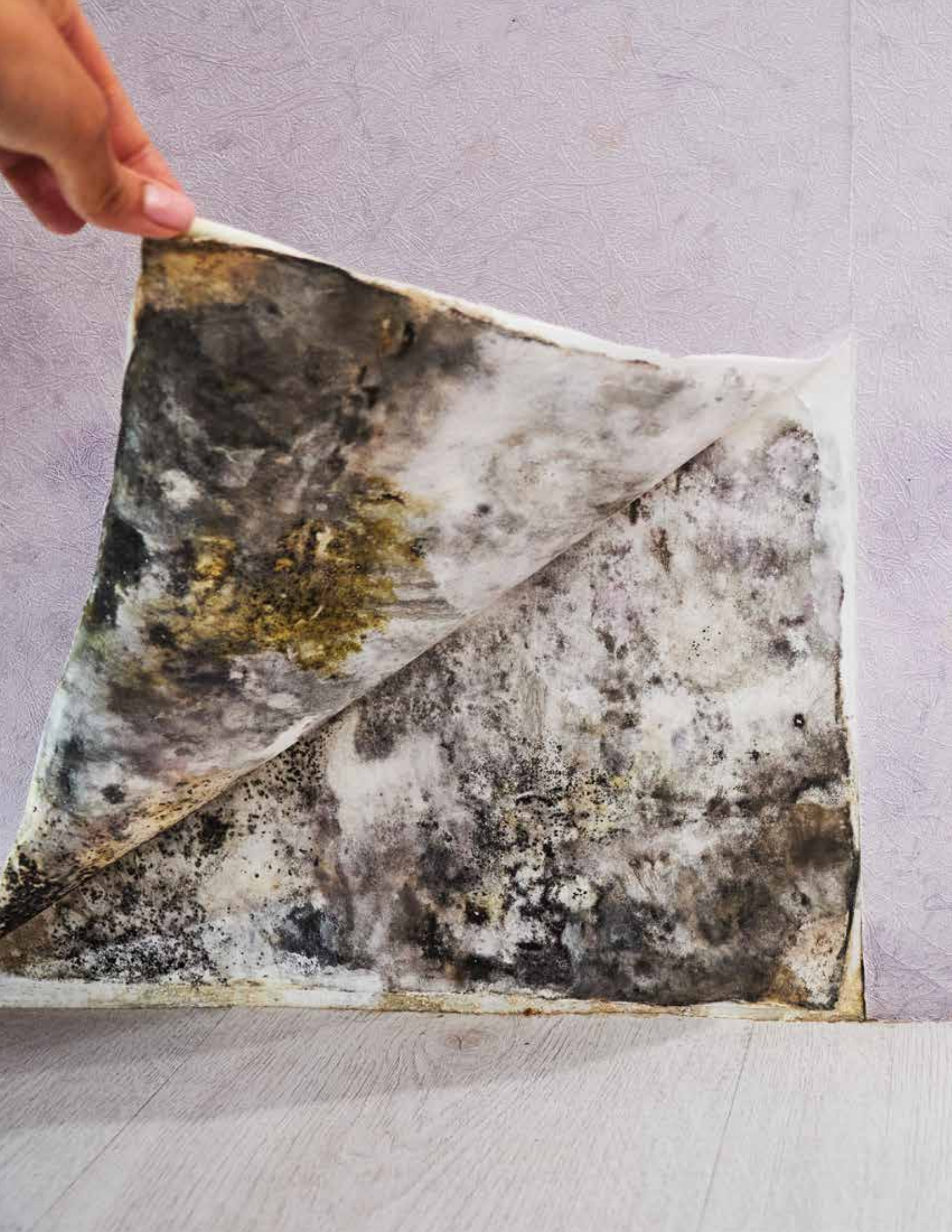


Mold case as a toxic tort

by Benjamin R. McCorkle, Esquires

Mold is Everywhere.

