IN THE SUPREME COURT OF OHIO

LOUISE TERRY, et al.,	:	
	:	
Plaintiffs/Appellees,	:	
	:	**Case No. 2006-0705**
	:	
v.	:	**Discretionary Appeal**
	:	**from Ottawa County Court**
OTTAWA COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DELAY, et al.,	:	**of Appeals, Sixth Appellate District (OT-05-009)**
	:	
Defendants/Appellants.	:	

MOTION FOR RECONSIDERATION OF APPELLEES LOUISE TERRY, ET AL.

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INTRODUCTION

Pursuant to S.Ct. Prac. R. XI (2), Appellees Louise Terry, et al., move this Honorable Court to reconsider the order which it has entered in this matter in order to clarify that the claims of emotional distress are specifically remanded to the Ottawa County Court of Common Pleas. After this Court's Order, Appellees still have two remaining claims. These remaining claims are based on the negligent and intentional infliction of emotional distress – issues which were not raised by Appellants in their trial court motion for summary judgment and which the Court of Appeals specifically found were not properly denied by the trial court. Appellees request clarification from this Court that this matter is remanded to the Court of Common Pleas of Ottawa County for all claims that were not raised by the Appellants and which were explicitly held by the Sixth District Court of Appeals to remain pending. Because the ruling of this Court was silent with respect to any claims not related to the personal injuries of the Appellees caused by their exposure to harmful workplace elements, Appellees respectfully request an order from this Honorable Court remanding their pending claims for emotional distress to the trial court.

ARGUMENT

A. Clarification is necessary to protect the remaining claims of Appellees.

As noted in Appellees' Merit Brief, the pleadings included causes of action for intentional and negligent infliction of emotional distress. Merit Brief, p. 1. Appellees' claims for emotional distress were not raised in Appellants' motion for summary judgment or in any of the filings before this Court. Id. Appellees also highlighted that the appellate court found that the trial court did not address the emotional distress claims. Id. The court of appeals held that the claims of intentional and negligent emotional distress were not raised in

Appellants' motion for summary judgment. 165 Ohio App.3d 638, 2006-Ohio-866, at ¶90. As stated by the Court of Appeals:

> [Appellees] are correct in that [Appellants] did not move for judgment on the claims for emotional distress. "A claim for intentional infliction of emotional distress is an independent action." *Meyers v. Hot Bagels Factory, Inc.* (1999), 131 Ohio App.3d 82, 92, 721 N.E.2d 1068, citing *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 6 OBR 421, 453 N.E.2d 666. A claim for emotional distress will lie where one who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another. Id. at the syllabus. It is not necessary for a plaintiff to prove bodily injury in order to maintain his or her claim. Id.

Id. at ¶90.

The primary reason that the trial court dismissed all of Appellees' claims was the complete exclusion of the testimony of Dr. Jonathan Bernstein. The trial court, however, never analyzed the Appellees' claims of intentional and negligent infliction of emotional distress. As noted by Appellees in their response to Appellants' motion for summary judgment, Appellants moved for summary judgment on Appellees' personal injury claims only. Plfs.' Opp. to Defs.' Motion for Summary Judgment, p. 2. Appellees' claims for emotional distress were not addressed by Appellants in their motion or by the trial court in its decision. As movants, Appellants were required to inform "the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296. When the moving party fails to address one or more of the nonmoving party's claims for relief, the trial court should construe the motion as one for partial summary judgment and determine that the remaining claims are viable. *ABN AMRO Mortgage Group v. Meyers*, 159 Ohio App.3d 608, 2005-Ohio 602, ¶¶8, 14. See, also, *ABN AMRO Mortgage Group, Inc. v. Arnold*, 2nd Dist. No. 20530, 2005-Ohio-925,

¶16 (the court erred in granting summary judgment on all the issues because movant failed to show a lack of material fact as to some of the issues). Therefore, the emotional distress claims must be remanded to the trial court.

"If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just." Civ.R. 56(D).

As unequivocally argued in Appellants' motion for summary judgment, they only sought summary judgment as to Appellees' personal injuries claims. The elements of the emotional distress claims were not delineated by Appellants in their brief or by the trial court in its opinion. Because emotional and physical injuries are distinct, see *Sinclair v. Graham*, 3rd Dist. No. 16-04-12, 2005-Ohio-1096, ¶¶6-7, the trial court incorrectly granted summary judgment as to issues not raised by motion.

