STATE OF WISCONSIN
SUPREME COURT

APPEAL NO: 07AP2873

CITY OF MILWAUKEE,

Plaintiff-Appellant,

v.

NL INDUSTRIES, INC,

Defendant-Respondent

and

MAUTZ PAINT CO.

Defendant

FILED
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CLERK OF SUPREME COURT
OF WISCONSIN

Appeal from the Circuit Court for Milwaukee County,
the Honorable John A. Franke, Circuit Court Judge, Presiding
Circuit Court Case No: 01CV003066

PLAINTIFF-APPELLANT'S APPENDIX

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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2873 **Cir. Ct. No. 2001CV3066**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CITY OF MILWAUKEE,
A MUNICIPAL CORPORATION,

PLAINTIFF-APPELLANT,

V.

NL INDUSTRIES, A FOREIGN CORPORATION,

DEFENDANT-RESPONDENT,

MAUTZ PAINT, A WISCONSIN CORPORATION,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. The City of Milwaukee (the City) appeals from a final judgment entered on a jury verdict in favor of NL Industries, Inc. (NL Industries). The City raises a total of twelve claims of error. First, the City

argues that the special verdict should be changed because the evidence showed that NL Industries intentionally caused the public nuisance found by the jury. In addition, the City argues that a partial new trial should be granted to remedy the following: five purported erroneous rulings on the jury instructions; three allegedly separate instances of improperly admitted evidence; the trial court's decision to dismiss the City's nuisance claim based on reckless conduct; the form of the special verdict related to the City's conspiracy claim; and the trial court's decision granting summary judgment to NL Industries regarding the City's requested future abatement costs.

¶2 After reviewing the record, we conclude that the evidence was sufficient to support the jury's finding that NL Industries did not intentionally cause the public nuisance found by the jury. In addition, we conclude that a partial new trial is not warranted on the remaining issues raised by the City. Accordingly, we affirm.

I. BACKGROUND.

¶3 This appeal follows an earlier remand from this court to the trial court for a trial after we concluded that genuine issues of material fact precluded the grant of summary judgment in the defendants' favor.[1] *See* ***City of Milwaukee v. NL Indus., Inc.***, 2005 WI App 7, 278 Wis. 2d 313, 691 N.W.2d 888 (Ct. App. 2004) (***NL Industries I***). The relevant facts provided in our previous decision are set forth in this opinion. *See* ***id.***, ¶¶2-4.

[1] Mautz Paint was originally named as a defendant; however, after the case was remanded for trial, the claims against it were stayed, and the City proceeded to trial solely against NL Industries.

¶4 According to the City's complaint, childhood lead paint poisoning is a severe public health problem in Milwaukee. The City alleged that one in five Milwaukee children tested in 1998 showed blood lead levels at or above the Centers for Disease Control threshold for lead poisoning. According to the City, "[t]his extraordinary incidence of childhood lead paint poisoning is linked to Milwaukee's old housing stock." Specifically, the City alleged that childhood lead paint poisoning is caused when children ingest lead-based paint dust and chips.

¶5 The alleged main source of this dust and chips was lead-based paint on old wood windows in homes in which children live. The complaint states: "Windows are exposed to weather that causes the paint on them to peel, crack, or chalk, and are subject to friction when they are opened and closed, all of which generates lead dust." In response to the problem of childhood lead poisoning, the City undertook a window abatement program in two target areas of the city.

¶6 The City asserted that NL Industries is responsible for these damages because its conduct in marketing and selling substantial quantities of lead pigments and/or lead-based paint in the City of Milwaukee during and after the construction of these dwellings, when it knew the hazards of lead poisoning related to its product, was a substantial factor creating the public nuisance at issue in this case.

¶7 Following remand, NL Industries moved for partial summary judgment on the City's request for future damages. The trial court granted the motion, and the case proceeded to trial on the remaining claims.

¶8 In its opening statement, the City repeatedly referenced that within the ten years preceding the trial, 19,000 children in Milwaukee were reported to

have elevated levels of lead in their blood and were at risk of lead-paint poisoning. The City further referenced that a level of ten micrograms of lead in a deciliter of blood has been identified as "a red flag for the brain damage. That's where we have to worry about the public, at the level of 10 micrograms of lead in a child's blood." In explaining the abatement process to the jury during its opening statement, counsel for the City stated: "The [lead] dust is the hazard that is harming most children."

¶9 The evidence revealed that NL Industries was founded in 1891 and dominated the lead manufacturing market throughout most of the twentieth century. It was in the 1970s that experts began to recognize household lead dust as an additional possible source of childhood lead poisoning. In 1978, a law went into effect essentially banning the use of lead in household paint.[2]

¶10 Prior to the law's enactment, the jury heard testimony that no agency of the federal government opposed the use of lead house paint; to the contrary, federal agencies recommended its use. In Milwaukee, the jury heard that lead paint was being specified in one way or another from 1900 up to the 1960s "[f]or nearly every conceivable public building: Schools, libraries, museums, play pavilions on playgrounds, [and in] hospitals."

¶11 Peter English, Ph.D, M.D., explained the history surrounding childhood lead poisoning. He testified that the first case report on the issue was from 1914 and related to a child who suffered seizures and a coma, and was later

[2] The first federal law banning the concentration of lead in house paint went into effect in 1971 and pertained only to federal housing. A subsequent law went into effect in 1972 and pertained to all housing. The concentration of permissible lead in house paint was reduced again by the 1978 law.

discovered to have chewed lead paint off of his crib. Other cases were reported thereafter, and it was observed that the lead was acquired by an abnormal eating pattern referred to as pica, which described "a craving for unnatural articles of food, a depraved appetite." Dr. English distinguished pica from normal hand-to-mouth activity of children and further testified, "this notion of an aggressive eating problem, pica, formed part of the public health community's understanding of the disease from – from the very beginning of the first consensus that happened in the 1930s through into the 1970s."

¶12 The evidence revealed that a plethora of health problems are associated with childhood lead poisoning, due to the fact that lead is toxic to a number of organ systems, including developing red blood cells, the kidneys, bones, heart, blood vessels, and the brain. The damage to the developing brain can result in a loss of IQ, along with a host of other behavioral problems. During cross-examination, the City's witness, Philip Landrigan, M.D., explained that the brain is most vulnerable when the lead exposure takes place early in development. The relevant time frame includes time spent in the womb through the five or six years after birth.

¶13 Dr. Landrigan acknowledged that the science of lead poisoning changed dramatically throughout the twentieth century. He provided a chronology related to the changing scientific knowledge of the danger associated with lead paint:

> [Counsel for NL Industries:] Then let's go to your residency, your pediatric residency. You graduated in 1967, and in that period of time, you found, did you not, that the main concern then for children in lead paint was not dust, but whether or not they had pica?
>
> [Dr. Landrigan:] That's correct.

> [Counsel for NL Industries:] And by pica, you mean the idea that children would actually eat chips of paint.
>
> [Dr. Landrigan:] That's right.
>
> [Counsel for NL Industries:] And that, in fact, was the prevailing opinion of the experts in the 1950s and '60s, that pica was the sole source, the sole route for children's exposure to lead paint.
>
> [Dr. Landrigan:] *That's right. Concepts of dust started to come out in – as best as I can recall, in the 1970s.*
>
> ....
>
> [Counsel for NL Industries:] Would you agree, sir, that as late as 1969, 1970, a lead level as high as 60 micrograms was considered safe in children?
>
> [Dr. Landrigan:] It was, yes.
>
> [Counsel for NL Industries:] Then into the mid-1970s, a lead level of as high as 40 was considered safe in children.
>
> [Dr. Landrigan:] Yes, that is correct.

(Emphasis added.)

¶14 It was not until 1991 that the Centers for Disease Control issued a report reflecting a public health consensus that lowered the "so-called action level for dealing with lead in children, the level of lead in blood in children," to ten micrograms. Additionally, the consensus in 1991 recognized lead dust as one of the major causes of childhood lead poisoning.

¶15 The City's theory at trial was that NL Industries was fully informed of the toxicity of lead when it was selling lead paint, and that whether the harm

resulted from pica or lead dust was irrelevant. The City sought to recover costs of abatement in the amount of $52.6 million, spent between 1992 and 2006.[3]

¶16 At the close of the City's case-in-chief, NL Industries moved to dismiss the following claims made by the City: that NL Industries negligently, recklessly, or intentionally created the alleged public nuisance; that NL Industries engaged in abnormally dangerous activities; and that NL Industries conspired to create the alleged public nuisance. The trial court took the motions to dismiss as to the City's nuisance claims based on intentional and negligent conduct under advisement and permitted those claims to go to the jury. The trial court granted NL Industries' motion as to the City's claims based on abnormally dangerous activity and reckless conduct. The trial court denied NL Industries' motion to dismiss the conspiracy claim; however, it recognized that the viability of the claim was dependent on whether there was a nuisance. The case proceeded to the jury.

¶17 The first special verdict question read: "Between 1992 and the end of 2006, was the presence of lead-based paint in and on houses in the City of Milwaukee a public nuisance?" The jury answered "yes." The second special verdict question asked: "Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance?"[4] The jury answered "no." In addition, the jury answered "no" to the third special verdict question, which asked: "Did NL Industries negligently engage in conduct that was a cause of the public

[3] Had the trial court not granted summary judgment as to the City's claim for future damages, it appears the City would have sought past and anticipated future costs of approximately $150 million.

[4] The City did not object to combining the question of intent and the question of causation on the verdict form.

nuisance?" Because the jury answered "no" to the second and third questions, the special verdict form directed the jurors not to answer the remaining questions related to the City's conspiracy and damages claims.[5]

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[5] In its entirety, the special verdict read as follows:

Public Nuisance Claim

QUESTION 1. Between 1992 and the end of 2006, was the presence of lead-based paint in and on houses in the City of Milwaukee a public nuisance?

ANSWER: Yes

If you have answered Question 1 "no," your verdict is complete. Do not answer any further questions. If you have answered Question 1 "yes," then answer the following questions, unless the instructions indicate that you should not answer a question.

QUESTION 2. Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance?

ANSWER: No

QUESTION 3. Did NL Industries negligently engage in conduct that was a cause of the public nuisance?

ANSWER: No

Conspiracy Claim

QUESTION 4. *[Answer this question only if you have answered "yes" to Question 2 OR Question 3.]* Did NL Industries engage in a conspiracy with one or more others that was a cause of the public nuisance?

ANSWER: [Left Blank By Jury]

QUESTION 5. *[Answer this question only if you have answered "yes" to Question 4.]* Did NL Industries or one of its co-conspirators perform any act in furtherance of that conspiracy?

(continued)

¶18 The City filed a motion to change the special verdict as to the second question and a motion for a new trial, both of which the trial court denied. The City now appeals. Additional facts are provided in the remainder of this opinion as needed.

II. ANALYSIS.

A. The evidence was sufficient to support the special verdict.

1. Standard of Review.

¶19 The City challenges the sufficiency of the evidence to support the jury's "no" answer to the second question on the special verdict, which read: "Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance?"[6] The City contends: "[T]he undisputed evidence at trial established that by 1944, at the latest, NL knew that childhood lead paint poisoning was a serious public health hazard, yet it continued to sell and promote

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ANSWER: [Left Blank By Jury]

Damages

QUESTION 6. *[Answer this question only if you have answered "yes" to Question 2 OR Question 3 OR Question 5.]* What sum of money, if any, will fairly and reasonably compensate the City of Milwaukee for past expenditures incurred to abate the public nuisance?

ANSWER: $[Left Blank By Jury]

(Formatting as it appears in original.)

[6] The City does not argue that the evidence was insufficient to support the conclusion that NL Industries' conduct was reasonable. We discuss *infra* in ¶¶47-53, the City's argument related to the propriety of the jury instruction and special verdict question incorporating the element of reasonableness.

lead paint for decades." As a result, the City requests that we change the special verdict.

¶20 WISCONSIN STAT. § 805.14(1) (2005-06) sets forth the standard that applies to both the trial court's and this court's review of a challenge to the sufficiency of the evidence.[7] *See* ***Richards v. Mendivil***, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). It provides in relevant part as follows:

> **(1)** TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

Sec. 805.14(1).

¶21 Accordingly, "'if there is any credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned.'" ***General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc.***, 215 Wis. 2d 104, 122, 572 N.W.2d 881 (Ct. App. 1997) (citation and brackets omitted). This is particularly true when the trial court upholds the verdict after denying postverdict motions. *See* ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 543, 472 N.W.2d 790 (Ct. App. 1991). On review, it is our responsibility "to look for credible evidence to sustain the jury's verdict, not to search the record for evidence to sustain a verdict that the jury could

[7] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

have reached, but did not." ***Nowatske v. Osterloh***, 201 Wis. 2d 497, 511, 549 N.W.2d 256 (Ct. App. 1996).

¶22 To establish liability for the public nuisance found by the jury, the City was required to establish a causal connection between the nuisance and underlying tortious acts attributable to NL Industries. Our supreme court has explained the dichotomy between a nuisance and liability for a nuisance as follows:

> At the outset, it is imperative to distinguish between a nuisance and liability for a nuisance, as it is possible to have a nuisance and yet no liability. A nuisance is nothing more than a particular type of harm suffered; liability depends upon the existence of underlying tortious acts that cause the harm. The RESTATEMENT (SECOND) OF TORTS illustrates this point:
>
> > [F]or a nuisance to exist there must be harm to another or the invasion of an interest, but there need not be liability for it. *If the conduct of the defendant is not of a kind that subjects him to liability ... the nuisance exists, but he is not liable for it.*

Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 2005 WI 8, ¶25, 277 Wis. 2d 635, 691 N.W.2d 658 (emphasis in ***Milwaukee Metro. Sewerage Dist.***; quoting RESTATEMENT (SECOND) OF TORTS § 821A cmt. c).

¶23 The RESTATEMENT (SECOND) OF TORTS § 825 sets forth the requirements for establishing intentional conduct in the context of a public nuisance. It provides, in relevant part: "[A]n interference with the public right, is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct." ***Id.***; *see also* ***Milwaukee Metro. Sewerage Dist.***, 277 Wis. 2d 635, ¶37 (applying § 825).

2. There is credible evidence in the record that NL Industries did not know that the public nuisance found by the jury was resulting or was substantially certain to result from its conduct.

¶24 The first step in the analysis is determining what the public nuisance was that the jury found to exist. Once this is established, we can determine whether NL Industries knew that it was resulting or was substantially certain to result from its conduct.[8] *See* RESTATEMENT (SECOND) OF TORTS § 825.

¶25 The City argues that the public nuisance was the presence of lead paint in and on houses in the City of Milwaukee based on the language of question one in the special verdict (i.e., "QUESTION 1. Between 1992 and the end of 2006, was the presence of lead-based paint in and on houses in the City of Milwaukee a public nuisance?"). We disagree with the City that the public nuisance is solely determined by the language of the special verdict. "It is well established that upon reviewing a jury's special verdict answers or other findings, we may refer to whatever facts in the record support the jury's findings. Similarly, we may turn to supporting documents in the record to interpret a jury's findings." ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶9 n.10, ___ Wis. 2d ___, 753 N.W.2d 448 (citations omitted).

¶26 The trial court inquired with counsel, as it listened to arguments on NL Industries' motion to dismiss after the City's case-in-chief, whether the jury had to find that NL Industries was substantially certain that its activities would cause childhood lead paint poisoning or whether the jury simply had to find that

[8] The City does not argue that NL Industries acted for the purpose of causing the public nuisance found by the jury. *See* RESTATEMENT (SECOND) OF TORTS § 825(a).

NL Industries was substantially certain that its selling of lead pigment and paint would result in the presence of lead paint in homes.

> [The Court:] And this is a huge, huge gulf here between having knowledge that your conduct is likely to cause paint to be on walls and knowledge that your conduct is likely to cause childhood lead paint poisoning, and the jury's entitled to know which of those two things need to be proven....
>
> ....
>
> [Counsel for the City:] Your Honor, I don't believe it's merely putting paint on walls. In terms of the intentional conduct, they're selling with knowledge that the product is hazardous as used. That – that – I think that's somewhere between the two options that you gave me. It's not simply knowing that paint is going on walls. It's the knowledge of the hazard to children, which is part of that – the knowledge component that we must prove under intentional tort.

¶27 As evidenced by the City's own statements in response to the trial court's inquiry, it was not the mere presence of lead paint on the walls that was the nuisance; rather, it is clear from the record that the public nuisance was the hazardous childhood lead exposure—lead exposure caused not only by chewing on lead painted surfaces (i.e., pica), but also from ingestion of lead dust and chips through normal hand-to-mouth activity. This is reflected by the City's own assertion during its opening statement: "The [lead] dust is the hazard that is harming most children."

¶28 The City wants this court to focus on the fact that lead paint is hazardous and argues that we should not distinguish between whether the hazard results from pica or lead dust. Presumably, this is because there was evidence at trial that the hazard of lead dust was unknown during the time NL Industries was manufacturing and selling lead pigment and paint.

¶29 The trial court made the distinction the City argues against. As a result, the City claims it was improperly required to prove that NL Industries had "perfect foresight" of the precise public nuisance that resulted. The City's claim in this regard is based on the trial court's decision denying its motion to change the special verdict. In its decision, the trial court wrote:

> During the 1930s, it became apparent that the toxicity of lead was not simply a health problem for those who worked in the lead industry or with lead paint. It was causing serious injury and death to children who, apparently attracted to the taste, ingested paint by chewing on toys or cribs or other painted surfaces. Decades later a much more subtle and insidious problem was identified, as it became clear that the mere presence of lead paint inevitably resulted in the presence of lead dust and chips and that, through the ordinary hand to mouth activities of very young children, lead was being ingested. It further became clear that this process was sufficient to cause great damage at blood levels much lower than were previously thought dangerous.

¶30 The City appeals from the trial court's decision, arguing that "[l]iability for causing an intentional nuisance does not depend on awareness of the exact scientific mechanism of how one's conduct is causing harm. It is knowledge of the harm itself, not knowledge of the method of how the harm occurred, which is important under Wisconsin law."

¶31 We disagree. First, the record belies the City's contention that it was required to prove that NL Industries had "perfect foresight" of the resulting public nuisance. After the City had presented its case-in-chief, the trial court, in deciding NL Industries' motion to dismiss the City's nuisance claim based on intentional conduct, discussed what the City was required to prove to establish the claim. The trial court specifically stated that knowledge of some specific fact or particular information was not required. The trial court explained:

> I have concluded that to establish a nuisance claim based on intentional conduct, the plaintiff in this case must prove that the defendant knew that an interference with a public right was resulting or was substantially certain to result from the promotion and sale of lead pigment and paint. I also conclude that in this case, that means knowledge that lead poisoning – lead poisoning in children would occur.
>
> ....
>
> ... I agree with the City that it is not necessary to prove that NL knew some specific fact or had some particular information about the risk or hazards that others did not have. I agree with the City that the foreseeability of the injury should not be reduced to foreseeability of harm at some particular blood level measured in micrograms per deciliter. But what was foreseen, what was reasonably certain to happen, what someone believed was reasonably certain to follow has to be judged not by some particular measure of lead in the blood but by what was known at the time the conduct was engaged in.

