

STATE OF INDIANA)
)
COUNTY OF VANDERBURGH)

VANDERBURGH CIR. COURT
CAUSE NO. 82C01-0911-PL-484

STATE OF INDIANA, through)
ATTORNEY GENERAL GREGORY F. ZOELLER, and)
VANDERBURGH COUNTY HEALTH DEPARTMENT)

Plaintiffs,)

v.)

MARK R. BRYAN, and)
TAMMY A. BRYAN)

Defendants.)

FILED
VANDERBURGH CIRCUIT COURT
JAN 14 2011
Susan K. Kirk
VANDERBURGH COUNTY CLERK

Final Judgment Compelling Compliance with Agreement

Attorney General Gregory F. Zoeller brought the above-captioned complaint on behalf of the State of Indiana, pursuant to Ind. Code § 4-6-2-1 and Ind. Code § 13-30-1-1, and Vanderburgh County, through its Health Department, pursuant to Ind. Code § 32-30-6-7, to compel the remediation of the lead hazards harbored in Defendants' rental property at 2225 Mulberry Street, a health hazard to which children have been exposed. The parties reached an Agreement which Defendants are not implementing. As set forth below, this Court orders them to do so.

General Facts about Lead Contamination

1. The Consumer Safety Commission banned the use of lead in residential paints after 1978. 16 CFR 1303.1 However, many homes and apartments built prior to 1978 contain lead-based paints. Unless properly cleaned or contained, particles of lead

may be found in the household dust, paint chips and soils around many of the homes built prior to 1978.

2. Small children are particularly susceptible to lead poisoning because small children are more likely to crawl and play in dusty and dirty areas, and small children are more likely to put things in their mouths.

It is well known that children of tender years have a proclivity to put anything they can get into their hands into their mouths.

Antwaun A. ex re. Muwonge v. Heritage Mut. Ins. Co., 228 Wis. 44, 596 N.W.2d 456, Ftn. 8 (Wis.1999), citing *Norwood v. Lazarus*, 634 S.W.2d 584, 587 (Mo.App.1982).

3. Children exposed to lead at unsafe levels may exhibit learning disabilities, decreased growth, hyperactivity, violent behavior, and brain damage, especially when exposed to lead during the crucial brain development stages taking place in children younger than six years of age. Ingestion of very small amounts of lead may cause these symptoms in a child. See Ex. A to Verified Complaint, Affidavit of Dr. Joan Duwve.

4. An elevated blood level is defined as a level of lead that is in the blood of a child younger than six years and is more than ten micrograms of lead per deciliter of blood. US Center for Disease Control and Prevention, "Managing Elevated Blood Lead Levels Among Young Children: Recommendations from the Advisory Committee on Childhood Lead Poisoning Prevention 42 (Birt Harvey ed., 2002), available at www.cdc.gov/nceh/lead/casemanagement/casemanage_main.htm

5. Under rules promulgated by the Environmental Protection Agency, "Lead-Based Paint Poisoning Prevention" is regulated at 40 CFR 745, *et seq.* The Department of Housing and Urban Development defines "Methods and Standards for Lead-Paint Hazard Evaluation and Hazard Reduction Activities" at 24 CFR 35.1300, *et*

seq. These regulations establish substantially similar regulatory levels of lead particles in the dust and soils around residences. Under the above promulgated rules, a lead-based paint hazard exists in a residential dwelling or child occupied facility under any of the following conditions:

Source	Level
Paint-lead hazard	Any chewable lead-based paint surface with teeth marks, damaged paint on an impact surface, or other deteriorated lead-based paint. 40 CFR 745.227(h)(2); 24 CFR
Dust-lead hazard - Floors	40 micrograms per square foot 40 CFR 745.227(h)(3); 24 CFR 35.1320(b)(2)(i)
Dust-lead hazard - Interior Window Sills	250 micrograms per square foot 40 CFR 745.227(h)(3); 24 CFR 35.1320(b)(2)(i)
Soils-lead hazard - bare soil in play area	400 parts per million 40 CFR 745.227(h)(4); 24 CFR 35.1320(b)(2)(ii)

These rules are applicable to federally subsidized housing, including landlords who accept Section 8 rental assistance.