1. Intentional Infliction of Emotional Distress.

"To establish a claim for intentional infliction of emotional distress, a plaintiff must show (1) that the actor either intended to cause emotional distress or knew of should have known that the actions taken would result in serious emotional distress to the plaintiff, (2) that the actor's conduct was so extreme and outrageous as to go 'beyond all possible bounds of decency' and was such that is would be considered as 'utterly intolerable in a civilized

community,' (3) that the actor's actions were the proximate cause of plaintiff's psychological injury, and (4) that the mental anguish suffered by the plaintiffs was serious and of such a nature that 'no reasonable man could be expected to endure it.'" *Buckman-Peirson v. Brannon*, 159 Ohio App.3d 12, 2004-Ohio-6074, ¶29; *Hale v. Dayton*, 2nd Dist. No. CA 18800, 2002-Ohio-542; *Yeager*, 6 Ohio St.3d 369, 374-75. "Serious" emotional distress is distress "beyond trifling mental disturbance, mere upset or hurt feelings." *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 78. Likewise, "serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." Id. When actually raised in summary judgment, "a plaintiff claiming severe and debilitating emotional distress must present some 'guarantee of genuineness' in support of his or her claim to prevent summary judgment in favor of the defendant." *Buckman-Peirson*, at ¶40; *Paugh*, at 76. Expert testimony on mental or emotional distress is not required. *Foster v. McDevitt* (1986), 31 Ohio App.3d 237, 239; *Paugh*, at 80; *Uebelacker v. Cincom Systems, Inc.* (1988), 48 Ohio App.3d 268, 276; *Buckman-Peirson*, at ¶41.

"Ohio courts have held that, as an alternative to and in lieu of expert testimony, a plaintiff may offer the testimony of lay witnesses acquainted with the plaintiff to show significant changes that they have observed in the emotional or habitual makeup of the plaintiff." *Buckman-Peirson*, at ¶41; *Paugh*, at 80; *Uebelacker*, at 276. As noted by the 2nd District, "jurisdictions that do not require expert medical testimony contend that the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress episodes took place." *Buckman-Peirson*, at ¶44. Further, "expert testimony is not

essential because other reliable forms of evidence, including physical manifestations of distress and subjective testimony, are available." *Miller v. Willbanks* (Tenn. 1999), 8 S.W.3d 607, 613, quoted with approval in *Buckman-Peirson*, at ¶44.

Expert testimony is not required regarding emotional distress because jurors can determine emotional injury. "While expert testimony is often presumed to be helpful to the jury, 'this presumption vanishes where the testimony concerns matters within the everyday knowledge and experience of a lay juror.'" *Tanner v. Rite Aid of West Virginia, Inc.* (1995), 194 W.Va. 643, 654, 461 S.E.3d 149, quoting 2 Franklin D. Cleckley, Handbook of Evidence for West Virginia Lawyers (3d Ed. 1994), Section 7-2(A)(2). "The jurors themselves, can refer to their own experiences in order to determine whether, and to what extent, the defendant's conduct caused the serious emotional distress." *Paugh*, at 80. If some "guarantee of genuineness" is given, expert testimony is not required. Id. at 76.

If this issue had actually been raised in Appellants' motion for summary judgment, Appellees could have provided additional testimony from fellow workers, spouses, and others to complement the medical records and the testimony of their treating physicians. Indeed, Appellees specifically identified these additional individuals as trial witnesses in 2001.

2. Negligent Infliction of Emotional Distress.

"Ohio law has traditionally permitted recovery for negligently inflicted emotional and psychiatric injuries accompanied by contemporaneous physical injury." *Binns v. Fredendall* (1987), 32 Ohio St.3d 244, 245. "Negligently inflicted emotional and psychiatric injury sustained by a plaintiff who also suffers contemporaneous physical injury need not be severe and debilitating to be compensable." Id. "Recovery for negligently inflicted emotional and

psychiatric injuries accompanied by contemporaneous physical injury may include damages for mental anguish, emotional distress, anxiety, grief or loss of enjoyment of life." Id. at paragraph 3 of the Syllabus.

The injuries that Appellees sustained were reasonably foreseeable to Appellants. "As Plaintiffs were employees of Ottawa County MR/DD, and Ottawa County MR/DD was leasing the office space from Defendants, the Defendants could clearly foresee that lack of caution on their part could reasonably be anticipated to cause injury to Plaintiffs." Judgment Entry, 02/04/2005, Regarding Summary Judgment, ¶27. Moreover, "Plaintiffs were within the class of persons intended to be protected by the regulation, and their injuries were a type of harm against which the regulation was intended to guard." Id. at ¶33.

Additionally, Appellants were served with Requests for Admissions. These Requests for Admissions were deemed admitted by court order. "When a party fails to timely respond to the request for admissions, 'the admissions [become] facts of record, which the court must recognize." *Marusa v. Brunswick*, 9th Dist. No. 04CA0038-M, 2005-Ohio-1135, ¶20, appeal not allowed, 106 Ohio St.3d 1486, 2005-Ohio-3978; *Clev. Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67, cert. denied (1986), 478 U.S. 1005. As Civ.R 36(B) provides, "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." The following became admitted facts for all purposes in this case:

1) Appellees working in the Buckeye Building were complaining to Appellants, of fatigue, malaise, nausea, chronic sinusitis, and/or headaches prior to August 2000.
2) Mold ran for two feet on the wall in Suite C in the Buckeye Building in 1997.

