

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-3816

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**JACQUELINE DIXSON, A MINOR,
BY HER GUARDIAN AD LITEM,
DALE R. NIKOLAY AND KATHRYN DIXSON,**

PLAINTIFFS,

v.

**WISCONSIN HEALTH ORGANIZATION
INSURANCE CORPORATION,**

DEFENDANT,

**BECKY MAE CARSON AND
ALLSTATE INSURANCE CO.,**

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,**

v.

ORIENTAL INVESTMENT COMPANY,

THIRD-PARTY DEFENDANT,

MILWAUKEE COUNTY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

CURLEY, J. Becky Mae Carson and Allstate Insurance Company appeal from the trial court's grant of summary judgment to Milwaukee County (County). The appellants claim that the trial court erred when it found that Milwaukee County was entitled to summary judgment. The appellants contend that Milwaukee County, while having no legal duty to inspect for lead based paint, gratuitously assumed this duty when, during an inspection conducted pursuant to its Rent Assistance Program, it inspected the rental unit occupied by Kathryn and Jacqueline Dixson and advised that "[t]he dwelling unit appears to be in compliance with HUD Lead Based Paint regulations." The appellants argue that this inspection was negligently conducted because several months later Jacqueline was diagnosed with lead poisoning. We disagree and affirm. Milwaukee County's inspection report did not create a duty to inspect for lead paint. Rather, the County only advised that the dwelling appeared to be in compliance with HUD lead based paint regulations. Since no contrary affidavits were ever submitted claiming that on the day of inspection the dwelling appeared not to be in compliance with the lead based paint regulations, summary judgment was proper.

I. BACKGROUND.

In the fall of 1990, when Jacqueline Dixson was approximately two years old, she was diagnosed with lead poisoning. A lawsuit was started by Jacqueline's mother and Jacqueline's guardian ad litem. The original suit was commenced against Becky Carson, the owner of the residence where the Dixsons lived in the fall of 1990, and her insurer, Allstate Insurance Company.

Carson and Allstate (collectively, Carson) then filed a third-party complaint naming Oriental Investment Company (Oriental) and Milwaukee County as defendants. Later, the Dixsons filed an amended complaint which incorporated Carson's causes of action against Oriental and Milwaukee County. Carson alleged that Oriental was the owner of a property occupied by Jacqueline's aunt which had a high concentration of lead based paint and that Jacqueline's ingestion of lead based paint while at her aunt's residence led to Jacqueline's injuries. Pertinent to this appeal is the claim against Milwaukee County.

The Dixsons were participants in the Milwaukee County Rent Assistance Program. Carson and the Dixsons claimed that Milwaukee County was liable for Jacqueline's injuries because "Milwaukee County was responsible for ensuring that each rental assistance unit passed a Housing Quality Standards inspection." Although the Dixsons moved into the Carson property in 1989, an inspection was conducted in June 1990 because, according to the attorney representing Milwaukee County, Dixson discovered "something" which prompted the inspection of the property. Carson contends that during the June 1990 inspection, Milwaukee County, although not legally obligated to inspect for lead based paint, did so and negligently performed this inspection, contributing to Jacqueline's lead poisoning injuries.

Carson's contention that the written inspection form created a duty to inspect for lead based paint is based on the following language, which was marked by a check, indicating that the item was okay. It stated:

The dwelling unit appears to be in compliance with HUD Lead Based Paint regulations, 24 CFR, Part 35 of the title, issued pursuant to the Lead Based Paint Poisoning Prevention Act, 42 U.S.C. 4801. The Owner may be required to provide a certification that the dwelling is in accordance with such HUD Regulations.

Carson submits that by checking off this statement on the inspection form, Milwaukee County assumed a duty to inspect for lead based paint, and that the inspection was negligently conducted because Jacqueline was diagnosed with lead poisoning several months later.