Shortly after I left work as a government lawyer and began practicing in the world of negligent torts, I encountered my first mold case involving a water damaged apartment. I was told not to pursue the case, but that I could probably help the family get moved to another apartment. The reason I was told to not take the case was that "mold is everywhere," and I would never be able to prove that the defendants' mold was the proximate cause of my client's injury, as opposed to mold found outside the apartment.

More recently I was offered the case of a mother and daughter whose bodies had been infected with mold, causing a variety of damages to them. Against all the advice I had ever received, I agreed to investigate their case. The women were given a series of misdiagnoses, e.g. Lupus, Lime Disease, and Legionnaires Disease, to explain their symptoms.[2]

The husband suspected that it might have something to do with mold in the air conditioning system, even though they lived in a new house with a professionally installed heat and air unit. The husband found a clinic in Florida that specialized in mold-related diseases. The family took vacation time to travel to the clinic, where the tests confirmed that the two women were suffering the side effects of mold infestation, specifically from the mycotoxins caused by Cladosporium mold. An expert examined the AC unit and determined that it had been improperly installed such that moisture was sucked into the plenum and ducting creating the ideal environment for the growth of mold. A taxological inspection revealed that the house and the AC system was infected by Cladosporium mold, which the microbiologist described as "toxic."

The question still remained: how do we prove that the specific mold found in their house was the proximate cause of their illness? The expert's use of the word, "toxic," led us to research how the cases of industrial toxins, such as asbestos, dealt with proximate cause, which in turn, led us to research the rare Arkansas cases law on toxic torts.

Arkansas Toxic Tort Law

A series of three cases developed the current state of toxic tort law in Arkansas.

Lohrmann v. Pittsburgh Corning Corp.: Proximate Cause

CONTINUED ON PAGE 6

is satisfied by the "frequency, regularity and proximity" test first established in the federal court case: *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Lohrmann* held that proof of asbestos exposure required more than a *de minimis* exposure to asbestos, but that causation required proof that the plaintiff was in the proximity of the toxin frequently and on a regular basis.

Chavers v. Gen. Motors Corp.: The *Lohrmann* test was adopted in Arkansas in *Chavers v. Gen. Motors Corp.*, 79 S.W.3d 361 (Ark. 2002). *Chavers* established elements that had to be proved in a toxic tort case – now referred to as the *Chavers* factors.

Green v. Alpharma, Inc.: Later in *Green v. Alpharma, Inc.*, 373 Ark. 378, 284 S.W.3d 29 (2008), the Arkansas Supreme Court solidified the elements of a toxic tort and extended application to toxins other than asbestos. The Court "adopted the *Chavers* test in an asbestos case, but we apply it to this toxic-tort case where the exposure involved a product other than asbestos." *Id* 373 Ark. at 389, 284 S.W.3d at 37–38.

Elements of a Toxic Tort

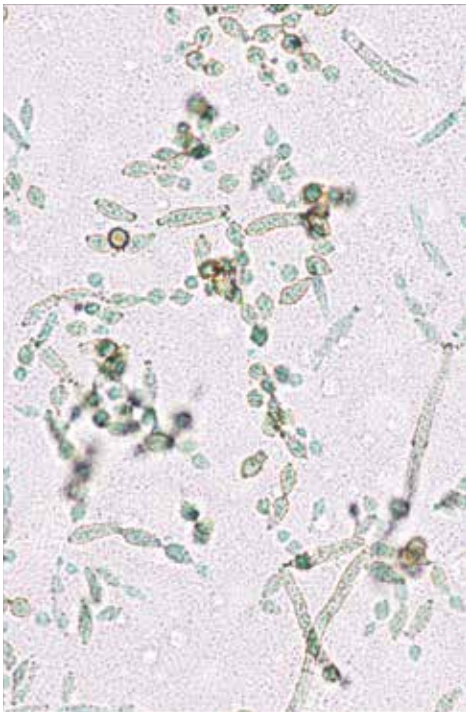
To plead a toxic tort in Arkansas, the Plaintiff must prove the following:

1. that the plaintiff was exposed to a toxic substance made or used by the defendant,
   a. Exposed to the toxin
   b. Defendant made or used the toxic substance
2. with sufficient frequency and regularity,
   a. Frequency – cannot have been infrequent exposure
   b. Must have been exposed for a sufficient period of time
3. in proximity to where the plaintiff worked or lived,
   a. Requires more than a *de minimus* exposure
   b. Generally, the toxin must have been at the workplace or the Plaintiff's house
4. such that it is probable that the exposure to the defendant's products caused the plaintiff's injuries.
   a. Proof that exposure to the toxin cause the effects the Plaintiff complains of
   b. Proof that the Plaintiff did have the side effects that the toxin produces

See TMG Cattle Co., Inc. v. Parker Commercial Spraying, LLC, 2018 Ark. App. 144, 4, n.1, 540 S.W.3d 754, 757 (2018).

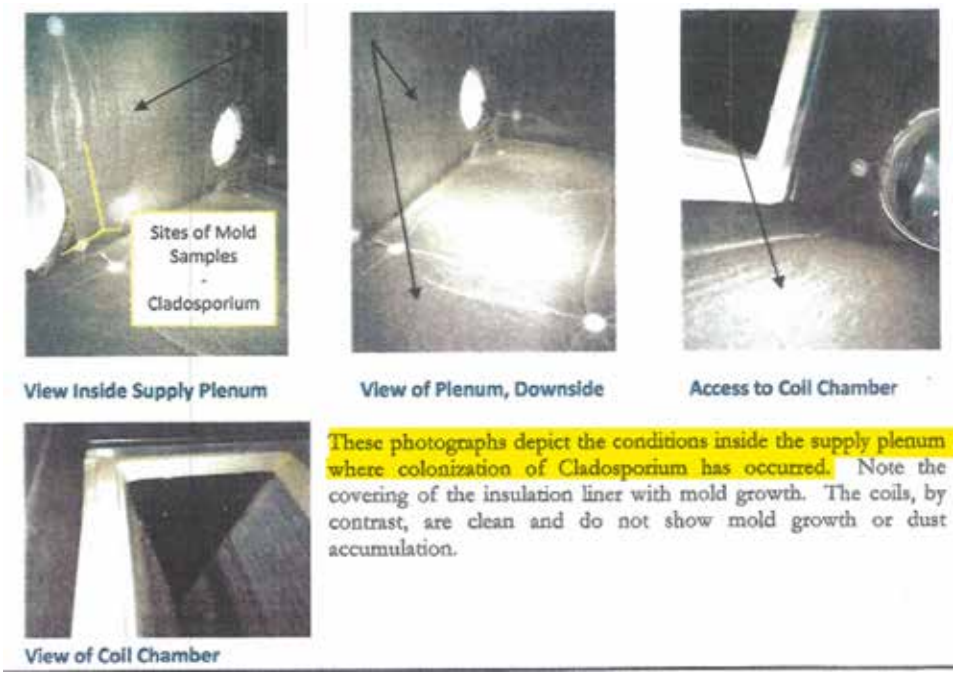
Element 1: Defendant's Liability

The first element establishes the defendant's liability – the toxic substance was made or used by the defendant. Even though the first element does not use the term, "duty," practically speaking, it would be difficult to sustain a case where you fail to prove that the defendant did something wrong. In the AC case above, we opted to allege that the contractor had a duty to properly install the AC unit but did not do so.



Cladosporium[1]

A plaintiff in a toxic tort case "must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover." *Bell v. Mine Safety Appliances*, No. 1:13-CV-01075, 2016 WL 797582, at *4 (W.D. Ark. Feb. 26, 2016), judgment entered, No. 1:13-CV-01075, 2016 WL 805240 (W.D. Ark. Feb. 26, 2016) *quoting Wright v. Willamette Industries, Inc.*, 91 F.3d 1105 (8th Cir. 1996). Even so, to prove exposure levels, plaintiffs need not produce a " 'mathematically precise table equating levels of exposure with levels of harm.' " *Bednar v. Basset Furniture Manufacturing Co.*, 147 F. 3d 737 (8th Cir. 1998) (quoting *Wright*, 91 F.3d at 1107). Rather, a plaintiff need only make a threshold showing that he or she was exposed to



toxic levels known to cause the type of injuries he or she suffered. *Id*.

