SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

July 27, 2006

Timothy Jay Houseal, Esquire
Young, Conaway, Stargatt & Taylor, LLP
1000 West Street, 17th Floor
P. O. Box 391
Wilmington, DE 19899-0391

Mary R. Sherlock, Esquire
8 The Green
Suite 4
Dover, DE 19901

Eugene H. Bayard, Esquire
David C. Hutt, Esquire
Wilson, Halbrook & Bayard
107 West Market Street
P. O. Box 690
Georgetown, DE 19947

Patrick E. Vanderslice, Esquire
Moore & Rutt, PA
122 West Market Street
P. O. Box 554
Georgetown, DE 19947

RE: Denise M. Duncan v. O.A. Newton & Sons Co., et al.,
C. A. No. 04C-03-033 THG

Dear Counsel:

Before the Court are motions to compel discovery or to prevent Plaintiff Denise M. Duncan ("Plaintiff") from calling experts at the scheduled trial in September. No expert opinion reports have been provided pursuant to the scheduling order. Also before the Court are the respective Motions of defendants O. A. Newton & Sons Company and Quality Mechanical, Inc. ("Defendants") for Summary Judgment based upon the statute of limitations and, alternatively, based on the failure of Plaintiff to produce an expert report linking any mold in her home to her many physical ailments. The Motions for Summary Judgment are granted for several alternative reasons, thereby mooting the other motions.

FACTUAL BACKGROUND

In 1975, Plaintiff's husband purchased a modular pre-built home from O. A. Newton & Son Company ("Newton"). In 1977, Plaintiff moved into that home. She resided in the home until August, 2002, except for a period when she moved out between mid-November 2001, and March, 2002.

Plaintiff has not enjoyed good health. She is 45 years of age. She has been a long-time smoker. She has many allergies. She has many different ailments, including, but not limited to, seizures, coronary problems, respiratory problems, irritable bowel, hiatal hernia, reflux, and osteoporosis.

Plaintiff has many doctors and has been hospitalized for her medical problems. Mental health issues also have been reported and in April, 2002, she spent four days in MeadowWood, a mental health facility.

At some time, but at least by 2001, she began to believe that her house was the source of her major medical problems. The focus was on carbon monoxide, carbon dioxide and mold.

In 2001, her neighbor, a plumber, went into the crawl space under her house, took photographs of mold, and obtained samples of it. Plaintiff had Gerald Llewellyn, Ph.D., a State Health Inspector, come to her home. He did not go into the crawl space to see the mold, but Plaintiff told him about it and showed him the pictures. He told her "that the toxic mold can make me black out or pass out or syncopes, which is in here as well". Transcript of Plaintiff's deposition dated May 31, 2006 at page 76, Line 3, (hereinafter, "P.__ , Plaintiff's deposition"). Plaintiff also said Dr. Llewellyn told her she should not be living in the house. (P. 125, Plaintiff's deposition).

In the fall of 2001, Plaintiff specifically complained about mold and discussed it with her family physician, Dr. John Appiott. She took him a sample of the mold and discussed getting it tested. The cost was approximately $1,500.00. (Page 15, Plaintiff's deposition). The sample was not tested.

She saw Jack L. Snitzer, D.O., FACOI, FACE, a specialist in diabetes and endocrinology, who noted in October, 2001:

> She has an exposure history apparently to carbon monoxide and carbon dioxide. Also questionable bacterial or fungal spores under her house.

In his impressions, he noted: "possibly some bacterial or fungal contamination at home".

Her homeowner's insurance company conducted an environmental inspection of her home. On March 19, 2002, that report was produced. It is known as the "Clayton report".

The report noted the following:

a. In the crawl space a condensation drip line allowed condensated water to drip onto the sandy soil.

b. On the outside of the house along the foundation, it is evident that the outside grade is higher than the level of the louvered air vents. This will allow rain water to flow through the vents and into the crawl space.

c. The heating, ventilating and air conditioning ("HVAC") was installed in 1992. [This was done by Defendant Quality Mechanical, Inc. ("Mechanical")]. The air filter had not been changed since installed in 1992.

d. The surface of the AHU (air handler unit) and the condensate drip line have some discoloration that appears to be mold growth. Tape lift samples were collected for microscopic fungal analysis.