¶32 Likewise, the jury instructions do not support the City's contention that it was required to prove NL Industries had "perfect foresight." The jury instructions repeated the special verdict question related to whether NL Industries intentionally and unreasonably engaged in conduct that was a cause of the public nuisance and further provided in relevant part as follows:

> ***Question 2: Intentionally and Unreasonably Causing a Nuisance***
>
> ***Question 2 asks:*** Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance? Before you may answer this question "yes," you must be satisfied that NL Industries acted intentionally and unreasonably, and that its intentional and unreasonable conduct was a cause of the public nuisance.
>
> ***"Intentionally."*** An interference with a public right is deemed to be "intentional" if the defendant acted for the purpose of causing it or knows that it is resulting or is substantially certain to result from his conduct. Thus, NL

Industries acted intentionally if it intended to create the public nuisance at issue in this case, or if it knew that its conduct was substantially certain to cause such a nuisance.[9]

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[9] In its entirety, the instruction related to special verdict question two provides:

> ***Question 2: Intentionally and Unreasonably Causing a Nuisance***
>
> ***Question 2 asks:*** Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance? Before you may answer this question "yes," you must be satisfied that NL Industries acted intentionally and unreasonably, and that its intentional and unreasonable conduct was a cause of the public nuisance.
>
> ***"Intentionally."*** An interference with a public right is deemed to be "intentional" if the defendant acted for the purpose of causing it or knows that it is resulting or is substantially certain to result from his conduct. Thus, NL Industries acted intentionally if it intended to create the public nuisance at issue in this case, or if it knew that its conduct was substantially certain to cause such a nuisance.
>
> ***"Unreasonably."*** In determining whether NL Industries acted unreasonably, you may consider all of the circumstances related to the defendant's conduct, the creation of the public nuisance at issue, and the extent of any harm or injury that was a consequence of the public nuisance. In determining whether NL Industries acted unreasonably, you may consider whether the conduct of NL Industries was in compliance with existing laws. However, the fact that the defendant's conduct may not have been in violation of any existing law does not necessarily relieve the defendant of liability in this case. You may find that the defendant's otherwise lawful conduct was unreasonable under all of the circumstances presented by the evidence in this case.
>
> ***"A Cause."*** This question does not ask about "the cause" but rather "a cause" because a public nuisance may have more than one cause. NL Industries is responsible for causing the alleged public nuisance if you find that its intentional and unreasonable conduct was *a substantial factor* in producing the public nuisance. A public nuisance may be caused by the conduct of a single person or entity or the combined conduct of any number of people or entities.

(continued)

(Footnote added; formatting as it appears in original.) Under these instructions, the jury was asked to find that NL Industries' intent or knowledge related to its conduct be linked to the public nuisance at issue, not that NL Industries was aware of the exact scientific mechanism of how its conduct was causing harm.

¶33 To support its position, the City claims that in determining whether the intentional conduct standard was met, the question is "whether the defendant knew it was causing danger and, in the face of that knowledge, whether the defendant continued its conduct." It relies on ***Vogel v. Grant-Lafayette Electric Cooperative***, 201 Wis. 2d 416, 548 N.W.2d 829 (1996), a stray voltage case, and claims it "met the ***Vogel*** intentional conduct standard by proving that NL sold and promoted its lead pigment and lead paint knowing or being substantially certain that the threat of childhood lead poisoning (or public harm) would result." We disagree with the City's reading of ***Vogel***.

¶34 In ***Vogel***, our supreme court quoted with approval RESTATEMENT (SECOND) OF TORTS § 825 cmt. c:

> "It is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional. It is not enough to make an invasion intentional that the actor realizes or should realize that this conduct involves a

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> "Substantial factor," as that term is used here, means that NL Industries' misconduct had such an effect in producing the public nuisance and resulting injury as to lead reasonable people to regard it as a cause, in the sense that the use of the term "cause" brings to mind the idea of responsibility. A substantial "cause" does not include every one of a great number of events without which the alleged public nuisance and alleged injury in question would not have occurred.

(Formatting as it appears in original.)

> serious risk or likelihood of causing the invasion. He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct."

Vogel, 201 Wis. 2d at 430-31 (citing RESTATEMENT (SECOND) OF TORTS § 825 cmt. c). ***Vogel*** held: "It is the unreasonable levels of stray voltage that may give rise to liability for an intentional invasion, not the use of a multi-grounded delivery system with interconnecting neutrals." ***Id.*** at 432. To support its conclusion that the electric cooperative defendant had not acted intentionally, the court pointed out that the Vogels failed to reference any evidence in the record establishing that the electric cooperative had knowledge that its system was resulting in unreasonable levels of stray voltage on the Vogels' farm, prior to the time when the Vogels first contacted the electric cooperative to complain that their cows were suffering the effects of stray voltage. *See* ***id.***

¶35 Following ***Vogel***, we agree with the trial court that it was not enough for the jury find that NL Industries anticipated "a harm" or "some harm," which would in essence result in strict liability for nuisance "whenever some harm could be anticipated even though nothing close to a *public* nuisance was forseeable." (Emphasis in trial court's decision.) Instead, the City had to prove that NL Industries anticipated the public nuisance found by the jury, which was hazardous childhood lead exposure caused not only by chewing on lead painted surfaces, but also from ingestion of lead dust and chips through normal hand-to-mouth activity.

¶36 Our review of the record reflects that the testimony during trial largely centered on the harm to children caused by lead dust. This was a key component of the hazardous childhood lead exposure that formed the basis of the City's public nuisance claim. During trial, the City sought to meld the knowledge

of the hazardous lead exposure resulting from pica with the later knowledge of hazardous lead exposure resulting from lead dust to form a continuum of knowledge on the part of NL Industries. It sought to do so despite the evidence that the lead-dust hazard was unknown during the time NL Industries was manufacturing and selling lead pigment and paint.[10]

¶37 Although the City would have us focus on other evidence in the record that arguably would have permitted the jury to reach a different result, that is not our role in reviewing the sufficiency of the evidence to support the jury's finding. *See* ***Nowatske***, 201 Wis. 2d at 511; ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 337, 538 N.W.2d 804 (Ct. App. 1995) ("It was in the jury's province to accept or reject any or all of th[e] evidence [presented at trial in determining its verdict]."). Here, the City's expert witness, Dr. Landrigan, acknowledged that the science of lead poisoning changed dramatically throughout the twentieth century. He testified that through the 1960s, the sole source for children in terms of exposure to lead paint was pica, not lead dust. Lead-dust concepts did not emerge until the 1970s, and even then, in the mid-1970s, a lead level of forty micrograms was considered to be safe in children.

¶38 We conclude that there is credible evidence in the record to support the jury's conclusion that NL Industries did not know that the public nuisance found by the jury was resulting or was substantially certain to result from its conduct, where the dangers associated with lead dust, which are largely

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[10] The City argued in its reply brief that it "presented evidence that NL was substantially certain it was causing serious public harm during the years it was selling and promoting lead paint … and that this harm was *a related and a natural precursor* to the public nuisance suffered by Milwaukee in the 1990s." (Emphasis added.)

responsible for the hazardous childhood lead exposure at issue, were unknown during the time NL Industries sold lead pigment and paint. As a result, we will not overturn the jury's answer to special verdict question two.

¶39 As stated, the City did not object to combining the separate issues of intentional conduct and causation into a single question on the verdict form. Given the wording of the special verdict question, because we have concluded that there is sufficient evidence to support the jury's conclusion that NL Industries did not act intentionally, we need not address whether the City proved that NL Industries was a substantial factor in causing the public nuisance.

B. The City is not entitled to a partial new trial.

¶40 Next, the City argues that a partial new trial should be granted to remedy what it contends were erroneous rulings on the jury instructions, the admissibility of evidence, the dismissal of its nuisance claim based on reckless conduct, the format of the special verdict related to its conspiracy claim, and the grant of summary judgment to NL Industries regarding its requested future abatement costs. We disagree.

1. Jury Instructions.

¶41 The City claims that the jury instructions contained fundamental errors that misled the jury. Specifically, the City argues that the trial court erred: (a) when it instructed the jury on the tort of private nuisance; (b) when it told the jury that NL Industries created a public nuisance only if its conduct was both intentional *and* unreasonable; (c) when it instructed the jury that NL Industries' conduct was intentional if it intended to create the public nuisance "at issue" in this case; (d) when it declined to instruct the jury that NL Industries' conduct met

the intentional standard, even if it was not substantially certain that harm would result when its conduct began, but if NL Industries continued its activities after learning that harm was substantially certain to result from its conduct; and (e) when it declined to give the City's proposed jury instruction regarding NL Industries' purported agency relationship with the Lead Industries Association (LIA).

¶42 We review with deference the instructions provided to the jury. ***State v. Wille***, 2007 WI App 27, ¶23, 299 Wis. 2d 531, 728 N.W.2d 343.

> The [trial] court has broad discretion as to the instructions it will give to a jury in any particular case. Instructions must fully and fairly inform the jury about the applicable principles of law. As long as the instructions adequately advise the jury of the law it is to apply, the court has the discretion to decline to give alternative or modified instructions even though they may properly state the law. If the jury instructions are not erroneous, the court's exercise of discretion will be affirmed on appeal. If an instruction is erroneous, a new trial will not be ordered unless the court's error was prejudicial.

Horst v. Deere & Co., 2008 WI App 65, ¶13, ___ Wis. 2d ___, 752 N.W.2d 406 (citations omitted). We now address each of the City's arguments regarding what it contends were erroneous jury instructions.

a. Private nuisance.

¶43 For the first question on the special verdict form, the trial court instructed the jury as follows:

> ***Question 1 asks:*** Between 1992 and the end of 2006, was the presence of lead-based paint in and on houses in the City of Milwaukee a public nuisance?
>
> A public nuisance is a condition that unreasonably interferes with a right common to the general public. A public nuisance requires an injury to the community or the

> general public, in contrast to *a private nuisance*, which requires an interference with a person's use or enjoyment of private property.
>
> A condition does not become a public nuisance simply because it interferes with the use and enjoyment of land by a large number of persons or causes injury to many persons. There must be some interference with a public right, such as an interference with the health or safety of the general public. However, a public nuisance need not directly affect all members of a community, as long as there is an interference with a right common to the general public.

(Emphasis in original jury instructions.)

¶44 The City argues that the language contrasting a private nuisance with a public nuisance was not proposed by either party and, in fact, was specifically objected to by the City. The City claims that this instruction confused the jury and that the confusion was exacerbated by NL Industries' references to what the City terms "the non-existent private nuisance cause of action" in its closing argument.

¶45 The jury answered "yes" to the question on the special verdict inquiring: "Between 1992 and the end of 2006, was the presence of lead-based paint in and on houses in the City of Milwaukee a public nuisance?" Consequently, because this question was answered favorably for the City, any alleged error in this instruction was harmless. WIS. STAT. § 805.18(2).[11]

[11] WISCONSIN STAT. § 805.18(2) provides:

(continued)

¶46 Furthermore, the definition provided in the jury instructions was consistent with that provided in the case law and the restatement section addressing public nuisances. *See* ***Milwaukee Metro. Sewerage Dist.***, 277 Wis. 2d 635, ¶¶27-28 (distinguishing the nature of the interests invaded where private and public nuisances are involved as follows: "'The essence of a private nuisance is an interference with the use and enjoyment of land.' … In contrast, '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community'" (citations omitted)); RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (describing the relation between public and private nuisance: "Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land"). Accordingly, the trial court did not erroneously exercise its discretion when it utilized an instruction that contrasted a private nuisance with a public nuisance.

> **(2)** No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

Before we will conclude that the error complained of has affected the party's substantial rights, "there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.... If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (citations omitted).

b. Intentional and unreasonable conduct.

¶47 In addition, the City argues that the trial court erred when it told the jury that NL Industries intentionally created the public nuisance only if its conduct was both intentional *and* unreasonable. According to the City, by giving this instruction, the trial court required it to prove an additional, nonessential element, i.e., unreasonableness, to prevail on its intentional public nuisance claim. Furthermore, the City argues that the intentional conduct instruction and correlating verdict question were inconsistent with the applicable law.

¶48 The parties agree that the unreasonableness of the invasion or the interference is a consideration in determining the existence of a public nuisance. NL Industries, however, also contends that the unreasonableness of its conduct is a relevant consideration. The City disagrees, arguing that "[n]o Wisconsin court has articulated the intentional creation of a public nuisance as requiring an element of 'unreasonable' *conduct* separate and apart from the requisite knowledge regarding the harm and the unreasonableness or seriousness of the *interference*." (Emphasis in brief.)

¶49 In addition to citing restatement provisions, the City again relies on language in ***Vogel*** to support its position; here, that it is the invasion or harm that must be found unreasonable, not the conduct. *See* RESTATEMENT (SECOND) OF TORTS §§ 821B & 822(a).[12] The ***Vogel*** court wrote:

[12] The RESTATEMENT (SECOND) OF TORTS § 821B defines a public nuisance as "an unreasonable interference with a right common to the general public."

(continued)

> "To be 'intentional,' an invasion of another's interest in the use and enjoyment of land, or of the public right, need not be inspired by malice or ill will on the actor's part toward the other. An invasion so inspired is intentional, but *so is an invasion that the actor knowingly causes in the pursuit of a laudable enterprise without any desire to cause harm.* It is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional."

Id., 201 Wis. 2d at 430 (emphasis added; quoting RESTATEMENT (SECOND) OF TORTS § 825 cmt. c). Given that the pursuit of a laudable enterprise, which presumably relates to reasonable conduct, can form the basis for nuisance liability, the City argues that the special verdict question requiring the jury to find NL Industries intentionally and unreasonably engaged in conduct causing the public nuisance was in error. *See also* 58 AM. JUR. 2D *Nuisances* § 10 ("[A]s distinguished from negligence liability, liability in nuisance is predicated upon an unreasonable injury rather than upon unreasonable conduct." (Footnote omitted.)).

¶50 Reaching a different conclusion, NL Industries cites ***Stunkel v. Price Electric Cooperative***, 229 Wis. 2d 664, 670-71, 599 N.W.2d 919 (Ct. App. 1999), where the court stated: "Lawful conduct that interferes with another's rights may be actionable in nuisance in those cases where intentional but unreasonable conduct is asserted as the underlying basis for a nuisance claim." ***Id.*** (citing

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The RESTATEMENT (SECOND) OF TORTS § 822(a) states, in relevant part: "One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is … intentional and unreasonable." In ***State v. Deetz***, 66 Wis. 2d 1, 16 n.6, 224 N.W.2d 407 (1974), our supreme court made clear that although the RESTATEMENT (SECOND) OF TORTS § 822 refers only to private nuisance, the law of public nuisance is the same. *See also* ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶46, 277 Wis. 2d 635, 691 N.W.2d 658 ("[S]ince the principal difference between a public and private nuisance lies in the nature of the interest violated or affected by the wrongful conduct, the elements required to establish liability for either are virtually identical.").

RESTATEMENT (SECOND) OF TORTS § 822(a).) Likewise, in ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen***, 129 Wis. 2d 129, 136, 384 N.W.2d 692 (1986), where an automobile dealership brought an action alleging private nuisance against an adjoining landowner, our supreme court described the issue before it as follows: "[The adjoining landowner] requests this court to review the court of appeals' determination that its conduct was unreasonable." There, in the context of considering whether a social utility analysis was required pursuant to the RESTATEMENT (SECOND) OF TORTS § 826, the court stated: "[A] fact finder must still determine the reasonableness of an actor's conduct in relation to the plaintiff, even if the conduct has social utility." ***Crest***, 129 Wis. 2d at 144. Based on the quoted language in the foregoing cases, NL Industries argues that reasonableness applies to an actor's conduct.

¶51 The City interprets ***Crest***'s holding differently, claiming that it makes clear that the unreasonableness inquiry relates to the harm caused by the conduct, as opposed to the conduct itself. As the City points out, the RESTATEMENT (SECOND) OF TORTS § 826(b), discussed in ***Crest***, provides: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if ... the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." In applying § 826(b), the ***Crest*** court held:

> Because we find that Crest [the automobile dealership] suffered serious harm caused by the intentional invasion of surface water stemming from Bauer Glass's [the adjoining landowner] conduct and because compensating for the harm sustained would not have rendered completion of the project infeasible, we find that the invasion of surface water caused by Bauer Glass's conduct was unreasonable.

Crest, 129 Wis. 2d at 143-44.

¶52 As evidenced by the varying positions of the parties, there is conflicting law on this issue, which may be due in part to inadvertent use of the term "unreasonable" in relation to conduct and interference or invasion. For purposes of this appeal, resolution of the conflict is unnecessary. We conclude that even if the wording of the instruction and verdict question were in error, it was harmless given that the jury answered in the negative the negligence question on the special verdict. *See* WIS. STAT. § 805.18(2).

¶53 The negligence question did not include the word "unreasonable." It read: "Did NL Industries negligently engage in conduct that was a cause of the public nuisance?" Inasmuch as the jury did not find that NL Industries was negligent, which requires a lesser showing of culpability than does a showing that NL Industries acted with intent, we do not find the addition of "unreasonable" in the language of the special verdict question on intentional conduct to have been pivotal.

c. The public nuisance "at issue."

¶54 The City argues that the trial court erred when it instructed the jury that NL Industries' conduct was intentional "if it intended to create the public nuisance *at issue in this case*, or if it knew that its conduct was substantially certain to cause such a nuisance." (Emphasis in brief.) The City contends it was prejudiced by the specificity the instruction required.

¶55 Although the City claims to have objected to this language "as requiring a showing the NL [Industries] had perfect contemporaneous foresight of the exact type of problems Milwaukee would eventually face as opposed to

knowledge that substantial harm would occur," it does not provide a record citation to substantiate that an objection was timely and properly made during the instruction and verdict conference. *See* WIS. STAT. § 805.13(3).[13] The City cites its memorandum regarding proposed verdict questions and jury instructions, but § 805.13(3) requires that counsel "stat[e] the grounds for objection with particularity on the record." With a record consisting of two files and nine separate boxes, and with a jury instruction conference that took place for just over two days, appropriate record citations are critical to our review. In the absence of such citations, we need not consider this issue further. *See* WIS. STAT. RULE 809.19(1)(d) & (e); *see also* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 453, 405 N.W.2d 354 (Ct. App. 1987) ("[I]t is not our obligation to extensively sift the enormous record for facts supporting or discrediting the position of any party on any issue.").

¶56 Notwithstanding, we agree with the trial court's decision denying the City's motion for a new trial on this issue because "there is no material difference

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[13] WISCONSIN STAT. § 805.13(3) provides:

> **(3)** INSTRUCTION AND VERDICT CONFERENCE. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. *Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.*

(Emphasis added.)

in meaning between the court's instruction and the City's request." In its memorandum submitting proposed verdict questions and jury instructions, the City requested an instruction providing, in relevant part: "NL industries acted intentionally if it acted for the purpose of creating a public injury or harm or knew that such a public injury or harm was resulting or was substantially certain to result from its conduct." (Underlining in original.) The City's reference to "a public injury" was essentially synonymous with the definition of public nuisance provided in the jury instructions, which read: "A public nuisance is a condition that unreasonably interferes with a right common to the general public. *A public nuisance requires an injury to the community or the general public*...." (Emphasis added.) The trial court appropriately exercised its discretion in fashioning this jury instruction.

d. Continued conduct and subsequent knowledge.

¶57 The City next contends that the trial court erred when it declined to adopt its proposed instruction regarding continued conduct and subsequent knowledge, which it claims was especially important in this case "where the jury was required to consider a lengthy time period during which the state of knowledge on the subject of childhood lead paint poisoning changed." The City's proposed instruction read: "NL's conduct meets this intentional standard, even if it was not substantially certain that harm would result when its conduct began, but NL continued its activities after learning that harm was substantially certain to result from its conduct." The City based this proposed instruction on the RESTATEMENT (SECOND) OF TORTS § 825 cmt. d, which explains what constitutes an intentional invasion and in a comment states: "[T]he first invasion resulting from the actor's conduct may be either intentional or unintentional; but when the

conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional."

