IN THE
COURT OF APPEALS FOR THE EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

Case No. 95135

CLEVELAND DEVELOPMENT L.L.C.

Plaintiff-Appellee

vs.

MICHAEL CARTER, et al.

Defendant-Appellant

Appeal From The Cleveland Municipal Court
Granting Judgment On The Pleadings

CORRECTED ASSIGNMENTS OF ERROR AND BRIEF OF APPELLANT

EDWARD G. KRAMER (0024873)
RYAN DEYOUNG (0086939)
FAIR HOUSING LAW CLINIC
3214 Prospect Avenue, East
Cleveland, Ohio 44115-2614
216-431-7400
Kramere7@aol.com
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

This case comes to the Court from the Cleveland Municipal Court's dismissal of the Claims brought by Appellants, Julia Roberts Carter et al., against Appellee, Stark Group L.L.C., in Case Number 2009 CVG 00344 on April 9, 2009. This dismissal by the trial court is a final appealable order that affects Appellants ability to pursue any of its distinct claims against Appellee, and the 8th District Ohio Court of Appeals has jurisdiction to consider this appeal under Article IV, Section 3 of the Ohio Constitution and R.C. §2505.03.

PRELIMINARY STATEMENT AND ASSIGNMENTS OF ERROR

This Appeal raises an issue of first impression for this Court relating to the scope of a property owner's duty to comply with a lawful order to abate lead hazards in rental housing pursuant to R.C. §3742.37, Cleveland Codified Ordinance 240.04, and 42 U.S.C. 4851. Unlike the issues raised by most lead poisoning cases that have come before this Court, this Appeal does not involve any issue as to whether the Appellee should escape liability because they lacked sufficient knowledge of the lead hazard posed by the subject premises because Appellee's actual knowledge of these hazards is clearly evidenced by the fact that the City of Cleveland ordered Appellee to remediate numerous lead paint hazards after the City conducted an inspection of the premises after a previous child residing at the subject premises was diagnosed with lead poisoning. Rather, this appeal raises the question of whether a former property owner's liability for the lead poisoning of subsequent tenants is cut off as a matter of law when they relinquish ownership of a property that is subject to a Lead hazard Control Order by allowing it to fall into foreclosure.

Through their notice of appeal, the Appellants have stated their position that based on both common law theories of negligence and violations of specified municipal ordinances and building codes, Appellee, Stark Group, LLC, breached a non-delegable duty to future occupants of the subject premises when it abandoned the property and/or negligently relinquished possession of the property rather than follow through on its obligation to remediate the lead hazards it contained. As a result, the subject premises remained in the hazardous condition that the Appellants have pled resulted in the poisoning of their minor daughter. Therefore the Appellants request review of the following issues:

1) WHETHER THE TRIAL COURT ERRED BY CONSIDERING FACTS OUTSIDE THE PLEADINGS IN RULLING ON APPELLEE'S MOTION "FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS THE STARK GROUP, LLC, THIRD PARTY DEFENDANT" UNDER RULE 12(B)(6) AND FAILING TO RULE ON APPELLEE'S REQUEST FOR FURTHER DISCOVERY UNDER 56(F).

2) WHETHER THE TRIAL COURT ERRED IN DISMISSING THE APPELLANTS THIRD PARTY COMPLAINT FINDING THAT IT WAS BEYOND ANY DOUBT THAT THE PLAINTIFFS COULD PROVE NO SET OF FACTS ENTITLING THEM TO RELEIF.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) THE TRIAL COURT ERRED BY CONSIDERING FACTS OUTSIDE THE PLEADINGS IN RULLING ON APPELLEE'S MOTION "FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS THE STARK GROUP, LLC, THIRD PARTY DEFENDANT" UNDER RULE 12(B)(6) AND FAILING TO RULE ON APPELLEE'S REQUEST FOR FURTHER DISCOVERY UNDER 56(F).

3) THE TRIAL COURT ERRED IN DISMISSING THE APPELLANTS THIRD PARTY COMPLAINT FINDING THAT IT WAS BEYOND ANY DOUBT THAT THE PLAINTIFFS COULD PROVE NO SET OF FACTS ENTITLING THEM TO RELEIF

STATEMENT OF THE CASE

This case arises out of two separate actions for forcible entry and detainer that were brought against Michael Carter and Julia Roberts Carter (hereinafter referred to as "Appellants" or the "Carters") in the Cleveland Municipal Court, Housing Division, 2009CVG00344, which was by Cleveland Development, LLC relating to a rental property located at 4320 East 53rd St., Cleveland, Ohio 44127, and 2010CVG00940, which was brought by Utah Appraisal Service, LLC relating to a property located at 8114 Bemar Street, Cleveland, Ohio 44105. In both of these cases the Carters brought Counterclaims and Third Party Complaints through which they alleged that the Plaintiffs in these actions, as well as various Third Party Defendants, were liable for damages resulting from the repeated lead poisoning of their minor daughter, Ashoura Carter. Both of these cases were consolidated by the Trial Court pursuant to Ohio Civil Rule 42(A)(1) through a Judgment Entry in 2010CVG000940 dated April 16, 2010, as well as a Judgment Entry in 2009CVG000344 dated April 19, 2010. R.20 p.1.

At issue in this appeal is the trial court's dismissal the Carters' claims against Third Party Defendant, The Stark Group LLC (hereinafter referred to as "Stark Group" or "Appellee") under Ohio Civil Rule 12(B)(6) for failure to state a claim upon which relief may be granted with regards to the lead poisoning their minor child suffered while living at 4320 East 53rd St., Cleveland, Ohio 44127. In pertinent part, the Carters' Third Party Claims against Stark Group incorporated the following allegations:

1) That there existed a defective condition of the walls, ceilings, floors, and soil of the premises, and more particularly, the paint on the walls, ceilings, oil, and floors contained an unsafe lead content, and walls

ceilings and floors were not in a proper condition of repair, and walls, ceilings, and floors had accumulated dust that contained an unsafe lead content. ¶8 of the Carters' Answer and Counterclaim in 2009CVG00344.

2) That Defendants Michael Carter, Julia Roberts Carter, and Ashoura Carter were unaware of the defective condition caused by the presence of dangerous and unhealthy levels of lead in the lead based paint on the walls of the Premises. Id. at ¶10.

3) That the Defendant Michael Carter and Third Party Plaintiffs Julia Roberts Carter and Ashoura Carter injuries were caused wholly by the negligence of the Plaintiff Cleveland Development, LLC and the Third Party Defendants, in failing to provide the required notices about lead paint hazards, to remove or cover the dangerous lead-containing paint, dust, soil of the premises, so as to make them inaccessible to children who resided therein. Id. at ¶11.

4) That as a direct, foreseeable, and immediate result of Plaintiff Cleveland Development LLC and the Third Party Defendants, who are the present and former owners of the premises which is the subject of this litigation, conduct the Third Party Plaintiff Ashoura Carter suffered lead poisoning. Id. at ¶12.

5) That the Carters' Third Party Complaint was brought to seek monetary damages, punitive damages, and attorney fees for violations of failure to disclose, warn or correct lead paint on the premises which is the subject of this litigation and fore retaliatory eviction. ¶2 of the Carters' Third Party Complaint in 2009CVG00344.

6) That upon information and belief, Third party Defendant Stark Group, LLC, owned the property at 3420 East 53rd St and is incorporated in the state of Ohio. Its principal place of business is 1310 E. 49th St. Cleveland, Ohio 44114. Third party Defendant Stark Group, LLC sold the property to Wilkerson Enterprises inc. which almost immediately sold the property to Third Party Defendant Florence Bell. Id at ¶4.

7) That upon information and belief, Third Party Defendant Stark Group, LLC was on notice that the property on East 53rd was contaminated with lead paint after an inspection by the city on or about November

18th, 2004. Id. at ¶7.

8) That upon information and belief Defendant Stark Group, LLC failed to correct the lead paint condition in the property on East 53rd even though they received several notices and orders to correct this condition from the City of Cleveland. Id. at ¶8.

9) Third Party Defendant Stark Group, LLC instead sold the property on E. 53rd to Third Party Defendant Wilkeinson Enterprises Inc. on November 17th 2006. Id. at ¶9.

10) That upon Information and belief, Third Party Defendant Stark Group, LLC intentionally failed to disclose that the property on East 53rd was contaminated with lead paint to Third Party Defendant Wilkinson Enterprises Inc. before selling the real property. Id. at ¶10.

11) That under Cleveland Ordinance CCO 240.06(a)(2), the inspections done by the City of Cleveland of the subject premises finding lead paint and the resulting orders to Third Party Defendant Stark Group, LLC to correct this condition created a legal duty to third parties, like Third Party Plaintiffs, the breach of which is actionable." Id. at ¶25.

12) That Third Party Plaintiffs were an intended beneficiary of the City of Cleveland actions. Id. at ¶26.

13) That the ability to rent and sell the premises was valuable consideration to Third Party Defendant Stark Group, LLC and the failure on its part to correct and disclose the condition that there was lead paint in selling the property resulted in the direct injuries complained of above by Third Party Plaintiffs. Id. at ¶27.

14) That Third Party Plaintiffs are not simply incidental beneficiaries, but have a cause of action against the Third Party Defendant Stark Group, LLC for its breach of the legal duties listed above which resulted in economic damages, emotional distress and physical injuries to them. Id. at ¶28.

In response to these claims, Stark Group filed a counterclaim for "Disparagement," "Business Duress," and "Tortious Interference with Advantageous Business Relations" on May 4,

2009. R.58. On July 6, 2009, the Carters filed a Motion Dismiss the Counterclaims Filed by Third Party Defendant The Stark Group, LLC. R.46. And on March 9, 2010 Stark Group filed a Motion for Judgment on the Pleadings and to Dismiss The Stark Group, LLC, Third party Defendant on March 9, 2010. R. 29. In this motion, Stark Group argued for Dismissal because "[the Carters] have failed to produce one iota of admissible, probative evidence in their responses to discovery of record herein to maintain their action against this Defendant. Additionally, the factual basis for their claims are at issue and dispute, warranting denial of their premature motion to dismiss, inasmuch as there remain numerous, technical, critical facts and factors, which movants cannot overcome, warranting denial, all at their costs." R. 29, p.1. The motion goes on to state that "[t]he pleadings of record in this cause, clearly warrant judgment for The Stark Group, LLC, Third Party Defendant, particularly in the admissions of the Carters...," cites admissions provided by the Carters that The Stark Group was not the owner of the subject premises when they lived there, and quotes from a few cases holding that a plaintiff must prove breach of a duty, harm, and causation in order to prevail in a negligence claim. Id.

On March 30, 2010, the Carters filed their Brief in Opposition to Judgment on the Pleadings (R.28) and a Request for Further Discovery pursuant to Ohio Rule of Civil Procedure 56(F). R.25. In their opposition brief, the Carters argue that Stark Group's Motion for Judgment on the Pleadings should be treated as a Motion for Summary Judgment under Rule 56(C) because it relies on facts that were outside of the Carters' pleadings, that Stark Group's motion to dismiss should be denied pursuant to Rule 56(C) because there remains a genuine issue of material fact regarding Stark Group's liability to the Carters under common law tort principles, and that any

ruling on Stark Group's motion to dismiss should be delayed pending further discovery pursuant to Rule 56(F) because the Defendant had refused to appear for discovery proceedings that were necessary to determine Stark Group's liability.

Without addressing the issues of whether Stark Group's motion to dismiss should be considered as a Motion for Summary Judgment under Rule 56(C), or whether the Carters should be allowed time for further discovery under Rule 56(F), the trial court issued a Judgment Entry granting Stark Group's motion to dismiss pursuant to Rule 12(B)(6) on April 19, 2010. R.20. In the Conclusions of Law and Facts supporting this Judgment Entry, the trial court found that Stark Group relinquished possession of the subject premises through a sheriff's sale rather than a direct sale to another Third Party Defendant, Wilkerson Enterprises, Inc., as was alleged in the Carters' pleadings. Based on the legal finding that O.R.C. §5302.30(B)(2)(d) exempts transfers "by a foreclosure sale that follows a default in the satisfaction of an obligation secured by a mortgage" from the requirement under O.R.C. §5302.30 that a seller of residential property must disclose any information concerning the existence of a material defect in the premises, the court concluded that, as a matter of law, the Carters could prove no set of facts which would entitle them to relief on their claims against Stark Group. The trial court also dismissed Stark Group's counterclaims against the Carters.

In accordance with App. R. 4(A), Appellants appealed the trial court's dismissal of the their claims against Appellee by a notice of appeal and assignments of error on May 19, 2010, which was delivered to the 8th District Court of Appeals on May 20, 2010. R.11.

SUMMARY OF ARGUMENT

This Appeal raises an issue of first impression for this Court relating to the scope of a property owner's duty to comply with a lawful order to abate lead hazards in rental housing pursuant to R.C. §3742.37, Cleveland Codified Ordinance 240.04, and 42 U.S.C. 4851. Despite the fact that these statutes authorize the issuance of mandatory Lead Hazard Control Orders for the explicit purpose of preventing further instances of childhood lead poisoning, Ohio courts have yet to recognize that a former owner of rental housing who fails to comply with a Lead Hazard Control Order can be held liable for the lead poisoning of subsequent occupants.

Appellants urge that this Court now recognize a property owner's liability for the harms that result from his/her failure to remediate a known lead hazard in accordance with a lawful order cannot be cut off simply because such an owner relinquishes possession of a property. Although Ohio courts have yet to specifically recognize that a former owner's failure to comply with an order to abate lead hazards in rental housing breaches a legal duty with regards to the health and safety of individuals who might occupy the property after he/she relinquished title, such a finding is supported under at least two theories of liability that have been adopted by Ohio Courts. First, the City of Cleveland's enactment of C.C.O. 240.04(e), which states that "No person shall fail to comply with an order issued by the Commissioner," and the Ohio Legislatures enactment of landlord duties under RC § 5321.04 and R.C. §3742.38, all support the imposition of duty under negligence per se. And second, even in the absence of a statute that gives rise to negligence per se, such liability is supported by the common law negligence principle that one has a duty to conduct

one's self with the degree of care that an ordinarily reasonable and prudent person exercises, or is accustomed to exercising, under the same or similar circumstances.

ARGUMENT

1) STANDARD OF REVIEW

The standard of review of the grant of a Motion for Judgment on the Pleadings is the same as the standard of review for a Civ. R. 12(B)(6) Motion. Review of a dismissal of a complaint based upon a judgment on the pleadings requires independent review of the complaint to determine if the dismissal was appropriate. Rich v. Erie County Department of Human Resources (1995), 106 Ohio App.3d 88, 91, 665 N.E.2d 278.

Judgment on the pleadings may be granted where no material factual issue exists. However, it is axiomatic that a motion for judgment on the pleadings is restricted solely to the allegations contained in those pleadings. Flanagan v. Williams (1993), 87 Ohio App.3d 768, 623 N.E.2d 185. *See, also*, Nelson v. Pleasant (1991), 73 Ohio App.3d 479, 481, 597 N.E.2d 1137; Barilatz v. Luke (Dec. 7, 1995), Cuyahoga App. No. 68304, unreported, 1995 WL 723294.