6. The Residential Lead-Based Paint Hazard Reduction Act of 1992 requires homeowners to disclose the presence of any known lead-based paint or lead-based paint hazards prior to selling or renting any pre-1978 home. 42 USC § 4852d(a).

Allegations Specific to the Defendants

7. Defendants own the house at 2225 East Mulberry Street in Evansville, which Defendants use as a rental property. Fair housing laws require that the Defendants make this rental property available to all, including parents with small children.

8. According to the Vanderburgh County Assessor, the house at 2225 East Mulberry Street was built in 1918.

9. On or before January, 2008, the Vanderburgh County Health Department received a referral stating that a child residing in the home had an elevated lead blood level.

10. With the tenant's permission, on January 18, 2008, Investigator Keith Goy inspected the home and performed a risk assessment, including the sampling of paint, soil and dust samples for analysis.

11. By letter to the Defendants on January 29, 2008, the County advised Defendants that the County had conducted a lead risk assessment on the home, and had collected paint, soil and dust samples for analysis. See Ex. B to Verified Complaint. The certified mail was returned "UNCLAIMED."

12. By letter to the Defendants on February 12, 2008, the County sent a final report to the Defendants. See Ex. C to Verified Complaint. The final report confirms that at least 15 lead hazards were present in the home, including high levels of lead in the child's bedroom and in the backyard play area. The final report also presented remediation alternatives to the Defendants. The Defendants were ordered to implement recommendations for remediating the lead hazard in the home, and to schedule a clearance examination to confirm that the lead hazard had been remediated, within 60 days. See Ex. C to Verified Complaint. On that same date, the County sent a copy of the final report to the tenant, and advised the tenant as to interim measures that could be taken to protect children from the lead hazards within the home.

13. By letter to the Defendants on January 16, 2009, the County once again advised the Defendants about the lead hazards within the home and ordered the Defendants to complete lead hazard remediation and schedule a clearance examination within 15 days. See Ex. D to Verified Complaint. Defendants were also ordered to provide the County with a written plan identifying the person who will be remediating the lead hazard and when remediation would be completed.

14. By letter to the Defendants on February 3, 2009, the County issued a citation against the Defendants. See Ex. E to Verified Complaint. The citation resulted in a \$50 fine which has since been paid.

15. To date, the Defendants have not demonstrated remediation of the lead hazard in accordance with the applicable laws and recommended remediation techniques, and thus it is believed that Defendants' property continues to pose a lead hazard.

16. Inspector Keith Goy has revisited the property during 2009 and observed no changes in those exterior conditions of the home capable of causing lead contamination, such as the peeling paint on the eaves. On several occasions he has observed indications that the home was occupied, such as a car in the driveway and furniture inside.

17. The parties and counsel met in Evansville on April 2, 2010, and entered into an Agreement which provided for the following:

- a. The house at 2225 Mulberry Street must remain empty until it passes a clearance exam to confirm that the lead hazards identified in the complaint have been remediated.
- b. The Bryans may list the property for sale for six months while seeking bids for remediation. They will work directly with VCHD for the lawful remediation requirements.

- c. They may list and sell the property for a period of six months, but (1) the Buyer must agree to give VCHD access to the property and to not inhabit the property until it passes a clearance exam, (2) \$17,575 of the purchase price will be escrowed for demolition, remediation and/or attorney fees, and (3) the house must be remediated or demolished within 90 days after a sale.
- d. Plaintiffs agreed to dismiss this lawsuit after the house passes a clearance exam and the Defendants have paid any court approved attorney's fees.

18. Shortly after the Agreement, the Plaintiffs moved to continue the hearing this Court had set for April 26, 2010, so that the Defendants would have the opportunity to implement this Agreement.

19. This Court set a scheduling conference for Friday, November 19, 2010, at 10 am, a date occurring shortly after the conclusion of the six month real estate listing. Plaintiffs appeared in person by the County and by counsel, however, Defendants did not appear. This Court scheduled a final hearing on January 14, 2011, at 10 am.