¶58 In arguing that the trial court properly rejected this instruction, NL Industries cites the comment in its entirety:

> *d. Continuing or recurrent invasions.* Most of the litigation over private nuisances involves situations in which there are continuing or recurrent invasions resulting from continuing or recurrent conduct; and the same is true of many public nuisances. In these cases the first invasion resulting from the actor's conduct may be either intentional or unintentional; but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional.

RESTATEMENT (SECOND) OF TORTS § 825 cmt. d. According to NL Industries, the circumstances referenced in comment d typically arise "when the defendant's conduct is contemporaneous with the asserted interference, such as odor emanating from an egg farm or smoke blowing from a factory." *Cf.* ***id.***, illus. 1.-4.[14] In contrast to these circumstances, NL Industries argues it was selling lead pigment and paint at least twenty years prior to the nuisance involved in this case.

[14] The illustrations for the RESTATEMENT (SECOND) OF TORTS § 825 depict the following scenarios:

(continued)

¶59 The City contends that our statement in ***Northridge Co. v. W.R. Grace & Co.***, 205 Wis. 2d 267, 282, 556 N.W.2d 345 (Ct. App. 1996), "that manufacturers can be liable for nuisance long after they relinquish ownership or control over their polluting products," refutes NL Industries' argument. This statement, made in the context of affirming a jury's finding that an asbestos manufacturer was liable for nuisance, is inapposite to the case before us. The issue here was not whether NL Industries could be held liable for a nuisance after

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1. A owns and occupies a house and lot adjacent to a house and lot owned and occupied by B. While B is entertaining guests in his house A, who has a grudge against B, builds a bonfire on his premises with substances that he knows will emit foul-smelling smoke. A knows that the wind will blow this smoke into B's house, and A's only purpose in building the fire is to annoy B. The smoke is blown in B's house, rendering it virtually uninhabitable for several hours. The invasion of B's interest in the use and enjoyment of his land is intentional. 2. A owns land on which he erects and starts to operate a factory. B owns land 200 yards from A's factory, on which he operates a poultry farm. A small stream flows across A's land and then onto B's land. B utilizes this stream in his poultry business. A, wishing to dispose of ten barrels of waste matter from his factory and knowing that the pollution of the stream will interfere with the operation of B's poultry farm, but having no desire to harm B, dumps the waste matter into the stream. This fouls the water for several days and causes a substantial interference with B's poultry business. The invasion of B's interest in the use and enjoyment of his land is intentional. 3. The same facts as in Illustration 2, except that there is no stream on A's or B's land. B gets water for his poultry business from a well on his land, and A dumps the waste matter into a depression on his land, from which it seeps into the ground and is carried 300 yards underground to B's well by a flow of percolating water unknown to A. The water in B's well is contaminated so that it cannot be used in his poultry business for some time. The invasion of B's interest in the use and enjoyment of his land is not intentional. 4. The same facts as in Illustration 3, except that after learning of the pollution of B's well A continues to dump waste into the same depression, which causes further pollution of the well and more interference with B's poultry business. These further invasions of B's interest in the use and enjoyment of his land are intentional.

it relinquished ownership or control over its lead pigment and paint. Instead, the trial court was asked to determine whether an instruction on "[c]ontinuing or recurrent invasions" was appropriate where the evidence reflected that the nuisance was unknown to NL Industries until after its conduct had ceased. We conclude that the trial court appropriately exercised its discretion in not giving the City's requested instruction.

e. Agency.

¶60 The City argues that the trial court erred when it declined to give the City's proposed instruction to the jury regarding NL Industries' purported agency relationship with the Lead Industries Association, an industry trade group. The City's proposed instruction titled "attribution of statements," provided in part:

> You have heard evidence that the LIA was an unincorporated association until 1961. Under the law, this unincorporated association, prior to its incorporation in 1961, had no existence apart from its members. As such, any statements made by this trade group prior to its incorporation are attributable to NL as a member of the association, and you should treat them as such.

¶61 The trial court concluded that an instruction on the issue was unnecessary, because in its view this case did not involve agency law. At the jury instruction conference, the court explained:

> I found a sufficient foundation to allow a jury to consider this evidence, but I believe it's still up to the jury to listen to argument and weigh all the evidence and decide what to make out of the LIA statements, what weight to give them, whether NL is responsible for one or more or all of these statements.
>
> Since, for the most part, these were not statements offered for real truth content and, in my judgment, were primarily helpful in assessing what some people might have known in 1940, for example, based on what a different person knew; that is, what a company knew based on

> evidence about what a trade association knew. No real agency finding was necessary for that link to exist or for that purpose to be important.
>
> ... I think the jury can use its common sense and sort this out.
>
> ....
>
> ... [Y]ou're free to argue the reasonable inferences from the evidence the jury has heard.

In its decision denying the City's request for a new trial, the trial court further explained that the statements at issue "were not material to liability-forming conduct and it was not necessary for the jury to determine whether NL was 'responsible' for such ... statements."

¶62 The City contends that because NL Industries had destroyed most of its records, the testimony offered by the historians at trial regarding their understanding of the time period and NL Industries' knowledge was largely dependent on trade associations "NL founded and controlled." NL Industries, in response, argues the conditions needed to prove the existence of an agency relationship were not established at trial, *see* WIS JI-CIVIL 4000;[15] specifically, that the Lead Industries Association's actions were subject to NL Industries' direction and control. We agree and conclude that the trial court appropriately

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[15] WISCONSIN JI-CIVIL 4000 provides in relevant part:

> An agency is based on an agreement between the parties which embodies three factual elements:
>
> (1) the conduct of the principal showing that the agent is to act for him or her;
> (2) the conduct of the agent showing that he or she accepts the undertaking;
> (3) the understanding of the parties that the principal is to control the undertaking.

exercised its discretion in denying the City's request for instructions related to this issue of agency.

2. Admissibility of evidence.

¶63 The City claims it was prejudiced when the trial court allowed the following evidence to be presented to the jury: (1) collateral source evidence; (2) evidence related to the utility of lead paint; and (3) evidence related to product identification and property maintenance.

¶64 A trial court has broad discretion in determining the relevance and admissibility of evidence and its decision will not be reversed absent an erroneous exercise of that discretion. *See* ***State v. Oberlander***, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989). "[T]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in." ***State v. Stinson***, 134 Wis. 2d 224, 232, 397 N.W.2d 136 (Ct. App. 1986). Rather, we "will uphold a decision to admit or exclude evidence if the [trial] court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Thus, we will not find an erroneous exercise of discretion if there is a rational basis for the trial court's decision. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

a. Collateral source evidence.

¶65 The City contends that the trial court erred in denying its motion *in limine* to preclude NL Industries from presenting evidence to the jury regarding the collateral sources of funds (e.g., federal and state grants) that the Milwaukee Health Department received to help finance its abatement and prevention

programs. Although we agree with the City that the admission of evidence of collateral sources of funds was error, we nevertheless conclude the error was harmless in light of the trial court's curative instruction. *See* WIS. STAT. § 805.18(2).

¶66 The collateral source rule ensures that "[t]he tortfeasor who is legally responsible for causing injury is not relieved of his obligation to the victim simply because the victim had the foresight to arrange, or good fortune to receive, benefits from a collateral source for injuries and expenses." ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶7, 235 Wis. 2d 678, 611 N.W.2d 764. It is both a rule of damages and a rule of evidence. ***Leitinger v. Dbart, Inc.***, 2007 WI 84, ¶¶28, 30, 302 Wis. 2d 110, 736 N.W.2d 1. "As a rule of damages, 'the collateral source rule denies a tortfeasor credit for payments or benefits conferred upon the plaintiff by any person [or entity] other than the tortfeasor.'" ***Id.***, ¶28 (citation omitted). Consequently, under the collateral source rule, it is improper to reduce a damage award based on a payment to the plaintiff from a collateral source. *See* ***id.*** "As a rule of evidence, the collateral source rule generally precludes introduction of evidence regarding benefits a plaintiff obtained from sources collateral to the tortfeasor." ***Id.***, ¶30.

¶67 The City relies on ***Leitinger*** to support the proposition that it was prejudiced in terms of both liability and damages when collateral source evidence was improperly admitted.[16] The City points to the ***Leitinger*** court's statement that "the purpose of the collateral source rule is not to provide the injured person with

[16] ***Leitinger v. Dbart, Inc.***, 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1, was released eleven days after the jury reached its verdict in this case.

a windfall, but rather to prevent the tortfeasor from escaping liability because a collateral source has compensated the injured person." *See* ***id.***, ¶34. The City also draws our attention to the authorities quoted by the ***Leitinger*** court in a footnote supporting the proposition that "[t]he collateral source rule protects plaintiffs by guarding against the potential misuse of collateral source evidence to deny the plaintiff full recovery to which he is entitled." *See* ***id.***, ¶31 & n.28. In the footnote, the ***Leitinger*** court first quotes the Alaska Supreme Court's statement in ***Loncar v. Gray***, 28 P.3d 928, 933 (Alaska 2001) that "[t]he collateral source rule 'exclud[es] evidence of other compensation on the theory that such evidence would affect the jury's judgment unfavorably to the plaintiff on the issues of liability *and* damages.'" ***Leitinger***, 302 Wis. 2d 110, ¶31 n.28 (emphasis added; one set of internal quotation marks omitted). In the same footnote, ***Leitinger*** quotes a treatise provision explaining that a justification for the collateral source rule is that "'the introduction of evidence that the plaintiff received benefits is inherently prejudicial to the plaintiff.'" ***Id.*** (quoting 1 DAN B. DOBBS, DOBB'S LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 3.8(1) at 375 (2d ed. 1993)).

¶68 In denying the City's motion *in limine*, the trial court explained that the collateral source rule applied and that the jury would be instructed not to reduce a damage award because of payments from a third party that may have been received by the City. The trial court continued, however, to explain its reasoning for allowing such evidence to be offered at trial:

> The general rule, of course, is that evidence shouldn't come in if it's offered for that purpose [of reducing a damage award], but it just seems incredibly impractical to me to think that we're going to try this case without reference to federal programs or federal grants or the jury somehow isn't going to be aware that there was at least a few dollars of state or federal money involved. I

> can't imagine working with these exhibits for more than a few minutes and somehow redacting them so that the jury doesn't find out about it, and it just seems to me to be totally unnecessary.

As noted, the trial court instructed the jury on the use to be made of the collateral source evidence:

> Evidence in this case has indicated that the City received grants from the federal government or other sources to help pay for some of the costs of its abatement program. However, any issues with respect to the distribution of any damages awarded are not a part of the jury trial in this matter, and this evidence may not affect you[r] answer to the damage question. You may not reduce your award of damages because the City may have received funds for some costs from another source.

¶69 The collateral source rule directly pertains to the recovery of damages; and here, the jury was appropriately instructed that evidence of collateral sources of funding was not to affect the jury's answer to the damage question on the special verdict. *See* ***Koffman v. Leichtfuss***, 2001 WI 111, ¶29, 246 Wis. 2d 31, 630 N.W.2d 201 ("The [collateral source] rule is grounded in the long-standing policy decision that should a windfall arise as a consequence of an outside payment, the party to profit from that collateral source is 'the person who has been injured, not the one whose wrongful acts caused the injury.'" (citation omitted)). "Where the trial court gives the jury a curative instruction, … the appellate court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition." ***Genova v. State***, 91 Wis. 2d 595, 622, 283 N.W.2d 483 (Ct. App. 1979); *see also* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) ("We presume that the jury follows the instructions given to it.").

¶70 Here, there is no basis in the record, other than one that calls for speculation, to support the conclusion that the collateral source evidence affected the jury's liability findings. The City introduced and relied on such evidence extensively after its motion *in limine* was denied. The City claims it was "forced to disclose the existence of collateral sources in the process of making its *prima facie* case for damages" as a result of the denial. Even if we accept this argument, as noted above, the curative instruction remedied any possible prejudice; and, since the evidence was offered by the City to make its *prima facie* case *for damages*, we fail to see how it would have affected the jury's liability findings. In addition, we are not convinced that NL Industries improperly used the City's evidence of funding sources; instead, NL Industries merely responded to the evidence presented by the City.[17] *See* ***State v. Richardson***, 2001 WI App 152,

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[17] Counsel for the City asserted during oral argument that NL Industries used the collateral source evidence to argue during closing that the City was not a "worthy plaintiff." This assertion presumably is based on the following statements by NL Industries' counsel during closing argument at trial:

> [T]he City doesn't really begin [its abatement program] until about 1992 [because this] is the time when their first federal grant money became available to do this. That's why they waited.
>
> Amy Murphy [the City's witness] testified that the funding initially for the project was in 1992, which is [by the] CDC [i.e., Centers for Disease Control]. And it's still ongoing. They're still receiving this funding. So it began because they had federal funding to do it.
>
> Then, as they added up different projects, you wonder, well, is [sic] the City's expenditures coming out of other city needs, like part of the city budget is being used for the childhood lead program. Well, no. Ms. Murphy testified that these projects are all conditional on using it specifically for this project, for childhood lead poisoning.

(continued)

¶11, 246 Wis. 2d 711, 632 N.W.2d 84 ("When a party opens the door on a subject, he cannot complain if the opposing party offers evidence on the same subject to explain, counteract, or disprove the evidence.").

b. Utility of lead paint.

¶71 Next, the City contends that the trial court erred in denying its motion to exclude evidence of or argument related to the utility or usefulness of lead paint. Likewise, the City claims that the trial court erred in denying its request for an instruction informing the jury that it should not consider the alleged utility of lead paint. The City's argument is based on the premise that the social utility of nuisance-causing conduct is irrelevant in a cause of action for damages.

¶72 In response, NL Industries denies it offered the evidence for the purpose of balancing the utility of the paint against the consequences of the presence of lead paint in Milwaukee homes; instead, it contends the evidence was

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> So this is all earmarked money coming in – earmarked money coming in for lead-paint poisoning conditional on being used for that purpose, so it's not diverted from the rest of the [C]ity's needs....
>
> ....
>
> The City made an important choice. It wasn't going to enforce the law against landlords. Instead, it was going to subsidize the replacement or refurbishment of windows. Why? Because they had a funding source willing to pay for that. And so they made that choice not to enforce but to subsidize.
>
> ... That's what the City chooses to do. It has a funding source willing to pay for it, so that's their program.

Many of the comments were made in response to evidence offered by the City and as such, were not improper. In addition, as previously stated any prejudicial effect these comments may have had regarding damages was remedied by the curative instruction. *See* ***Genova v. State***, 91 Wis. 2d 595, 622, 283 N.W.2d 483 (Ct. App. 1979).

offered in its effort to show that it did not act tortiously. In addition, NL Industries argues that the City waived this argument during the jury instruction conference when counsel for the City stated: "[W]e would request the Court to respectfully consider inclusion, under "unreasonable," the fact that they may find that invasion is unreasonable depending upon the gravity of the harm outweighing the utility of the actor's conduct, or that the harm caused by the conduct is serious."

¶73 The City did not reply on this issue, and we, therefore, do not address it further. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted.").

c. Product identification and property maintenance.

¶74 The City also sought to exclude evidence related to a lack of property maintenance or product identification based on its contention that such evidence was irrelevant to the creation of the alleged public nuisance. The trial court denied the City's motion and its proposed jury instruction on the issue, which the City claims was error. The City relies on our earlier decision to support its argument. *See* ***NL Industries I***, 278 Wis. 2d 313, ¶¶14-15 (agreeing with the City that identification of the specific lead pigment or paint contained in the houses being abated was unnecessary to prove causation).

¶75 In response, NL Industries asserts that evidence related to property maintenance and the lack of product identification was properly admitted to show the following: that the presence of lead-based paint, absent surface deterioration, does not unreasonably interfere with a public right; that its sales and promotion of lead pigment and paint in Milwaukee did not cause the alleged public nuisance;

and that tortious conduct on the part of landlords and the City itself caused and/or contributed to the alleged public nuisance.[18]

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[18] Citing a memorandum filed in opposition to its motion *in limine*, the City claims NL Industries conceded that it did not intend to argue about any lack of property-specific product identification but then proceeded to cross-examine one of its witnesses on the issue and to address the point in its closing argument. In the memorandum, NL Industries wrote:

> NL does not intend to offer proof that NL's lead pigment was [not] on any specific window that the City has abated, or will abate in the future. At the same time, NL fully anticipates presenting, as the City acknowledge [sic] it may, evidence concerning whether causation of any public nuisance is due to the impacts of [NL's] sales and promotional conduct on the community.

(Brackets in original; citations and internal quotation marks omitted.) The City does not direct us to any such evidence *offered by* NL Industries.

However, as the Dissent points out, during cross-examination of a witness, NL Industries inquired whether the City ever attempted to determine the entity responsible for making or selling the lead it argued was present in Milwaukee homes. In addition, during closing argument, counsel for NL Industries stated:

> They [the City] do that [i.e., try to shift the costs of the abatement program] without ever trying to find out if our product, Dutch Boy, is in any of those homes, doing very little to find out if it's really lead paint in those homes or if there are lead hazards.
>
> ....
>
> ... The City says take all of their expense in this whole program, and all but 0.74 they say goes to paint, and that, therefore, goes to NL. That's their claim to you. And yet we know, most of the time, they aren't even looking for another source.

These statements were made in the context of NL Industries' argument that the City was improperly attributing nearly all of the costs of its abatement program to lead paint, when there were other sources of lead that were not explored. To support its argument, NL Industries highlighted evidence offered by the City to substantiate its claims for damages, which read in part:

(continued)

¶76 We disagree with the City that our previous ruling precluded NL Industries from making arguments based on product identification and property maintenance. The fact that the City was not required to prove identification of the specific lead pigment and paint to establish causation, did not make the lack of such identification off-limits to NL Industries where the City sought to hold NL Industries responsible for all of its abatement costs. We conclude the trial court properly exercised its discretion in deeming this evidence admissible.

3. NL Industries' claims related to recklessness, conspiracy, and future costs.

¶77 Finally, the City argues that the trial court erred when it dismissed the City's nuisance claim based on reckless conduct; in its formatting of the special verdict related to the City's conspiracy claim; and when it granted summary judgment to NL Industries on the City's requested future abatement costs.

> Since its inception, the Childhood Lead Poisoning Prevention Program has spent its resources addressing lead hazards caused by the presence of lead paint. During the 15-year tenure of the program, there have been *exceptional* instances in which the Program investigated non-paint sources of lead.... As such, approximately 0.74 percent of the Program's resources have been expended on non-paint sources of lead. This amount is deducted from the subtotal of the past damages figure.

(Emphasis added.)

While comments were made regarding the lack of product identification, NL Industries never argued that the City was required to prove that NL Industries' lead pigment or paint was present in order to prevail on its claims. Instead, it appears NL Industries' argument related to whether its sales and promotion of lead pigment and paint in Milwaukee caused the alleged public nuisance, or whether it could be the result of other non-paint sources of lead.

a. Reckless conduct liability.

¶78 As stated, at the close of the City's case-in-chief, NL Industries moved to dismiss, among other claims, the City's claim that NL Industries recklessly created the alleged public nuisance. The trial court granted NL Industries' motion based on its conclusion that the evidence was insufficient to permit a reasonable jury to find that the elements of a nuisance claim based on reckless conduct were proven.