Elements 2 & 3 & 4: Causation

The issue of causation deserves a more thorough examination, as this is the element most likely to be challenged. It is still the plaintiff's burden to prove causation, but the method of proof is somewhat different than the standard negligence proximate cause analysis. Our Supreme Court has explained that "the *Chavers* test itself 'establish[es] causation.'" *Green v. Alpharma, Inc.,* 373 Ark. at 389, 284 S.W.3d at 37–38 *citing Chavers*, 349 Ark. at 561, 79 S.W.3d at 368. The *Green* court went on to explain that "this fourth element considers the application of the first three elements in deciding whether a causal connection exists between Green's exposure and his injuries." *Id* at 395, 284 S.W.3d at 42. Furthermore, "causation is almost always a question of fact for the jury . . . ." *Id*.

Rather than having to prove that the presence of the toxic substance was the sole cause of plaintiff's damages, in a toxic tort case courts have required proof that the toxin was a "substantial factor" in causing the plaintiff's harms. *See* RESTATEMENT (SECOND) OF TORTS§§ 431, 433. To prove that the toxic was a substantial factor, courts generally apply the *Lohrmann* "frequency-regularity-proximity" test.[3]

Final Thoughts

Not all, or even most, cases where mold is present can be characterized as a toxic mold case. First, you have to prove that the toxin is known to cause the damages suffered by your client. Next, you must prove that the defendant knowingly made or used the toxin. Furthermore, merely being exposed to the toxin is not enough for causation. You have to prove that the plaintiff lived or worked in the presence of the toxin. Finally, you have to prove that your client did, indeed, suffer from the side effects associated with the toxin.

Most landlord-tenant mold cases are going to fail under the *caveat lessee* doctrine that often absolves landlords from any liability in tort at all. Look for the failed fixer-up cases where the landlord attempted to fix the mold problem but did so negligently.

Nevertheless, in the proper case, Arkansas toxic tort law provides a cause of action where a standard negligence analysis would fail.•

Endnotes

1. Source https://www.inspq.qc.ca/ INSPQ Public health expertise and reference centre, Quebec.

2. Some people are more sensitive to mold that others. If someone sensitive to mold remains in constant contact, it can lead to the development of chronic symptoms, Toxic Mold Syndrome. Once a person develops symptoms, they become even more likely to react to a new mold environment. https://www.mayoclinic.org/diseases-conditions/mold-allergy/symptoms-causes/syc-20351519; https://www.poison.org/articles/2011-oct/mold-101-effects-on-human-health

3. For Arkansas cases, see Chavers, supra; Green, supra; Bell v. Mine Safety Appliances, No. 1:13-CV-01075, 2016 WL 797582, at *4 (W.D. Ark. Feb. 26, 2016), judgment entered, No. 1:13-CV-01075, 2016 WL 805240 (W.D. Ark. Feb. 26, 2016); TMG Cattle Co., Inc. v. Parker Commercial Spraying, LLC, 2018 Ark. App. 144, 4, n.1, 540 S.W.3d

CONTINUED ON PAGE 21

examination will likely be blistering." *Id.* Research has shown that more frequently than not, the testimony of life care planners will be admissible.