20. At the hearing on January 14, 2011, the Vanderburgh County Health Department presented evidence as to the current status of the house at 2225 Mulberry Street. The house remains vacant, however, it does not appear to be listed for sale, the lead based paint hazard has not been remediated, and the property is now tagged for high weeds. Other than keeping the property vacant, the Defendants appear to be doing nothing about the lead based paint problems identified in the risk assessment attached to the complaint.

21. This Court has reviewed the Affidavit of Timothy J. Junk regarding Attorney Fees, and finds that 52.2 hours (including 7 hours estimated travel and attendance at January 14th hearing) is a reasonable amount of time for researching, drafting the complaint, attending a settlement conference, and proceeding with this case

through the hearing on January 14, 2011. This Court agrees that \$250 per hour is a reasonable and appropriate market rate for the qualifications exhibited by the Deputy Attorney General.

Conclusions of Law

22. A landlord has a duty to provide a residence that is in a safe, clean and habitable condition. Ind. Code § 32-31-8-5.

23. Whatever is injurious to health or offensive to the senses so as to essentially interfere with the comfortable enjoyment of life or property is a nuisance subject to legal action. Ind. Code § 32-30-6-6.

24. The conditions in Defendants' rental house unreasonably expose tenants and the public to lead hazards and thus constitute a nuisance. *See, Erwin v. Roe*, 928 N.E.2d 609 (Ct. Ap. 2010) (landlord's failure to provide the lead based paint disclosure required by federal law, and which resulted in the poisoning of tenant's child, is *per se* negligence under Indiana common law)

25. The Attorney General may bring an action to enjoin a nuisance. Ind. Code § 4-6-2-1; *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N.E. 809, 811 (1898)(State, by Attorney General, has authority to bring a common law nuisance action to enjoin oil company's wasting of natural gas).

26. A civil action to abate or enjoin a nuisance may also be brought by an attorney representing the county in which the nuisance exists. Ind. Code § 32-30-6-7.

27. The Vanderburgh County Health Department has authorized the Attorney General to act on its behalf in this litigation against this Defendant.

28. A county that brings a successful action to abate or enjoin a nuisance caused by the unlawful dumping of solid waste may recover reasonable attorney fees incurred in bringing the action. Ind. Code 32-30-6-7(c).

29. The Attorney General is entitled to reasonable attorney fees for bringing this nuisance action on behalf of Vanderburgh County Health Department to abate or enjoin the nuisance caused by the Defendants' unlawful dumping of solid wastes on its property.

30. A dwelling is unfit for human habitation when that dwelling is dangerous or detrimental to life or health because of want of repair, defects, or an unsanitary condition that is likely to cause sickness among the occupants of the dwelling. Ind. Code § 16-41-20-1.

31. The state health department or county health officials may declare a dwelling that is unfit for human habitation a public nuisance, and order remediation of the nuisance. Ind. Code § 16-41-20-6 & 7.

32. The Vanderburgh County Health Department issued orders to the Defendants under Ind. Code § 16-41-20-1. See Verified Complaint Exs. C & D.

33. Defendants did not seek judicial review of the orders issued by the Vanderburgh County Health Department within 10 days, as required by Ind. Code § 16-41-20-9.

34. If no appeal is taken, the order of the county health officer is final and conclusive. Ind. Code § 16-41-20-11(c).

35. A person who fails to comply with an order of the county health officer is liable for all costs and expenses incurred in executing the order, plus attorney's fees. Ind. Code § 16-41-20-12.

36. Because the Defendants are not implementing the Agreement, the Plaintiffs are incurring more attorney's fees to compel compliance.

Final Judgment and Order

This Court enters final judgment and ORDERS as follows:

37. On or before April 29, 2011, the Defendants are ORDERED to comply with the Agreement by either (a) remediating the house at 2225 Mulberry Street so that it passes a clearance exam, or (b) demolishing the house; and

38. It is ORDERED that the Defendants are jointly and severally liable for Plaintiffs reasonable attorney's fees to date of \$13,050.

39. This Court sets a compliance hearing for June ¹⁹, 2011, at ¹⁰ am/pm, and orders each Defendant to appear in person. The hearing will be cancelled if Defendants show compliance with this Final Judgment and Order.

Date: 1-14-11

Clark A. Hebert

Dist. to:

Judge, Vanderburgh Co. Circuit Court

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