¶79 The standard we use to review the trial court's grant of NL Industries' motion to dismiss the City's nuisance claim based on reckless conduct was recently set forth by our supreme court in ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶36, ___Wis. 2d ___, 752 N.W.2d 800. There, the court stated:

> A motion to dismiss a claim based on insufficiency of the evidence adduced at trial may be granted when a court "is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995); *see also* WIS. STAT. § 805.14(1). We have explained that we will "not overturn a [trial] court's decision to dismiss for insufficient evidence unless the record reveals that the [trial] court was 'clearly wrong.'" ***Id.*** at 389, 541 N.W.2d 753 (citing ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 110, 362 N.W.2d 118 (1985)). We read the "clearly wrong" standard and the "no credible evidence" standard together, such that when a [trial] court dismisses a claim that is supported by any credible evidence, its decision is "clearly wrong." ***Id.***

Berner Cheese Corp., 752 N.W.2d 800, ¶36.

¶80 In its two-paragraph argument on this issue, the City does not address whether its reckless conduct claim was supported by credible evidence

such that the trial court's decision was "clearly wrong." *See* ***id.*** Instead, the City argues that because reckless conduct is a lesser standard than intentional conduct, it was prejudiced when the trial court precluded the jury from considering this claim. *See* RESTATEMENT (SECOND) OF TORTS § 500 cmt. f.[19]

¶81 Recklessness, however, requires a greater showing of culpability than negligence, and here the jury found that there was no negligent conduct on the part of NL Industries. The City did not appeal the jury's finding in this regard. As a result, we fail to see how the trial court's decision to dismiss the City's public nuisance claim based on reckless conduct can be deemed to have been in error.

b. Conspiracy.

¶82 The City argues that the trial court erred when it instructed the jury to answer question four on the special verdict form, "Did NL Industries engage in a conspiracy with one or more others that was a cause of the public nuisance," only if the jury had previously found that NL Industries either "intentionally and unreasonably," or "negligently" "engage[d] in conduct that was a cause of the public nuisance." *See supra* ¶17 n.5. The City claims that it was prejudiced because the format of the special verdict precluded the jury from considering NL Industries' vicarious liability related to acts it promoted but did not commit.

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[19] RESTATEMENT (SECOND) OF TORTS § 500 cmt. f provides, in relevant part:

> While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

See ***Segall v. Hurwitz***, 114 Wis. 2d 471, 481, 339 N.W.2d 333 (Ct. App. 1983) ("A conspiracy may produce one or more torts. If it does, then every conspirator is liable for that tort, including a conspirator who promoted but did not commit the tort.").

¶83 Trial courts are vested with "wide discretion in determining the words and form of a special verdict." ***Gumz v. Northern States Power Co.***, 2007 WI 135, ¶23, 305 Wis. 2d 263, 742 N.W.2d 271. We will only disturb the trial court's drafting of a special verdict where "the special verdict questions fail to cover all issues of fact or are inconsistent with the law." ***Id.***, ¶24. We review *de novo* "[w]hether a special verdict reflects an accurate statement of the law applicable to the issues of fact in a given case." ***Id.***

¶84 As NL Industries argues in its brief, the City has not appealed the trial court's jury instruction on conspiracy. In relevant part, the instruction provided: "A conspiracy is a combination of two or more persons acting together to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. The essence of the conspiracy alleged here is a combination or agreement which had as its purpose the creation of a public nuisance." NL Industries writes:

> The jury's resolution of Special Verdict Questions 2 and 3 in the negative foreclosed a finding of conspiracy under this instruction.
>
> First, the jury's determination on Question 2 that NL [Industries] did not "act for the purpose" of creating the public nuisance foreclosed a finding that NL [Industries] entered into a conspiracy, the purpose of which was the creation of a public nuisance. The City does not suggest otherwise.
>
> Second, the jury's determination that NL [Industries'] sale and promotion of lead-pigment and lead-based paint was not negligent foreclosed a finding that NL

> entered into a "tortious" or "unlawful" agreement with others to sell and promote those products.

We agree.

¶85 Under the conspiracy instruction given, which is not at issue on appeal, a "yes" response to question four would have resulted in an inconsistent verdict given the jury's answers to questions one and two. Consequently, we conclude that the trial court did not err in its formatting of the special verdict as to the City's conspiracy claim.

c. Future abatement costs.

¶86 The City argues that the trial court erred in granting NL Industries' motion for partial summary judgment as to the City's requested future abatement costs. The issue of future costs is moot in light of the jury's findings that NL Industries is not liable and we do not address it further.[20]

[20] Following the submission of its response brief, NL Industries submitted two subsequently released non-Wisconsin cases for our review, ***Rhode Island v. Lead Industries Ass'n***, 951 A.2d 428 (R.I. 2008), and ***Smith v. 2328 University Avenue Corp.***, 52 A.D.3d 216 (N.Y. App. Div. 2008). We agree with the City that these cases are not pertinent to the issues in this case.

(continued)

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

In ***Lead Industries Ass'n***, the Rhode Island Supreme Court reversed a verdict imposing liability on lead pigment manufacturers for creating a public nuisance based on its conclusion that the state of Rhode Island could not "allege any set of facts to support its public nuisance claim that would establish that defendants interfered with a public right or that defendants were in control of the lead pigment they, or their predecessors, manufactured *at the time* it caused harm to Rhode Island children." ***Id.***, 951 A.2d at 435. In contrast, in our previous decision holding that genuine issues of material fact precluded summary judgment in NL Industries' favor, we concluded that a public nuisance claim was validly pled in this case. *See* ***City of Milwaukee v. NL Indus., Inc.***, 2005 WI App 7, ¶1, 278 Wis. 2d 313, 691 N.W.2d 888 (Ct. App. 2004). Furthermore, the ***Lead Industries Ass'n*** court's discussion of public nuisance law in Rhode Island, which encompasses different elements than Wisconsin's public nuisance law—namely, an element of control—is irrelevant to the issues presented in this appeal. *See* ***Lead Indus. Ass'n***, 951 A.2d at 435, 446, 449-50. Likewise, the ***Smith*** court's decision to reverse a lower court's denial of NL Industries' motion to dismiss based on New York product liability law is inapposite given that the City's claims at issue here involve nuisance law, not product liability law. *See* ***id.***, 52 A.D.3d at 216.

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¶87 KESSLER, J. (*dissenting*). I respectfully dissent. In my view, the City is entitled to a new trial because errors of law in the admission of evidence and errors of law in the jury instructions render the verdict unreliable. Because these errors of law caused the jury to deliberate with substantial information it should not have had, based on instructions which misstated the law, the City is entitled to a new trial.

I. Collateral source evidence.

¶88 One of the most significant errors in this case was the admission of evidence that the Milwaukee Health Department received federal and state grants to help finance its abatement and prevention programs. *See* majority op., ¶¶65-70. I agree with the Majority that the trial court erroneously exercised its discretion when it denied the City's motion in limine to exclude this collateral source evidence. *See* ***id.*** However, I disagree with the majority's conclusion that the trial court's curative instruction rendered this error harmless. *See* ***id.***, ¶¶65, 70. Rather, I conclude that the error affected the substantial rights of the City, *see* WIS. STAT. § 805.18(2), because there is a "reasonable possibility that the error contributed to the outcome" of the trial. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698. Therefore, I conclude that the City is entitled to a new trial.

¶89 The admission of the collateral source evidence allowed NL Industries to argue, in effect, that the City was not a worthy plaintiff. In closing argument, NL Industries emphasized to the jury that the City did not undertake the abatement until federal funds were provided (implying the need was not important enough until the City could abate the problem for free), and that the City's other

programs did not suffer any financial impact because the grants paid for the abatement project (implying there were no damages that needed to be awarded). *See* majority op., ¶70 n.17. At closing argument, NL Industries' counsel told the jury that the City's abatement program was an "experiment" that replaced windows as a means of reducing lead poisoning. Counsel then stated:

> Now, it's unfair to NL. The City's entitled to experiment with HUD all they want, but … they chose the high-cost approach; they chose to do it by subsidies because they had a funding source to do it, where they've worked to spend all the available money from that funding source, and then try to shift all that over to my company, alone out of the whole world, just shift it over to us.

¶90 In making these arguments, NL Industries invited the jury to find in its favor not just on damages, but also on liability, because the City benefitted from a collateral source. This is precisely what the collateral source rule is designed to prevent. *See* ***Leitinger v. DBart, Inc.***, 2007 WI 84, ¶¶33-34, 302 Wis. 2d 110, 736 N.W.2d 1 (collateral source rule aims at deterring tortfeasor's negligent conduct and prevents "tortfeasor from escaping liability because a collateral source has compensated the injured person."). NL industries should not have been permitted to invite jury bias in its favor by talking about the grant money the City received. *See* ***Town of East Troy v. Soo Line Ry. Co.***, 653 F.2d 1123, 1132 (analyzing application of Wisconsin's collateral source rule in public nuisance case involving funding received from the U.S. Department of Housing and Urban Development and concluding that tortfeasor "was properly prevented from possibly creating jury bias in its favor by mentioning or producing evidence of the HUD grant to the Town.").

¶91 The majority concludes that the trial court's curative instruction remedied the erroneous admission of the collateral source evidence. I disagree. If

any curative instruction could dissipate the taint of erroneously admitted collateral source evidence, the curative instruction given in this case did not do that. The instruction told the jury that

> any issues with respect to the distribution of any damages awarded are not a part of the jury trial in this matter, and this evidence *may not affect you[r] answer to the damage question.* You may not reduce *your award of damages* because the City may have received funds for some costs from another source.

See majority op., ¶68 (emphasis added).

¶92 Significantly, this instruction prohibited the jury from considering outside funds when it considered damages, but did not instruct the jury that it must not consider the evidence of grants in *any way* in its determinations. This is problematic because the collateral source rule is not merely a rule of damages, but a rule of evidence. *See* ***Leitinger***, 302 Wis. 2d 110, ¶¶28, 30. ***Leitinger*** explained: "As a rule of evidence, the collateral source rule generally precludes introduction of evidence regarding benefits a plaintiff obtained from sources collateral to the tortfeasor." ***Id.***, ¶30. Application of the collateral source rule "prevents the fact-finder from learning about collateral source payments, even when offered supposedly to assist the jury in determining [some other issue], so that the existence of collateral source payments will not influence the fact-finder." ***Id.***, ¶54.

¶93 Consequently, although the jury should not have been permitted to consider the collateral source evidence for *any* purpose, it was allowed to consider it as evidence for any purpose other than damages. Specifically, the jury was free to improperly consider the collateral source evidence when determining liability.

¶94 This error was far from harmless. This case did not involve a subtle or innocuous passing reference to collateral sources. Rather, NL Industries was allowed, over the City's objection, to emphasize the collateral sources and argue the City only abated the properties because it was given funds to do so. NL Industries argued vigorously that the City was an unworthy plaintiff. I conclude that the jury instruction did nothing to cure the extremely prejudicial impact on liability of the collateral source evidence and NL Industries' argument thereon which was presented to the jury. There is, at minimum, a reasonable possibility that the jury considered this improper evidence and improper argument in deciding the liability questions. Because the erroneous admission of the collateral source evidence prejudicially affected the City's substantial rights, the City is entitled to a new trial. *See* WIS. STAT. § 805.18(2).

II. Evidence concerning product identification.

¶95 The City sought to exclude evidence related to lack of product identification. *See* majority op., ¶¶74-76. The trial court denied the motion. Ultimately, NL Industries was permitted to raise and argue the issue of product identification in a way that contradicts this court's decision in ***City of Milwaukee v. NL Industries, Inc.***, 2005 WI App 7, 278 Wis. 2d 313, 691 N.W.2d 888 ("***NL Industries I***"). In that case, we rejected NL Industries' argument that "the City must prove, at a minimum, that NL Industries' pigment or lead paint or Mautz's lead paint is present on windows." ***Id.***, ¶14. We recognized the City's admission "that, because technology does not make it possible to do so, the City cannot identify the specific lead pigment or paint contained in the houses being abated." ***Id.***, ¶15. We concluded that it would be up to the jury to decide if NL Industries (and the other defendant) "caused this nuisance by selling lead paint in

Milwaukee and promoting its use there" and "the extent and effect of promotion of lead paint sales by both defendants." ***Id.***, ¶¶18, 19.

¶96 Contrary to our holding that NL Industries' potential liability was not based on whether the City could prove that lead which NL Industries produced could be identified in a particular home, NL Industries was permitted to argue that because the City did not prove what we held it did not have to prove, the City should not prevail. NL Industries was allowed to ask the following questions on cross-examination:

> Did the City at any time during the course of its lead program ever make any effort to determine who made the paint, whether it's lead-based paint or not, on the properties in the target area?"
>
> ....
>
> "Did the City ever attempt to determine who made or sold the lead that may or may not have been present in the paint on homes in the target areas?

Then, during closing argument, NL Industries focused much of its argument on the theory that it was improper for the City to abate the lead poisoning using window replacement "without ever trying to find out if our product, Dutch Boy, is in any of those homes, doing very little to find out if it's really lead paint in those homes or if there are lead hazards." This argument implied that the City *could have* determined if it was Dutch Boy paint on a particular home, and that it *should have* done so. This argument contradicted our holding in ***NL Industries I***, and flowed from the erroneous denial of the City's motion in limine concerning product identification. Permitting those questions and argument, in direct contradiction of our previous holding, justifies a new trial.

III. Jury instruction requiring proof both of intent and of unreasonable conduct.

¶97 The City argues that the trial court erroneously asked in the special verdict[1] and erroneously instructed the jury "that NL Industries intentionally created the public nuisance only if its conduct was both intentional *and* unreasonable." *See* majority op., ¶47. The court instructed that in order to answer "yes" to this special verdict question, the jury "must be satisfied that NL industries acted intentionally *and* unreasonably, and that its intentional *and* unreasonable conduct was a cause of the public nuisance." (Emphasis added.) As the majority notes, the parties both find support for their respective positions on this issue in what may well be "conflicting law on this issue." *See* ***id.***, ¶52. The majority concludes that resolution of this conflict is unnecessary "given that the jury answered in the negative the negligence question on the special verdict." ***Id.*** I disagree.

¶98 If the City is correct, it is entitled to a new trial because the error was not harmless. Whether the City had to prove NL Industries' conduct was unreasonable, in addition to being intentional, is no minor issue: it had profound implications on the evidence required. Using the instructions given, NL Industries argued that the City had to prove that NL Industries knew the precise mechanism of childhood lead poisoning at the time it intentionally sold the lead based paint in Milwaukee, thus making the conduct "unreasonable" in additional to intentional.[2]

[1] Question two of the special verdict asked: "Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance?"

[2] It has never been disputed that NL Industries sold lead based paint in Milwaukee; NL Industries has never claimed that the paint got to Milwaukee accidentally, or without its knowledge. The dispute has centered on what NL Industries knew about the impact of that paint on children.

This allowed NL Industries to argue that liability could only be premised on its foreknowledge of the exact mechanism of the injuries the affected children suffered. Because NL Industries did not know the ultimate extent to which its product would harm children, it argued, its conduct was not unreasonable. There is a reasonable possibility that this argument, based on the jury instruction, "contributed to the outcome" of the trial. *See* ***Martindale***, 246 Wis. 2d 67, ¶32. Thus, if the instruction was erroneous, the City is entitled to a new trial.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CIVIL DIVISION, BRANCH 25

CITY OF MILWAUKEE,

Plaintiff,

v.

Case No. 01-CV-3066

NL INDUSTRIES, INC.,

Defendant.

FILED
CIVIL DIVISION
SEP 25 2007

Memorandum Decision
Denying Plaintiff's Motion to Change the Special Verdict

Following the jury trial in this matter, the City of Milwaukee filed a motion to change the jury's answer to Question 2 in the verdict form from "No" to "Yes."[1] The City contends that the evidence required any reasonable jury to answer this question "Yes." For reasons set forth below, as well as reasons set forth in various rulings on related issues during the trial, I disagree.

In answering "Yes" to verdict Question 1, the jury had found that the presence of lead-based paint in and on houses in the City of Milwaukee between 1992 and 2006 was a condition that unreasonably interfered with a right common to the general public. Question 2 on the verdict form, which the jury answered "No," read as follows:

> ***QUESTION 2.*** Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance?
>
> ANSWER: No

[1] Plaintiff also filed a separate motion to set aside the entire verdict and order a new trial, which is addressed in a separate decision.

Although the form of Question 2 is not at issue, it should be noted that it combined the element of intentional conduct and the issue of cause into a single question. This was done for reasons discussed on the record and with agreement of both parties. *See Trial Tr., Vol. 19,* at 3148-3149, and *Vol. 20,* at 3174-75.[2]

For purposes of this motion, I will accept the City's argument that if one looks at NL's conduct between 1900 and 1978, or even between, say, 1940 and 1978, such conduct was clearly a substantial factor in producing the nuisance. I will also assume that *if* a jury were to find that NL knew that it was creating the type of public health problem that led to the City's abatement efforts, that the jury should necessarily find that such conduct was unreasonable.

The real issue was whether NL had sufficient knowledge to satisfy the element of intent. In that regard the jury was instructed that "NL Industries acted intentionally if it intended to create the public nuisance at issue in this case, or if it knew that its conduct was substantially certain to cause such a nuisance." *Jury Instructions,* at 4. As with virtually all nuisance cases, there was no claim that the offending party had acted for the purpose of causing the nuisance, and so the question turned on what NL knew was reasonably certain to follow from its conduct. The factual circumstances of this nuisance, however, presented significant problems for the finder of fact in attempting to determine what NL knew was "substantially certain" to follow from its conduct. Unlike the typical nuisance case, the

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[2] The reason for the broad scope of Question 2 was the conceptual confusion that would result if, as both parties requested, a jury was first asked to consider whether defendant intentionally *created* a nuisance and then to consider whether such conduct *caused* the nuisance. This problem was discussed again when NL Industries objected to a similar combined format for the negligence questions, at which point I described a "backup plan" that would allow the jury to somehow first consider the intentional *creation* of the nuisance and then the *legal cause* of the nuisance. *Trial Tr., Vol.20,* at 3174-3175. I did not pursue this idea primarily because the parties had agreed to a combined question and because any such alternative approach would present its own significant drafting problems. Although I noted that a combined question made it harder to determine precisely what a jury meant by the answer "No," I considered that there was really no issue as to whether NL's contributions were "a cause" of the nuisance as that nuisance had been defined for the jury, and that this case was primarily about the level of knowledge necessary to satisfy the intent element of a public nuisance.

"conduct" that contributed to the nuisance occurred over a period of more than 75 years, during which time NL's knowledge was evolving in significant respects. Unlike the typical nuisance case, there was a large gap between the last of the conduct, which ended completely by 1978, and the injury suffered by the City beginning in 1992. The gap between most of the conduct and the emergence of the *public* nuisance was enormous.

It was the City's legal theory that it need only to prove that NL anticipated that its conduct would cause "childhood lead paint poisoning, or the threat of childhood lead paint poisoning." *See Plaintiff's Proposed Jury Instructions, filed June 12, 2007,* at 11, and *Plaintiff's Proposed Jury Instructions, filed June 15, 2007,* at 6. Its factual theory was that at least by the 1930's, NL was aware that children were suffering severe injury and death from ingesting lead paint, and was therefore quite aware that paint was poisoning children. The problem with both theories is that the evidence in the case identified two related yet quite different lead poisoning problems. More importantly, it was overwhelmingly clear that the problem identified in the first half of the century was *not the reason* why the presence of lead-based paint in 1992 constituted a *public* nuisance and was *not the reason* why the City undertook its abatement efforts.

During the 1930s, it became apparent that the toxicity of lead was not simply a health problem for those who worked in the lead industry or with lead paint. It was causing serious injury and death to children who, apparently attracted to the taste, ingested paint by chewing on toys or cribs or other painted surfaces. Decades later a much more subtle and insidious problem was identified, as it became clear that the mere presence of lead paint inevitably resulted in the presence of lead dust and chips and that, through the ordinary hand to mouth activities of very young children, lead was being ingested. It further became clear that this

process was sufficient to cause great damage at blood levels much lower than were previously thought dangerous.