A reviewing court need not defer to the trial court's decision in such cases. Id. A Motion for a Judgment on the Pleadings, pursuant to Civ. R. 12(C), presents only questions of law. Peterson v. Teodosia (1973), 34 Ohio St.2d 161, 165-166, 297 N.E.2d 113. The determination of a motion under Civ. R. 12(C) is restricted solely to the allegations in the pleadings and the nonmoving party is entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom,

construed in her favor." Id.

2) THE TRIAL COURT ERRED BY CONSIDERING FACTS OUTSIDE THE PLEADINGS IN RULLING ON APPELLEE'S MOTION "FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS THE STARK GROUP, LLC, THIRD PARTY DEFENDANT" UNDER RULE 12(B)(6) AND FAILING TO RULE ON APPELLEE'S REQUEST FOR FURTHER DISCOVERY UNDER 56(F).

In its Brief in Opposition to Motion for Judgment on the Pleadings Appellants argued that the trial court should treat Stark's Motion for Judgment on the Pleadings as a motion for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure because it relied information outside of the pleadings by quoting from and attaching the Carter's responses to Stark's second set of discovery requests. R.28. Based on the understanding that Stark's Motion for Judgment on the Pleadings thus constituted a motion for Summary Judgment, Appellants' framed their Opposition Brief as an Opposition to Summary Judgment and requested that the trial court grant them further time for discovery pursuant to Rule 56(F). In Attorney Kramer's affidavit in support of this request for additional discovery, Mr. Kramer indicated that Appellants had timely noticed Stark of a deposition under Rule 30(B)(5), but that Stark did not attend the deposition. Due to Stark's failure to attend this deposition, Appellant's were unable to to develop evidence that Appellee was under a duty to protect the Carters from injury, that Appellee had breached this duty, and that the Carters' injuries proximately resulted from the defendant's breach of duty. *See* Affidavit attached to R.28.

Not only do Appellants contend that the trial court erred by recognizing Appellee's Motion as one under 12(b)(6) because it relied on facts outside the pleadings, Flanagan v. Williams (1993), 87 Ohio App.3d 768, 623 N.E.2d 185. *See, also*, Nelson v. Pleasant (1991), 73 Ohio App.3d 479,

481, 597 N.E.2d 1137; Barilatz v. Luke (Dec. 7, 1995), Cuyahoga App. No. 68304, unreported, 1995 WL 723294, Appellants also contend that the trial court itself relied on facts outside the pleadings when it used new facts regarding the manner in which Appellee relinquished ownership of the subject premises in granting dismissal under Rule 12(b)(6). And it was based on new facts that Appellant's brought to the court's attention based on its understanding that the Appellee's Motion should be considered as one for summary judgment that the trial court found that the subject premises had passed through foreclosure rather than a direct sale from Appellee. In doing so, Appellant's submit that the court erred in both granting dismissal under 12(b)(6), as well as in concluding that Appellee should be dismissed because foreclosure absolves an owner of the duty to disclose known hazards to subsequent purchasers under R.C. § 5302.30. Even if it is the case that R.C. § 5302.30 does not impose a duty on owners to disclose lead hazards to subsequent purchasers who take possession through a foreclosure sale, this does not, as a matter of law, mean that Appellee was absolved of all liability to Appellants as a matter of law because R.C. § 5302.03 only deals with duties among buyers and sellers or real estate, not third parties who might be harmed by the negligent acts of such buyers and sellers.

Thus, although Appellants contend that dismissal was inappropriate under 12(b)(6) even under the facts considered by the trial court, Appellants submit that it was error for the trial court to enter a ruling under Rule 12(b)(6), and that the trial court should have thus ruled on their request for additional discovery under Rule 56(f) before entering its final order. In the event that the trial court had properly allowed this request for additional discovery before making a decision based under Rule 56(C), Appellants would have been able to depose Appellee and develop facts tending

to show that Appellee had a financial interest in the foreclosing party, and had made a conscious decision to allow the subject premises to fall into foreclosure.

3) THE TRIAL COURT ERRED IN DISMISSING THE APPELLANTS THIRD PARTY COMPLAINT FINDING THAT IT WAS BEYOND ANY DOUBT THAT THE PLAINTIFFS COULD PROVE NO SET OF FACTS ENTITLING THEM TO RELEIF.

To prevail on their common law negligence claim, Appellate Carters must prove by a preponderance of the evidence that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty[1], that damage resulted, and that there was a causal relation between the breach of the duty and the damage. Bell v. Goldsmith, 1995 WL 396352 (Ohio App. 8 Dist. 1995).

It is clear that Stark knew prior to the Carters' occupying the premises of the lead paint hazard. The issue is whether the property being purchased at a sheriff's sale breaks the duty imposed on it to protect foreseeable future tenants like the Carters from harm of lead poisoning? The trial court found that it did not state a claim, but this was legal error.

a. Public Policy demands all Actors involved in Lead Poisoning of a Innocent Child be Liable when they Breach their duty to Remediate

Prior to 1950, most houses were painted with lead-based paint. About two-thirds of homes built before 1940 and about half built from 1940 to 1960 contain heavily leaded paint. There is evidence that the Lead Industry Association and paint manufacturers knew of risks of lead to children since 1933, but continued making lead-based paint until forbidden in 1978.

The U.S. Centers for Disease Control (CDC) defines lead poisoning in terms of lead in a child's blood in micrograms per tenth of a liter (mcg/dl). The current level considered "lead poisoned" is 10 mcg/dl. In the instant case Aushora Carter blood level was 21 mcg/dl. The CDC and the American Academy of Pediatrics have both described lead poisoning as the number one environmental problem facing American children.

The vast majority of victims are poor minorities live in older housing. Black children are more than twice as likely to be poisoned as white children. Ashoura Carter and the Carter family fits all of these statistical generalizations of the problem. The Carters are African-American, Ashoura was only a little over one year of age when she was lead poisoned at the the 3420 E. 53rd St, Cleveland, Ohio property that had be abandoned by Stark Group L.L.C. rather than pay the expenses to remediate the lead paint problem.

Children are the most vulnerable to lead-based paint poisoning. They are most likely to be exposed by eating paint chips, chewing on objects containing lead-based paint, and breathing household dust containing lead-based paint. The Agency for Toxic Substances and Disease Registry (ATSDR) says that a child who swallows large amounts of lead may develop may occur. Even at much lower levels of exposure, lead can affect a child's mental and physical growth. [1] Agency for Toxic Substances and Disease Registry (ATSDR). 2005. Toxicological Profile for lead. (*Draft for Public Comment*). Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service Damage from lead poisoning is permanent and irreversible. The New England

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[1] The question of breach in negligence cases is one of fact left for the trier of fact to decide. Magaraian v. Hawkins, 321 F.3d 235, 238 (1st Cir. 2003).

Journal of Medicine has reported that a child exposed to low levels of lead during childhood is seven times more likely to drop out of high school and six times more likely to have a significant reading disability. At higher levels of exposure, lead can cause kidney damage, impaired reproductive function, anemia, high blood pressure, coma and, potentially, death.The City of Cleveland ranks first in the nation among large metropolitan areas in the percentage of children with blood lead levels sufficient to cause permanent injuries. Cleveland had the highest percentage of children with lead poisoning among cities with the most lead poisoning cases (based on 2001 data). Further, a 2003 study found that the Saint Clair-Superior, Glenville, and Fairfax neighborhoods had the highest percentage of lead levels in children in the City of Cleveland. See Attachment One – Table form Environmental Watch. Each of these neighborhoods had blood lead levels at or above 20% of the total tested. Citywide, 20 neighborhoods had lead poisoning rates of 10% or greater. *Id.* Of the cities with the highest rates of lead-poisoned children, Cleveland is tied with Buffalo for oldest housing stock. The 2000 U.S.

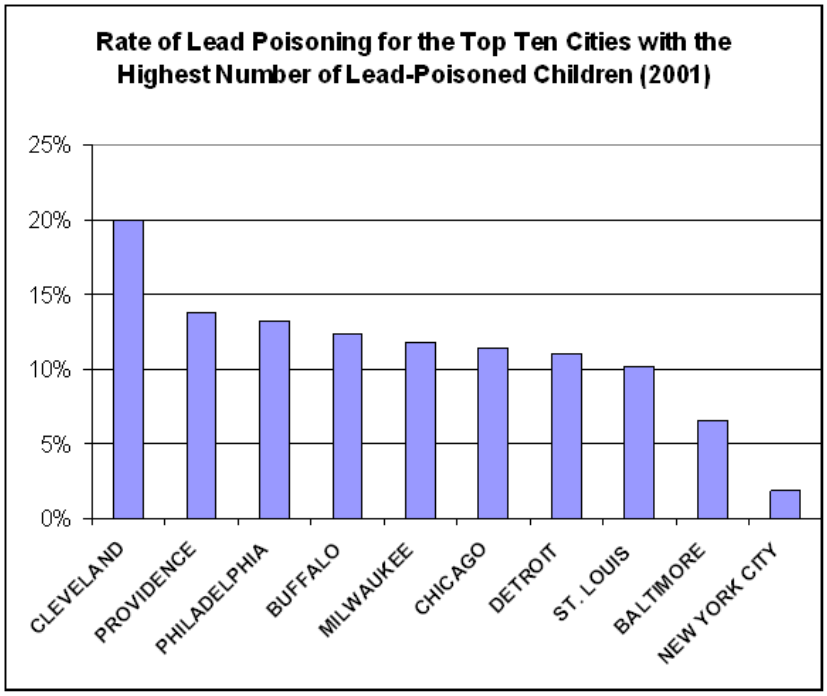

Figure 1: Created by Environmental Health Watch with data from the Alliance for Healthy Homes

Census data for median year structure built is 1940 for Cleveland. This further illustrates that large number of homes which are likely to contain lead-based paint.

In such an environment where ---the victims are poor and without power ---justice mandates that all actors that contributed to the harm must be required to pay for the damage. The issue presented in this appeal is a matter of not only first impression in Ohio, but the extensive research in preparing this brief uncovered no decisions either pro or con on the issue of holding a previous property owner liable when it intentionally abandons the property to avoid lead remediation costs resulting in a future family with small children becoming poisoned at the property now own by a new landlord.

b. Failure to Comply with Lead Hazard Control Order Constitutes Negligence per se Under the Ohio Revised Code and/or Cleveland Codified Ordinances.

Prior to the Ohio Supreme Court's decision in Shroades v. Rental (1981), 68 Ohio St. 2d 20, tenants like the Carters were clearly at the mercy of unscrupulous landlords who could and would continue to collect rents for property in various states of disrepair. Tenants were often in financial circumstances which would not permit them to assume the cost of repair or to, alternatively, relocate themselves and their families to a new home where they would not be exposed to the hazards of a structure which had not been properly maintained. Similarly, a tenant did not have available any effective legal remedy to force a landlord to make repairs or pursue recovery for personal injury or damages done as a result of a landlord's failure to put and keep the premises in a fit and habitable condition.

Recognizing that Ohio common law had failed to place a cognizable duty to repair on out of possession landlords and that the financial burden of proper maintenance is best placed upon landlords, the Ohio legislature enacted RC § 5321.04 which set forth the obligations of any landlord who is a party to a rental agreement. This statute states in relevant part:

> (A) A landlord who is a party to a rental agreement shall do all of the following:
> (1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;
> (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable
> condition;

The Ohio Supreme Court thereafter held that a landlord is liable for injuries, sustained on the demised residential premises, which are proximately caused by the landlord's failure to fulfill the duties imposed by RC § 5321.04. Shroades, *supra* at 25. This issue was revisited by the Court nineteen years later in Sikora v. Wenzel 88 Ohio St.3d 493 (2000) which held that:

> A landlord's violation of the duties imposed by R.C. 5321.04 (A)(1) or 5321.04(A)(2) constitutes negligence *per se,* but a landlord will be excused from liability under either section if he neither knew nor should have known of the factual circumstances that caused the violation. (*Shroades v. Rental Homes, Inc*. [1981], 68 Ohio St.2d 20, 22 O.O.3d 152, 427 N.E.2d 774, clarified.) *Id*. at at Syllabus.

The Shroades Court went on to establish a rule of law whereby a violation of a law applying a duty on a landlord would constitute negligence per se subject, of course, to a showing that the violation of the statute was a proximate cause of the alleged injury. Anderson v. Ceccardi (1983), 6 Ohio St.3d 110.; Eisenmuth v. Moneyhon (1954), 161 Ohio St. 367.

The distinction between negligence and negligence per se is that the former must be found by the jury from the facts, the conditions and circumstances disclosed by the evidence; whereas,

the latter is a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required. Swoboda v. Brown (1935), 129 Ohio St. 512 at Syllabus 4. Where a specific requirement is made by statute and an absolute duty thereby imposed, no inquiry is to be made whether the defendant acted as a reasonably prudent man, or was in the exercise of ordinary care. *Id*. at 522; Ornella v. Robertson (1968), 14 Ohio St.2d 144, 149. Liability is, therefore, established irrespective of the question of whether his act is such as is deemed to meet and satisfy the test of ordinary or reasonable care which would be applied in the absence of such statutory definition and imposition of absolute duty. Id.

In Shroades, the plaintiff was injured as a result of an defective exterior step which broke has she attempted to exit the apartment which she had rented from the defendant. There was no specific building code or other regulation alleged to have been violated; therefore, the cause of action was based primarily upon the landlord's failureto comply with the requirement of RC § 5321.04(A)(2) to put and keep the premises in a fit and habitable condition. The language of RC § 5321.04(A)(2) does not set forth a specific requirement and sounds more like, a general negligence standard; therefore, the Court, in essence, was finding that a necessary pre-requisite to the violation of this subsection of the statute was the proving of an act or omission which would constitute general negligence (i.e. negligence within negligence per se). Notice of the subject defect, either actual or constructive, has been a long-standing element of proof for negligence in premises liability cases; therefore, insertion of this element into the analysis of RC § 5321.04(A)(2) is legally sound and appropriate.

In the instant case, the Third Party complaint pled that Appellee Stark when it owned the property was under duties imposed by the City of Cleveland Codified ordinance defining lead hazards as a nuisance. *Cleveland Ordinance 240.02*. The Code notes in pertinent part that 'The Commissioner may determine that a nuisance is required to be immediately controlled under this section if, in the Commissioner's opinion, failure to immediately control the hazard may cause a serious risk to the health of the occupants of the property. In such a case, the Commissioner may require the owner or manager of the property to immediately control the nuisance." At C.C.O. 240.04(e), the Code further provides that that "No person shall fail to comply with an order issued by the Commissioner..."

The purpose of ordering property owners to control lead hazards is derived from Ohio Revised Code §3742.37, Ohio Administrative Code 3701-30-07 and 3701-30-08, which in essence grants the director to conduct public health lead risk assessments on properties that he determines are a possible source of child's lead poisoning. Specifically, 3701-30-07 aims to prevent lead poisoning in individuals under six years of age. Furthermore, federal law also establishes a duty to abate lead nuisances in housing where children under the age of six may reside. The Residential Lead-Based Paint Hazard Reduction Act, 42 USCS §4851 (1), enacted under President George Bush, finds that low-level lead poisoning is widespread among American children under age 6, with minority and low-income communities disproportionately affected.