Milwaukee County filed a summary judgment motion arguing that the claims against it should be dismissed because there is no requirement by law that Milwaukee County conduct tests to find lead based paint. The County submitted an affidavit from Kim Jines, Program Coordinator for the Milwaukee County Rent Assistance Program. Her affidavit stated that pursuant to the Rent Assistance Program, Milwaukee County had a "duty to conduct initial and annual quality inspections so as to provide decent, safe and sanitary units," but that the County was under no requirement by law to test for lead based paint. Consequently, the County argued that the statement in the inspection form referencing the lead based paint regulations was only an advisory statement to the participants that "[t]he dwelling unit appears to be in compliance with HUD Lead Based Paint regulations."

The trial court adopted Milwaukee County's position, finding that the "inspection was not a guarantee that no lead based paint is present it only

stated that the property appears to be in compliance with the pertinent regulations,” and granted the County’s motion. The trial court further found that the “third-party complaint commenced against County of Milwaukee, failed to state a claim upon which relief may be granted. County employees, in administrating a rental assistance program, owed the Plaintiffs no duty of protection by law from lead-based paint poisoning.” This appeal follows.

II. ANALYSIS.

In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the trial court under § 802.08, STATS. See *Reel Enterprises v. City of La Crosse*, 146 Wis.2d 662, 666-67, 431 N.W.2d 743, 745-46 (Ct. App. 1988).

Carson contends that the trial court erred in granting summary judgment to Milwaukee County because all the elements of a negligence cause of action against the County were sufficiently alleged and “[Milwaukee] County failed to demonstrate that it was entitled to judgment with such clarity as to leave no room for controversy, since the issue of whether the County assumed a duty was never addressed.” The elements of negligence are well known. To prove a negligence cause of action one must establish the following: (1) the defendant had a duty of care or voluntarily assumed a duty of care; (2) this duty was breached; (3) there was a causal connection between the defendant’s conduct and the injury; and (4) the plaintiff suffered an actual loss or damage as a result of the injury. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 319, 401 N.W.2d 816, 822 (1987).

The dispute in this matter centers around the first element. Did Milwaukee County, by its actions, voluntarily assume a duty to inspect for lead based paint? The appellants concede that Milwaukee County was not legally bound to inspect the property for lead based paint, but, they posit, Milwaukee County assumed this duty when it included in its Rent Assistance Program inspection form a statement that the County's inspector found that "[t]he dwelling appeared to comply with HUD Lead Based Paint regulations."

In arguing that the County's actions created a duty where none existed, the appellants cite Wisconsin law which states "that liability may be imposed on one who, having no duty to act, gratuitously undertakes to act and does so negligently." *Nischke v. Farmers & Merchants Bank & Trust*, 187 Wis.2d 96, 113, 522 N.W.2d 542, 549 (Ct. App. 1994). Further, the appellants point out that the underpinning for the *Nischke* court's holding was the RESTATEMENT (SECOND) OF TORTS § 323 (1965). See *Nischke*, 187 Wis.2d at 113-14, 522 N.W.2d at 549. The RESTATEMENT § 323 reads:

Negligent Performance of Undertaking to Render Services.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Under the undisputed facts present here, we conclude that Milwaukee County did not gratuitously undertake a duty to inspect for lead based paint.

First, the Jines affidavit submitted on the County's behalf confirms that the County is under no duty to test for lead based paint and that "[i]t is the responsibility of the owner or lessor of the unit to have the unit tested for lead poisoning." The affidavit also asserts that it is the practice of Milwaukee County to advise the rent assistance participant to watch out for lead based paint poisoning and, more importantly, that "Milwaukee County requires the rent assistance participant to read and sign a document entitled 'Lead-based Paint Notice' for informational purposes, only, and participants are given a copy." Thus, it is the practice of the employees of the Rent Assistance Program to advise program participants of the dangers of lead based paint and to obtain the signatures of the participants to verify that they were notified of the problem.