This led to an outright prohibition on the sale of lead paint by January of 1978, although even then the full extent of the health problems was not recognized – in part because some of the circumstances that led to the crisis were not yet in place. For a variety of reasons about which we heard much testimony at trial, circumstances that included the simple activities of opening and closing windows and the sanding of old paint surfaces, lead paint was gradually poisoning a staggering number of children. It was this problem that caused the Court of Appeals to refer to a "community wide injury to public health" in this case and a "public health catastrophe" in another.[3] It was this problem that caused the City of Milwaukee to identify a *public* health crisis and target certain areas for abatement. It was this problem that caused the injury that was at the core of the City's nuisance claim, as described by its counsel:

> The injury is the need to abate the lead paint on the walls. This is what the Court of Appeals is saying that it's not just -- they are saying that it's not the kids with poisoning. It's the injury to the City. It's that injury which this case is about. So the harm is the need to abate the lead paint.

Tr. May 15, 2007, at 25. As serious as the earlier childhood lead poisoning problems may have been, they were only historical background for the public nuisance of 1992. That public nuisance would have existed, perhaps in a much more virulent form, had no child ever been poisoned by chewing on toys or crib railings.

I rejected the legal theory embodied in the City's requested instructions because the phrase "childhood lead paint poisoning" clearly included the poisoning identified in the 1930's, which was vastly different in nature and scope than the lead dust crisis identified by

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[3] *City of Milwaukee v. NL Industries, et al,* 278 Wis. 2d 313, ¶ 15 (Ct. App. 2005); *Thomas ex rel.Grambling v. Mallett, 285 Wis. 2d 236, 558 (2005).*

the testing done in the 1980's and 1990's. It was the latter tragedy that the City alleged had risen to the level of an *interference with a public right,* not the earlier instances of children eating lead paint.

The basis for the specific instructions given by the court is further discussed in connection with the City's motion for a new trial, but under any reasonable view of intent, the City was required to do more than show that NL anticipated the sort of childhood lead poisoning that was well-documented during the first half of the 20th Century. Relying on the Restatement (Second) of Torts and *Vogel v. Grant Lafayette Elec. Cooperative,* 201 Wis. 2d 416 (1996), I concluded that it was not enough for the jury to find that a defendant anticipated "a harm" or "some harm." Such a doctrine would impose strict liability for nuisance whenever some harm could be anticipated even though nothing close to a *public* nuisance was foreseeable. The plaintiff must establish that the defendant anticipated "the harm" that actually occurred.

Under this legal standard, the City's factual theory failed because the childhood lead poisoning of the 1930's and the childhood lead poisoning problem that triggered the City's abatement efforts in 1990 were ultimately two very different things. Proof that NL was aware of the earlier problem, even buttressed by anecdotal evidence that at times NL acted in its narrow self-interest and with corporate insensitivity, did not establish the NL anticipated the public nuisance found by the jury in its answer to Question 1.

Given the many decades over which NL promoted and sold lead paint, it is not surprising that the evidence regarding NL's sense of corporate responsibility was mixed. Evidence offered by the defense indicated that at times the lead industry, and NL in particular, acted responsibly and in the public interest as to matters related to the toxicity of lead. The evidence also suggested that the lead industry, including NL, was very concerned about the

public image of lead products, and that at times the lead industry preferred to have bad news cast in the best possible light, did not always share information that reflected badly upon lead products, and sought to blame others for health problems related to lead. Ultimately, this evidence said little or nothing about NL's ability to foresee the lead paint crisis that was quietly and gradually gathering in what became the target areas for the City's lead abatement efforts.

The City claimed, in pretrial submissions and before the jury, that evidence would show that NL and the lead industry covered up important information about the dangers of lead, presumably evidence related to the forseeability of a public nuisance. No such evidence materialized. The most the City could point to in this respect was that in 1952, the Lead Industries Association had gathered lead poisoning data from health departments in several cities and did not take steps to disseminate that information. *See Exhibit 39.* It is difficult to find a meaningful secret here. Twenty-six children reported poisoned by lead paint in Baltimore, four of whom died, is a problem whether or not a similar number of victims is identified elsewhere. Even if we assume that public health officials were not aware of what was happening elsewhere, common sense suggests they would not have been surprised to learn that similar cities had similar problems. This sketchy and incomplete data added little to what was already known, and the numbers only serve to emphasize the gulf between what was known in the 1950's and what was later discovered in the 1980's.

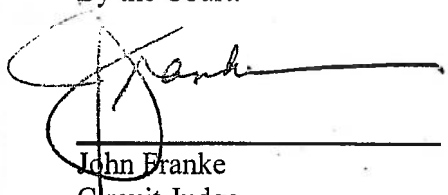
While the historical background was interesting, it said nothing by itself about whether anyone at NL anticipated the public health crisis that brought about the City's abatement efforts in the 1990's. In fact, the evidence demonstrated that despite widespread concern about the toxicity of lead and about its effect on children, *no one* anticipated the "public health catastrophe" that eventually led to the injury suffered by the City in this case. Thus,

whether the intent instruction referred to "the public nuisance at issue in this case," or some other description of the public health crisis that was at the heart of the City's public nuisance theory, the jury was entitled to find that the City's evidence was woefully insufficient and to answer the question "No."

It might be sound public policy under some circumstances to require an industry to pay for injuries caused by its products, even when the injuries were not anticipated. There may be other legal claims that establish liability for an injury that is not foreseen. The law of nuisance, however, does not impose such liability. Therefore, it is ordered that the City's motion to change the jury's answer to Question 2 in the verdict form is denied.

Dated: September 24, 2007.

By the Court:



John Franke
Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CIVIL DIVISION, BRANCH 25

CITY OF MILWAUKEE,

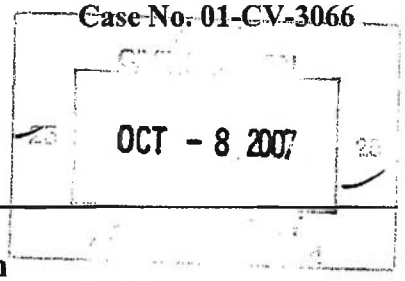
Plaintiff,

v.

NL INDUSTRIES, INC.,

Defendant.

Case No. 01-CV-3066



Memorandum Decision
Denying Plaintiff's Motion for a New Trial

Following the jury trial in this matter, the City of Milwaukee filed a motion to set aside the verdict and order a new trial.[1] Most of the issues raised in this motion were discussed before or during trial, some on several occasions and some to a considerable extent. For reasons set forth below as well as reasons set forth in connection with earlier rulings, the City's motion will be denied.[2]

The motion for a new trial raises seven challenges to the instructions, grouped under Section A of the City's motion and brief. In addition, the City seeks a new trial based on violations of the collateral source rule (see Section B of the City's motion); the trial court's decision not to submit a nuisance theory based on recklessness, (Section C); and the court's grant of summary judgment on the issue of future costs (Section D). Finally, the City contends that the court improperly denied three of its motions in limine (Section E).

[1] Plaintiff also filed a separate motion to change the jury's answer to Verdict Question 2, which was addressed in a separate decision.

[2] Because more than 90 days have passed since the verdict, the post-trial motions are considered denied pursuant to Wis. Stat. § 805.16(3). This decision only confirms that denial.

The City's principal objections to the jury instructions concern the instructions related to the claim of an intentional public nuisance, and the legal basis for those instructions will be discussed below. I will also discuss the City's requested instruction regarding agency and its claim that the City was prejudiced by evidence of collateral source payments. As to the other issues raised by the City, I will rely on the record made in connection with pretrial motions and rulings during the trial.

I. Jury Instructions on the Claim of Intentional Public Nuisance

A. Introduction

There is no Wisconsin case that defines the intentional conduct element of a claim based on the intentional creation of a public nuisance. The court's instructions were drawn from *Vogel v. Grant-Layfayette Elec. Co-op.*, 201 Wis. 2d 416 (1996), a private nuisance case that addressed the concept of intent, and the Restatement of Torts (Second). Wisconsin cases have long cited with favor to the Restatement, which attempts to distill the vast, "impenetrable jungle" of nuisance law into some basic principles of law.[3]

The Restatement emphasizes that a *public* nuisance has its historical origins in crimes against the property and rights of the Crown, a tort that is completely distinct from the notion

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[3] This criticism of nuisance law is from Prosser and Keegan on Torts:

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a "nuisance," and there is nothing more to be said.

W. Page Keeton, et al., Prosser and Keeton on Torts, at 616 (5th ed., Lawyers ed., 1894) This indictment is frequently quoted by frustrated appellate courts, including our own Supreme Court in *Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee*, 277 Wis. 2d 635, ¶ 24 (2005).

of a *private* nuisance. Restatement of Torts (Second), Section 821B, Comment a. These torts share the name of "Nuisance" only through of an "accident of historical development":

> This word, which in its origin is merely the French word for harm, has come, by reason of nothing more that the mere use of the same term to describe two quite different things, to cover two types of invasion of the interests of others. They have little or nothing else in common, and are quite unrelated . . .

Id., Chapter 40, Introductory Note. The Restatement defines a public nuisance as an "unreasonable interference with a right common to the general public." *Id.*, § 821B. A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Id.*, § 821D.

Beyond this important distinction as to the nature of the interest that is invaded, however, it is difficult to identify principles of *private* nuisance liability that do not have some applicability to a claim of *public* nuisance. In the Restatement topic entitled "Private Nuisance: Elements of Liability," the comments repeatedly refer to public nuisances and indicate, expressly or implicitly, that that the rules set forth apply to a public nuisance as well. Wisconsin public nuisance cases often cite to private nuisance cases, without apology or distinction, and in the briefs filed in this case, the parties have relied primarily on private nuisance cases.

B. The Court's Instructions

Verdict Question 1 addressed the existence of the public nuisance as it pertained to both the City's *intentional* and *negligent* public nuisance claims. Question 1 on the verdict form, which the jury answered "Yes," read as follows:

> ***QUESTION 1.*** Between 1992 and the end of 2006, was the presence of lead-based paint in and on houses in the City of Milwaukee a public nuisance?
>
> ANSWER: Yes

Verdict Question 2 then addressed the City's *intentional* public nuisance theory:

> ***QUESTION 2.*** Did NL Industries intentionally and unreasonably engage in conduct that was a cause of the public nuisance?
>
> ANSWER: No

The jury instructions regarding the terms "intentionally" and "unreasonably" as used in Question 2 were as follows:

> "***Intentionally.***" An interference with a public right is deemed to be "intentional" if the defendant acted for the purpose of causing it or knows that it is resulting or is substantially certain to result from his conduct. Thus, NL Industries acted intentionally if it intended to create the public nuisance at issue in this case, or if it knew that its conduct was substantially certain to cause such a nuisance.
>
> "***Unreasonably.***" In determining whether NL Industries acted unreasonably, you may consider all of the circumstances related to the defendant's conduct, the creation of the public nuisance at issue, and the extent of any harm or injury that was a consequence of the public nuisance. In determining whether NL Industries acted unreasonably, you may consider whether the conduct of NL Industries was in compliance with existing laws. However, the fact that the defendant's conduct may not have been in violation of any existing law does not necessarily relieve the defendant of liability in this case. You may find that the defendant's otherwise lawful conduct was unreasonable under all of the circumstances presented by the evidence in this case.

The City has two objections to these instructions. First, it contends that the court should have defined "intentionally" by reference to "public injury or public harm" instead of "the public nuisance at issue." Secondly, it contends that the instructions incorrectly required the plaintiff to prove that NL's conduct was unreasonable.

C. The Element of Intent

In most nuisance cases, both public and private, there is no real issue regarding intent, because the connection between the defendant's conduct and the offensive condition and the resulting injury is direct, immediate and unmistakable. The lead paint nuisance at issue here is quite different, and rests on a uniquely indirect connection between conduct and injury.

Unlike the invasions so apparent in a classic nuisance – the smoke spewed forth by the factory or the sulfur dioxide discharged into the air by the defendant in *Jost v. Dairyland Power Co.* – NL did not simply spray lead paint over neighboring houses or pour it into the water supply.[4] Instead it marketed and sold lead paint that, by subsequent choices made by any number of suppliers, retailers and homeowners, found its way into homes as an invited and welcomed guest, a guest that only much later and only under certain circumstances, became dangerous and quite unwelcome. The evaluation of intent is further complicated by the long period of time that lapsed between the defendant's conduct and the development of the public nuisance.

There was no dispute that the City had to prove that *at the time it promoted and sold lead paint,* the defendant "intended" some consequence related to childhood lead poisoning. There was no dispute that this element could be satisfied either by showing that this consequence was NL's actual purpose or that that NL "knew that its conduct was substantially certain to cause" such a consequence. The evidence did not suggest that NL sold paint for the purpose of causing childhood lead poisoning and thus, as with virtually all nuisance claims, "intent" is really a question of the defendant's knowledge and awareness, that is, whether the defendant knew that the harmful consequences were reasonably certain to happen.

The City's objection to the instructions is directed at the description of the consequence that must be anticipated by NL. In its requests submitted just before and after the close of the evidence, the City proposed that the anticipated consequence be described as "an injury or harm, that is, childhood lead paint poisoning, or the threat of childhood lead paint poisoning":

> NL's conduct was intentional if, without any desire to cause injury or harm, NL nonetheless had knowledge that its activities were a cause

[4] *Jost v. Dairyland Power Co-op.*, 45 Wis.2d 164 (1969).

> of an injury or harm, that is, childhood lead paint poisoning, or the threat of childhood lead paint poisoning, or if NL was substantially certain that its activities would cause such injury or harm.

Plaintiff's Proposed Jury Instructions, filed June 12, 2007, Request 10, at page 11; *Plaintiff's Proposed Jury Instructions,* filed June 15, 2007, Request 5, at page 6.

Both the *Restatement* and the *Vogel* decision make it clear that knowledge of *some* harm or injury is not enough. Such a theory would mean strict nuisance liability for any manufacturer of products known to cause injury and death – such as children's bicycles or products containing mercury – if other unanticipated problems developed. In the context of the City's nuisance claim against NL, identifying the harm as "childhood lead poisoning" does not correct the problem, because the phrase begs a critical question. Does it include the harm to children who chewed on toys and crib rails that was reported in the 1930's? It certainly seems to. In fact, it would seem to include even one instance of lead poisoning. Under such an instruction the City might be entitled to a directed verdict, since there was at least some period when NL knew that its paint was causing some children to become lead poisoned.[5]

The court's instruction was drafted from the Restatement's definition of an intentional invasion:

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
>
> (a) acts for the purpose of causing it, or
>
> (b) knows that it is resulting or is substantially certain to result from his conduct.

[5] Such a theory would have raised other difficult questions, given the extraordinarily long time between the defendant's conduct and the public nuisance. Would it be enough for the jury to find that NL anticipated that "some childhood lead poisoning" would occur at the time of its conduct, say, in the 1940's, or would the jury be asked to determine whether NL knew in the 1940's that the problem would still exist 50 years later, when the City was injured by this nuisance?

Restatement, § 825. The pronoun "it" clearly refers to "an interference with the public right" and the Restatement comments make it clear that "it" means *the* interference that is alleged to be the nuisance.

Vogel confirms this interpretation. In that case, the court considered negligence and private nuisance claims of dairy farmers who alleged that their herd was adversely affected by stray voltage from the particular system that distributed electricity to their farm. The problems with the herd and the decline in milk production were first noticed in 1970, although it was not until 1986 that the Vogel's suspected stray voltage was the problem and contacted the Grant-Lafayette Electrical Cooperative. The trial court declined to submit an intentional nuisance theory, and the Supreme Court affirmed this decision. Even though the defendant knew that stray voltage would result from the type of delivery system used on the farm, liability for intentional nuisance required knowledge of the unreasonable levels of stray voltage that were harming the cows. *Id.*, at 431-32. As the court concluded:

> In order for a nuisance to exist in this fact situation, there must be an *unreasonable* amount of stray voltage that affects the person's interest in the private use and enjoyment of land. Therefore, GLEC may be liable for an intentional invasion under the continuing invasion rationale expressed in the Restatement if it continued to impose excessive levels of stray voltage onto the Vogels' farm that might endanger their cows after it had *knowledge of the problem*. However, that is not the case here. In fact, the record indicates the opposite.

Id., at 433, *emphasis added.*

In *Vogel,* "the problem" was clearly excessive stray voltage that harmed cows. It was not simply *some* stray voltage, nor was it the electrical distribution equipment that had apparently caused "the problem." In this case, characterizing "the problem" is not so easy, because the "injury" was characterized in so many different ways, including the threat of harm created by the mere existence of lead paint, the more immediate harm created by the lead dust that accumulates, the elevated blood levels found in so many children, the injuries

suffered by these lead poisoned children, the larger public health problems that resulted from all of these symptoms, and reduced property values. Because this *public* nuisance claim was brought by the City, its counsel focused on the need to pay for lead abatement programs:

> The injury is the need to abate the lead paint on the walls. This is what the Court of Appeals is saying that it's not just -- they are saying that it's not the kids with poisoning. It's the injury to the City. It's that injury which this case is about. So the harm is the need to abate the lead paint.

Tr., Motion Hearing, May 15, 2007, at 25. What was "the problem" that NL must have anticipated in order for it to be liable for causing a public nuisance? Was it some of these injuries? All of them?

After the court had proposed that "the problem" be described as "the public nuisance at issue in this case," the plaintiff requested that the court instead refer to "public injury or public harm." *Plaintiff's Memorandum Regarding Proposed Verdict Questions and Jury Instructions,* filed June 18, 2007, at 11.[6] In the context of this case, "public injury" would appear to be a reference to the public nuisance as that was defined for the jury:

> A public nuisance is a condition that unreasonably interferes with a right common to the general public. A public nuisance requires an *injury to the community or the general public.* . .

Jury Instructions, at 2. Under that interpretation, there is no material difference in meaning between the court's instruction and the City's request. If the phrase was intended to refer to a different or broader "public injury or public harm," some additional explanation was needed.

Of course, it was not necessary that the jury find that NL anticipated the precise nature and scope of the problem as it unfolded in the 1990's. It is enough that NL have foreseen the

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[6] June 18 was essentially the second full day of the jury instruction conference. The evidence had been completed towards the end of the day on Thursday, June 14, and because of the extensive issues that remained as to the appropriate jury instructions, the jury was excused until Monday, June 18, at 10:30 a.m. Both parties submitted new proposed verdict forms and jury instructions on Friday, and the court and parties spent most of that day on issues related to the jury instructions. Substantial issues remained when the court adjourned for the weekend at 5:30 p.m., and these issues were discussed for most of the day on Monday, June 18. The court did not begin instructing the jury until late in the day, and closing arguments did not begin until Tuesday morning.

general problem that was outlined by the City's evidence and that the problem would rise to the level of an injury to the community. I considered adding jury instructions along these lines, but did not do so because no party requested them, because any such instructions would likely have presented contentious drafting issues, and because it was obvious to the jury that the law did not require the City to prove that NL knew precisely what was going to happen 50 years in the future.

D. Unreasonableness

Perhaps no instruction issue was the subject of more discussion than the question of how the notion of unreasonableness should be addressed. The City's proposed instructions permitted the jury to consider whether the *harm* caused by the nuisance was unreasonable, but did not permit consideration of whether NL's *conduct* was unreasonable. I concluded that under the Restatement rules the unreasonableness of the defendant's conduct is clearly an issue in any claim of public nuisance. Less clear is where within the framework of legal instructions the jury should be told to consider such unreasonableness.