Appellee Stark received an order on February 2, 2005 to control the lead hazards identified at 3420 E. 53rd St. Despite agreeing to comply with and receiving an extension to comply with the order until May 14, 2005, failed to abate the nuisance and instead walked away from the property

in the hopes of avoiding the expense of remediation of the problem!. A new owner subsequently purchased the property, but as will be discussed later, Appellee's failure to comply with the order and statutory mandates after notice of the hazard contributed to Appellant Ashoura Carter, a child under the age of six physical and emotional injuries.

Based on the statutes and ordinances that have been enacted by the City of Cleveland and the State of Ohio, Appellee's failure to comply with the order requiring it to abate the lead nuisance at 3420 E. 53rd is negligence per se. The trial court erred in not finding this intentional and willful refusal to comply with the law to be both the factual and proximate cause of Ashoura's physical and emotional injuries. Even though there were no contractual relations between Stark and the Carters it may be held liable. . See, e.g., Tackling v. Shinerman, 630 A.2d 1381 (Conn. Super. Ct. 1993). (A real estate appraiser may be liable to the purchaser of the appraised property for negligent failure to detect peeling, chipping, and cracking lead-based paint even no privity exists between them) [Attachment-4]; See, generally, Pancak, Miceli, and Sirmans, *"Legal Duties of Property Owners Under Lead-Based Paint Laws," 24 Real Estate LJ 7 (1995)*.

c. Appellee Stark Breached a Common Law duty to Subsequent Residents when it Relinquished Ownership of the subject premises through Foreclosure rather than Cooperating with the City in Remediating the Lead Hazards it Posed to Occupants. Predecessor landowner liability for nuisance is recognized in the Restatement (Second) of Torts § 840A [Attachment-2] which states:

> A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession ***remains subject to liability for the continuance of the nuisance after he transfers the land***.

(Emphasis added.) The comment to section 840A further explains:

> If the vendor or lessor has himself created on the land a condition that results in a nuisance by selling or leasing the land to another. In these cases it frequently has been said that by transferring the land with the condition existing upon it he has authorized the continuation of the nuisance. This is usually somewhat fictitious; and a better reason is that his responsibility toward those outside of his land is such that he is not free to terminate his liability to them for the condition that he has himself caused or concealed, by passing the land itself on to a third person. The effect of the rule is to require vendors and lessors in order to avoid liability to take reasonable steps to abate existing conditions involving any nuisance before they transfer land.

Although there is no case in Ohio which expressly adopts or interprets Section 840A, Ohio courts generally look to the Restatement (Second) of Torts to determine the liability of landowners for claims brought against them for injuries suffered both on and off the land by conditions on the land. DiCenzo v. A-Best Prods. Co., Inc., (2008) 120 Ohio St.3d 149, 164, 897 N.E.2d 132. The Supreme Court recognized that "[t]he Restatement itself is a roadmap of where courts are going." *See also,* Gilbert v. Korvette, Inc., 327 A.2d 94, 100, fn. 25 (Pa. 1974)(stating "this court has not hesitated to adopt sections of the Restatement (Second) of Torts when our common-law precedents varied from the Restatement or when the Pennsylvania common law provided no answer.)

Another section of the Restatement (Second) of Torts § 373 expressly refutes the trial court's position that Appellee Stark may not be held liable for damages caused to the Carters after the transferred ownership or possession of it. The rule in § 373 "applies to any structure or other artificial condition upon the land which the vendor has himself created, ***or which he has negligently permitted to remain after it has been created by another.***" Restatement (Second) of Torts § 373 (1965) [emphasis added]. "It applies where the condition involves an unreasonable risk of harm to others outside of the land, whether that risk is due to the original character of the structure or condition, or to disrepair." *Id.*

Based upon the Third Party Complaint which must be considered true the Carters' have stated the necessary elements for a claim that Stark negligently permitted the property not to be remediated and simply abandoned the property. Olpp v. Hocking Val. Ry. Co., 22 Ohio N.P.(N.S.) 433 (Ohio.Com.Pl.,1920) (If it is within the power of person by exercise of skill and labor to abate a nuisance, he must do so, but if he fails to do so and allows it to continue he is responsible for maintaining a continuing nuisance.)

There is one case on all points by the highest court in the State of Massachusetts on this issue. In Minaya v. Massachusetts Credit Union Share Ins. Corp.,392 Mass. 904, 906 (Mass.,1984)[Attachment -3] the Supreme Judicial Council held that:

> Further, "[p]ublic policy in a civilized community requires that there be someone to be held responsible for a private nuisance on each piece of real estate, and, particularly in an urban area, that there be no oases of nonliability where a private nuisance may be maintained with impunity." *Kurtigian v. Worcester,* 348 Mass. 284, 291, 203 N.E.2d 692 (1965). Thus, an owner of land who has maintained a nuisance may not be discharged of responsibility for that nuisance merely by either failing to pay property taxes or by a transfer until the new titleholder has had a reasonable time to correct the nuisance. Resolution of the plaintiffs' claims is therefore contingent on the development of facts relative to the nature of the nuisance, the time at which the defendant relinquished control of the property, and whether the period commencing on the date on which the city assumed control and ending on the date of the fire was reasonably sufficient to permit the city to abate the particular nuisance.

See also, Prosser, Torts § 64 at 413 (4th ed. 1971). The same conclusions hold true for the liability as described in Restatement (Second) of Torts § 840A (1977) in decisions from other jurisdictions. State v. Ole Olsen, Ltd., 38 A.D.2d 967, 968, 331 N.Y.S.2d 761, 763 (2d Dept.1972) ("[NY-RPAPL § 841] specifically authorizes the prosecution of an action against both the creator of a nuisance on real property and his grantee to abate the nuisance and for damages resultant therefrom"); United States v. Hooker Chemicals and Plastics Corp., 722 F.Supp. 960, 968-70

(W.D.N.Y.1989); State of N.Y. v. Solvent Chemical Co., Inc. 880 F.Supp. 139, 144 (W.D.N.Y.,1995) (It seems likely, therefore, that the New York courts would hold, by extension, that one who passively continues a public nuisance created by a prior owner, and then resells the property upon which the nuisance exists (so becoming an "intermediate owner"), could be held liable for abatement of the nuisance and for damages unless he had no actual or constructive notice of the existence of the nuisance at the time he owned the property.) Smith v. Elliott, 9 Pa. 345 (1848); Royal Indem. Co. v. Caleco, Inc., 2004 WL 2612288 (E.D.Pa.2004) at Slip Op 7 (There is support, however, in both Pennsylvania case law and the Restatement for the proposition that liability for nuisance can continue beyond a party's sale of the land., the Pennsylvania Supreme Court noted that a party who creates a nuisance is liable for any resulting damages and that this liability continues for as long as the nuisance does-even after the creator's possessory interest has terminated. Restatement § 840A echoes this principle and additionally imposes a limited liability on vendors who did not initially create the nuisance) Eastman v. Amoskeag Manufacturing Co., 44 N.H. 143, 156 (1862)"He who erects a nuisance does not by conveying the land to another transfer the liability for the erection to the grantee."); Goss, Inc., 630 F.Supp. 1361, 1407 (D. N.H. 1985); Robertson v. Monroe, 80 N.H. 258, 262, 116 A. 92 (1922) and other cases cited therein.

d. The Appellants Injuries Were Proximately Caused by Appellee Stark's Failure to Remediate Known Lead Hazards Prior to Abandoning the Subject Premises to Foreclosure

The plaintiff has the burden to prove that the defendant's tortious conduct was a factual cause of the plaintiff's harm. Consistent with the burden of proof in civil actions, plaintiff must demonstrate by a preponderance of the evidence that a defendant's tortious conduct was a

factual cause of harm. This burden consists of the two elements of the burden of proof: 1) the burden of production, which requires the introduction of sufficient evidence to permit a rational factfinder to make a determination that a defendant's tortious conduct was a factual cause of the harm, and 2) the burden of persuasion, which requires that the factfinder be persuaded from the evidence that factual causation more likely than not exists. *Restatement Second of Torts §433B(1)*

To isolate and determine whether an act was a factual cause of an outcome requires consideration of whether that outcome would have occurred without the act's having taken place. As philosophers have taught, factual cause is not a phenomenon that can be seen or perceived; instead, it is an inference drawn from prior experience and some, often limited, understanding of the other causal factors—the causal mechanism—required for the outcome. Thus, all causal determinations require inferential reasoning. Sometimes the inferential reasoning required is quite evident, as when a child is found to have suffered from lead poisoning in a home that was under an order for lead abatement. Reasonable inferences are matters left to the jury's collective experience and common sense.

At this stage of the litigation the plaintiff need not prove the defendant's tortious conduct was a cause of the harm. As was discussed earlier the legal standard for judgment on the pleadings all factual allegations must be taken as true. In the portion of the Appellants Answer,counterclaims & Third Party Complaint contain these allegations:

> That the Defendant Michael Carter and Third Party Plaintiffs Julia Roberts Carter and Ashoura Carter injuries were caused wholly by the negligence of the Plaintiff Cleveland Development, LLC and the Third Party Defendants, in failing to provide the required notices about lead paint hazards, to remove or cover the dangerous lead-containing paint,

> dust, soil of the premises, so as to make them inaccessible to children who resided therein. Answer, Counterclaim & Third Party Complaint. at ¶11.
>
> That Third Party Plaintiffs are not simply incidental beneficiaries, but have a cause of action against the Third Party Defendant Stark Group, LLC for its breach of the legal duties listed above which resulted in economic damages, emotional distress and physical injuries to them. Id. at ¶28.

Even if this was to be based on a Rule 56 standard the civil burden of proof merely requires a genuine issue of material fact. Here, the Carters have met their burden of proof by presenting evidence that meets the required standard. Stark Group LLC received an order to control lead hazards from the Cleveland Department of Public Health on February 2, 2005. Stark was ordered to comply with this order by March 15, 2005 but received an extension until May 14, 2005 based upon a request by the Defendant. Further, the current owner, Ms. Bell has received a similar order to control lead hazards. This order was received more than two years after Stark's clear duty to abate the lead in the home. This evidence meets the standard raising a genuine issue of material fact and establishes that Stark Group LLC is the factual and proximate cause of the harm suffered by the Carters.

When a party sues multiple actors and proves that each engaged in tortious conduct that exposed the plaintiff to a risk of harm and that the tortious conduct of one or more of them caused the plaintiff's harm but the plaintiff cannot reasonably be expected to prove which actor or actors caused the harm, the burden of proof, including both production and persuasion, on factual causation is shifted to the defendants. Courts have shifted the burden of proof on the aspect of causation that requires identification of the actor who committed the tortious conduct—there being

adequate evidence that the tortious conduct caused the plaintiff's harm. These cases are characterized by a close relationship among the actors who potentially caused the other's harm, the actors having superior knowledge of the relevant circumstances, and the person harmed having no reasonable prospect for obtaining evidence of causation.

In some cases, the specific facts of the defendant's tortious conduct and its relationship to the harm to the plaintiff may be sufficient to justify a reasonable inference of causation. As a matter of scope of liability, the defendant's tortious conduct must increase the risk of harm to the plaintiff and such tortious conduct could reasonably be found, after the fact, to have increased the risk of harm to a greater extent than the risk posed by all other potential causes. In the end, the line between permissible inference for the jury and impermissible speculation is one that must be determined based on the specific facts. Since Appellant's have alleged that Appellee is liable as a joint tortfeaser with the other Third Party Defendants in this action, the question of whether Appellee's conduct was such that Appellee could have reasonably foreseen its occurrence based on their conduct is a factual determination that should be left for the jury.

CONCLUSION[2]

In the present appeal, this Court should reverse the trial court and find that the Third Party Compliant against Stark states a claim. It is the only public position that recognizes that a property owner may not escape liability by refusing to do its statutory duties. It is only just and fair since the Carters' are innocent victims and the defendants', including Stark, are the ones at fault.

Respectfully submitted,

_____
Edward G. Kramer (0024873)
The Fair Housing Law Clinic
3214 Prospect Avenue
Cleveland, Ohio 44115-2600
216-431-7400

_____
RYAN DEYOUNG(0086939)
FAIR HOUSING LAW CLINIC
The Housing Advocates, Inc.
3214 Prospect Avenue, East
Cleveland, Ohio 44115-2600
(216) 431-7400
ATTORNEYS FOR
DEFENDANTS-APPELLLANTS

[2] *Acknowledgment is made of the work done on this brief by Neil McGowan a legal intern of Cleveland State University, Cleveland-Marshall College of Law.*

CERTIFICATE OF SERVICE

A copy of the foregoing Brief was mailed this 18thday of March 2011 to the following:

J. Norman Stark, Attorney #0007243
Counsel for The Stark Group, LLC
1310 East 49th Street, 2nd Flr.
Cleveland, Ohio 44114-3803
Tel.: (216) 426-8400 Fax: (216) 426-8411
Email: Normanstark@aol.com

_____
EDWARD G. KRAMER

Attachment -1

ATTACHMENT -1

Confirmed and Estimated Lead Poisoning*
Children Less than Six Years of Age
City of Cleveland (2003)

Environmental Health Watch

City of Cleveland Neighborhoods	Children less than 6 yrs 2000 Census	Number Tested	Percent of Children Tested	Children Confirmed Poisoned	Percent Confirmed Poisoned	Estimated Total Poisoned**
St. Clair-Superior	1,288	536	42%	142	26%	341
Glenville	2,325	1,114	48%	237	21%	495
Fairfax	643	308	48%	62	20%	129
North Broadway	1,047	379	36%	70	18%	193
Forest Hills	1,570	668	43%	118	18%	277
South Collinwood	1,559	527	34%	83	16%	246
Detroit-Shoreway	1,859	768	41%	119	15%	288
Woodland Hills	1,439	587	41%	88	15%	216
Hough	1,590	665	42%	97	15%	232
Stockyards	999	431	43%	61	14%	141
Union-Miles	1,528	616	40%	84	14%	208
Clark-Fulton	1,498	653	44%	85	13%	195
Buckeye-Shaker	1,362	478	35%	62	13%	177
Goodrich-Kirtland Park	341	186	55%	24	13%	44
South Broadway	2,216	725	33%	92	13%	281
Ohio City/Near West Side	878	327	37%	39	12%	105
Mt. Pleasant	2,210	818	37%	97	12%	262
North Collinwood	1,756	495	28%	50	10%	177
Brooklyn Centre	947	363	38%	35	10%	91
Corlett	1,403	490	35%	47	10%	135

West Boulevard	1,798	594	33%	56	9%	170
Kinsman	1,040	465	45%	43	9%	96
Edgewater	568	153	27%	14	9%	52
Cudell	1,194	422	35%	38	9%	108
Tremont	790	349	44%	28	8%	63
Central	1,966	803	41%	52	6%	127
Lee-Miles	1,026	347	34%	19	5%	56
Euclid-Green	587	238	41%	11	5%	27
Jefferson	1,784	437	24%	16	4%	65
Puritas-Longmead	1,354	355	26%	11	3%	42
Old Brooklyn	3,050	630	21%	18	3%	87
Kamms Corners	1,611	223	14%	4	2%	29
Riverside	597	184	31%	3	2%	10
Neighborhoods w/ < 100 tests***	565	179	32%	20	11%	63
Cleveland	46,388	16,513	36%	2,025	12%	5,229 ****

- *A blood lead level of 10 mcg/dL or greater (Elevated Blood-Lead Level - EBL) is considered childhood lead poisoning. There is strong evidence of damage well below 10.
  ** Estimated Total Poisoned assumes the rates of poisoning for tested and non-tested children are the same and applies the Percent Confirmed Poisoned rate (based on children actually tested) to the total population under age 6.
  *** Neighborhoods with fewer than 100 tests performed may produce unreliable estimates. (Downtown, Industrial Valley and University)
  **** Total of neighborhood estimates (not city average times population).