3) During the tenancy of the Ottawa County MRDD, the windows in the Buckeye Building were refitted with metal brackets on them to keep the glass in the frame.

4) By March 2000 at least one window was defective and allowed in rainwater.

5) Dark spots were visible in the carpeting after the carpet was cleaned in May 2000.

6) The Toy Lending Library in the Buckeye Building was flooded in March 2000.

7) Mold grew around the vent in the building while MRDD occupied it.

8) The Buckeye Building had a musty smell as early as July 1998.

9) The Buckeye Building had dirty vents, water-stained ceilings and a rotten front door on or about May 11, 2000.

Appellants did not cross appeal the order deeming these facts admitted.

Even according to Appellants' own expert, Dr. Ronald Gots, when people think there is mold around they get scared and develop symptoms. Dep. of R. Gots, 04/05/04, pp. 100-101. "So learning about something that people consider dangerous leads to symptoms, and I don't think there's any question about that, and there's a vast amount of study on that issue." Id. at p. 101. He also testified that failure to recognize the potential severity of a problem in the building such as growing mold and failing to minimize people's concerns by responding too tentatively may increase anger, distress, and symptoms. Id. at p. 134. Dr. Gots also explained that people get symptoms from an odor, such as mildew, and may feel symptomatic with mildew odors. That is an emotional response as opposed to an irritant response. Id. at 149.

The trial court failed to recognize that Appellants did not move for summary judgment on the claims of emotional distress. The appellate court remanded this case to proceed on these claims. Because the ruling from this Court was to "reinstate the judgment of the trial court granting summary judgment to Appellants", Appellees respectfully request clarification that this order does not contradict the holding of the Court of Appeals, nor the law and facts of this case, that the separate claims of intentional and negligent infliction of emotional distress were improperly dismissed and that they do survive.

B. Appellees seek clarification to avoid wasting judicial resources.

If this Court did not clarify that the two emotional distress claims are remanded, Appellees' alternative would be to seek mandamus from the Court of Appeals or this Court to order the trial court to allow these claims to proceed. A writ of mandamus is appropriate unless "there is a plain and adequate remedy in the ordinary course of the law." Ohio Revised Code 2731.05. Because this Court has very recent familiarity with this matter and is in a position to clarify the record, Appellees request that its remand be clarified without requiring Appellees to seek mandamus.

As Justice O'Donnell recently noted, "it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect." *State ex rel. Ohio General Assembly v. Brunner*, ___ Ohio St. 3d ___, 2007-Ohio-4460, at ¶23, dissenting opinion, quoting *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14. Appellees are not asking for the Court to modify its opinion but simply to clarify that the claims which were not appealed to this Court are remanded to the trial court. In contrast to the matter before this Court in *Brunner*, Appellees

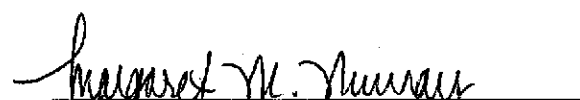
repeatedly highlighted the fact that these two emotional distress claims were not appealed to this Court. See Merit Brief, p. 1; Memorandum in Opposition to Jurisdiction, p. 8, n. 2; p. 9.

This litigation commenced in September 2000. It has involved more than twenty plaintiffs, two appellate decisions, and one Supreme Court decision. While Appellees may return to the trial court based on the decision of the Court of Appeals, the trial court will likely require a specific order from an appellate court directing it to do so. The trial testimony in this case was recorded more than two years ago. Causing this matter to proceed to a third appeal would result in a waste of judicial resources and a delay of justice. Judicial economy militates in favor of clarifying now that the two emotional distress claims are remanded to the trial court.

CONCLUSION

For the reasons stated above, Appellees Louise Terry, et al., respectfully requests that the Court clarify that remand to the Court of Common Pleas of Ottawa County includes the remaining claims of Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Reconsideration of Appellees Louise Terry, et al., was sent to Thomas J. Antonini and Mark A. Ozimek, Robinson, Curphey & O'Connell, 9th Floor Four Seagate, Toledo, Ohio 43604, Attorneys for Appellants John J. Caputo, Jr., Leonard A. Partin, Lake Investments, Inc., Northcoast Property Management Company, and W.W. Emerson Company; to Lynne K. Schoenling, Curry, Roby & Mulvey Co., L.P.A., 8000 Ravines Edge Court, Suite 103, Columbus, Ohio 43235, Attorney for Amicus Curiæ, Ohio Association of Civil Trial Attorneys; and, to Arnold S. White, White & Fish L.P.A., Inc., 1335 Dublin Road #201 C, Columbus OH 43215, and Paul W. Flowers, Paul W. Flowers Co., L.P.A., 50 Public Square, Suite 3500, Cleveland OH 44113, Attorneys for Amicus Curiæ, Ohio Association of Justice, f/k/a Ohio Academy of Trial Lawyers, by regular U.S. mail, on this 9th day of October 2007.

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