As noted earlier, a public nuisance is defined as an "unreasonable interference with a right common to the general public." *Id.*, § 821B. Following this definition, § 821B list three circumstances that might support a finding of unreasonableness, all of which reference the defendant's conduct:

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute ordinance or administrative regulation, or

> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Id., § 821B.

The notion of unreasonableness is also linked to an intentional "invasion" in § 822, which distinguishes nuisances based on intentional conduct from those based on negligent or other tortious conduct:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) *intentional and unreasonable*, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Id., § 822, *emphasis added.* As used in the Restatement, the terms "invasion" and "interference" encompass both the nuisance itself and the defendant's tortious conduct, and § 822 does not specify whether one or both must be *intentional and unreasonable*. In the typical nuisance case, the wrongful conduct is contemporaneous with the creation of the injury, and the distinction may be less important or perhaps its importance is less apparent. Moreover, the term *intentional* can only be applied to the defendant's conduct, and the requirement that the invasion be "intentional *and unreasonable*" may be viewed as directed primarily at the defendant's behavior. Earlier comments about the meaning of "Unreasonable interference" following § 821B support this conclusion:

> In each of these categories [of tort liability], some aspect of the concept of unreasonableness is to be found. If the interference with the public right is intentional, it must also be unreasonable. *[parenthetical reference omitted]* If the interference was unintentional, the principles governing negligent or reckless conduct, or abnormally dangerous activities all embody in some degree the concept of unreasonableness.

Id., § 821B, Comment e.

The question of whether an "invasion" is both intentional and unreasonable is further complicated by the "imperative distinction" between a nuisance and liability for a nuisance, emphasized in *Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee*, 277 Wis. 2d 635 (2005) and based on citations to the Restatement:

> . . . it is imperative to distinguish between a nuisance and liability for a nuisance, as it is possible to have a nuisance and yet no liability. *A nuisance is nothing more than a particular type of harm suffered*; liability depends upon the existence of underlying tortious acts that cause the harm. The Restatement (Second) of Torts illustrates this point:
>
> > [F]or a nuisance to exist, there must be harm to another or the invasion of an interest, but there need not be liability for it. *If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists but he is not liable for it.*"
>
> Restatement (Second) of Torts § 821A cmt. c (emphasis added).
>
> Much of the confusion in nuisance law results from a "[f]ailure to recognize that . . . nuisance has reference to the interest invaded and not to the type of conduct that subjects the actor to liability." Restatement (Second) of Torts § 822 cmt. b. Thus, a cause of action in nuisance is predicated upon a particular type of injurious consequence, not the wrongful behavior causing the harm. *(citation omitted).*

Id., ¶¶ 25-26. To invite the jury to consider the reasonableness of the defendant's conduct in determining the existence of the nuisance would violate this distinction. It would ask the jury to consider and weigh the same factors that would bear on whether a defendant's conduct was intentional or negligent or otherwise tortious.

The jury instructions proposed by the City did not permit the jury to consider or determine the reasonableness of the *defendant's conduct* as to either the existence of the nuisance or the defendant's conduct. The notion of unreasonableness appears only in the proposed definition of public nuisance:

> A public nuisance is a condition which substantially or unreasonably interferes with a right common to the general public such as health or safety.

Plaintiff's Proposed Jury Instructions, filed June 12, 2007, Request 3, at page 4; *Plaintiff's Proposed Jury Instructions,* filed June 15, 2007, Request 1, at page 1. Ssince these instructions allowed the jury to find *either* a substantial *or* an unreasonable interference, a finding that the interference was "substantial," as it quite obviously was, meant that the notion of unreasonableness had been written out altogether.

To the extent that jury might consider whether the interference was unreasonable, the City's instructions discussed this only in terms of the injury component of the nuisance:

> An interference is unreasonable if it materially affects or impairs, or threatens to affect or impair the health of a community or neighborhood.
> . . .
>
> When you consider the unreasonableness of the interference, you may consider a number of factors including the nature of the harm, the number of people in the community who may be affected by it, the extent of the harm, the permanence of the injuries, or the potential for likely future injuries or harm.

Plaintiff's Proposed Jury Instructions, filed June 12, 2007, Request 4, at page 5; *Plaintiff's Proposed Jury Instructions,* filed June 15, 2007, Request 2, at page 3. This definition of "unreasonable interference" and the suggested considerations focus entirely on the "injurious consequences" as they existed between 1992 and 2006. The instructions allow for no consideration of the reasonableness of the defendant's conduct, all of which occurred before 1978.

The City's instructions incorrectly omitted any consideration of the reasonableness of NL's *conduct.* Based on the rules and comments of the Restatement, and on the "imperative distinction" between and a nuisance and liability for the nuisance, the jury was properly instructed on the theory of a public nuisance based on intentional conduct.

II. The City's Requested Instruction on the Law of Agency

Over the defendant's objections, a great deal of evidence was received that reflected statements by persons affiliated with the Lead Industries Association. These statements reflected a variety of opinions and discussions about health issues related to lead and lead paint and also the exchange of information on such issues. Their principal purpose was to establish what was known within the lead industry generally and by NL in particular. In that respect, the evidence was not significant for its "truth content," but was admissible to demonstrate what NL was likely to have known about the dangers of lead paint during the first half of the 1900's. While this evidence was received without limitation, the City objects to the court's failure to instruct the jury about whether it must or could "attribute" the statements to NL Industries. Specifically, the City asked that the jury be instructed that all statements of the Lead Industries Association prior to 1961 should be "attributed" to NL Industries, because the LIA was then an unincorporated association, and that statements after 1961 could be "attributed" to NL if the jury found that the LIA was NL's agent or co-conspirator.

The defendant has contended that the requested instruction did not correctly summarize the law regarding the jury's evaluation of such evidence. I will put those issues aside because, in the context of this case, the proposed instruction is both confusing and unnecessary. I received this evidence because it was relevant to the determination of NL's state of mind during the many decades in which the conduct that allegedly caused the nuisance had occurred. I found that it was relevant for this purpose regardless of whether an agency foundation had been laid for all of the time periods and all of the declarants reflected in this evidence. Since the evidence was received without limitation, the question is whether

the City was entitled to an instruction intended to guide the jury as to the "attribution" of these statements.

The conduct for which NL was alleged to be responsible was the promotion and sale of lead pigment and paint. There was no doubt that that NL engaged in such conduct, and the "agency" statements at issue did not bear on such conduct by NL or others in any material way. The evidence reflected who knew what and who said what to whom within the lead paint industry. Of course, the statements of an agent can be important verbal acts, such as where an agent accepts an offer or speaks words that are negligent. The statements at issue here, however, were not material to liability-forming conduct and it was not necessary for the jury to determine whether NL was "responsible" for such the statements. Under these circumstances it would be confusing and unnecessary to ask the jury to determine whether the legal elements of agency had been satisfied as to each of the many statements and each of the many speakers.

III. Collateral Source Issue

The evidence at trial disclosed to the jury that most of the lead abatement programs at issue were funded by various "grants." Even though the jury became aware of this primarily through evidence elicited by the City, the City contends that this was violation of the collateral source rule and that it is entitled to a new trial. In addition to arguments raised at trial, the City argues that the recent decision in *Leitinger v. DBart, Inc.*, 2007 WI 84, entitles it to relief.[7]

[7] Citing language from *Leitinger, t*he City questions the validity of my distinction between the collateral source rule and its "evidentiary corollary." Whether the evidentiary component of the collateral source rule is viewed as a "rule" or a "corollary" does not affect its application in this case. Based on a footnote in the *Leitinger* decision, however, it appears that the better term is "evidentiary analogue." *Id.*, at ¶ 30, fn 24.

Leitinger was a personal injury case, and addressed an issue that has arisen in the effort to determine the reasonable value of medical expenses in the complex and seemingly unreasonable world of health care pricing. Specifically:

> The issue of law presented on review is whether, in light of the collateral source rule, evidence of the amount actually paid by a plaintiff's health insurance company for the plaintiff's medical treatment is admissible in a personal injury action for the purpose of establishing the reasonable value of the medical treatment rendered.

Id., ¶ 4. Apparently on the theory that evidence of what was actually paid is at least as probative of reasonable value as evidence of the amount billed, the trial court permitted the defendant to introduce evidence of the amounts actually paid by the plaintiff's insurance company. The Supreme Court disagreed, finding that the collateral source rule applied and concluding that the evidence was not admissible for that purpose.

In our case, NL *did not* seek to offer evidence of federal grant amounts for the purpose of establishing the reasonable value of lead abatement programs. In fact, *it was the City* that chose to use such evidence as the principle measure of damages. It did so for very good reasons, but it cannot then claim unfair prejudice and demand a new trial based on the collateral source rule or the holding in *Leitinger*.

Based on the exhibits to be used by the City and representations made in pretrial proceedings, it was clear that the damages case could not be explained and defended before the jury without reference to the grant programs. The testimony of Amy Murphy and other witnesses bore this out. The damages figures were directly based on grant expenditures and the City sought to use the grant review and oversight procedures as evidence that the expenditures were in fact related to the abatement of lead paint. NL also sought to use this evidence for legitimate purposes, such as challenging the credibility of HUD studies and challenging the City's policy choices in attacking the problems created by lead paint.

While the jury did not reach the question of damages, it was carefully instructed that it could not reduce its damage award based on this evidence:

> Evidence in this case has indicated that the City received grants from the federal government or other sources to help pay for some of the costs of its abatement program. However, any issues with respect to the distribution of any damages awarded are not a part of the jury trial in this matter, and this evidence may not affect you answer to the damage question. You may not reduce your award of damages because the City may have received funds for some costs from another source.

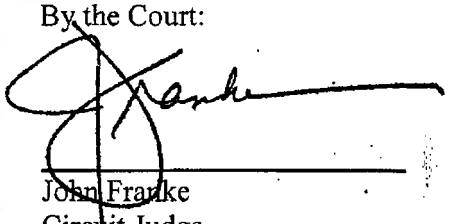
Jury Instructions, at 9. The City, however, now raises an issue not mentioned at trial, that is, that collateral source evidence prejudiced the plaintiff on issues related to liability. For reasons discussed above, the City has waived any claim of prejudice. Moreover, while there may be cases in which a jury's decision on liability could be affected by knowledge that the plaintiff has been reimbursed from other sources, this is simply not such a case. I see no meaningful risk that this jury would have altered or compromised its liability decision because of evidence that other government entities may have borne some of the costs.

Conclusion

For these reasons, and for reasons set forth before and during the trial, the plaintiff's motion for a new trial is without merit. Because more than 90 days have passed since the verdict, the motion must be denied, and pursuant to Wis. Stat. § 805.16(3) it is ordered that judgment shall be entered for the defendant.

Dated: October 7, 2007.

By the Court:



John Franke
Circuit Judge

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

CITY OF MILWAUKEE,
a municipal corporation,

Plaintiff,

vs. Case No. 01-CV-3066

NL INDUSTRIES, INC.,
a foreign corporation,

Defendants.

Before the Honorable

JOHN FRANKE, Circuit Court Judge

Branch 25, presiding

Monday, June 4, 2007

VOLUME 10

10:55 a.m.

A P P E A R A N C E S:

MICHAEL HAUSFELD, RICHARD LEWIS, RICHARD SERPE, TERRY NILLES, CHRISTOPHER RIORDAN, Attorneys at Law, appeared on behalf of the Plaintiff.

JAMES T. MURRAY, JR., DONALD SCOTT, MICHAEL WIRTH, Attorneys at Law, appeared on behalf of the Defendant.

knowledge of that all, that's fine. I'm talking about Exhibit 404, page 4.

But what he has no basis to testify to based on personal knowledge is whether any of that money was spent on lead paint, and we would object to any testimony from Mr. Egan on that subject.

MR. LEWIS: Your Honor, may I respond?

THE COURT: All right.

MR. LEWIS: Your Honor, 404 has the exact same numbers. 404 has the names of the grants. In light of the Court's consideration of making an instruction to the jury on collateral source at the close of evidence, we preferred not to list the grants in this exhibit. But I agree with Mr. Hughes; it's the identical information. The witness is familiar with it. The witness can explain the procedures as to these numbers. And we did provide to the defendants the back-up for every single cell in this spreadsheet, and to get from this spreadsheet to 392 is a mathematical exercise.

We would be happy to examine the witness on 404 as opposed to 392, because the bottom line is we want to ask this witness what the procedures are and what the number is, and both documents have the same information.

THE COURT: I'm looking at one copy of Exhibit 404 on the laptop, and then the one that's on our common screen here I believe is Exhibit 392.

MR. LEWIS: That's correct, Your Honor.

THE COURT: And I'm having trouble reading any of the numbers precisely, but it's clear that 392 has four categories in the total, and 404 has many more categories and then a total.

Are you saying, Mr. Lewis, that those total numbers running along the bottom are all exactly the same?

MR. LEWIS: No, Your Honor. I'm saying the total of $53,036,838 and the final total of 52,644,365 is exactly the same.

THE COURT: And did you explain to Mr. Hughes in some way how one does the math and takes all the categories on 404 and comes up with the numbers on 392, or did you just provide him with this and say this is our latest exhibit?

MR. LEWIS: Your Honor, these are the four basic categories of expenditures that come out of the spreadsheet 404. I wasn't present at the deposition that Mr. Hughes is reading from, and I don't recall all the questioning about 404.

MR. HAUSFELD: Your Honor, in order to

assist in terms of just viewing, if we could put 404 up and 392, I think we can answer Your Honor's question very quickly.

THE COURT: Well, not right now.

MR. HAUSFELD: Okay.

MR. LEWIS: I do believe the numbers on the bottom are the same. I misspoke, Your Honor. The bottom row of totals are the same.

MR. HUGHES: Your Honor, I'm not sure that they are the same.

THE COURT: Hold on. Hold on. We're going to take a break here because neither side seems sure what they are or what they have. I'm not sure defense had the obligation to sort this out and figure out for itself how these four categories and new numbers compare to the old numbers, but apparently they're not sure. And the plaintiff doesn't seem to be even sure about these various numbers.

Whichever exhibit is going to be used, it appears to me that this is only admissible as a summary exhibit. It's a summary of a lot of information. And a summary exhibit can summarize information that is in the record, but it's just so massive, it's hard for a jury to deal with. And you

put a witness on the stand to say they've looked through all the exhibits and they've added up the numbers in the fifth columns of such-and-such and here's the total and provides a summary that anybody could do if they have the time to go through the exhibits.

The same thing can be done with out-of-court information under rule 910.06. The rule doesn't specifically say, but it's always been my understanding that a summary exhibit like this has to be testified about by a person with knowledge. Either the person who actually did the work, went out and looked at the underlying sources and directly observed all of the things that go into preparing the summary, or perhaps someone who supervised that process.

Now, I believe there's some very general case law out there that guides a court into -- in what it can accept in terms of a foundation from someone who didn't actually do it but who somehow supervised the work and is relying on work that was actually done by others.

Now, under any standard, or a summary exhibit under 910.06, I have not yet heard a foundation for where these numbers came from, how

exactly they relate either to some kind of general category of lead prevention or lead-poisoning prevention programs or some other category of programs that relate specifically or primarily to lead paint or how this witness or anyone that he relied on went about figuring this out.

So whichever chart we're using, I don't know that we're close here. And I don't want to prevent use of a more reasonable chart, a simpler chart, if that really makes sense. But I am troubled that for many months, if not many years, we proceeded with a certain format for laying out the damages, and now that appears to have been changed. I'm baffled by the explanation.

My suggestion is that if there's a collateral source problem, we can simply instruct the jury about it. It would seem to be more necessary if 404 is used than if 392 is used. So I don't understand what the problem with 404 is in that regard. If we don't use it, then the instruction becomes less necessary.

But in any event, I don't see a foundation for either of these exhibits right now. And we're going to take a break and start over. And my plan is to start with the jury and see if there's

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

CITY OF MILWAUKEE,
a municipal corporation,

Plaintiff,

vs. Case No. 01-CV-3066

NL INDUSTRIES, INC.,
a foreign corporation,

Defendant.

Before the Honorable

JOHN FRANKE, Circuit Court Judge

Branch 25, presiding

Tuesday, June 5, 2007

VOLUME 11

9:40 a.m.

A P P E A R A N C E S:

RICHARD LEWIS, RICHARD SERPE, SARA SCHUBERT, Attorneys at Law, appeared on behalf of the Plaintiff.

JAMES T. MURRAY, JR., DONALD SCOTT, ANDRE PAUKA, JOHN HUGHES, Attorneys at Law, appeared on behalf of the Defendant.

for the overall truth of the finding.

Q We turn to page 100 -- I'm sorry, 1,040 of the same document, the American Academy report. 1,040.

And right above the costs and benefits, you need to blow up that paragraph.

Doctor, the last sentence of this section says that "There remains no evidence that chelation will reverse cognitive impairment."

Let me stop there and ask if you could explain briefly what chelation is.

A Chelation is -- it's a medication, chelating agents, as they're called. These are medications that doctors give to a child with lead poisoning to flush the lead out of the body. The chemicals tie up the lead, they chemically bind the lead, and it washes out through the urine. And I've used these medications myself. They can be life saving in the case of a child with acute lead poisoning who's extremely sick. Which we don't see very much of these days but used to.

So one of the questions that arose is -- among the pediatric community is they said to themselves, well, we know that chelating agents can get lead out of the body. Is it possible if we can get the lead out of the body that the child's IQ

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

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a municipal corporation,

Plaintiff,

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Defendant.

Before the Honorable

JOHN FRANKE, Circuit Court Judge

Branch 25, presiding

Wednesday, June 6, 2007

VOLUME 12

9:20 a.m.

A P P E A R A N C E S:

RICHARD LEWIS, RICHARD SERPE, CHRIS RIORDAN, KATE KONOPKA, Attorneys at Law, and SARA SCHUBERT, appeared on behalf of the Plaintiff.

JAMES T. MURRAY, JR., DONALD SCOTT, ANDRE PAUKA, JOHN HUGHES, Attorneys at Law, appeared on behalf of the Defendant.

moment.

(Sidebar discussion held.)

THE COURT: Members of the jury, I am going to excuse you for a moment. Please wait in the jury room. We'll bring you down from there, and if we're not able to proceed quickly, we'll give you a time to be ready. So jurors have a short recess. Please wait in the jury room. All rise for the jury.

(Jury excused.)

(Sidebar discussion held.)

(The following proceedings were held outside the presence of the jury.)

THE COURT: We discussed a couple of things at the sidebar. The main reason for the recess was because Mr. Murray indicated he was going to review some exhibits and thought it might be helpful if Mr. Lewis could see them first, and perhaps we should do that off the record. You can look at them and see whether there's going to be an objection.

But before you do that, I don't know if it's necessary to make a record on any other issues that have arisen. There have been several objections that I understand go to what I will call the collateral source issue.

Did you want to be heard further on

that, Mr. Lewis?

MR. LEWIS: Yes, Your Honor. Consistent with your prior rulings, we understood there will be a collateral source instruction. We also understood that mention of the HUD programs was inevitable in this trial, but I understood the Court to be instructing counsel not to ask questions for the sole purpose of identifying the source of funding and, therefore, undercutting what we expect will be an instruction on collateral source.

I believe such questions were asked repeatedly, over objection, in the examination of Ms. Murphy, questions that had no other purpose other than to elicit the source of fundings. One of the questions was actually nothing other than "What is the source of funding?"

So I'd like to preserve my objection on that, Your Honor. And the City is very concerned that your instruction under the law on collateral source will be undercut by this type of examination.