- Source: Data analyzed by Epidemiology and Surveillance Services at The Cuyahoga County Board of Health. Original data obtained through the Ohio Department of Health's Childhood Lead Poisoning Prevention Program.
  Estimates by Environmental Health Watch

Attachment -2

Restatement of the Law — Torts
Restatement (Second) of Torts
Current through August 2010

Division 10. Invasions Of Interests In Land Other Than By Trespass
Chapter 40. Nuisance
Topic 4. Persons Liable
Title B. Liability Resulting From Failure To Act

§ 840A. Continuing Liability After Transfer Of Land

Link to Case Citations

(1) A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land.

(2) If the vendor or lessor has created the condition or has actively concealed it from the vendee or lessee the liability stated in Subsection (1) continues until the vendee or lessee discovers the condition and has reasonable opportunity to abate it. Otherwise the liability continues only until the vendee or lessee has had reasonable opportunity to discover the condition and abate it.

Comment:

a. This Section parallels § 373, on liability for physical harm resulting from conditions on the land after transfer, to which reference should be made.

b. The rules on the liability of a possessor of land who remains in possession for nuisances resulting from conditions on the land are stated in §§ 834 (see in particular Comment *e*), 839 and 840. The rule stated in this Section applies only when the transferor would have been subject to liability for the nuisance if he had remained in possession.

c. If the vendor or lessor has himself created on the land a condition that results in a nuisance, he cannot escape liability for the continuation of the nuisance by selling or leasing the land to another. In these cases it frequently has been said that by transferring the land with the condition existing upon it he has authorized the continuation of the nuisance. This is usually somewhat fictitious; and a better reason is that his responsibility toward those outside of his land is such that he is not free to terminate his liability to them for the condition that he has himself caused or concealed, by passing the land itself on to a third person. The effect of the rule is to require vendors and lessors in order to avoid liability to take reasonable steps to abate existing conditions involving any nuisance before they transfer the land.

d. For like reasons the rule stated applies to nuisances resulting from artificial conditions on the land created by third persons, with or without the consent of the transferor for which he would be liable because of his failure to abate them, as stated in § 839. Thus when the transferor if he had remained in possession would be subject to liability for a nuisance resulting from a condition created by trespassers on his land or by his predecessor in title before he acquired the land, he remains subject to liability after he has sold or leased the land to another.

e. The rule stated applies to nuisances resulting from natural conditions of the land to the extent that the vendor or lessor would be liable for them if he remained in possession, as stated in § 840.

Illustrations:

1. A and B are severally in possession of adjoining lands. There is an old brick chimney on A's land that he knows is in such a state of disrepair that it may collapse at any time and cause damage to B's land. A sells his land to C

without repairing the chimney. Shortly afterwards it collapses and refuse is thrown on B's land causing damage. A is subject to liability to B.2. A, B and C are severally in possession of adjoining lands, through which a stream flows from A's land to B's and then to C's. Without B's consent, C enters B's land and there builds a dam across the stream. The dam to B's knowledge floods A's land to an unreasonable extent and seriously interferes with A's use and enjoyment. B does nothing to prevent this. B leases his land to X and X takes possession. The flooding of A's land continues. B is subject to liability to A for the harm occurring after as well as before he leases the land.3. A purchases from B land upon which B has erected a building. At the time of the purchase a cornice of the building is in such condition as to shed rainwater upon the steps leading into the basement of C's adjoining building. A discovers this condition and does nothing to remedy it. A leases the land to D, who takes possession. Thereafter, during a heavy rainfall water shed by the cornice onto the steps floods C's basement. A is subject to liability for this harm.

Comment on Subsection (2):

f. See § 373, Comment *c*.

Case Citations

Reporter's Notes & Cross References Through December 1977

Case Citations 1978 — June 1987

Case Citations July 1987 — June 2005

Case Citations July 2009 — April 2010

Reporter's Notes & Cross References Through December 1977:

REPORTER'S NOTE

This Section is new. It is worded to conform to § 373 and is intended to make that Section applicable to cases of nuisance.

For cases supporting the Section, see the Note to § 373. Also the following: Bixby v. Thurber, 80 N.H. 411, 118 A. 99 (1922) (lessor); Eastman v. Amoskeag Mfg. Co., 44 N.H. 143, 82 Am.Dec. 201 (1862) (vendor); Wenzel v. Duncan, 32 N.Y.S.2d 223 (Sup.Ct.1941) (vendor); Flanagan v. Gregory & Poole, Inc., 136 W.Va. 554, 67 S.E.2d 865 (1951) (vendor); State v. Ole Oleson, Ltd., 76 Misc.2d 796, 352 N.Y.S.2d 97, aff'd, 45 A.D.2d 821, 357 N.Y.S.2d 1016 (1975) (vendor). But cf. Maisenbach v. Buckner, 133 Ill.App.2d 53, 272 N.E.2d 851 (1971).

Subsection (2): Two good decisions on the time limit of the transferor's liability are Cavanaugh v. Pappas, 91 N.J.Super. 597, 222 A.2d 34 (1966); and Sarnicandro v. Lake Developers, Inc., 55 N.J.Super. 475, 151 A.2d 48 (1959).

Cross References to

1. Digest System Key Numbers

C.J.S. Nuisances §§ 85, 86.

West's Key No. Digests, Nuisance 10.

Case Citations 1978 — June 1987:

No earlier citations

C.A.3, 1985. Cit. in disc., cit. in ftn., com. (c) quot. in ftn. A property owner sued a corporation whose predecessor in interest had owned the property, alleging negligence and public and private nuisance. The property owner contended that the predecessor had caused contamination of the ground water and the river during its operation of a chemical plant on the property. The trial court awarded damages to the property owner and issued an injunction, ordering the corporation to take steps to eliminate the pollution. Reversing the judgment and vacating the injunction, this court held that there was no claim for private nuisance for defective conditions of the premises, since the defects existed at the time of the land transfer; the property owner should have made his own inspection of the premises. The court stated that the exceptions to the caveat emptor theory did not apply in this case. The court also rejected the public nuisance claim, holding that the property owner lacked standing to sue because he did not suffer a harm different from that suffered by other members of the public, and this requirement applied to plaintiffs seeking injunctive relief. Although pecuniary harm certainly might be harm of a different kind from that suffered by the general public, said the court, there was no evidence that the property owner suffered this harm exercising the right common to the general public that was the subject of interference, i.e., the right to pure water. Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 313, cert. denied 474 U.S. 980, 106 S.Ct. 384, 88 L.Ed.2d 337 (1985).

D.N.H.1985. Subsec. (1) quot. in disc. The EPA sued the owners and former owners of toxic waste sites. The state of New Hampshire and the town nearest the sites intervened as plaintiffs with their own suits. Many generators of toxic wastes sent to the sites were joined in third party complaints seeking indemnity or contribution. Many cross-claims were also filed. This court determined both sites to be hazardous and noted that the EPA had taken numerous expensive remedial actions. The plaintiffs argued that the defendants' liability was joint and several and indivisible. The court noted that the burden of proof as to apportionment was on each defendant and that if the harm was divisible, each defendant was responsible only for his portion. Failure to show that the harm was divisible results in liability for the entire harm. The court added that the division must be reasonable and found that the damages were joint and several because the exact amount of chemicals each defendant generator supplied could not be pinpointed. The court found all past owners and present owners and past generators to be liable for the damages because the toxic waste statute holds all who deposit any toxic substance strictly liable, an owner of a site or a past owner remains liable for the continuation of a nuisance after transferring the land, and the generators employed independent contractors to do work that they should have realized was hazardous and failed to demand safety precautions. The court did find that one landowner was not liable for the activities of its lessee because he exercised reasonable care to prevent the creation of a nuisance. United States v. Ottati & Goss, Inc., 630 F.Supp. 1361, 1407.

E.D.Pa.1984. Quot. in sup. Plaintiff was required to remove a pollutant from its property and the banks of a river. Plaintiff then sued the company from whom it purchased the property, claiming negligence, private nuisance, and public nuisance, on the ground that defendant's predecessor in interest had caused the contamination. After a jury verdict for plaintiff, defendant moved for a judgment n.o.v. or a new trial. The court denied defendant's motions, holding that, as a successor corporation, defendant assumed liability for the contamination and could be held accountable for a nuisance which its predecessor created. The court rejected defendant's contention that the general rule of nonliability with its narrow exception set forth in §§ 352 and 353 controlled, finding neither section applicable because they addressed only a vendor's liability for physical harm to persons on the land. Instead, the court decided that, given an opportunity, the Pennsylvania Supreme Court would adopt s 840A making a vendor liable for the continuation of a nuisance after he transfers the land. Philadelphia Elec. Co. v. Hercules, Inc., 587 F.Supp. 144, 154, judgment reversed and injunction vacated 762 F.2d 303 (3rd Cir.1985). See above case. Certiorari denied 474 U.S. 980, 106 S.Ct. 384, 88 L.Ed.2d 337 (1985).

Mass.1984. Quot. in part in sup. Landowners alleged that their dwellings were destroyed by a fire proximately caused by dangerous conditions maintained by the prior owner of an adjacent property. The trial court entered judgment on the pleadings in favor of the prior owner. Reversing and remanding for further proceedings, this court held that, although a transfer of ownership of land usually relieves the prior owner of liability for dangerous conditions existing on the land, the transferor may remain liable for the continuation of a nuisance after he transfers the land until the new titleholder has had a reasonable opportunity to correct the nuisance. Minaya v. Massachusetts Credit Union Share Ins., 392 Mass. 904, 467 N.E.2d 874, 876.

Case Citations July 1987 — June 2005:

W.D.N.Y.1989. Quot. in sup., subsec. (2) cit. in disc. The state government of New York and the federal government sued a chemical company on a theory of public nuisance to recover costs incurred to prevent further migration of wastes, to relocate families, and for other actions taken in response to emergency orders issued after hazardous substances were detected in the surface and ground water, soil, the basements of homes, and other locations in the area surrounding the Love Canal. Granting the plaintiffs' motion for summary judgment, the court held that any liability the defendant incurred for creation of the public nuisance was not terminated when it sold the property to the board of education with notice in the deed of the presence of wastes on the property, because New York courts adhered to the principle that the creator of a nuisance was not released from liability when he conveyed the property to another. U.S. v. Hooker Chemicals & Plastics Corp., 722 F.Supp. 960, 968, 969.

N.D.Ohio, 1993. Quot. in sup., subsecs. (1) and (2) cit. in sup. A city brought a CERCLA action against the current and former owners of a coke-producing facility alleging, among other claims, nuisance liability. This court, granting in part the defendants' motions to dismiss, held, inter alia, that although the former owners, as vendors of the property, would have been liable for nuisance damages while they continued to be in possession of the property, their liability did not continue, as the current owners had knowledge of contamination of the property. City of Toledo v. Beazer Materials & Services, Inc., 833 F.Supp. 646, 657–658.

Mass.App.1987. Cit. in sup., cit. in case cit. in sup., com. (c) cit. in sup. A purchaser of land that was subsequently determined to contain hazardous waste materials sued the seller and the seller's broker alleging, inter alia, the creation of a private nuisance, negligent misrepresentation, and violations of state consumer protection and hazardous waste laws. The trial court granted summary judgment to the defendants on all counts. Affirming in part, this court held that the provisions of §§ 373 and 840A of the Restatement, relied on by the plaintiff, did not support an action for private nuisance by a buyer against a seller because they concerned a physical condition causing harm to others outside the land. Sheehy v. Lipton Industries, Inc., 24 Mass.App. 188, 507 N.E.2d 781, 783, review denied 400 Mass. 1103, 509 N.E.2d 1202 (1987).

Mich.App.1995. Cit. in diss. op. Property owners sued current and former owners of neighboring gasoline station on theories of public and private nuisance, negligence, and trespass when they discovered a gas leak at the station resulting in ground water contamination. After current owner reached a settlement with plaintiffs, the trial court granted former owner's motion for summary judgment on all counts. Affirming, this court held, inter alia, that although the leak constituted a public nuisance, former owner could not be held liable since it sold the station to current owner 13 years before the leak occurred. Dissenting opinion, believing that material factual issues existed concerning the cause of the leak and former owner's role in creating the condition that led to it, would have reversed with regard to the nuisance and negligence claims. Cloverleaf Car Co. v. Phillips Petroleum Co., 213 Mich.App. 186, 540 N.W.2d 297, 303.

Case Citations July 2009 — April 2010:

D.Mass.2009. Cit. in case quot. in sup. Plaintiff who suffered a severe electric shock while helping a tenant move out of a property when he touched a metal door that had apparently come into contact with electrical wires in the basement of the property brought claims for negligence and breach of the warranty of habitability against current owners and former owner of the property. This court granted summary judgment for former owner, holding that he owed no duty of care to plaintiff; the general rule was that a transfer of ownership of land relieved the owner of liability for dangerous conditions existing on the land, and a recognized exception to the rule did not apply, because there was no evidence that defendant knew of the dangerous condition that the metal door presented and, even if he did, the condition was not concealed from or unknown to current owners. Creeden v. Sanieoff, 621 F.Supp.2d 18, 20.

(1979)

REST 2d TORTS § 840A

END OF DOCUMENT

Attachment -3

392 Mass. 904, 467 N.E.2d 874

Supreme Judicial Court of Massachusetts,
Essex.

Jose MINAYA et al.[FN1]

FN1. Juana Rosario, Martin Castillo, Alejandro Nunez, Victor Castillo, Manuel Nunez, and Seferina Ramos.

v.

MASSACHUSETTS CREDIT UNION SHARE INSURANCE CORPORATION.

Argued Feb. 8, 1984.
Decided Aug. 28, 1984.

Landowners commenced an action alleging that their dwellings were destroyed by a fire proximately caused by the dangerous and hazardous conditions maintained by the prior owner of adjacent property. The Superior Court, Essex County, Murphy, J., entered judgment on the pleadings in favor of prior owner. On grant of landowners' application for direct appellate review, the Supreme Judicial Court, Abrams, J., held that complaint, alleging that landowners' dwellings were destroyed by a fire proximately caused by the dangerous and hazardous conditions maintained by prior owner of adjacent property currently owned by city after final decree in city's tax lien case against prior owner had been recorded approximately four weeks before the fire, stated a claim of nuisance against prior owner.