As to the dining room, the report noted at page 10:

Dining Room

> Analytical results of the air sample collected in the dining room indicated a culturable fungal concentration of 165 cfu/m3 on the CMA and 130 cfu/m3 on the MEA. The overall fungal concentration was similar to the outdoor samples with similar species identified in the outdoor samples. However, a low concentration of *Aspergillus ochraceus* was identified on both the CMA and MEA in comparison to the other fungal taxa present. *Aspergillus ochraceus* was not identified in any of the outdoor samples and was also identified in the crawl space samples.
>
> Analytical results suggest that there is a fungal reservoir or amplification site in the dining room influencing the space. *Aspergillus ochraceus* was identified in the debris collected and analyzed from in [sic] the supply duct serving the dining room. The sources of the fungi are most likely a combination of the outdoor air, fungi growing in the debris in the supply ventilation ducts, and the return air system pulling in air from the crawl space.

As to the crawl space, the report noted at page 10:

> Crawl Space
>
> Analytical results of the air sample collected in the crawl space indicated a culturable fungal concentration of 1,319 cfu/m3 on the CMA and 3,969 cfu/m3 on the MEA. *Cladosporium, Penicillium, epicoccum nigrum* and *Aspergillus ochraceus* were identified on both the CMA and MEA. The overall fungal concentration is high; however, the rank order and biodiversity of fungal species identified is similar to those seen in the outdoors samples collected.
>
> The analytical results suggest that there is a fungal reservoir or amplification site in the crawl space influencing the space. *Aspergillus ochraceus* was identified in lower concentrations than the other fungi identified on both the CMA and MEA samples but was not identified in any of the three outdoor samples. Additionally, *Chaetomium* was also identified in lower concentrations than the other fungi identified in the crawl space and was not present in any of the outdoor samples. The presence of *Aspergillus* and *Chaetomium* suggest a continuous source of moisture and organic food sources of these fungi and other fungi to proliferate in the crawl space.

Also noted was that:

> Tape lift samples collected confirmed the visual observations that the surfaces were contaminated with fungal growth.

The conclusions of the report located on page 15, noted that: ". . . fungal amplification is present in the crawl space . . . and in the debris present in the supply ducts", which entered after installation of the system.

Finally, the report concludes:

> 5. There are no United States Federal regulations for evaluating potential health effects of fungal contamination. All molds have the potential to cause health effects, and the presence of fungal contamination and moisture-damaged building materials are generally not considered acceptable in indoor environments.

Plaintiff filed suit on March 19, 2004. She alleges Newton is liable for her medical ailments because the grade around the house which was installed allowed water to enter the vents in the foundation which also allowed organic materials to enter the crawl space which in turn created an environment for mold to grow. When this occurred since 1975 is unknown.

She alleges Mechanical is liable for her medical ailments because it allowed the condensation drip in the crawl space to create an environment for mold to grow. When this occurred since 1992 is unknown.

Plaintiff further alleges in her complaint that Mechanical allowed the filter to remain dirty and did not properly maintain the unit since its installation. In Mechanical's summary judgment motion, the President of Mechanical submitted an affidavit that (a) in 1992, Mechanical installed the unit which had a one year warranty; (b) a service call request was made in July, 1993, and the unit was serviced; (c) a preventative maintenance agreement was offered at an additional cost but Mr. and/or Mrs. Duncan never contracted for same; and (d) Mechanical has not been to the Duncan residence since July, 1993.

In her response, Plaintiff only states whether Mechanical continued to visit is a fact that remains in dispute. Plaintiff has not produced or discovered any records that dispute the affidavit and records of Mechanical. The Clayton report notes owners advised the air filter had not been changed since 1992, supporting Mechanical's position that it has not been there since 1993. The Clayton report also noted a return duct was separated, but there is no indication as to when this separation occurred.

What this case has boiled down to is as follows. Newton's improper grading in 1975 allowed water intrusion into the crawl space and/or Mechanical's placement of condensation drip pipes in the crawl space allowed a moisture build-up. The water or moisture created an environment for mold. The mold caused Plaintiff's medical conditions.

STANDARD OF REVIEW

Summary judgment only will be granted when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[1] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[2] If, after discovery, the non-moving party cannot make a sufficient showing

[1] *Id.* at 681.

[2] Super. Ct. Civ. Rule 56 (e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986).

of the existence of an essential element of his or her case, summary judgment must be granted.[3] If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.[4] The evidence is viewed in the light most favorable to the non-moving party.[5]

PROCEDURAL PROBLEMS

On or before April 3, 2006, Plaintiff was required to identify her experts and provide Defendants with her expert opinion reports. Defendants had to identify their experts and produce their related reports by June 1, 2006.

A two week trial was scheduled to begin on Monday, September 18, 2006.

First signs of trouble as to discovery took place when Mechanical noticed a Motion to Compel as to outstanding Interrogatories. Interrogatories filed in February, 2005 had not been answered despite Mechanical's urging. The Motion to Compel was granted on January 20, 2006.