THE COURT: I've been unable to find the instruction I used in a trial several months ago. This doesn't come up a lot in terms of the need for an instruction, but it might be helpful if I would draft that and share with you what I have in mind,

but I certainly plan to consider instructing the jury that they can't reduce any award because of funds received from another source.

Now, Mr. Murray, if this comes up again, do you believe there's some legitimate purpose for talking about the federal funding process?

MR. MURRAY: Well, number one, I think I moved beyond that point. I don't expect any more questions about it, but I certainly think there was.

I mean, it was Mr. Lewis who introduced the exhibits that has HUD, CDC, and EPA all over it. The witness answered some questions about how the funding process, the budget process, the application, and then the approval process by the granting authority goes. So it's not as though I opened the door to this, and I think the jury's entitled to understand how the system -- how the process works.

MR. LEWIS: Your Honor, first of all, when we took the grants out in Exhibit 392, there was an objection from defense counsel.

Second of all, in the Court's comments on discussions of the collateral source rule, we fully understood that some of this information would have to come in to explain these programs. What I'm

objecting to is the gratuitous questioning on the source of funding for no other legitimate reason other than to undercut the instruction that we anticipate receiving on the collateral source rule.

I'm not saying that we can have this trial without discussing HUD or EPA. The Court has been quite clear on that, and the Court's absolutely right, but it's the gratuitous questioning for no other purpose, which we heard repeatedly already in this examination, which is objectionable and which really has contaminated the jury on the anticipated instruction.

MR. MURRAY: Well, I can tell you --

THE COURT: Hold on, hold on. I don't see a problem here at all. I don't think there's any way for the City to present its damage case here without reference to federal grants or to information that implicitly or explicitly conveys that a lot of federal dollars were at issue.

I'm not going to try to go back and sort out whether a couple of questions asked by Mr. Murphy after the direct here had any particular purpose or not. I can think of some, but I just don't see a problem. I don't see that anything's poisoned or tainted here. I can't imagine the jury

won't be able to follow that instruction. This federal grant business has been up in front of them and as big as can be on the screen, and I just don't see the questions asked by Mr. Murphy as somehow -- Mr. Murray as somehow creating a problem here. I do not see a problem. So the objection's overruled.

Now, that's not a license to continue to go into grant issues unless there's some immediate purpose to explaining the testimony or responding to the testimony. Let's put that aside for you now.

Anything that needs to be put on the record before you share exhibits here and indicate where the questioning of Ms. Murphy is going?

MR. MURRAY: No, nothing else until --

THE COURT: Let's take a two- or three-minute recess. Hopefully it won't take longer, and you can discuss this.

(Discussion off the record.)

THE COURT: We are back on the record without the jury. Please be seated or remain seated. Did someone want to be heard before we bring the jury down? Mr. Lewis?

MR. LEWIS: Yes, Your Honor. Mr. Murray has provided me with two documents, each of them in a redacted form.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

CITY OF MILWAUKEE,
a municipal corporation,

Plaintiff,

vs. Case No. 01-CV-3066

NL INDUSTRIES, INC.,
a foreign corporation,

Defendant.

Before the Honorable

JOHN FRANKE, Circuit Court Judge

Branch 25, presiding

Tuesday, June 19th, 2007

VOLUME 21

9:16 a.m.

A P P E A R A N C E S:

RICHARD LEWIS, MICHAEL HAUSFELD, KATE KONOPKA, and TERRY NILLES, Attorneys at Law, and AMY MURPHY, appeared on behalf of the Plaintiff.

DONALD SCOTT, JAMES T. MURRAY, JR., JOHN HUGHES, and ANDRE PAUKA, Attorneys at Law, appeared on behalf of the Defendant.

Well, the City's not put in any evidence of what a reasonable business would have done because, in fact, other businesses were making and selling lead pigment, making and selling lead paint, making and selling lead gasoline throughout this entire period until the 1970s. If that's any measure of what a reasonable business would do, they were doing the same as NL was.

But let's look at a different benchmark. What about gleaning what's reasonable from what the public health people were thinking and saying at that time or the government officials who dealt with paint who had no commercial interest in it? How do we judge NL by that standard?

Well, Alice Hamilton was the nation's premier expert in lead poisoning through the first half of the 20th century, from 1900 until her career ended in 1943. During that entire time of her life, she never once recommended a restriction on lead house paint to protect children. Dr. Markowitz admitted that. She did once, in 1913, recommend a limit for the safety of painters but quickly, the same year, said that that would be preposterous because the painters wouldn't put up with that; they wanted lead paint. Otherwise, she

The City's lead program, interestingly, didn't begin until 1991. I want to show you why. I'm going to put together what's going on nationally with what's going on in Milwaukee over time.

Now, remember, in the 1970s, 10 micrograms is not the standard. It's much, much higher. But the federal government begins to work on lead in 19 -- 1970s, and this is a decline in the prevalence of 10-microgram blood levels even though it won't be defined as elevated until right here.

In contrast, the City doesn't really begin until about 1992. The law in 1991 that began in 1992. So they begin much later than other parts of the country. But when they do, the results are clear, just like they were across the country.

Now, why did Milwaukee wait so long? 1992 is the time when their first federal grant money became available to do this. That's why they waited.

Amy Murphy testified that the funding initially for the project was in 1992, which is CDC. And it's still ongoing. They're still receiving this funding. So it began because they

had federal funding to do it.

Then, as they added up different projects, you wonder, well, is the City's expenditures coming out of other city needs, like part of the city budget is being used for the childhood lead program. Well, no. Ms. Murphy testified that these projects are all conditional on using it specifically for this project, for childhood lead poisoning.

So this is all earmarked money coming in -- earmarked money coming in for lead-paint poisoning conditional on being used for that purpose, so it's not diverted from the rest of the city's needs. And this is -- and the City itself has operations and maintenance and indirect costs, which, according to testimony, is not necessarily --

Yes?

MR. LEWIS: Objection, Your Honor.

THE COURT: Ground?

MR. LEWIS: Collateral source instruction.

THE COURT: The jurors have been instructed regarding this. I don't know if I need to read it again. They'll get the instructions in

writing. And to the extent that's an objection to this argument, it's overruled.

MR. LEWIS: Thank you, Your Honor.

THE COURT: You may continue.

MR. SCOTT: So in terms of any effect upon the City's other needs and use of its budget, what's gone in is operations and maintenance and indirect and allocation of other costs.

Now, at this point, the City faced important choices, and they made some important choices about what to do. They could enforce the law or they could do something different.

Ms. Murphy testified that, yes, the ordinances and statutes imposed upon landlords the responsibility to maintain their rental properties in lead-safe condition.

What about the authority of the Health Department to deal with elevated blood leads? They have the authority to prosecute landlords and engage in direct administration. That's when the landlord won't do it, the City can go in, do it, or have a contractor go in and send a bill or put it on the tax bill. They had that power since 1991, didn't use it until 19 -- until 2002.

What about getting ahead of the problem

and going after landlords who have hazards but no children yet who are lead poisoned? How about being proactive to order lead abatement apart from secondary invention? We choose not to exercise that authority. We choose not to do it.

The City made an important choice. It wasn't going to enforce the law against landlords. Instead, it was going to subsidize the replacement or refurbishment of windows. Why? Because they had a funding source willing to pay for that. And so they made that choice not to enforce but to subsidize.

Now, a good example, Shonia Zollicoffer came to testify. In one of her properties, an investment property, she used the subsidy program. She's a good person. She, I'm sure, would have taken care of the windows anyway. But the money was there and being offered, and so she used it, which would probably have increased the property value of her investment unit. I mean, that kind of makes sense. That's what the City chooses to do. It has a funding source willing to pay for it, so that's their program.

But it always was an experimental program with HUD, which is why HUD wanted to evaluate it.

And those reports that you folks had the labor of looking at so many times, Battelle and the other ones, they wanted a study to see if it really worked.

So the City chose not to exercise their enforcement power but instead to subsidize. And, in fact, when applications went down to use that subsidy money, they went out to drum up more applications for it so it would all be used.

Now, this is good for the property owners who apply to the program. The question is, is it really the best program for the children? The City says, well, it was or assume it was. HUD didn't assume anything. HUD wanted to evaluate that. Is it really working for the kids? It seems like it could have been a good idea at the time, but here is what the studies show.

This was a summary slide I had of Dr. Magee. Battelle, which is Milwaukee only; 14 grantee, Milwaukee's 1 of 14. Conclusions in all three are consistent. Window treatments, like Milwaukee's, do not reduce children's blood lead more than paint stabilization and cleaning. Window treatments do reduce the window dust. They do not reduce the floor dust lead. And children are

getting the blood lead from the floor, not from the window.

Now, during Magee's testimony and again this morning, Mr. Lewis showed you this one portion very deep on page 301 of the HUD report about spot painting and cleaning being unsuccessful.

Bear with me.

All lead-hazard control interventions, except spot painting and cleaning, Strategy 2, reduced average dust lead loadings on all surfaces examined.

City says, voila, it didn't work. Strategy 2 did not reduce the dust lead on the windows. That's what this means. It did reduce the dust lead on the floor.

Back to the executive summary. They tell us, Interior Strategy 2, the lowest intensity, that includes cleaning and spot painting, performed as well or better than other strategies in similar models based on floor and dust-lead loadings and failures. That's the conclusion. On blood lead, no difference in the interior strategy effects was noted for declines in blood lead, assuming interior floor dust lead is the primary exposure pathway of dust lead to a child, as established. This finding

may suggest a reason why Interior Strategy 5, which is Milwaukee's, did not prove to be more effective than the others.

It was an experiment. The City chose not to enforce but to experiment with HUD on this windows approach. They were surprised -- the reports say they were surprised -- to find it wasn't the windows, folks, where kids were getting the lead, it was the floors, and particularly the stuff being tracked in from out of doors. That was their finding.

Now, it's unfair to NL. The City's entitled to experiment with HUD all they want, but unfair, particularly in the context of this claim. They chose -- they chose the high-cost approach; they chose to do it by subsidies because they had a funding source to do it, where they've worked to spend all the available money from that funding source, and then try to shift all that over to my company, alone out of the whole world, just shift it over to us.

So it wasn't wrong to experiment, but they chose the subsidy approach, and now they want to shift that over.

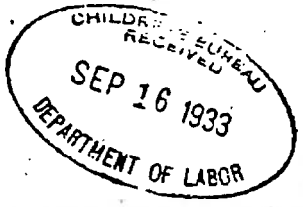
They do that without ever trying to find

METROPOLITAN LIFE INSURANCE COMPANY

NEW YORK CITY

LOUIS I. DUBLIN
Third Vice-President and Statistician

September 14, 1933



Dr. Ella Oppenheimer
Childrens Bureau
Washington, D. C.

Dear Dr. Oppenheimer

The inquiry to which you refer was made in 1930 by means of the enclosed letter which we sent to a list of 75 pediatrists in practically all sections of the country.

We received 33 replies. The most important of these was from Dr. Charles F. McKhann of the Department of Pediatrics, Harvard Medical School and the Childrens Hospital, Boston. He is the physician referred to in the October 1930 Statistical Bulletin and who stated that he had seen 50 cases of lead poisoning in children during six years in the Childrens Hospital. He further stated that these cases were "proven beyond a doubt," and that the "lead is obtained from chewing paint from the crib, woodwork about the house and toys." Dr. McKhann had an article on "Lead Poisoning in Children" in the American Journal of Diseases of Children, September, 1926; also a second article on this subject - where published I do not recall.

Dr. Arthur F. Abt of Chicago, author of Abt's Pediatrics, wrote us that "lead poisoning in children is not uncommon." Dr. C. G. Grulee, Chicago, author of textbooks on childrens diseases, in referring to paragraphs a, b, c and d in our form letter said, "I think the points mentioned by the pediatrists are well taken, in fact, I agree absolutely in every way with them." Dr. Harold K. Faber, Professor of Pediatrics at Stanford University School of Medicine, wrote that he was "surprised that the subject had not come to the attention of your Company long ago," and that "every pediatrician of experience keeps it in mind when he is dealing with cases of convulsions without fever, severe secondary anemias with constipation and abdominal pain, and the like." Dr. Faber mentions four recent references in American pediatric literature, together with one South American reference and one Japanese. Dr. A. G. Basler, Professor of Pediatrics at the Chicago Medical School, writes that the condition is well known and that he has "for 25 years warned parents as to cribs, toys, etc., painted with lead paint." Many other doctors wrote that they had seen cases of lead poisoning in children and mentioned cribs, toys, woodwork, furniture, lead nipple shields and breast ointments with a lead base as the sources.

On the other hand, a few of the doctors wrote that they had never seen, or rarely seen, a case of lead poisoning in children. Even among these, several either knew of such cases, recognized lead poisoning in infants as a definite entity, or made it a point to warn mothers of the danger.

MLE 4878

Exh0011

In connection with this whole matter, please be advised that our Bulletin article received a great deal of publicity against which there was strong remonstrance by the Lead Industries Association. You will readily understand that we wish to avoid any controversy with the lead people. Please, therefore, do not mention the Metropolitan in connection with whatever releases you may make. We have the entire case in our files and if you wish to see all the correspondence, or will send a representative to this Bureau, it will be placed at your service. In that event, kindly see our Supervisor, Mr. Van Buren.

Very truly yours

Louis I. Dublin

Third Vice President
and Statistician

2-3
Enc.

x either directly or by inference LID

METROPOLITAN LIFE INSURANCE COMPANY
FREDERICK H. ECKER, PRESIDENT
NEW YORK CITY

LOUIS I DUBLIN
Statistician

September 11, 1930

Dear Doctor:

Within two months several deaths of young children insured in the Industrial Department of this Company have been certified as due to lead poisoning. Except for these, and one additional case reported several years ago, all deaths reported from this cause among our more than nineteen million Industrial policyholders have been those of adults, and have been identified as due to chronic occupational poisoning. In a death certified to us several years ago, the physician told us that the child had formed the habit of eating paint from its crib and had actually died from a chronic lead intoxication.

In the most recent of these cases the certifying physician happened to be a pediatrist of high standing. In his reply to our letter asking particulars about the case history, he stated:

a. That the history was positive and definite,
b. That he was surprised that we had found the diagnosis so rare in children, and that in his judgment, it would be reported more often but for the fact that the condition is often unrecognized by physicians,
c. That it is obvious that more care should be taken by parents to safeguard children against contracting lead poisoning,
d. That if the Metropolitan could do anything toward disseminating information about lead poisoning in young children, it would perform a "valuable service."

We have decided to follow up this very interesting information on lead poisoning and to ascertain, if possible, whether the opinion of the pediatrist with whom we have corresponded is confirmed by that of pediatrists in general. If so, we shall be glad to call attention to lead poisoning among young children in the literature of our Welfare Division.

It will be greatly appreciated if you will give us the benefit of your judgment and experience in this matter.

Very truly yours,

Statistician

Box 498.
CF 1933-36 (
4-5-17

102074

September 27, 1933.

Dr. Louis I. Dublin,
Third Vice President and Statistician,
Metropolitan Life Insurance Company,
New York, N.Y.

TO FILES
BUREAU

My dear Dr. Dublin:

Thank you very much indeed for your detailed letter in response to my request for information concerning your inquiry as to lead poisoning in children. We shall be very careful, indeed, not to mention the Metropolitan bulletin in any way.

Sincerely yours,

Ella Oppenheimer, M.D.

eo-dh

MLE 4881

Exh0011.0004

March 25, 1936.

RETURN TO FILES
CHILDREN'S BUREAU

Mr. Van Buren, Supervisor,
Metropolitan Life Insurance Company,
New York, New York.

Dear Mr. Van Buren:

Some time ago Doctor Dublin wrote me I might see the files of correspondence between the Metropolitan Life Insurance Company, a number of pediatricians, and the Lead Industries Association, regarding lead poisoning in children. In connection with this he told me to see you.

I am writing to say that I shall be in New York on Friday or Saturday and plan to come to see this correspondence. If this is inconvenient, will you let me know.

Sincerely yours,

ELLA OPPENHEIMER, M.D.

4-5-17

September 11, 1933.

RETURN TO FILES
CHILDREN'S BUREAU

Editor Statistical Bulletin,
Metropolitan Life Insurance Company,
1 Madison Avenue,
New York, New York.

Dear Sir:

In planning the preparation of a popular folder on the Prevention of Lead Poisoning in Children, it occurred to me that it would be interesting and enlightening to get some estimate as to the extent of known lead poisoning among children in this country. In the Statistical Bulletin of October, 1930, you report in general terms the result of an inquiry you made to a number of pediatricians as to their experience in this matter. I wonder if it would be possible for you to let me have more details as regards this inquiry. Indeed, if it is not asking too much, I should be very grateful if you felt you could let me see the original material.

Very truly yours,

MLE 4882

Exh0011.0005

CHRONIC LEAD POISONING IN INFANCY AND EARLY CHILDHOOD

Chronic lead poisoning occurs much more frequently among infants and young children than has been generally supposed. It would be a more prominent item in both morbidity and mortality records but for the fact that the condition is often unrecognized by physicians. This conclusion is based upon an inquiry recently made by the Metropolitan Life Insurance Company among a number of prominent pedistrists. Large numbers of such poisonings among children were disclosed in the practice of these doctors.

The most informing reply to the Company's letters was that of a Boston physician who stated that fifty cases of lead poisoning in children had been seen in a single Boston hospital during the last six years, that the diagnosis in these cases was "proven beyond a doubt" and that the lead had been ingested, for the most part, as the result of chewing paint from cribs, woodwork or toys. Several pediatrists reported that they had demonstrated conclusively that lead nipple shields and lead ointments on the breasts of mothers, who were suckling young infants, were responsible for lead poisoning, which had now and then proved fatal. A majority of the pediatrists agreed that chronic lead poisoning in infancy and childhood is by no means a rare condition, and almost all believed that wide publicity should be given to this fact through the press or the "popular" literature of health departments and private health agencies, with special insistence upon the dangers inherent in cribs and toys painted with material which contains lead.

One correspondent stated that he had made it a practice over a period of twenty-five years to warn parents about the danger of children developing the paint-eating habit, and another doctor wrote that he found intelligent parents fearful of wet paint but oblivious to the dangers of dry paint.

Lead poison is a real source of danger to infants and young children, and education of parents concerning this hazard would be a definite, forward step in public health education. Lead poisoning is rarely thought of as a cause of illness in infants and children. Private physicians having a general practice should consider more frequently the possibility that they may be dealing with this serious disease.

Metropolitan Life Insurance Company
Statistical Bulletin, October, 1930.

Exh0012

PROG HUMAN HEALTH Fax:410-706-0727 Oct. 23 '98 15:45 P.04/05

ride, treacle, malt extract, dried yeast and potassium bromate. It was found that all the bakers who had suffered from dermatitis had been using yeast foods or accelerators containing ammonium or potassium persulphate and that the outbreak of dermatitis followed a few months after the introduction of this chemical in yeast foods, a practice new in Australia.

Water suspensions or solutions of whole products were used in testing. A typical subject, when tested, shows a marked wheal and erythema to most of the substances mentioned above, particularly malt wheat flour, while the reaction to ammonium persulphate in 5 to 10 per cent solutions is a great wheal and marked erythema which persist often for days, whereas the other reactions disappear within an hour or two. Often the testing lights up a resolving dermatitis. A 1 per cent solution applied over a few minutes does not produce a marked reaction.

Individuals unaffected by dermatitis have not reacted to these substances. Does the practice of bleaching flours have any bearing on this question? A critical appreciation of the results so far obtained will be published later, but one is tempted to forecast that bakers' dermatitis in Sydney in 1929 resulted from the unfortunate association of allergic individuals with aqueous solutions of persulphate.—Charles Badham *et al.* (see previous abstracts). E. R. H.

