

Lead poisoning cases in courts County programs face litigation

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ALBANY — Sierra Dawn LaFontaine remembers that her 9th birthday is coming up in a few days but she sometimes forgets how to turn on a lamp she uses every day.

Short-term memory lapses are just one problem that plagues Sierra from the brain damage that was caused by a case of lead poisoning. As a toddler, Sierra ate the sweet-tasting lead paint chips that were peeling from the walls and woodwork of her family's Cohoes apartment. Health, behavior and learning problems followed.

"We have had our dogs for six years, and sometimes she asks me: 'Mommy, what is that dog's name?' Or one minute, she can spell the word 'cat' and then can't remember how to turn on a light switch," said Tracey LaFontaine.

Last October, a jury awarded Sierra \$1.8 million in damages and ordered Albany County to pay 30 percent - or \$540,000 - for improperly supervising the lead paint removal process. The landlord was ordered to pay the other 70 percent of the award to Sierra, who now lives in Greenwich.

The lead paint poisoning prevention programs in a number of area counties, including Albany County, are being challenged in the courts by the parents of children who were poisoned. About 25 of these cases are pending against Albany County.

The county is appealing the \$1.8 million verdict and plans to fight all the lawsuits.

"The county's position is emphatic: There is no liability. None," said Albany attorney John W. Bailey, who is defending the county in many of the lead paint poisoning cases.

But juries in the two cases that have gone to trial in state Supreme Court in Albany since last fall have seen it differently.

County negligent

A jury in late February awarded two Albany sisters - now 5 and 7 years old and both brain damaged from lead poisoning - \$90,000 each. That jury found that Albany County was negligent and should pay the entire \$180,000, but because the landlords settled their case earlier for \$417,000, a legal rule takes effect and the county will not have to pay.

"We have successfully proved that the county of Albany was negligent and had a [lead poisoning prevention] program that failed to protect the children," said Albany attorney Peter Danziger, who represented the lead-poisoned girls in both cases. "The inspectors were repeatedly and grossly negligent. There has been a tremendous amount of disregard for the current requirements."

Bailey said the county is concerned that the juries found the county liable.

"Sure it worries us but we are absolutely committed and determined to fight every single one of these until the end because we are very proud of the program," Bailey said.

In a third, recent lead paint poisoning case, the landlords of a Cohoes apartment building in December agreed to pay an 8-year old girl now living in Rensselaer 32.8 million. Albany County was not named as a defendant only because of a legal glitch.

"The County needs to do a much better job when they inspect for lead and when they certify that a proper abatement was performed. Unfortunately they're [the county] directly contributing to additional lead poisoning of children," Danziger said. "Juries are finding landlords

responsible for their negligence and the county is being held responsible for the negligence of the county inspectors.”

Older housing

Lead paint has not been manufactured since a 1978 ban was imposed after its health effects became well known. But many homes - particularly run-down rental units - have layers and layers of lead paint on the walls and wood.

That puts the lower-income children who often live in such apartments at the greatest risk of getting poisoned by it. In response to the dangers posed by lead paint, many local governments set up programs to reduce the threat of poisoning.

Albany County was one of them. Its program has been in place since the 1980s.

“This is a program in which the county voluntarily is reaching out to try to help children who have been identified with elevated lead levels,” said Bailey. “The county is trying to intervene by educating the parents and the landlords about the medical issues associated with lead ingestion. And it is an educational effort on the county’s part.”

The lead poisoning prevention outreach program has two prongs, the medical side and the environmental side. State law requires that young children get a lead screening test done each year.

Any child with a blood-lead level of 0.10 micrograms or more per deciliter must be reported to the Albany County Health Department.

If a child’s blood-lead level rises to 0.15, a public health nurse is sent to the home to meet with the parents and teach them about lead poisoning prevention.

If a child’s blood-lead level hits 0.20 or above, the county health department’s environmental unit is dispatched to inspect the home and test its lead levels. The inspectors meet with the landlords and give them instructions on how to deal with any lead levels that are considered too high, then return to inspect the dwelling again once the work is done.

Toddler sick

The process in Sierra’s case began in 1992 when a physical revealed that she had an elevated blood-lead level. A county public health nurse was sent to the family’s 64B Willow St. apartment in Cohoes and saw peeling paint and observed Sierra, then about 16 months old, having contact with lead paint and possible lead paint dust, both of which cause lead poisoning.