Reversed and remanded.

West Headnotes

[1] KeyCite Citing References for this Headnote

302 Pleading
302XVI Motions
302k342 Judgment on Pleadings
302k345 Insufficient Cause of Action or Defense
302k345(1.4) k. Complaint, Declaration, Petition or Statement of Claim. Most Cited Cases

Effect of a motion for judgment on the pleadings is to challenge the legal sufficiency of the complaint. Rules Civ.Proc., Rule 12(c), 43A M.C.L.A.

[2] KeyCite Citing References for this Headnote

272 Negligence
272XVII Premises Liability
272XVII(K) Persons Liable
272k1262 k. Prior Owners. Most Cited Cases
(Formerly 272k26)

Transfer of ownership of land, in most cases, relieves the prior owner of liability for dangerous conditions existing on the land.

[3] KeyCite Citing References for this Headnote

279 Nuisance
279I Private Nuisances
279I(A) Nature of Injury, and Liability Therefor
279k9 k. Persons Creating or Causing Nuisance. Most Cited Cases

Owner of land who has maintained a nuisance may not be discharged of responsibility for that nuisance merely by either failing to pay property taxes or by a transfer until the new titleholder has had a reasonable time to correct the nuisance.

[4] KeyCite Citing References for this Headnote

279 Nuisance
279I Private Nuisances
279I(C) Abatement and Injunction
279k32 k. Pleading. Most Cited Cases

Complaint, alleging that landowner's dwellings were destroyed by a fire proximately caused by the dangerous and hazardous conditions maintained by prior owner of adjacent property currently owned by city after final decree in city's tax lien case against prior owner had been recorded approximately four weeks before the fire, stated a claim of nuisance against prior owner. Rules Civ.Proc., Rule 12(c), 43A M.C.L.A.

[5] KeyCite Citing References for this Headnote

302 Pleading
302I Form and Allegations in General
302k8 Matters of Fact or Conclusions
302k8(3) k. Characterization of Acts or Conduct and Stating Result Thereof in General. Most Cited Cases

Failure of complaint to allege certain specific facts, to show causal link between alleged nuisance and fire, and state a claim of nuisance did not warrant judgment on the pleadings; intendments were to be made in favor of plaintiff, rather than against him, and legal conclusions were not to be frowned upon if defendant was fairly notified of the nature of the claim and grounds on which plaintiff relied. Rules Civ.Proc., Rules 8, 12(c), 43A M.C.L.A.

***875 *904** John P. McGloin, Lynn, for plaintiffs.

Michael P. Marnik, Lynn, for defendant.

Before WILKINS, ABRAMS, NOLAN and LYNCH, JJ.

ABRAMS, Justice.

In this action, the plaintiffs allege that their dwellings were destroyed by a fire proximately caused by the ***905** dangerous and hazardous conditions maintained by the defendant on an adjacent property. The defendant's answer was a denial, and an affirmative defense that, on the date of the fire, September 9, 1982,

the owner of the property was the city of Lynn, because, on August 13, 1982, a final decree in the city's tax lien case against the defendant had been recorded. In its answer, the defendant claimed that it "was not in control, did not own nor have any interest in the premises" on the date of the fire. The defendant moved for judgment on the pleadings. Mass.R.Civ.P. 12(c), 365 Mass. 754 (1974). A Superior Court judge allowed the defendant's motion, and we granted the plaintiffs' application for direct appellate review. We reverse.

[1] The effect of a motion for judgment on the pleadings is "to challenge the legal sufficiency of the complaint." *Burlington v. District Attorney for the N. Dist.,* 381 Mass. 717, 717-718, 412 N.E.2d 331 (1980). See *Liberty Mut. Ins. Co. v. United States,* 490 F.Supp. 328, 329 n. 1 (E.D.N.Y.1980) ("On a 12[c] motion, the movant is deemed to admit his adversary's allegations of fact; the movant's allegations, conversely, are taken as true only if specifically admitted by the adversary"). "For purposes of the court's consideration of the [rule 12(c)] motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." 5 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 1368, at 691 (1969).

The essence of the complaint is that the defendant's property was in a dangerous and hazardous condition, and that the condition of the property created a nuisance for which the defendant was liable. The plaintiffs assert that "[a]s a direct and proximate result of the nuisance created or allowed to exist by the defendant and the negligence, or intentional acts of the defendant as aforesaid, the plaintiff[s'] personal property and [that] of the plaintiff [s'] famil[ies] [was] damaged and destroyed by fire, all to the plaintiff[s'] damage."

The parties do not dispute the fact that on the date of the fire, September 9, 1982, the defendant did not own the property ***906** because on August 13, 1982, the city of Lynn had recorded a final decree in its tax lien case against the defendant. The complaint, however, does allege that the defendant continued to maintain the nuisance "for several days" after the city recorded its tax lien.

The narrow issue before us is whether the fact that title to the property was in the city of Lynn insulates the defendant from any liability. We conclude that it may not, and therefore we remand for further proceedings.

[2] A transfer of ownership of land does, in most cases, relieve the prior owner of liability for dangerous conditions existing on the land. See Restatement (Second) of Torts § 352 (1965). There is, however, an exception to this general principle which, on the pleadings before us, may apply to the instant case.

The "exception to the general rule of nonliability of the vendor is found in a number of cases where the land, when it is transferred, is in such condition that it involves an unreasonable risk of harm to ***876** those outside of the premises. In nearly all of the decided cases, this has amounted to either a public or a private nuisance, but this is clearly not essential. In such a case the vendor remains subject, *at least for a reasonable time,* to any liability which he would have incurred if he had remained in possession, for injuries to persons or property outside of the land, caused by such a condition. The reason usually given is the obviously fictitious one that by selling the land in such condition he has 'authorized the continuance of the nuisance.' A more reasonable explanation would appear to be merely that the vendor's responsibility to those outside of his land is regarded as of such social importance that he is not permitted to shift it, even by an outright sale" (emphasis supplied). W. Prosser, Torts § 64, at 413 (4th ed. 1971). The Restatement (Second) of Torts § 840A (1977) states that a transferor of land "upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land ... until the vendee or lessee has had reasonable opportunity to discover the condition and abate it." See *id.,* § 373 (analogous ***907** provision for negligence). See also *O'Connor v. Altus,* 67 N.J. 106, 114, 335 A.2d 545 (1975) ("liability for physical harm caused by a natural or artificial condition, of which the vendor has actual or constructive notice, involving unreasonable risk to persons on or off the land continues only until the vendee has had a reasonable opportunity to discover the condition and take appropriate precautions"). Cf. *Walter v. Wagner,* 225 Ky. 255, 258, 8 S.W.2d 421 (1928) ("the one who creates a nuisance on his land is not relieved from liability for the

damage it occasions to others by a sale of the property.... [Liability] would continue until the liability of the purchaser becomes fixed").

[3] Further, "[p]ublic policy in a civilized community requires that there be someone to be held responsible for a private nuisance on each piece of real estate, and, particularly in an urban area, that there be no oases of nonliability where a private nuisance may be maintained with impunity." *Kurtigian v. Worcester,* 348 Mass. 284, 291, 203 N.E.2d 692 (1965). Thus, an owner of land who has maintained a nuisance may not be discharged of responsibility for that nuisance merely by either failing to pay property taxes or by a transfer until the new titleholder has had a reasonable time to correct the nuisance. Resolution of the plaintiffs' claims is therefore contingent on the development of facts relative to the nature of the nuisance, the time at which the defendant relinquished control of the property, and whether the period commencing on the date on which the city assumed control and ending on the date of the fire was reasonably sufficient to permit the city to abate the particular nuisance.

Our decision is not inconsistent with *Kurtigian v. Worcester, supra,* relied on by the defendant. In that case, liability for a private nuisance was imposed on the defendant city, which had recorded an instrument of taking nine years before the plaintiff's injury. We held that, despite the fact that the city had not foreclosed the prior owner's right of redemption until after the injury, "the city's right to possession long preceded the date of injury." *Id.* at 287, 203 N.E.2d 692. We stated that "[l]iability for damage caused by the defective condition of premises turns upon whether a defendant was in control, either through ownership or otherwise," *id.* at 285, 203 N.E.2d 692, and concluded that the nuisance ***908** "was on land owned by and subject to the control of the city." *Id.* at 290, 203 N.E.2d 692. Because the city was liable,[FN2] we specifically did not reach the issue of the liability of the prior owner. *Id.* at 285-286, 203 N.E.2d 692.

FN2. The city of Lynn has not been joined as a defendant in this action, and no issues relating to its liability are before us.

****877** [4] [5] Because in some limited circumstances a prior owner of real estate may be liable for a nuisance even after the transfer of title to the property, the plaintiffs' complaint is legally sufficient to survive a motion under Mass.R.Civ.P. 12(c).[FN3] The judgment is reversed and the matter remanded to the Superior Court for further proceedings consistent with this opinion.

FN3. The defendant also argues that the plaintiffs' pleadings are defective in that they fail to allege certain specific facts, they fail to show the causal link between the alleged nuisance and the fire, and they insufficiently state a claim of nuisance. Under our rules of civil procedure, such defects do not warrant judgment on the pleadings.

"Under Mass.R.Civ.P. 8, 365 Mass. 749 (1974), intendments are to be made in favor of the pleader, rather than against him, and we resist any tendency to reinstate abandoned pleading requirements. *Charbonnier v. Amico,* 367 Mass. 146, 152-153, 324 N.E.2d 895 (1975). Legal conclusions are not frowned on, if the defendant is fairly notified of the nature of the claim and the grounds on which the plaintiff relies. *Conley v. Gibson,* 355 U.S. 41, 45-46 [78 S.Ct. 99, 101-102, 2 L.Ed.2d 80] (1957)." *Druker v. Roland Wm. Jutras Assocs.,* 370 Mass. 383, 385, 348 N.E.2d 763 (1976).

So ordered.

Mass.,1984.
Minaya v. Massachusetts Credit Union Share Ins. Corp.
392 Mass. 904, 467 N.E.2d 874

Attachment -4

42 Conn.Supp. 517, 630 A.2d 1381, 9 Conn. L. Rptr. 91

Judges and Attorneys

Superior Court of Connecticut,
Judicial District of New London.

Bruce TACKLING et al.
v.
Mary SHINERMAN et al.

No. 521012.
April 20, 1993.

Home purchasers brought action against appraiser alleging negligence and violation of Connecticut Unfair Trade Practices Act (CUPTA). Appraiser moved for summary judgment. The Superior Court, Judicial District of New London, Teller, J., held that: (1) issue of material fact as to whether appraiser owed duty to third-party purchasers precluded summary judgment on negligence claim; (2) issues of material fact as to whether appraiser violated federal regulations concerning inspection for defective paint surfaces precluded summary judgment; and (3) issues of material fact precluded summary judgment on CUPTA claim.

Motion denied.

West Headnotes

[1] KeyCite Citing References for this Headnote

272 Negligence
272I In General
272k202 k. Elements in general. Most Cited Cases
(Formerly 272k1)

In order to recover damages in negligence, plaintiff must prove that actor owed duty of care to victim, which was breached by actor's failure to meet standard of care arising therefrom, and that breach was proximate cause of actual harm suffered by victim.

[2] KeyCite Citing References for this Headnote

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1692 k. Duty as question of fact or law generally. Most Cited Cases
(Formerly 272k136(14))

Existence of duty in negligence action is question of law for court to decide.

[3] KeyCite Citing References for this Headnote

272 Negligence
272XV Persons Liable
272k481 k. Privity. Most Cited Cases
(Formerly 272k14)

Concept of privity is not relevant to action based upon negligence.

[4] KeyCite Citing References for this Headnote

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and liabilities to adverse parties and to third persons. Most Cited Cases

In negligence actions by third parties against attorneys, inquiry is whether primary or direct purpose of transaction was to benefit third party.

[5] KeyCite Citing References for this Headnote

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and liabilities to adverse parties and to third persons. Most Cited Cases

Unlike liability of other professionals, inquiry as to whether attorney owes to third parties duty to use care requires additional consideration of attorney-client privilege.

[6] KeyCite Citing References for this Headnote

272 Negligence
272XVII Premises Liability
272XVII(G) Liabilities Relating to Construction, Demolition and Repair
272k1205 Liabilities of Particular Persons Other Than Owners
272k1205(1) k. In general. Most Cited Cases
(Formerly 272k2)

Negligence analysis applied to contractors, builders, architects, and surveyors with respect to their duty to third parties applies to real estate appraisers.

[7] KeyCite Citing References for this Headnote

272 Negligence
272XVII Premises Liability
272XVII(G) Liabilities Relating to Construction, Demolition and Repair
272k1205 Liabilities of Particular Persons Other Than Owners
272k1205(1) k. In general. Most Cited Cases
(Formerly 272k2)

Whether appraiser owes duty to use care to third parties depends upon resolution of issue of foreseeability, which involves inquiry as to whether it was reasonably foreseeable that third parties would rely on appraiser's report and whether it was reasonably foreseeable that harm of general nature of that suffered would result if duty to use care was not exercised.

[8] KeyCite Citing References for this Headnote

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general. Most Cited Cases

Genuine issue of material fact, precluding summary judgment for appraiser in home purchasers' negligence action, existed as to whether it was reasonably foreseeable that purchasers of home, with mortgage backed by Department of Housing and Urban Development (HUD) and insured by Federal Housing Authority (FHA), would rely on HUD-approved appraiser's determination as to existence of lead paint in home and as to whether it was reasonably foreseeable that negligent performance of appraiser's duty would result in alleged lead poisoning of purchaser's three children and decreased property value.

[9] KeyCite Citing References for this Headnote

272 Negligence
272II Necessity and Existence of Duty
272k214 k. Relationship between parties. Most Cited Cases
(Formerly 272k2)

272 Negligence KeyCite Citing References for this Headnote
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k387 k. Foreseeability. Most Cited Cases
(Formerly 272k59)

Although relationship between parties is factor to consider when determining issue of foreseeability in negligence action, it is not dispositive on issue of whether defendant owed duty to plaintiffs.

[10] KeyCite Citing References for this Headnote

272 Negligence
272IV Breach of Duty
272k259 k. Violations of statutes and other regulations. Most Cited Cases
(Formerly 272k6)

In order to prevail on common-law negligence claim for violation of statute, plaintiff must be member of class protected by statute and injury must be of type statute was intended to prevent.

[11] KeyCite Citing References for this Headnote

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general. Most Cited Cases

Genuine issue of material fact as to whether appraiser violated federal regulations implementing National Housing Act precluded summary judgment for appraiser in purchasers' negligence action; purchasers, who obtained mortgage backed by Department of Housing and Urban Development (HUD) and insured by Federal Housing Authority (FHA) were members class protected by regulations requiring

inspection for defective paint surfaces, and regulations seek to protect that class from unknowingly occupying structure that contains lead paint. National Housing Act, 12 U.S.C.A. § 1701 et seq.

[12] KeyCite Citing References for this Headnote

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(15.1) k. In general. Most Cited Cases

Genuine issues of material fact as to whether appraiser owed duty to third-party home purchasers precluded summary judgment for appraiser in purchasers' action alleging violation of Connecticut Unfair Trade Practices Act (CUPTA) arising out of appraisers alleged negligence in inspecting for presence of lead paint. C.G.S.A. § 42-110a et seq.