Second, we note that the inspection form does not read or suggest that lead based paint testing was done by the County. Nor does the form advise the reader that the lead based paint regulations have actually been met. Rather, the language used in the form claims that the dwelling "appears" to meet the HUD regulations dealing with lead based paint. "Appear" has been defined in THE AMERICAN HERITAGE DICTIONARY 88 (3d ed. 1992), as "[t]o seem or look to be." Applying this definition, the inspection form merely alerts the reader that a visual inspection revealed no obvious violation of the lead based paint regulations. Moreover, the form goes on to instruct the reader that "[t]he *Owner* may be required to provide a certification that the dwelling is in accordance with such HUD Regulations." (Emphasis added.) Thus, we conclude that the form did not create a duty to inspect for lead based paint. Instead, the inspection form merely noted that there were no visual signs of lead based paint and that the owner would be the party responsible for certifying that the regulations have been met.

Under the summary judgment methodology, the court must “examine the moving parties’ affidavits and other supporting documents to determine whether that party has established a prima facie case for summary judgment. If it has, [this court] then reviews the opposing parties’ affidavits and other supporting documents to determine whether there are any material facts in dispute that would require a trial.” *Nierengarten v. Lutheran Social Services*, 209 Wis.2d 538, 548-49, 563 N.W.2d 181, 184 (Ct. App. 1997) (citations omitted), *rev’d on other grounds*, 219 Wis.2d 687, 580 N.W.2d 320 (1998). Our review of the record reveals no contrary report or affidavit contesting the inspector’s observation that the Dixson’s rental unit “appear[ed] to be in compliance with HUD Lead Based Paint regulations” on the day of the inspection, nor can we find any document countering the program coordinator’s statements regarding the Rent Assistance Program’s practices and procedures.

Since we are satisfied that the County did not create a duty to inspect for lead based paint, and since no evidence has been submitted that the June 1990 inspection report concluding that Dixson’s dwelling appeared to be in compliance with HUD’s lead based paint regulations was erroneous, this matter is ripe for summary judgment treatment and the trial court is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 97-3816(D)

SCHUDSON, J. (*dissenting*). Did the County assume a duty to inspect for lead-based paint? As the majority acknowledges, the County's Rent Assistance Program advised that "[t]he dwelling unit appears to be in compliance with HUD Lead Based Paint regulations." But what the majority fails to acknowledge is that those HUD regulations, as Carson explains, include "[s]ubpart C [of 24 C.F.R. subtitle A, part 35] deal[ing] with the elimination of lead-based paint hazards in HUD-associated housing." Thus, as Carson argues:

The County's failure to specify which part of 24 CFR, Part 35 that it was referring to in its inspection report requires that 24 CFR, Part 35 be reviewed in its entirety when addressing the issue before this court on appeal. One reasonable interpretation of the County's representation to Dixon that the unit she wanted to rent appeared to comply with 24 CFR, Part 35 is that any lead paint on the premises had either been eliminated or covered. Whether such a representation by the County is in fact true in this case is a question of fact for the jury to decide.

Carson points to 24 C.F.R. § 35.20¹ and 24 C.F.R. § 35.24² regarding the elimination of lead-based paint hazards.

¹ 24 C.F.R. § 35.20 (1998) states that the purpose and scope of subpart C is the implementation of "the provisions of section 302 of the [Lead-Based Paint Poisoning Prevention] Act with respect to establishing procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing HUD-associated housing which may present such hazards."

² 24 C.F.R. § 35.24 (1998) enumerates the minimum requirements regarding elimination of lead-based paint poisoning hazards in HUD-associated housing and specifies that "[a]ppropriate provisions for the inspection of applicable surfaces and elimination of hazards shall be included in contracts and subcontracts involving HUD-associated housing."

Further, introducing common sense to the analysis is helpful. As the majority notes, the County's summary judgment submissions establish that "[i]t is the responsibility of the *owner* or *lessor* of the unit to have the unit tested for lead poisoning" (emphasis added), and that "it is the practice of Milwaukee County to advise the rent assistance participant to watch out for lead based paint poisoning." Majority at 7. That may be so, but what would a *tenant* believe when advised by the County's Rent Assistance Program that "[t]he dwelling unit appears to be in compliance with HUD Lead Based Paint regulations"?

I respectfully dissent.