On April 3, 2006, Plaintiff identified her experts but provided no expert opinion reports other than incorporating the Clayton report mentioned above which was attached to the original complaint.

Plaintiff identified Edward A. Emmitt, M.D., as her doctor specializing in occupational and environmental medicine. His opinions are key to this case. No report was provided.

Also, in Plaintiff's April 3rd discovery response, she identified eight treating physicians (general practice, orthopedic surgery, neurological surgery, neurology, pain management, and gastroenterolgy), saying no more than that their opinions will be consistent with Dr. Emmitt's. Of course, since Dr. Emmitt's report has not been provided, it would be futile to depose the doctors.

With no expert reports being made available, Newton filed a Motion to Compel the reports, or in the alternative, a Motion in Limine to exclude the experts from testifying. Mechanical joined Newton in these motions, noting the time delays had become prejudicial and dispositive motions would be filed.

The motions were noticed for May 12, 2006. Plaintiff's counsel did not appear. Later, Plaintiff's counsel apologized to the Court and opposing counsel, informing all that there was a mix-up in his calendar.

By way of a teleconference on May 17, 2006, the motions were to be addressed, but a potential attorney-client conflict problem with Plaintiff's counsel resulted in it being moved to May

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[3] *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991), *cert. denied,* 504 U.S. 912 (1992); *Celotex Corp., supra.*
[4] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).
[5] *Merrill v. Crothall-American, Inc.,* 606 A.2d 96, 99-100 (Del. 1992).

25, 2006. On May 25th, Plaintiff's counsel still had not resolved the potential conflict so the motions were rescheduled for June 1, 2006. On June 1, 2006, Plaintiff still had not filed her expert opinion reports. Plaintiff's counsel informed the Court that the reports were too expensive and that the case should settle without obtaining them.

Unfortunately for Plaintiff, Defendants did not agree. The parties were far apart and Defendants had been pushing for discovery responses and to stay on track for trial. Since the discovery was not provided, Defendants desired to pursue a dispositive motion path and the above-noted summary judgment motions were filed.

Argument on the motions took place on June 16, 2006. On June 23, 2006, the Court requested that Plaintiff produce, by June 30, 2006, medical records previously provided to Defendants which causally connected the mold to any of Plaintiff's many ailments. This was requested because at oral argument, Defendants reported the records provided did not connect the mold allegations to her medical complaints. Plaintiff argued they did. Finally, on June 23, 2006, there was discussion of whether the grade allegation as to Newton was obvious or latent.

On June 30, 2006, Plaintiff timely filed the requested materials.

I have reviewed the medical records Plaintiff has provided. Plaintiff complained to her many medical providers about carbon dioxide, carbon monoxide and mold at her house.

In all of the records provided, the best Plaintiff can point to is a May 7, 2002 progress note of Dr. Appiott which states that the syncopes is "possibly related to living conditions." Other mental health impressions are noted.

The other records may contain notations about a mold or toxic mold but these are comments noted about what Plaintiff reports.

Contrary to Plaintiff's position, the medical records provided to the Court do not support her claim that there is a diagnosis in the records which supports her claim that her doctors have opined in her favor.

Perhaps recognizing same, Plaintiff included in her June 30th submission to the Court an affidavit of Dr. Appiott, her family or primary physician, dated June 30, 2006. The Court did not request such. What was requested were the medical records previously provided in discovery that medically connect the mold allegation to her medical condition.

Defendants immediately cried foul and asked that the Court not consider this last minute unsolicited affidavit. Defendants requested it be stricken from the record. Plaintiff has not responded.

Defendants' Motion to Strike is granted. Like the expert supplemental report produced in *Coleman v. Pricewaterhouse Coopers, LLC*,[6] Dr. Appiott's affidavit drops into this case like a bomb. It was not solicited and there is no record that Plaintiff communicated the intent to file same to Defendants, nor was any communication made with the Court. This affidavit appears to attempt to remedy Plaintiff's failure to comply with the April 3rd discovery deadline. It comes too late, and it would be unfair to consider it in light of the posture of this Motion and the Scheduling Order as to discovery and trial.

What is troubling is that Plaintiff made strategical decisions about compliance with discovery due to the expense of same. Now Plaintiff wants the Court to grant a "do over". Plaintiff's decisions must weigh into the exercise of the Court's discretion. Thus far in this case, many serious allegations against Defendants have been made, but the proof is lacking.