***1382 *517** Sklarz, Early & Avalone, New Haven, for the plaintiffs.

Douglas J. Monaghan, Groton, for the named defendant.

Skelley, Vinkels & Rottner, Hartford, for the defendant Doris DeWees.

Garon Camassar, New London, for the defendant William E. Kane et al.

Waller, Smith & Palmer, New London, for the defendant McCue Mortgage Co.

No appearance for the defendant Remax Olympic Realty Co.

TELLER, Judge.

The issue presented is whether the court should grant the motion of the defendant Doris DeWees for summary judgment on counts fourteen and fifteen of the plaintiffs' complaint on the grounds that: this defendant did not owe a duty to the plaintiffs; the federal regulations do not authorize a private cause of action; and the plaintiffs have not alleged sufficient ***518** facts to sustain an action under the Connecticut Unfair Trade Practices Act (CUTPA). The court denies the motion as to both counts.

The plaintiffs, Bruce and Helene Tackling, individually and as father, mother and next friends of their minor children Jessica, Nicholas and Joseph Tackling, filed a nineteen count revised complaint on August 21, 1992. The action arises out of a real estate transaction in which the plaintiffs purchased a home containing lead paint. The plaintiffs allege in counts fourteen and fifteen that DeWees performed an inspection on the plaintiffs' property as required in order for the plaintiffs to receive a Federal Housing Authority (FHA) insured mortgage loan through the federal department of Housing and Urban Development (HUD).

They allege further that as part of the process and procedure of providing financing, as required by HUD/FHA guidelines, it was necessary that an appraisal be done to establish the value of the residence, and that the defendant McCue Mortgage Company hired DeWees to perform the necessary inspection of the property that the plaintiffs sought to purchase. The plaintiffs also allege that: the appraisal was ***1383** paid for by them; DeWees knew or should have known that the plaintiffs had three small children; and that the residence contained lead-based paint on its interior and exterior surfaces which was peeling, chipping and cracking. As a result of the negligent appraisal by DeWees and in violation of the HUD/FHA guidelines, the plaintiffs allege, they obtained the mortgage loan from HUD/FHA and McCue, purchased their residence at a price far above its real fair market value, and that the Tackling children ultimately became

exposed to dangerous, toxic and poisonous paint with a base greater than six hundredths of one percent lead.

***519** The plaintiffs allege in count fourteen that DeWees was negligent in performing her inspection. In count fifteen the plaintiffs allege that the actions of DeWees violate General Statutes § 42-110a et seq. (CUTPA). The plaintiffs seek damages for both physical and emotional injuries and financial losses.

DeWees then filed the present motion seeking summary judgment on counts fourteen and fifteen of the plaintiffs' complaint. The plaintiffs filed a memorandum of law in opposition to DeWees' motion and the parties were heard.

A moving party is entitled to summary judgment if the party proves the nonexistence of material facts and that the party is entitled to judgment as a matter of law. Practice Book § 384.

DeWees argues that she is entitled to summary judgment on count fourteen of the plaintiffs' complaint because there was no privity of contract between her and the plaintiffs, and, therefore, she asserts that the section of the National Housing Act that requires an appraiser to "inspect the dwelling for defective paint surfaces"; 24 C.F.R. § 5200.805; does not provide the plaintiffs with a private cause of action.

The plaintiffs base their claim in the fourteenth count of their complaint on the common law theories of negligence and negligence per se. Despite DeWees' assertion, the plaintiffs do not contend that the Federal Housing Act provides a private cause of action.

[1] [2] [3] In order to recover damages in negligence, a plaintiff must prove that the actor owed a "duty of care to the victim, which was breached by the actor's failure to meet the standard of care arising therefrom and that the breach was the proximate cause of actual harm suffered by the victim." *Coburn v. Lenox Homes, Inc.,* 186 Conn. 370, 372, 441 A.2d 620 (1982) (*Coburn II*). ***520** The existence of such a duty is a question of law for the court to decide. *Shore v. Stonington,* 187 Conn. 147, 151, 444 A.2d 1379 (1982). "A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." *Coburn II,* supra, 186 Conn. at 375, 441 A.2d 620. The concept of privity is not relevant to an action based upon negligence. *Zapata v. Burns,* 207 Conn. 496, 516, 542 A.2d 700 (1991), citing *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916).

Although the appellate courts of Connecticut have yet to address the issue of an appraiser's liability to third parties, the courts have examined the liability of other professionals in similar relationships.

In *Coburn v. Lenox Homes, Inc.,* 173 Conn. 567, 575, 378 A.2d 599 (1977) (*Coburn I*), the Supreme Court adopted the reasoning of the Massachusetts Supreme Judicial Court in *McDonough v. Whalen,* 365 Mass. 506, 512, 313 N.E.2d 435 (1974), and stated: "[A] builder or contractor may be liable for injuries or damage caused by his negligence to persons with whom he has no contractual relation and even though his work is completed and accepted by the owner before the injuries or damage occurred. Liability will be imposed, however, only if it is foreseeable that the contractor's work, if negligently done, may cause damage to the property or injury to the persons living on or using the premises." (Internal quotation marks omitted.) The court in *Coburn I,* supra, further opined ***1384** that an actor's duty to use due care depends upon the "foreseeability that harm may result if [care were] not exercised." Finally, that court determined that the existence of a duty in the case before them depended upon the "resolution ***521** of questions requiring factual development," regarding the foreseeability of the resulting harm to the plaintiff. Id., 173 Conn. at 576, 378 A.2d 599.

[4] [5] In *Zapata v. Burns,* supra, 207 Conn. at 516-17, 542 A.2d 700, the court recognized that the negligence standard previously discussed and applicable to builders and contractors, logically extends to architects and engineers. Furthermore, such liability, regardless of privity, has been extended to attorneys; *Krawczyk v. Stingle,* 208 Conn. 239, 543 A.2d 733 (1988); [FN1] to accountants; *Twin Mfg. Co. v.*

Blum, Shapiro & Co., 42 Conn.Supp. 119, 602 A.2d 1079 (1991); [FN2] and to surveyors; *Simics v. Sharpe*, Superior Court, judicial district of Ansonia-Milford, Docket No. 33261, 1991 WL 86196 (May 13, 1991).

FN1. In actions by third parties against attorneys, the inquiry is whether the "primary or direct purpose of the transaction was to benefit the third party." *Krawczyk v. Stingle*, 208 Conn. 239, 245, 543 A.2d 733 (1988). Unlike the liability of other professionals, the inquiry of whether an attorney owes to third parties a duty to use care requires the additional consideration of the attorney-client privilege. Id., at 245-46, 543 A.2d 733. In *Krawczyk,* the court declined to impose liability for the negligent delay in the execution of an estate planning document because it would conflict "with a lawyer's duty of undivided loyalty to the client." Id., at 246, 543 A.2d 733.

FN2. In *Twin Mfg. Co. v. Blum, Shapiro & Co.*, 42 Conn.Supp. 119, 120, 602 A.2d 1079 (1991), the court applied the criteria set out in *Credit Alliance Corporation v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985): " '(1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.' " The court granted the defendant's motion to strike asserting that the plaintiff had failed to allege the existence between the parties of a relationship approaching privity to sustain the third prong of the *Credit Alliance* test. *Twin Mfg. Co. v. Blum, Shapiro & Co.*, supra, 42 Conn.Supp. at 121, 602 A.2d 1079; see also *Rogovan v. Coopers & Lybrand*, Superior Court, judicial district of New London, Docket No. 519696, 1992 WL 77182 (April 3, 1992, 7 C.S.C.R. 480) (where the court granted the defendant's motion to strike on the ground that the plaintiff had failed to allege the requisite relationship between the parties).

***522** Other courts have held appraisers liable to third parties. See *Larsen v. United Federal Savings & Loan Assn.*, 300 N.W.2d 281 (Iowa 1981); *Stotlar v. Hester*, 92 N.M. 26, 582 P.2d 403 (1978); [FN3] but see *Gay v. Broder*, 109 Cal.App.3d 66, 167 Cal.Rptr. 123 (1980).

FN3. The court, citing § 552 of the Restatement (Second) of Torts (1977), held that the appraiser could also be held liable for negligent representation. *Stotlar v. Hester*, 92 N.M. 26, 28-29, 582 P.2d 403, 405-406 (1978).

[6] [7] The court concludes that the negligence analysis applied to contractors, builders, architects and surveyors logically extends to appraisers. Whether the appraiser owed a duty to use care to the plaintiffs in the present case depends upon the resolution of the issue of foreseeability, which involves a two-tier inquiry: (1) is it reasonably foreseeable that the plaintiffs would rely on the appraiser's report; and (2) is it reasonably foreseeable that harm of the general nature of that suffered would result if the duty to use care was not exercised. See *Coburn I*, supra, 173 Conn. at 575-76, 378 A.2d 599.

[8] The plaintiffs allege in their complaint that DeWees was selected and hired by McCue, HUD and the FHA to perform the appraisal of the residence. The plaintiffs allege further that such inspection was required by HUD/FHA guidelines and that DeWees knew or should have known that the plaintiffs had one child under six years of age and that the plaintiff wife was in her third trimester of pregnancy. The plaintiffs also allege that they paid for the appraisal.

DeWees attached her own affidavit to her memorandum of law in support of her ***1385** motion for summary judgment. In the affidavit, DeWees states that she was contacted by McCue to perform an appraisal of the property, that there was no contractual relationship between her and McCue, and that there was no contractual relationship between her and the plaintiffs.

***523** It is evident that the plaintiffs have alleged sufficient facts to sustain an action in negligence against DeWees. There is a genuine issue of material fact as to whether it is reasonably foreseeable that

the plaintiffs, the buyers of a home purchased with a mortgage backed by HUD, and insured by the FHA, would rely on a HUD approved appraiser's determination of the existence or nonexistence of lead paint. This is particularly so if, as alleged by the plaintiffs, the appraisal was a prerequisite to the plaintiffs obtaining a mortgage backed by HUD, and if the appraiser was required to determine the existence or absence of lead paint. There is also a genuine issue of material fact regarding whether it is reasonably foreseeable that the negligent performance of the appraiser's duty would result in the general harm that the plaintiffs allege: lead poisoning and decreased property value.

[9] The factual assertions set forth by DeWees do not prove, as a matter of law, that she owed no duty to use care to the plaintiffs. As stated earlier, privity is not required to sustain an action in negligence. See *Coburn I,* supra, at 572, 378 A.2d 599. Although the relationship between the parties is a factor to consider when determining the issue of foreseeability, it is not dispositive on the issue of whether DeWees owed a duty to the plaintiffs.

The plaintiffs also allege that DeWees owed a duty to them under federal regulations.

[10] In order for a plaintiff to prevail on a common law negligence claim for the violation of a statute a plaintiff must satisfy two conditions: "(1) the plaintiff must be a member of the class protected by the statute; and (2) the injury must be of the type the statute was intended to prevent." *Small v. South Norwalk Savings Bank,* 205 Conn. 751, 760, 535 A.2d 1292 (1988); *Wright v. Brown,* 167 Conn. 464, 468-69, 356 A.2d 176 (1975).

***524** [11] In *Small v. South Norwalk Savings Bank,* supra, the plaintiff sued the mortgage company that financed her home alleging that it breached a duty to advise or inform her, as required by 12 C.F.R. §§ 339.0 through 339.5, that the property was located in a special flood hazard area. The plaintiff based her claim on the following language, which mandated that banks insured by the Federal Deposit Insurance Corporation " 'shall, as a condition of making, increasing, extending or renewing any loan secured by improved real estate ... located or to be located in an area that has been identified by the Secretary of Housing and Urban Development as an area having special flood hazards, mail or deliver as soon as feasible but not less than 10 days in advance of closing of the transaction ... a written notice to the borrower stating: (1) That the property securing the loan is or will be located in an area so identified....' " Id., 205 Conn. at 754, 535 A.2d 1292 quoting 12 C.F.R. § 339.5.

In the lower court, the case went to the jury on the negligence claim and the jury returned a verdict in favor of the plaintiff. Id., at 755, 535 A.2d 1292. On appeal, the defendant argued that it did not owe a duty to the plaintiff and, therefore, the judgment should be reversed. Id., at 759-60, 535 A.2d 1292. The court examined the requirements that a plaintiff must meet in order to sustain a negligence action founded upon the violation of a statute and upheld the plaintiff's award. Id., at 760, 535 A.2d 1292.

In the present case, the plaintiffs have cited 24 C.F.R. § 200.810(b), which provides in pertinent part: "Appraisal. The fee panel appraiser or direct endorsement appraiser of a dwelling constructed prior to 1978 *shall* inspect the dwelling for defective paint surfaces. If a defective paint surface is found, the commitment or other approval document *will* contain the requirement that the surface is to be treated as described in paragraph (c) of this section. Treatment of the surface ***525** *shall* be accomplished before ****1386** the mortgage is endorsed for insurance...." (Emphasis added.) They have also cited 24 C.F.R. § 200.800, which provides in pertinent part: " *The purpose of this subpart* is to implement the provisions of section 302 of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4821-4186, by establishing procedures to *eliminate as far as practicable the hazards of lead-based paint poisoning...."* (Emphasis added.)

The plaintiffs allege that DeWees was selected as an appraiser because she was approved by the FHA as an appraiser. The directive language of the regulations cited above is substantially similar to the directive language cited by the plaintiff in *Small v. South Norwalk Savings Bank,* supra. The plaintiffs, as purchasers and occupiers of the premises, are members of the class protected by the regulations, which seek to protect the members of that class from unknowingly occupying a structure that contains lead paint. As such, it is evident that the plaintiffs' negligence allegations, affidavits and documentary evidence raise

genuine issues of material fact. DeWees' motion for summary judgment as to count fourteen is, therefore, denied.

[12] DeWees asserts that she is entitled to summary judgment on count fifteen of the plaintiffs' complaint, which alleges a violation of CUTPA, because she owed no duty to the plaintiffs. DeWees concludes in her memorandum that, because she is not liable for negligence, it cannot be reasonably argued that her conduct constituted an unfair or deceptive trade practice.

As the court has denied DeWees' motion for summary judgment on the plaintiffs' negligence count, her argument regarding the plaintiffs' CUTPA claim must also fail.

Accordingly, the defendant DeWees' motion for summary judgment is denied as to counts fourteen and fifteen.

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Attachment -5

42 U.S.C. § 4851

The Congress finds that—

(1) low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under age 6, with minority and low-income communities disproportionately affected;

(2) at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems;

(3) pre-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead-based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead-based paint;

(4) the ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children;

(5) the health and development of children living in as many as 3,800,000 American homes is endangered by chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes;

(6) the danger posed by lead-based paint hazards can be reduced by abating lead-based paint or by taking interim measures to prevent paint deterioration and limit children's exposure to lead dust and chips;

(7) despite the enactment of laws in the early 1970's requiring the Federal Government to eliminate as far as practicable lead-based paint hazards in federally owned, assisted, and insured housing, the Federal response to this national crisis remains severely limited; and

(8) the Federal Government must take a leadership role in building the infrastructure—including an informed public, State and local delivery systems, certified inspectors, contractors, and laboratories, trained workers, and available financing and insurance—necessary to ensure that the national goal of eliminating lead-based paint hazards in housing can be achieved as expeditiously as possible.