LaFontaine said she and her husband did everything the nurse suggested to make the \$425-a-month apartment safer, including mopping the surfaces every day with a special cleanser and renting a special filtered vacuum cleaner and supplies to try to remove some of the worst peeling paint. They spent a weekend working while their children stayed with grandparents and got only two window sills done.

“I called the nurse and said that we had worked all weekend and made little progress. I asked if there was something they could make the landlord do,” LaFontaine said.

But Sierra’s blood-lead level had not reached 0.20, so the environmental part of the program was not started until a few months later, when another lead screening showed Sierra had a 0.37 blood-lead level.

The landlord was told to begin taking steps to abate the lead paint hazard, which he did. The family moved out after paint chips were scattered through the apartment during the work, LaFontaine said.

Sierra’s blood-lead levels slowly began to creep down, but the damage had already been done, according to court testimony. She is hyperactive and has behavioral problems, learning difficulties and lingering health problems.

Danziger said the county was negligent because it failed to advise the landlord properly about lead paint abatement and didn’t adequately supervise the removal process.

The landlord in the LaFontaine case is appealing the verdict as well.

One issue for the juries was whether the county - by implementing a lead poisoning prevention program - had a “special duty” which would make it legally responsible for seeing that the program accomplished what it was designed to do.

“There was no question that the county had a special duty. When they came in and did their inspections, they assumed the responsibility to do it properly.” Danziger said. “This is exactly the type of ‘special duty’ that the courts have already recognized can create county liability.”

Lawyers for the county unsuccessfully argued in both cases that the lead poisoning prevention program gave the county no special duty” to protect the populace.

“In order for a municipality to be found liable, a ‘special duty’ relationship must exist, and nothing that the county does would give rise to a ‘special duty’ relationship,” Bailey said.

But the two verdicts in which juries disagreed could indicate otherwise.

Financial Impact

And with the number of lawsuits pending against the county, the recent verdicts raise the question of what financial impact the cases could have on the county.

“What we have learned from the two juries that there is tremendous compassion for children and there is almost complete contempt for landlords,” Bailey said. “The two juries we have had have had no mercy at all as far as the landlords are concerned: both juries were concerned that the landlords had no insurance or no money and therefore were concerned about awarding verdicts strictly against the landlords.

“Jurors told us that was a major deciding factor in deciding liability against the county ... They knew that the children would get some money,” Bailey said.

Albany County is self-insured for awards up to \$50,000, meaning the county has to pay the first \$50,000. Anything over \$50,000 is covered by insurance, county officials said.

The county sees victory in the February verdict in which a jury awarded sisters Tanya and Marilyn Valentino only \$90,000 each.

“It shows you just how unpredictable jury verdicts are.” Bailey said.

He said the testimony from the doctors in the two cases about the damage the lead poisoning did to the children was essentially the same.”

But Danziger said the parents in the two cases were markedly different and that the county seized on the background of the Valentino girls’ mother — who smoked several packs of cigarettes a day, drank, was addicted to Valium during the pregnancies and no longer has custody of the children.

Lawyers said several jurors in that case wanted to hold the parents liable for the girls’ injuries but that is not permitted under state law.

A judge in a Rensselaer County lead paint poisoning case recently addressed this issue in a decision in which he said it makes little sense not to be allowed to hold parents - once they are made aware of a potential lead paint danger - liable.

In this case, state Supreme Court Justice James B. Canfield dismissed a lead paint poisoning case against Rensselaer County and a landlord for a variety of reasons. Canfield ruled that the parents’ negligence can be used as a defense in some cases.

That decision is being appealed.

“In cases where the county is negligent and the county’s negligence causes injury to the child, the child is innocent and the fact that the parents should have done something more is not a defense to the county’s negligence,” said Danziger, who also is handling that lead paint poisoning case.

Meanwhile, Albany County officials said there are no plans to end or significantly alter the lead poisoning prevention program.

“We’re not looking to change it. We always look for ways to make it better but the lawsuits will not make us change the program.” said Deputy Albany County Executive Chris Andreucci. “We believe there are benefits of informing these parents of the potential problems that might happen with lead poisoning.”

The State Department of Health has not recommended that any changes be made in the county’s lead poisoning prevention program, county officials said.