Finally, I note that not only does the affidavit come too late, it appears to be too little. Dr. Appiott reports in his June 30, 2006 affidavit that he diagnosed Plaintiff to be suffering from the effects of mold and fungal exposure. He references his May 7, 2002 progress report, but, as noted above, there is no such diagnosis. Two days later, on May 9, 2002, Dr. Appiott signed Plaintiff's discharge summary from Nanticoke Hospital. Mold or fungal exposure is not mentioned. The only environmental comment was "she needs to vacate her current home as it is known to have carbon monoxide poisoning". The affidavit which Dr. Appiott signed on June 30, 2006, flies in the face of his own medical records. Fairness and following this Court's rules and orders result in the striking of Dr. Appiott's affidavit.

One final argument of Plaintiff needs to be addressed.

Plaintiff argues that she does not need to do anything more than identify her expert witnesses and then Defendants can take depositions to learn what those opinions might be. This is contrary to the scheduling order and this Court's practice. Plaintiff was to identify her experts and provide their reports as to their expert opinions. Then, Defendants would be on notice of the bases for the expert opinions, and, pursuant to the scheduling order, respond in kind as to their experts and supply the bases for their opinions by way of a report. It is not reasonable to require Defendants' counsel to go on a wild goose chase with Plaintiff's experts or to depose Plaintiff's experts without the benefit of having the opinions and the medical or scientific reasoning for those opinions.

Defendants' summary judgment motions are granted. Plaintiff's failure to provide any medical opinion reports pursuant to the discovery order combined with Plaintiff's decisions about the economics of the case result in Plaintiff not being in a position to pursue her case. Expert medical testimony causally linking any mold in her house to her medical complaints is necessary. Without it, Plaintiff's case fails and summary judgment must be granted.

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[6] 2006 WL 1725566 (Del. Supr.)

HVAC EXPERTS - MECHANICAL

Mechanical also argues that summary judgment should be granted due to Plaintiff's failure to name or provide an expert as to the question of whether Mechanical's work in 1992 was done properly. Whether the HVAC system was designed and installed properly is not something a lay jury could determine without the benefit of an expert.[7] Whether it was proper or improper or a breach of any Code to permit condensate to drip into sandy soil under a house is also something that would require an expert witness.

Plaintiff has failed to provide an expert's report as to Mechanical's negligence or workmanship. The issue involves work done in 1992. To allow a jury to make a decision without supporting expert testimony would result in a speculative verdict. Summary judgment is granted Mechanical due to Plaintiff's failure of proof as to this claim.

STATUTE OF LIMITATIONS AS TO NEWTON

In 1975, Newton placed the home and had the grading performed, presumably by the Third-Party Defendant A. C. Givens & Son, Inc.

In Plaintiff's lawsuit, Plaintiff complains that the grade on the outside of the house allowed rain water to flow under the house and into the crawl space by way of the louvered air vents in the foundation. She further alleges that some time since 1975, the water intrusion became the cause of mold growth which was not discovered until at least 26 years later.

Water flows downhill. If the grade was such that it allowed water to back up against the foundation and enter the crawl space through the vents, then this unworkmanlike grading was obvious. Plaintiff's husband as well as Plaintiff are charged with knowledge of the obvious.[8] She cannot now complain that what was going on in the crawl space was not discoverable when the cause of the problem was knowable. Grading is a patent defect discoverable through reasonable inspection.[9] Plaintiff's latent defect argument fails. Since the Statute of Limitations began to run approximately 29 years before the lawsuit was filed, it expired long ago. Newton's Motion for Summary Judgment as to the Statute of Limitations is granted.

STATUTE OF LIMITATIONS
TIME OF DISCOVERY

Alternatively, even if I applied the time of discovery rule to the claims against Newton and Mechanical, Plaintiff still has filed too late.

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[7] *Brandt v. Rokeby Realty Co.*, 2004 WL 2050519 (Del. Super.).

[8] *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Associates, Inc.*, 1988 WL 90569 *5 (Del. Super.), *citing Baker v. Hamada, Inc.,* 455 A.2d 353 (Del. 1982)

[9] *George v. Kuschura*, 1986 WL 6588, *6 (Del. Super.).

On March 19, 2004, Plaintiff filed the present lawsuit. Defendants argue that even if the time of discovery theory is applied, Plaintiff still is barred from pursing this claim because she should have filed suit earlier based on what she knew and when she knew it. All parties have focused on the two year statute of limitations[10] and looked to what Plaintiff knew before March, 2002.

Plaintiff argues that she had her suspicions about mold, but the dots were not connected until at least when she received the Clayton report which identifies potential toxic mold in her home. Plaintiff also argues that the two-year limitations period should not begin until Plaintiff relayed the results of the Clayton report to her family doctor and he confirmed her symptoms were related to the mold exposure.

