<sup>31</sup> Landlords and contractors may also face punitive damages for particularly egregious conduct. Thus, to limit liability, landlords and contractors should proactively implement mold identification and remediation strategies and should promptly investigate and respond to residents' moldy building condition complaints.

### Litigation After 'Cornell'

The precedent *Cornell* set is potentially problematic for all New York landlords, but particularly for those owning large buildings with envelope problems or a significant internal water leak. The *Cornell* decision sets a low hurdle for personal injury claims based on the resident's exposure to indoor mold and dampness to survive summary judgment. Indeed,

the decision does not require much evidence to connect allegations of mold exposure with respiratory and other similar ailments, which have multiple confounding factors and can be difficult to disprove. Defendants can no longer rely on *Fraser* to preclude plaintiffs' expert causation testimony. To the contrary, plaintiffs may now rely on *Cornell* to support the admissibility of their expert testimony and survive summary judgment.

By citing to the studies on which Johanning relied, plaintiffs can satisfy the Frye standard and establish general causation. And *Cornell* suggests that after general causation has been established, expert testimony based on a differential diagnosis is sufficient to satisfy Frye and demonstrate specific causation.

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1. 939 N.Y.S.2d 434 (N.Y.App.Div. 2012).
2. 870 N.Y.S.2d 266, 268-70 (N.Y.App.Div. 2008).
3. *Cornell*, 939 N.Y.S.2d at 440-41.
4. *Fraser*, 870 N.Y.S.2d at 269-70, (citing *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448 (2006)).
5. See *id.* at 267 (requiring expert testimony on the issue of causation).
6. *Id.* at 267-70.
7. *Id.* at 278 (Mazzarelli, J.P., dissenting).
8. *Id.* at 267 (majority).
9. *Id.* at 268-69.
10. *Id.* at 268-69.
11. *Id.* at 269 n.3 (discussing *Cox-Ganser, et al., Respiratory Morbidity in Office Workers in a Water-Damaged Building*, 113 *Envtl. Health Persp.* 485 (2005)).
12. *Id.* (discussing Jaakkola, Home Dampness and Mold, Parental Atopy and Asthma in Childhood: A Six-Year Population-Based Cohort Study, 113 *Envtl. Health Persp.* 357 (2005)).
13. See *id.* at 269-70 (explaining there is no standard method for measuring "dampness," and that plaintiffs' expert failed to comply with plaintiffs' own authority regarding standards for measuring inhalation exposure).
14. *Cornell*, 939 N.Y.S.2d at 435.
15. *Id.* at 435-36.
16. *Id.* at 439.
17. *Id.* at 440.
18. *Id.* at 435 (quoting *Fraser*, 870 N.Y.S.2d at 268).
19. *Id.* at 437; *Fraser*, 870 N.Y.S.2d at 267, 272-73.
20. *Cornell*, 939 N.Y.S.2d at 441 (emphasis added).
21. *Id.* at 437-38.
22. *Id.* (quoting *Excess dampness and mold growth in homes: An evidence-based review of the aeroirritant effect and its potential causes*, 28 *J. Of Allergy And Asthma Proc.*, May/June 2007).
23. *Id.* at 439-40 (quoting Hydrophilic Fungi and Ergosterol Associated with Respiratory Illness in a Water-Damaged Building, 116 *Envtl. Health Persp.*, June 2008).
24. *Fraser*, 870 N.Y.S.2d at 269-70.
25. *Cornell*, 939 N.Y.S.2d at 440.
26. *Id.* at 440-41.
27. *Id.* at 441.
28. *Id.* at 438.
29. See *id.* at 441 (explaining that "in order to be considered as a possible cause, in a differential diagnosis matrix, a given agent must be capable of causing the harm observed).
30. See, e.g., *Am. Indus. Hygiene Assoc., Facts About Mold* (2011), available at <http://www.aiha.org/news-pubs/newsroom/Documents/Facts About Mold December 2011.pdf> ("Most symptoms are temporary and eliminated by correcting the mold problem."); Mark J. Mendell et al., *Respiratory and Allergic Health Effects of Dampness, Mold, and Dampness-Related Agents: A Review of the Epidemiologic Evidence*, 116 *Envtl. Health Persp.* 748 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3114807> (discussing the importance of indoor mold prevention and remediation).
31. However, courts are unlikely to grant class certification on personal injury grounds, but might on contractual type claims. See, e.g., *Brandner v. Abbott Labs., Inc.*, 2012 U.S. Dist. Lexis 7017, at \*11-15 (E.D. La. Jan. 23, 2012) (explaining that individual issues predominate over issues common to the class).