In conclusion, although the arguments in many generic omnibus motions in limine are unsupported, these motions have become increasingly popular. The Arkansas Supreme Court and the United States District Courts in Arkansas have questioned their use if they are not offered to justify the inclusion or exclusion of a specific matter or evidence. Even in light of several courts' criticism, these motions are growing in popularity. Attorneys should work to prevent opposing counsel from normalizing non-existent law and word policing. It is our hope that this article and the case citations included will help you respond quickly to these distracting motions, and you will have more time to focus on important matters related to trial preparation.•

Endnote

1 *See, e.g., Utah v. Devey,* 136 P.3d 90, n.5 (Utah Ct. App. 2006); *Vermont v. Wigg,* 889 A.2d 233, 237 (Vt. 2005); *Ohio v. Wright,* No. 02CA008179, 2003 WL 21509033, at *2 (Ohio Ct. App. July 2, 2003); *Jackson v. Delaware,* 600 A.2d 21, 24-25 (Del. 1991); *Talkington v. Texas,* 682 S.W. 2d 674, 675 (Texas Crim. App. 1984).

754, 757 (2018); Skender v. Ameron Intern. Corp., 2009 WL 129891, at *2 (W.D. Ark. Jan. 20, 2009); Wright v. Willamette Industries, Inc., 91 F.3d 1105 (8th Cir. 1996); Jackson v. Anchor Packing Co., 994 F.2d 1295, 1303 (8th Cir. 1993) (applying Arkansas law).For cases from other jurisdictions see Slaughter v. S. Talc Co., 949 F.2d 167, 171 (5th Cir. 1991) ("The most frequently used test for causation in asbestos cases is the 'frequency-regularity-proximity test' announced in Lohrmann."). See, e.g., Chism v. W.R. Grace & Co., 158 F.3d 988, 992 (8th Cir. 1998) (applying Missouri law); Jones v. Owens-Corning Fiberglas Corp., 69 F.3d 712, 716 (4th Cir. 1995) (applying North Carolina law); Dillon v. Fibreboard Corp., 919 F.2d 1488, 1491 (10th Cir. 1990) (applying Oklahoma law); Robertson v. Allied Signal, Inc., 914 F.2d 360, 380 (3d Cir. 1990) (applying Pennsylvania law); Lyons v. Garlock, Inc., 12 F. Supp. 2d 1226, 1229 (D. Kan. 1998) (applying Kansas law); Kraus v. Celotex Corp., 925 F. Supp. 646, 652 (E.D. Mo. 1996) (applying Missouri law); Thacker v. UNR Indus., Inc., 603 N.E.2d 449, 457 (Ill. 1992); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 859 (Iowa 1994); Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 460 (Md. 1992); Monsanto Co. v. Hall, 912 So. 2d 134, 137 (Miss. 2005); Gorman-Rupp Co. v. Hall, 908 So. 2d 749, 757 (Miss. 2005); James v. Bessemer Processing Co., Inc., 714 A.2d 898, 911 (N.J. 1998); Sholtis v. American Cyanamid Co., 568 A.2d 1196, 1207 (N.J. Super. Ct. App. Div. 1989); Gregg v. V-J Auto Parts, Co., 943 A.2d 216, 227 (Pa. 2007); Eckenrod v. GAF Corp., 544 A.2d 50, 53 (Pa. Super. Ct. 1988); Henderson v. Allied Signal, Inc., 644 S.E.2d 724, 727 (S.C. 2007); Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 770 (Tex. 2007); Vaughn v. Ford Motor Co., 91 S.W.3d 387, 393 (Tex. App. 2002) (applying Illinois law). But see Ingram v. ACandS, Inc., 977 F.2d 1332, 1343-44 (9th Cir. 1992) (applying Oregon law); Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480, 1486 (11th Cir. 1985) (applying Georgia law); Bailey v. N. Am. Refractories Co., 95 S.W.3d 868, 872 (Ky. Ct. App. 2001); Purcell v. Asbestos Corp., Ltd., 959 P.2d 89, 94 (Or. App. 1998), modified on reconsideration, 963 P.2d 729 (Or. App. 1998) (applying Oregon law). The Lohrmann causation standard has been adopted by statute in a number of states. See FLA. STAT. ANN. § 774.203(30)-204 (2008) (applying to certain claims); GA. CODE ANN. § 51-14-3(23) (2008); and OHIO REV. CODE ANN. § 2307.96(B) (2008).