Article IV, § 3, Ohio Constitution

Organization and Jurisdiction of Court of Appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgement that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies. (3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of the article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

C.C.O. 240.02

Lead Hazards Are A Nuisance

(a) This Council finds that lead hazards constitute a nuisance.

(b) The Commissioner may determine that a nuisance is required to be immediately controlled under this section if, in the Commissioner's opinion, failure to immediately control the hazard may cause a serious risk to the health of the occupants of the property. In such a case, the Commissioner may require the owner or manager of the property to immediately control the nuisance or the Commissioner may, by his or her authorized representative, immediately control such nuisance.

Secondary Prevention

(a) When the Commissioner becomes aware that an individual under 6 years of age has lead poisoning, the Commissioner is authorized to conduct an investigation or lead risk assessment in accordance with the requirements of Chapter 3701 of the Ohio Administrative Code.

(b) In conducting the investigation, the Commissioner may request permission to enter, or for a lead inspector or risk assessor to enter, the residential unit, child day-care facility, or school that the Commissioner suspects to be the sources of the lead poisoning. If the Commissioner or delegated lead inspector or risk assessor is unable to obtain permission to enter the property, either may apply for an order of court to enter the property.

(c) As part of the investigation, the Commissioner may review the records and reports, if any, maintained by a lead inspector, lead abatement contractor, lead risk assessor, lead abatement project designer, lead abatement worker, or clearance technician.

(d) When the Commissioner determines, as a result of an investigation and/or risk assessment conducted under division (a) of this section, that a residential unit, child day-care facility, or school are contributing to a child's lead poisoning, the Commissioner is authorized to issue an order, in accordance with Chapter 3701 of the Ohio Administrative Code, to have each lead hazard controlled.

(e) No person shall fail to comply with an order issued by the Commissioner under division (d).

Civ. R. 12(B)

How presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Civ. R. 12(C)

Motion for judgment on the pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

Civ. R. 28

Persons Before Whom Depositions May be Taken

(A) Depositions within state. Depositions may be taken in this state before: a person authorized to administer any oath by the laws of this state, a person appointed by the court in which the action is pending, or a person agreed upon by written stipulation of all the parties.

(B) Depositions outside state. Depositions may be taken outside this state before: a person authorized to administer oaths in the place where the deposition is taken, a person appointed by the court in which the action is pending, a person agreed upon by written stipulation of all the parties, or, in any foreign country, by any consular officer of the United States within his consular district.

(C) Disqualification for interest. Unless the parties agree otherwise as provided in Civ. R. 29, depositions shall not be taken before a person who:

(1) is a relative or employee of or attorney for any of the parties, or

(2) is a relative or employee of an attorney for any of the parties, or

(3) is financially interested in the action.

(D) Prohibited contracts.

(1) Any blanket contract for private court reporting services, not related to a particular case or reporting incident, shall be prohibited between a private court reporter or any other person with whom a private court reporter has a principal and agency relationship, and any attorney, party to an action, party having a financial interest in an action, or any entity providing the services of a shorthand reporter.

(2) “Blanket contract” means a contract under which a court reporter, court recorder, or court reporting firm agrees to perform all court reporting or court recording services for a client for two or more cases at a rate of compensation fixed in the contract.

(3) Negotiating or bidding reasonable fees, equal to all parties, on a case-by-case basis is not prohibited.

(4) Division (D) of this rule does not apply to the courts or the administrative tribunals of this state.

Civ. R. 30(B)(5)

A party, in the party’s notice, may name as the deponent a public or private corporation, a partnership, or an association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The persons

so designated shall testify as to matters known or available to the organization. Division (B)(5) does not preclude taking a deposition by any other procedure authorized in these rules.

Civ. R. 56

Summary Judgment

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim,

cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. 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. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit
affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

O.R.C. § 5302.03

Use of word grant.

In a conveyance of real estate or any interest therein, the word "grant" is a sufficient word of conveyance without the use of more words. No covenant shall be implied from the use of the word "grant."

O.R.C. § 5302.30

Property disclosure form required for all residential real property transfers.

(A) As used in this section:

(1) “Good faith” means honesty in fact in a transaction involving the transfer of residential real property.

(2) “Land installment contract” has the same meaning as in section 5313.01 of the Revised Code.

(3) “Political subdivision” and “state” have the same meanings as in section 2744.01 of the Revised Code.

(4) “Residential real property” means real property that is improved by a building or other structure that has one to four dwelling units.

(B)(1) Except as provided in division (B)(2) of this section, this section applies to any transfer of residential real property that occurs on or after July 1, 1993, by sale, land installment contract, lease with option to purchase, exchange, or lease for a term of ninety-nine years and renewable forever. For purposes of this section, a transfer occurs when the initial contract for transfer is executed, regardless of when legal title is transferred, and references in this section to transfer offers and transfer agreements refer to offers and agreements in respect of the initial contract for transfer.

(2) This section does not apply to any transfer of residential real property that is any of the following:

(a) A transfer pursuant to court order, including, but not limited to, a transfer ordered by a probate court during the administration of a decedent’s estate, a transfer pursuant to a writ of execution, a transfer by a trustee in bankruptcy, a transfer as a result of the exercise of the power of eminent domain, and a transfer that results from a decree for specific performance of a contract or other agreement between persons;

(b) A transfer to a mortgagee by a mortgagor by deed in lieu of foreclosure or in satisfaction of the mortgage debt;

(c) A transfer to a beneficiary of a deed of trust by a trustor in default;

(d) A transfer by a foreclosure sale that follows a default in the satisfaction of an obligation secured by a mortgage;

(e) A transfer by a sale under a power of sale following a default in the satisfaction of an obligation that is secured by a deed of trust or another instrument containing a power of sale;

(f) A transfer by a mortgagee, or a beneficiary under a deed of trust, who has acquired the residential real property at a sale conducted pursuant to a power of sale under a mortgage or a deed of trust or who has acquired the residential real property by a deed in lieu of foreclosure;

(g) A transfer by a fiduciary in the course of the administration of a decedent’s estate, a guardianship, a conservatorship, or a trust;

(h) A transfer from one co-owner to one or more other co-owners;

(i) A transfer made to the transferor’s spouse or to one or more persons in the lineal line of consanguinity of one or more of the transferors;

(j) A transfer between spouses or former spouses as a result of a decree of divorce, dissolution of marriage, annulment, or legal separation or as a result of a property settlement agreement incidental to a decree of divorce, dissolution of marriage, annulment, or legal separation;

(k) A transfer to or from the state, a political subdivision of the state, or another governmental entity;

(l) A transfer that involves newly constructed residential real property that previously has not been inhabited;

(m) A transfer to a transferee who has occupied the property as a personal residence for one or more years immediately prior to the transfer;

(n) A transfer from a transferor who both has not occupied the property as a personal residence within one year immediately prior to the transfer and has acquired the property through inheritance or devise.

(C) Except as provided in division (B)(2) of this section and subject to divisions (E) and (F) of this section, every person who intends to transfer any residential real property on or after July 1, 1993, by sale, land installment contract, lease with option to purchase, exchange, or lease for a term of ninety-nine years and renewable forever shall complete all applicable items in a property disclosure form prescribed under division (D) of this section and shall deliver in accordance with division (I) of this section a signed and dated copy of the completed form to each prospective transferee or prospective transferee's agent as soon as is practicable.

(D)(1) Prior to July 1, 1993, the director of commerce, by rule adopted in accordance with Chapter 119. of the Revised Code, shall prescribe the disclosure form to be completed by transferors. The form prescribed by the director shall be designed to permit the transferor to disclose material matters relating to the physical condition of the property to be transferred, including, but not limited to, the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property, including the roof, foundation, walls, and floors; the presence of hazardous materials or substances, including lead-based paint, asbestos, urea-formaldehyde foam insulation, and radon gas; and any material defects in the property that are within the actual knowledge of the transferor.

The form also shall set forth a statement of the purpose of the form, including statements substantially similar to the following: that the form constitutes a statement of the conditions of the property and of information concerning the property actually known by the transferor; that, unless the transferee is otherwise advised in writing, the transferor, other than having lived at or owning the property, possesses no greater knowledge than that which could be obtained by a careful inspection of the property by a potential transferee; that the statement is not a warranty of any kind by the transferor or by any agent or subagent representing the transferor in this transaction; that the statement is not a substitute for any inspections; that the transferee is encouraged to obtain the transferee's own professional inspection; that the representations are made by the transferor and are not the representations of the transferor's agent or subagent; and that the form and the

representations contained therein are provided by the transferor exclusively to potential transferees in a transfer made by the transferor, and are not made to transferees in any subsequent transfers.

The form shall include instructions to the transferor for completing the form, space in which the transferor or transferors shall sign and date the form, and space in which the transferee or transferees shall sign and date the form acknowledging receipt of a copy of the form and stating that the transferee or transferees understand the purpose of the form as stated thereon.

(2) Not later than January 1, 2006, the director shall revise the disclosure form to include a statement that information on the operation and maintenance of the type of sewage treatment system serving the property is available from the department of health or the board of health of the health district in which the property is located.

As used in this section, "sewage treatment system" has the same meaning as in section 3718.01 of the Revised Code.

(E)(1) Each disclosure of an item of information that is required to be made in the property disclosure form prescribed under division (D) of this section in connection with particular residential real property and each act that may be performed in making any disclosure of an item of information shall be made or performed in good faith.

(2) If an item of information is unknown to the transferor of residential real property at the time the item is required to be disclosed in the property disclosure form and if the approximation is not used for the purpose of circumventing or otherwise evading divisions (C) and (D) of this section, the transferor may make a good faith approximation of the item of information.

(F)(1) A transferor of residential real property is not liable in damages in a civil action for injury, death, or loss to person or property that allegedly arises from any error in, inaccuracy of, or omission of any item of information required to be disclosed in the property disclosure form if the error, inaccuracy, or omission was not within the transferor's actual knowledge.

(2) If any item of information that is disclosed in the property disclosure form is rendered inaccurate after the delivery of the form to the transferee of residential real property or the transferee's agent as a result of any act, occurrence, or agreement, the subsequent inaccuracy does not cause, and shall not be construed as causing, the transferor of the residential real property to be in noncompliance with the requirements of divisions (C) and (D) of this section.

(G) Any disclosure of an item of information in the property disclosure form prescribed under division (D) of this section may be amended in writing by the transferor of residential real property at any time following the delivery of the form in accordance with divisions (C) and (I) of this section. The amendment shall be subject to this section.

(H) Except as provided in division (B)(2) of this section, every prospective transferee of residential real property who receives in accordance with division (C) of this section a signed and dated copy of a completed property disclosure form as prescribed under division (D) of this section shall acknowledge receipt of the form by doing both of the following:

(1) Signing and dating a copy of the form;

(2) Delivering a signed and dated copy of the form to the transferor or the transferor's agent or subagent.

(I) The transferor's delivery under division (C) of this section of a property disclosure form as prescribed under division (D) of this section and the prospective transferee's delivery under division (H) of this section of an acknowledgment of receipt of that form shall be made by personal delivery to the other party or the other party's agent or subagent, by ordinary mail or certified mail, return receipt requested, or by facsimile transmission. For the purposes of the delivery requirements of this section, the delivery of a property disclosure form to a prospective co-transferee of residential real property or a prospective co-transferee's agent shall be considered delivery to the other prospective transferees unless otherwise provided by contract.

(J) The specification of items of information that must be disclosed in the property disclosure form as prescribed under division (D)(1) of this section does not limit or abridge, and shall not be construed as limiting or abridging, any obligation to disclose an item of information that is created by any other provision of the Revised Code or the common law of this state or that may exist in order to preclude fraud, either by misrepresentation, concealment, or nondisclosure in a transaction involving the transfer of residential real property. The disclosure requirements of this section do not bar, and shall not be construed as barring, the application of any legal or equitable defense that a transferor of residential real property may assert in a civil action commenced against the transferor by a prospective or actual transferee of that property.

(K)(1) Except as provided in division (K)(2) of this section, but subject to divisions (J) and (L) of this section, a transfer of residential real property that is subject to this section shall not be invalidated because of the failure of the transferor to provide to the transferee in accordance with division (C) of this section a completed property disclosure form as prescribed under division (D) of this section.

(2) Subject to division (K)(3)(c) of this section, if a transferee of residential real property that is subject to this section receives a property disclosure form or an amendment of that form as described in division (G) of this section after the transferee has entered into a transfer agreement with respect to the property, the transferee, after receipt of the form or amendment, may rescind the transfer agreement in a written, signed, and dated document that is delivered to the transferor or the transferor's agent or subagent in accordance with divisions (K)(3)(a) and (b) of this section, without incurring any legal liability to the transferor because of the rescission, including, but not limited to, a civil action for specific performance of the transfer agreement. Upon the rescission of the transfer agreement, the transferee is entitled to the return of, and the transferor shall return, any deposits made by the transferee in connection with the proposed transfer of the residential real property.

(3)(a) Subject to division (K)(3)(b) of this section, a rescission of a transfer agreement under division (K)(2) of this section only may occur if the transferee's written, signed, and dated document of rescission is delivered to the transferor or the transferor's agent or subagent within

three business days following the date on which the transferee or the transferee's agent receives the property disclosure form prescribed under division (D) of this section or the amendment of that form as described in division (G) of this section.

(b) A transferee may not rescind a transfer agreement under division (K)(2) of this section unless the transferee rescinds the transfer agreement by the earlier of the date that is thirty days after the date upon which the transferor accepted the transferee's transfer offer or the date of the closing of the transfer of the residential real property.

(c) A transferee of residential real property may waive the right of rescission of a transfer agreement described in division (K)(2) of this section.

(d) A rescission of a transfer agreement is not permissible under division (K)(2) of this section if a transferee of residential real property that is subject to this section receives a property disclosure form as prescribed under division (D) of this section or an amendment of that form as described in division (G) of this section prior to the transferee's submission to the transferor or the transferor's agent or subagent of a transfer offer and the transferee's entry into a transfer agreement with respect to the property.

(4) If a transferee of residential real property subject to this section does not receive a property disclosure form from the transferor after the transferee has submitted to the transferor or the transferor's agent or subagent a transfer offer and has entered into a transfer agreement with respect to the property, the transferee may rescind the transfer agreement in a written, signed, and dated document that is delivered to the transferor or the transferor's agent or subagent in accordance with division (K)(4) of this section without incurring any legal liability to the transferor because of the rescission, including, but not limited to, a civil action for specific performance of the transfer agreement. Upon the rescission of the transfer agreement, the transferee is entitled to the return of, and the transferor shall return, any deposits made by the transferee in connection with the proposed transfer of the residential real property. A transferee may not rescind a transfer agreement under division (K)(4) of this section unless the transferee rescinds the transfer agreement by the earlier of the date that is thirty days after the date upon which the transferor accepted the transferee's transfer offer or the date of the closing of the transfer of the residential real property.