Defendants argue Plaintiff was fully charged with facts that required the statute of limitations clock to begin running in the fall of 2001 and, therefore, her lawsuit, filed in March 2004, comes too late.

It is necessary for the Court to conduct a fact intensive inquiry as to what the Plaintiff knew, when she knew it, and determine whether the Plaintiff was blamelessly ignorant of her potential claim or dilatory in pursuing the action.[11]

When the "injury" occurs for triggering the two-year statute of limitations in a time of discovery scenario is basically the time Plaintiff should have discovered the injury.[12] It is the point in time that the claimant is "on notice that the injury may be tortiously caused" by defendant.[13] Stated another way, the statute of limitations clock begins to run

> "upon discovery of facts' constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence, on inquiry which, *if pursued*, would lead to the discovery of such facts."[14] (emphasis added).

When a plaintiff is on notice of a potential claim, the clock begins to run.[15] It is not when all the dots have been connected as Plaintiff argues. It is when Plaintiff was reasonably on notice that her

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[10]The law in Delaware is that the two year statute of limitations for personal injuries as set forth in 10 Del. C. §8119 applies to all actions seeking personal injuries, whether the claim originates in contract or tort. *Riley v. Schnee*, 560 A.2d 491 (Del. 1989); *Shaw v. Aetna Life Insurance Company*, 395 A.2d 384 (Del. Super. Ct. 1978); *Patterson v. Vincent*, 61 A.2d 416 (Del. Super. Ct. 1948)

[11]*Brown v. E. I. duPont de Nemours and Company, Inc.*, 820 A.2d 362 (Del. 2003).

[12]*Brown,* 820 A.2d at 366, *citing Layton v. Allen,* 246 A.2d 794, 797 (Del. 1968).

[13]*Brown,* 820 A.2d at 368.

[14]*Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*,, 860 A.2d 312, 319 (Del. 2004), *quoting Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982).

[15]*Brown*, 820 A.2d.

medical complaints may be attributable to the mold in her house. It is when Plaintiff loses her status of being "blamelessly ignorant".

Plaintiff relies heavily on the asbestos cases, particularly *Collins v. Pittsburgh Corning Corporation*.[16] In *Collins*, the Supreme Court noted that asbestos cases are unusual and difficult because many people have been exposed to asbestos in the workplace and therefore, a person's subjective belief of illness was not sufficient to place him or her on notice. Also noteworthy is that the defendant's doctors assured him there was no asbestos-related illness. Finally, the Supreme Court noted:

> Fixing the period of limitations in asbestos exposure cases is often problematic because of the acknowledged latency period . . . associated with asbestos.[17]

Returning to the facts of this case, when does Plaintiff lose her blamelessly ignorant status or become dilatory in not timely prosecuting her claim?

My conclusion is that it is at least by the end of 2001 for the following reasons:

1. Plaintiff knew she was sick. She was not subjectively sick. She was objectively ill with many problems.

2. Plaintiff had photos of the mold under her house. Plaintiff had physical samples of the mold under her house.

3. Dr. Llewellyn had come to her home and made her aware that toxic mold "can make me pass out or pass out or syncopes". Further, he told her not to live there.

4. She took samples to her doctor and discussed the samples with her doctor. The samples were not tested. Plaintiff testified the cost was approximately $1,500.00.

5. She saw Dr. Snitzer who noted the possibility of fungal contamination in her home.

Under these circumstances, I feel that Plaintiff was not blamelessly ignorant. Her decision not to pursue the testing of the samples should not result in the statute of limitations being held in abeyance until samples were later tested per the Clayton report. Time of discovery does not mean that the statute of limitations does not run until Plaintiff is told by her doctor or lawyer that she has a cause of action. After being put on notice as to the possibility of mold being the cause of her

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[16] 673 A.2d 159 (Del. 1996).
[17] *Collins*, 673 A.2d at 162.

medical issues and armed with a sample, she should have begun her inquiry in 2001. Summary judgment is granted based upon the time of discovery/statute of limitations issue.

In conclusion, the summary judgment motions of Defendants are alternatively granted for the failure of Plaintiff to produce the expert evidence as to medical causation, the failure to have a HVAC or other expert concerning Mechanical's work, and for the failure to timely file her lawsuit. In light of these decisions, all other pending motions are deemed moot and the case is removed from the September trial calendar.

IT IS SO ORDERED.

Yours very truly,

T. Henley Graves

THG:baj
cc: Prothonotary