(L) The right of rescission of a transfer agreement described in division (K)(2) of this section or the absence of that right does not affect, and shall not be construed as affecting, any other legal causes of action or other remedies that a transferee or prospective transferee of residential real property may possess against the transferor of that property.

O.R.C. § 5321.04

Landlord obligations.

(A) A landlord who is a party to a rental agreement shall do all of the following:

(1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;

(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in a safe and sanitary condition;

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him;

(5) When he is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of a dwelling unit, and arrange for their removal;

(6) Supply running water, reasonable amounts of hot water and reasonable heat at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection;

(7) Not abuse the right of access conferred by division (B) of section 5321.05 of the Revised Code;

(8) Except in the case of emergency or if it is impracticable to do so, give the tenant reasonable notice of his intent to enter and enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary.

(9) Promptly commence an action under Chapter 1923. of the Revised Code, after complying with division (C) of section 5321.17 of the Revised Code, to remove a tenant from particular residential premises, if the tenant fails to vacate the premises within three days after the giving of the notice required by that division and if the landlord has actual knowledge of or has reasonable cause to believe that the tenant, any person in the tenant's household, or any person on the premises with the consent of the tenant previously has or presently is engaged in a violation as described in division (A)(6)(a)(i) of section 1923.02 of the Revised Code, whether or not the tenant or other person has been charged with, has pleaded guilty to or been convicted of, or has been determined to be a delinquent child for an act that, if committed by an adult, would be a violation as described in that division. Such actual knowledge or reasonable cause to believe shall be determined in accordance with that division.

(B) If the landlord makes an entry in violation of division (A)(8) of this section, makes a lawful entry in an unreasonable manner, or makes repeated demands for entry otherwise lawful that have the effect of harassing the tenant, the tenant may recover actual damages resulting from the entry or demands, obtain injunctive relief to prevent the recurrence of the conduct, and obtain a judgment for reasonable attorney's fees, or may terminate the rental agreement.

O.R.C. §3742.37

Lead hazard control order.

(A) If the results of a risk assessment conducted under section 3742.36 of the Revised Code indicate that one or more lead hazards identified in a residential unit, child care facility, or school are contributing to a child's lead poisoning, the director of health or authorized board of health immediately shall issue an order to have each lead hazard in the property controlled. The areas of the unit, facility, or school that may be subject to the lead hazard control order include the following:

(1) The interior and exterior surfaces and all common areas of the unit, facility, or school;

(2) Every attached or unattached structure located within the same lot line as the unit, facility, or school, including garages, play equipment, and fences;

(3) The lot or land that the unit, facility, or school occupies.

(B) A lead hazard control order issued under this section shall be in writing and in the form the director shall prescribe. The director or board shall specify in the order each lead hazard to be controlled and the date by which the unit, facility, or school must pass a clearance examination demonstrating that each lead hazard has been sufficiently controlled. The director or board may include in the order a requirement that occupants of the unit, facility, or school whose health may be threatened vacate the unit, facility, or school until the unit, facility, or school passes the clearance examination.

The director or board shall have the order delivered to the owner and manager of the unit, facility, or school. If the order applies to a building in which there is more than one residential unit, the director or board shall have a copy of the order delivered to the occupants of each unit or require that the owner or manager of the building deliver a copy of the order to the occupants of each unit. If the order applies to a child care facility or school, the director or board shall have a copy of the order delivered to the parent, guardian, or custodian of each child under six years of age who

receives child care or education at the facility or school or require the owner or manager of the facility or school to have a copy of the order so delivered.

O.R.C. § 3742.38

Owner or manager to cooperate and choose method of control.

The owner and manager of a residential unit, child care facility, or school that is subject to a lead hazard control order issued under section 3742.37 of the Revised Code shall cooperate with the director of health or board of health that issued the order in controlling each lead hazard specified in the order. The owner or manager shall choose a method of controlling each lead hazard that enables the residential unit, child care facility, or school to pass a clearance examination. The method chosen may be the owner or manager's personal preference, a proposal made by a person under contract with the owner or manager, or a recommendation that the director or board may provide. The owner or manager shall inform the director or board of the method that the owner or manager chooses to control each lead hazard.

Ohio Administrative Code 3701-30-07

Public health lead investigations.

When the director becomes aware that an individual under six years of age has lead poisoning the director shall conduct a public health lead investigation to determine the source of the lead poisoning. When the director becomes aware that an individual between six years and sixteen years of age has lead poisoning, the director may conduct a public health lead investigation to determine the source of the lead poisoning.

(A) For children with a blood lead level of ten micrograms per deciliter or greater but less than fifteen micrograms per deciliter the director shall cause the completion of a comprehensive questionnaire on a form prescribed by the director. The completed comprehensive questionnaire shall be reviewed by a public health lead investigator. The public health lead investigator shall be responsible for any follow up actions deemed necessary (e.g., provide educational materials to the family, conduct a public health lead risk assessment).

(B) For children with a blood lead level of fifteen micrograms per deciliter or greater the director shall conduct an on-site investigation of a residential unit, child care facility or school. The investigation shall be performed by a public health lead investigator.

(1) Prior to or during an on-site investigation, the public health lead investigator shall:

(a) Review known records and reports on applicable residential units, child - care facilities, or schools made by any licensed lead inspector, lead abatement contractor, lead risk assessor, lead abatement project designer, lead abatement worker, clearance technician, or someone trained in essential maintenance practices; and

(b) Complete a comprehensive questionnaire on a form prescribed by the

director.

(2) Based on the review of known records and reports and the completion of the comprehensive questionnaire the public health lead investigator shall do the following as appropriate:

(a) A visual assessment of the residential unit, child care facility, or school;

(b) X-ray fluorescence (XRF) analysis of deteriorated paint on or in:

(i) Interior surfaces, exterior surfaces, and common areas of the residential unit, child care facility, or school; and

(ii) Attached or unattached structures located within the same lot line as the residential unit, child care facility, or school, including garages, play equipment, and fences;

(c) Samples for analysis from glazed dinnerware or ceramic cookware suspected of containing lead; and

(d) Other samples for analysis as deemed necessary to determine a possible source of lead poisoning.

(C) After performing the components set forth in paragraph (B) of this rule, the public health lead investigator shall continue the investigation in accordance with the following:

(1) If the public health lead investigator is able to determine that a residential unit, child care facility or school is a possible source of lead poisoning, the public health lead investigator shall conduct a public health lead risk assessment of one or more residential units, child care facilities or schools in accordance with rule 3701-30-08 of the Administrative Code;

(2) If the public health lead investigator is not able to determine that a residential unit, child care facility or school is a possible source of lead poisoning, the public health lead investigator shall take targeted environmental samples, to determine if the residential unit, child care facility or school is a possible source of lead poisoning. The targeted environmental samples may include the following:

(a) Dust samples, for analysis, as appropriate, from the following areas including porches and other exterior living areas as defined in rule 3701-32-01 of the Administrative Code, kitchens, bedrooms, living rooms, and dining rooms;

(b) Soil samples, for analysis, as appropriate, from bare soil surfaces on

play areas, the drip line of the residential unit, child care facility or school, and the yard; and

(c) First draw or flushed water samples for analysis, as appropriate, from the tap most commonly used for drinking water, infant formula, or food preparation. Water samples shall be collected in accordance with sample methods specified in paragraph (B) of rule 3745-81-86 of the Administrative Code.
If the results of the analysis of any of the targeted environmental samples exceed the hazard level as set forth in rule 3701-32-19 of the Administrative Code, the public health lead investigator may conclude that the residential unit, child care facility or school is a possible source of lead poisoning and conduct a public health lead risk assessment of the residential unit, child care facility or school in accordance with rule 3701-30-08 of the Administrative Code.
If the results of the analysis of the targeted environmental samples are below the hazard level as set forth in rule 3701-32-19 of the Administrative Code, the public health lead investigator may conclude that the residential unit, child care facility or school is not a possible source of the lead poisoning. The public health lead investigator shall then investigate any other residential unit, child care facility or school that the public health lead investigator reasonably suspects to be a possible source of lead poisoning.

(3) If the public health lead investigator is able to determine that essential maintenance practices have been performed in accordance with sections 3742.41 to 3742.46 of the Revised Code and all rough, pitted or porous horizontal surfaces have been covered in accordance with section 3742.41 of the Revised Code, the public health lead investigator shall presume the residential unit, child care facility or school is not the source of the lead poisoning. The public health lead investigator shall then investigate any other residential unit, child care facility or school the public health lead investigator reasonably suspects to be a possible source of lead poisoning.

(D) At the conclusion of the public health lead investigation, which may include one or more public health lead risk assessments conducted in accordance with rule 3701-30-08 of the Administrative Code, the public health lead investigator shall prepare and provide a report in a format prescribed by the director. The report shall contain the following information, unless it is otherwise included in a public health lead risk assessment report created pursuant to rule 3701-30-08 of the Administrative Code:

(1) Date(s) of the public health lead investigation;

(2) Address, unit number, and date of construction of each residential unit, child care facility or school investigated;

(3) Name, address, and telephone number of the owner or manager of each residential unit, child care facility or school investigated;

(4) Name, license number, and signature of the public health lead investigator conducting the public health lead investigation and the name, address, and telephone number of the agency employing each public health lead investigator;

(5) Name, address, and telephone number of each environmental lead analytical laboratory approved pursuant to rule 3701-82-02 of the Administrative Code performing the analysis of any collected samples;

(6) Results of the visual assessment of each residential unit, child care facility or school investigated;

(7) The testing method and sampling procedure for paint analysis employed and the specific locations of each component tested for the presence of lead;

(8) All data collected from on-site testing, including the quality control data and, if an XRF is used, its serial number;

(9) For residential units the following statement displayed at the top of the report in bold letters:
Ohio law (section 5302.30 of the Revised Code) requires every person who intends to transfer any residential real property by sale, land installment contract, lease with option to purchase, exchange, or lease for a term of ninety-nine years and renewable forever, to complete and provide a copy to the prospective transferee of the applicable property disclosure forms, disclosing known hazardous conditions of the property, including lead-based paint hazards.
Federal law (24 CFR part 35 and 40 CFR part 745) requires sellers and lessors of residential units constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than six years of age resides or is expected to reside in such housing) or any zerobedroom dwelling to disclose and provide a copy of this report to new purchasers or lessees before they become obligated under a lease or sales contract. Property owners and sellers are also required to distribute an educational pamphlet approved by the United States environmental protection agency and include standard warning language in sales contracts or in or attached to lease contracts to ensure that parents have the information they need to protect children from lead-based paint hazards.

(10) Background information regarding the physical characteristics and occupant use patterns that may cause lead hazard exposure to one or more children;

(11) Results of the lead loading analysis of dust samples, in micrograms per square foot, by location of samples recorded on a diagram of the floor plan of each residential unit, child care facility or school investigated;

(12) Results of the lead concentration analysis of soil samples, in parts per million, by location of sample recorded on a plot plan of each residential unit, child care facility or school investigated;

(13) Results of the lead concentration analysis of water samples, in parts per billion;

(14) Other sources of lead identified by the public health lead investigator in the child's environment; and

(15) Any other information required by the director.

(E) A copy of the complete public health lead investigation report including any and all public health lead risk assessment information obtained pursuant to the public health lead investigation and required to be reported under paragraph (C) of rule 3701-30-08 of the Administrative Code shall be provided to the child's parent or guardian.

Ohio Administrative Code 3701-30-08

Public health lead risk assessment.

(A) When the director determines that a residential unit, child care facility, or school is a possible source of the child's lead poisoning, the director shall conduct a public health lead risk assessment of that property in accordance with paragraphs (G)(1) to (G)(9) of rule 3701-32-07 of the Administrative Code. If a public health lead investigator completed one or more of the components of the public health lead risk assessment when conducting a public health lead investigation in accordance with rule 3701-30-07 of the Administrative Code within the previous twenty-eight calendar days, the public health lead investigator is not required to repeat those components.

(B) The public health lead investigation and public health lead risk assessment may be completed in the same day. Prior to or within three calendar days of a public health lead risk assessment, the public health lead investigator shall send written notice to the owner or manager of a property where a public health lead risk assessment is to be or has been conducted. The notice shall be sent by regular mail or hand-delivered and state that the property is suspected of being a possible source of a child's lead poisoning and the date of the public health lead risk assessment will be or has been conducted.

(C) At the conclusion of the public health lead risk assessment, the public health lead investigator shall prepare a report for each residential unit, child care facility or school where a public health lead risk assessment was conducted. The report shall be written in a format prescribed by the director. The report shall contain the following, as applicable:

(1) Date of the public health lead risk assessment;

(2) Address, unit number, and date of construction of each residential unit, child care facility or school assessed;

(3) Name, address, and telephone number of the owner or manager of each residential unit, child care facility or school assessed;

(4) Name, license number, and signature of the public health lead investigator conducting the public health lead risk assessment and the name, address, and telephone number of the agency employing each public health lead investigator;

(5) Name, address, and telephone number of each environmental lead analytical laboratory approved pursuant to rule 3701-82-02 of the Administrative Code performing the analysis of any collected samples;

(6) Results of the visual assessment of each residential unit, child care facility or school assessed;

(7) The testing method and sampling procedure for paint analysis employed and the specific locations of each component tested for the presence of lead;

(8) All data collected from on-site testing, including quality control data and if an XRF is used, its serial number;

(9) For residential units, the following statement displayed at the top of the report in bold letters:
Ohio law (section 5302.30 of the Revised Code) requires every person who intends to transfer any residential real property by sale, land installment contract, lease with option to purchase, exchange, or lease for a term of ninety-nine years and renewable forever, to complete and provide a copy to the prospective transferee of the applicable property disclosure forms, disclosing known hazardous conditions of the property, including lead-based paint hazards.
Federal law (24 CFR part 35 and 40 CFR part 745) requires sellers and lessors of residential units constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than six years of age resides or is expected to reside in such housing) or any zerobedroom dwelling to disclose and provide a copy of this report to new purchasers or lessees before they become obligated under a lease or sales contract. Property owners and sellers are also required to distribute an educational pamphlet approved by the United States environmental protection agency and include standard warning language in sales contracts or in or attached to lease contracts to ensure that parents have the information they need to protect children from lead-based paint hazards.

(10) Background information regarding the physical characteristics and occupant use patterns that may cause lead hazard exposure to one or more children;

(11) Results of the lead loading analysis of dust samples, in micrograms per

square foot, a copy of the lab report, and a diagram of the floor plan of each residential unit, child care facility or school assessed illustrating the sample locations;

(12) Results of the lead concentration analysis of soil samples, in parts per million, a copy of the lab report, and a diagram of each residential unit, child care facility or school assessed illustrating the sample locations;

(13) Results of the lead concentration analysis of water samples, in parts per billion and a copy of the lab report;

(14) A description of the location and type of identified lead hazards; and

(15) A description of recommended control options for each identified lead hazard.

(D) The report shall be sent by certified mail return receipt requested or hand delivered to all relevant property owners or managers within fourteen calendar days of receipt of laboratory test results.