The Use of X-ray Machines in Shops or Other Industrial Places—It was found that in the use of X-ray machines in boot departments of several city shops the erythema dose which might produce burns to the customer was over 25 minutes where all the rays come through a lead glass covering the screen, but that a leakage around the screen might lead to a burn in a shorter time. As the exposure when fitting a shoe is generally well under a minute there would appear to be little danger unless the use were repeated on successive weeks.

The machines however revealed a very definite hazard to the operator, particularly from insufficient protection from leakage around the screen.

It was therefore recommended: (1) that all X-ray machines in shops or other industrial places should be licensed after testing and inspection by the Board of Health; (2) that the present machines be immediately protected to the satisfaction of the Board of Health; (3) that in the case of machines used for shoe fitting, a notice be posted warning customers that their feet should not be exposed for more than 3 minutes in any one month, and that the use of the machines to search for needles and such like bodies is dangerous.—Charles Badham *et al.* (see previous abstracts).

E. R. H.

Chronic Lead Poisoning in Infancy and Early Childhood—The Metropolitan Life Insurance Company, as a result of a recent inquiry among prominent pediatrists, calls attention to the large number of cases of lead poisoning occurring among infants and children. The brief note points out that a Boston physician reports 50 cases of lead poisoning among children at a Boston hospital during the past 6 years. In these cases the diagnosis was proved beyond doubt, the source of lead being the paint on cribs, woodwork and toys.

It seems obvious that the simple precaution of using zinc paints in these cases should be resorted to. Lead poisoning due to the use of nipple shields and of lead ointments on the breasts of mothers was also considered a source of poisoning by the physicians interviewed. —*Stat. Bull.*, Metropolitan Life Insurance Company, 11, 10: 4 (Oct.), 1930.

L. G.

PROG HUMAN HEALTH Fax:410-706-0727 Oct 23 '98 15:46 P.05/05

21:18, 1931

5. Of the total *samples* showing a positive presumptive test 100 per cent were confirmed for the new medium whereas only 68.7 per cent were confirmed for standard lactose broth.

6. The new Dominick-Lauter medium was found to be far superior to standard lactose broth for the detection of *B. coli* in water.

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1. Leahy, Harold W. Comparison of the Dominick-Lauter Test with Standard Methods Tests for *B. coli* in Water. Preliminary Report. *J. Am. W. Works Assn.*, 23: 1680 (Nov.), 1930.
2. Dominick, John F., and Lauter, Carl J. Methylene Blue and Bromocresol Purple in Differentiating Bacteria of the Colon-Aerogenes Group. *J. Am. W. Works Assn.*, 11: 1047–75 (Aug.), 1924.
3. American Public Health Association. *Standard Methods of Water Analysis*, 5th ed., 1925.
4. Levine, M. Notes on Experiments with the Presumptive and Confirmatory Tests for *B. coli* in Water Analysis for the American Expeditionary Forces. *J. Am. W. Works Assn.*, 7: 183 (Feb.), 1920.

Chronic Lead Poisoning in Infancy and Early Childhood

THE Metropolitan Life Insurance Company, as a result of a recent inquiry among prominent pediatrists, calls attention to the large number of cases of lead poisoning occurring among infants and children. The brief note points out that a Boston physician reports 50 cases of lead poisoning among children at a Boston hospital during the past 6 years. In these cases the diagnosis was proved beyond doubt, the source of lead being the paint on cribs, woodwork and toys.

It seems obvious that the simple precaution of using zinc paints in these cases should be resorted to. Lead poisoning due to the use of nipple shields and of lead ointments on the breasts of mothers was also considered a source of poisoning by the physicians interviewed.—*Stat. Bull.*, Metropolitan Life Insurance Company, 11, (0: 4 (Oct.), 1930. L. G.

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LEARN TO DO YOUR PART IN THE PREVENTION OF DISEASE

HUNTINGTON WILLIAMS, M.D., DR.P.H.
COMMISSIONER
LOUIS DAVIES, M.D., M.P.H.
ASSISTANT COMMISSIONER
FRED GAITHER
SECRETARY

BUREAU OF LABORATORIES
CLINTON L. EVANS
DIRECTOR
T. C. BUCK, JR.
ASSISTANT DIRECTOR

BALTIMORE CITY HEALTH DEPARTMENT

Child Lead Controversies

May 12, 1950

RECEIVED
MAY 15 1950
DIVISION OF
INDUSTRIAL HYGIENE
BALTIMORE CITY HEALTH DEPT.

Dr. Manfred Bowditch
Director, Health and Safety
Lead Industries Association
420 Lexington Avenue
New York 17, New York

Dear Dr. Bowditch:

At the recent meeting on Air Pollution in Washington you informed me that you were in correspondence with the Metropolitan Life Insurance Company concerning the preparation of material describing cases of lead poisoning in children. You indicated that it was your impression that there was more kerosene poisoning than lead poisoning in children.

I informed you that I had some data already prepared by the Metropolitan Life Insurance Company concerning lead poisoning in children. In checking through my files I found a copy of an article which appeared in the October, 1939 Statistical Bulletin of the Metropolitan Life Insurance Company. The article is entitled "Chronic Lead Poisoning in Infancy and Early Childhood". In accordance with your request a copy of this article is enclosed.

I hope that this material will prove useful to you.

Sincerely yours,

Emanuel Kaplan, Sc.D.
Chief, Division of Chemistry
Bureau of Laboratories

EK:S
Enc.

Copies to: Mr. Clinton L. Evans
Dr. W. E. Schalck
Mr. C. E. Couchman
Public Health Information

Sicilia
DEPOSITION EXHIBIT
NO 26 3/20/08
MELANIE M. KIRCHENSTEIN
EVANS REPORTING SERVICE

MLE 4886

Lead Industries Association
420 LEXINGTON AVENUE
NEW YORK 17, N.Y.

CLINTON H. CRANE, PRESIDENT
F. H. BROWNELL, VICE PRESIDENT
F. W. ROCKWELL, VICE PRESIDENT
FELIX EDGAR WORNER, SECRETARY AND TREASURER

January 19, 1944

Dr. Robert A. Kehoe
College of Medicine
University of Cincinnati
Cincinnati, Ohio

Dear Dr. Kehoe:

If you read TIME no doubt you saw the item which appeared in the December 20 issue entitled, "Paint Eaters" derived from an article by Byers and Lord, published in the November, 1943 issue of the American Journal of Diseases of Children, entitled, "Late Effects of Lead Poisoning on Mental Development." It drew some amazing conclusions alleging that lead poisoning in early childhood had left effects showing up years later. It was a most alarming revelation. Naturally, I immediately instituted an investigation because, if what this article describes is correct, then we have indeed a most serious public health hazard.

However, on examining the article from which the TIME condensation was made, I am really surprised that a reputable journal of the American Medical Association would publish such a dissertation. Superficially it is a long paper, well illustrated, and must seem impressive to the profession at large. Many case histories are described, but to any one who has studied lead poisoning intensively and who is familiar with the vast amount of work that has been done in recent years on the metal, and who wishes to sift fact from fancy, the assertions made appear to be far from proven.

Although 20 cases of alleged lead poisoning in children are individually described in not a single case have I found the authors making the slightest attempt to ascertain whether or not the paint used on the cribs contained any lead. They apparently proceed on the assumption that any paint chewed from any crib must be lead bearing and build up their contentions on medical diagnoses that do not sound convincing to me.

For example, take the very first case. There was no stippling of the blood, the urine was normal, there was no analysis made of the paint, but the X-ray showed

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"dense bands of metallic deposit at the growing ends of the shafts, characteristic of lead poisoning." For that reason alone the case was alleged to be lead poisoning.

Take Case No. 9, the youngster had scarlet fever and other infections. Again the X-ray is relied upon as the only evidence. There was no analysis of the paint.

Or Case 4, in which it was stated, "results of the physical examination and laboratory investigation were not remarkable," but again the X-ray comes along with a "positive" determination of lead! No paint analysis.

All the cases are more or less alike, but one of the prizes is Case No. 6 because here there is alleged to be a high lead content of the blood but the X-ray was negative! Nevertheless it was diagnosed as lead poisoning.

Or better yet, look at Case 11 in which an infant's blood at 2-5/12 years showed "a mild secondary anemia and her urine a moderate amount of pus." When she was 4¼ years old she showed a "history of chewing wood.." and "her blood was examined for stippled cells, without success." At 5¼ years her family stated definitely that "in chewing wood she had chewed painted articles of furniture." On t is occasion "her blood showed 1.8 per cent stippled cells and a mild secondary anemia." The X-ray examination suggested "recurrent lead poisoning." Two years later the X-rays showed "faint bands of density some distance behind the growing ends of the long bones, thought to be due to the old deposits of lead." But, here comes the most interesting point of all; four years later, when she was 11, and still growing, "her blood, urine and spinal fluid showed about one hundred times the concentration of lead found in normal persons. In spite of these results, roentgenograms of the long bones showed no evidence of lead deposits." Rather confusing, isn't it?

All the cases are more or less similar and there is no need of going into any more of them here.

I note, too, that most of the work involved in this article was prepared by Elizabeth S. Lord, Ph.D., who died recently.

As you know, it is our belief here, based on careful investigation, that no crib manufacturer in the United States today is using any lead paint on cribs, nor has he used any for years, for two reasons:

(1) other paints, such as zinc oxide, lithophone and titanium base enamels are cheaper than white lead, and

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(2) they make a harder and more satisfactory enamel than white lead.

Wouldn't you think, therefore, that rather than jump to conclusions, conclusions based chiefly upon only one premise, and X-ray diagnosis of the bones, the authors would at least have tried to ascertain whether or not the cribs had been painted with lead? This would have been so easy to determine. Window sills might be painted with lead but here, too, leadless paints are more apt to be employed which is the current vogue on interiors.

In the second place I am struck with the fact that the examinations made of the children in almost all cases showed no stippling of the blood and in most cases where an effort was made to find out whether the children were excreting any lead, the urine was normal, or no analysis was made. On the other hand, the authors place great weight upon the X-ray and their article is replete with X-ray photographs of the bones calling attention to well marked deposits of "lead" on the margins of the shafts of long bones.

Now it may very well be that the authors did not see or don't agree with the careful work of Dr. L. T. Fairhall, reported in Public Health Report Vol. 58, No. 6, dated February 5, 1943, entitled, "Identification of Lead in Bone Tissue" where he states:

> "It is apparent that the small amounts of lead deposited in bone are insufficient to register by means of X-rays and that darkened areas which have heretofore been accepted as lead deposits are likely to be due to calcium. From what is now known concerning the distribution of lead in bone, it would be surprising indeed if such small amounts of lead so evenly distributed would be revealed by X-rays in the presence of such large amounts of calcium. The lead content of human bones with known exposure to lead is also insufficient in amount to impart any marked opacity to X-rays."

If lead was so prominent in the X-ray photographs shown by Byers and Lord in their paper there must have been perfectly enormous amounts of lead in the bones to do so. This seems incredible to me. Why didn't it show up in the urine?

Another point which I can not understand is that years after these youngsters were alleged to have contracted lead poisoning and were removed from the exposure and subsequently re-examined, this so-called lead line was still found in the bones. How do the authors account for that?

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Dr. Kehoe: -4- January 19, 194[illegible]

I hesitate, of course, to bother you in wartime with this topic but I think you will agree with me that this is an episode which, because of your deep interest in lead and your high standing in the profession, can not be ignored. Is is unfortunately true, and I know from bitter experience, that other doctors will accept as authoritative this paper of Byers and Lord and probably build upon it still more fantastic assertions. I would, therefore, like to know from you what, in your judgment, is the best thing to do. Do you think, for example, that it is something which might be brought to the attention of your distinguished committee on lead poisoning which has just published such an able report for the American Public Health Association?

With kindest regards,

Sincerely yours,

[signature]

Secretary.

P.S. In the event you do not have a copy of the paper mentioned at your disposal, I am enclosing a photostatic copy.

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February 7, 1944

ly

Mr. F. E. Wormser,
Lead Industries Association,
420 Lexington Avenue,
New York City 17.

Dear Mr. Wormser:

I have had time only recently to consider your letter of January 19, and the article by Byers and Boyd in the American Journal of Diseases of Children. Having been out of the country for several months, I could not get around to answering it sooner.

I fear that you will be disappointed by my answer, for I am disposed to agree with the conclusions arrived at by the authors, and to believe that their evidence, if not entirely adequate, is worthy of very serious consideration. Perhaps my own experience prejudices me in favor of the acceptance of their findings, for I have seen cases of serious mental retardation in children that have recovered from lead poisoning of the encephalopathic type, and among my records is one case of permanent feeble mindedness which I attribute to a well defined episode of lead encephalopathy in an infant. The child is now fourteen or fifteen years of age.

The article must be considered on two bases, - (1) evidence of the occurrence of lead poisoning, and (2) evidence of mental impairment. For my part I am willing, - perhaps too willing - to accept the conclusions of the authors as to the second point. It must be pointed out that the contribution of Elizabeth E. Lord, Ph.D. was made on this aspect of the problem, and not on the question of lead exposure or lead poisoning. I should not take issue with the propriety or competence of her work in this field, although I am frank to say that I have no knowledge of her abilities. It is true that the authors do some rather amateurish theorizing on the subject of the behavior of lead in the human organism in the first part of their article, and that they discuss the criteria of the diagnosis of lead poisoning in a somewhat less than well-informed manner. On the other hand, it appears that they did not make the diagnoses in these cases but rather accepted the diagnoses made as a matter of record in the Childrens Hospital, and carried out their follow-up studies on cases that would ordinarily be accepted as lead poisoning in children. I agree that the diagnoses may have

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been in error in some instances, perhaps even in many, for I know how difficult this problem is in the case of children. In the final analysis it is frequently impossible to be sure on ordinary clinical grounds, and often a series of analyses of the blood and urine are required to prove or disprove the significance of the lead exposure. On the other hand, the criteria used here, as indicated in the Summary of the Data, are orthodox.

You quarrel with the statement about chewing paint and say that the manufacturers don't use it on cribs and toys. That may well be true. My experience leads me to accept it as such. However, the householder repaints these articles, and often with lead-containing paints. Please note that the article makes point of the fact that the children chewed paint "off cribs, window sills or furniture," and also refers to the statement of parents that they had repainted cribs. I'm afraid it will do you no good to try to combat the significance of the history of chewing articles in relation to the problem of lead poisoning in children. The most significant feature of the history of exposure in an overwhelming proportion of the cases of lead poisoning in children is just that fact. "Pica" is at the bottom of most of these cases, and unfortunately the environment of small children is not sufficiently free of lead for their safety. Have you seen the data on lead poisoning in children in Queensland? These cases were largely due to chewing the paint off the railings of the porches on which the children played.

You also object to the significance of the X-Ray evidence of lead absorption. I'm afraid you are not on good ground. The work of Park and Vogt on this point is much too extensive and good to be dismissed so easily. This sign does not exist in adults, for there is no line to be photographed in the case of the adult, unless perhaps he absorbs much lead while a broken bone is mending. However, in the case of the child it is a very useful presumptive sign. Although the dense line at the epiphyseal edge of the rapidly growing and calcifying long bone of the child is not specific for lead, (this should always be checked by blood or urinary lead analysis) it is associated with the absorption of abnormal quantities of lead in many instances, and therefore it may not be ignored. Fairhall's work (he is not a physician, either) was mainly on the bones of dogs, which may or may not have been young and growing. He does not mention this point, and I am not sure he was even aware of its significance. However, he did not say that no line was visible in the bones of children exposed to lead. He only said that there is considerable doubt that any line seen in human or other bones is due to the shadow cast by lead itself at that point. I am not prepared to argue the matter of the lead concentration in the region of most rapid growth in the bones of childred, for I have no analytical data on that aspect of the problem. I am prepared to say that the occurrence of a dense

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narrow band at the epiphyseal line in the long bones of a child is a warning that had better be carefully investigated, for although it is by no means certain, the likelihood is that this child has been swallowing or inhaling considerable quantities of lead in the very recent past. I advise you to examine the articles of Park and of Vogt with considerable care before you make too broad an interpretation and application of Lawrence Fairhall's observations.

The statements in the case records that "the urine was normal," do not refer to normal lead concentrations, but rather to the lack of ordinary abnormalities such as albuminuria, hematuria, and the like. You must remember that the use of the urinary and blood lead concentrations as evidence of the extent of the recent lead absorption of an individual was not popular in Boston even after these procedures had come to be accepted as diagnostic measures elsewhere. It is not surprising therefore, that lead analyses on the blood or urine were not carried out. In this connection it is enlightening to note (page 475) that the authors refer to the recently published method of analysis of Fairhall and Keenan as offering some hope that the lead in urine may eventually be found to have some clinical significance.

You must not take too seriously the reported absence of stippling and lead lines in many of these cases. The blood findings on children are somewhat more erratic than they are in adults, and then the large proportion of doctors do not know how to examine a blood smear to find out if stippling is present. I speak here from long experience with the results of this examination in hospitals. We never take them seriously unless we know who made the examination. As for lead lines, they are rarely seen even in the most severely poisoned children, for the reason that children seldom have chronic gingivitis.

Finally, from the purely clinical viewpoint, the symptomatology of most of these cases was such as to justify the strong suspicion that lead poisoning existed. Any attempt to discredit the diagnoses in most instances would not be worth the effort, since only detailed evidence could be used to do this. No such evidence is available. I quite agree that the reasoning in some instances was "confusing."

From all this you may gather that I think that the only thing that can be done about this paper and this concept, is to investigate the problem further, so as to settle the facts. What has been said is suggestive, and I think there is more than a grain of truth in it. The situation may not be as black, however, as it has been painted.

I apologize for the length of this letter, but I could not explain

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MLE 5446

Mr. F. E. Wormser - (4) - February 7, 1944

my point of view without considerable discussion.

I'm glad you liked the report of the A.P.H.A. Committee. I, also, think it is good.

Cordially yours,

Robert A. Kehoe, M. D.

RAK ef

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Exh0029.0004

To: Mr. Ziegfeld

December 16, 1952

From: Manfred Bowditch

Subject: 1952 ACTIVITIES

The following is a brief outline of Health and Safety activities during the first eleven months of 1952. A more comprehensive report will be made to the members of our Association when records for the full year are available.

CHILDHOOD LEAD POISONING This problem continues to be a major "headache" and a source of much adverse publicity, of which the Baltimore publications herewith are but two examples. No accurate estimate of its prevalence is possible, but these figures on 1952 reports from a few communities with which we are in touch will serve to point up its importance.

	All Cases	Fatal Cases
Atlanta	3	0
Baltimore	26	4
Boston	5	1
Cincinnati	12	4
Cleveland	16	5
New Castle, Pa.	15	3
New York	44	14
St. Louis	61	4
Washington	11	4
miscellaneous	4	1
	197	40

Most of the above figures are incomplete; this is particularly true of those for New York City, which are based on estimates by the Assistant Health Commissioner, Mr. Trichter, whose present illness has delayed the further report promised. Detailed investigation of any such large number of cases to determine their validity would be prohibitively expensive and time consuming, as witness the costs of the current Baltimore ($10,000 for one year) and Boston ($2,500 to $3,000 per year) studies. But granting that many could be shown to be of doubtful validity, this would not lessen the adverse publicity, and it is my considered opinion that we must find means of securing more accurate diagnosis of lead poisoning or face the likelihood of widespread governmental prohibition of the use of lead paints on dwellings.

INDUSTRIAL LEAD POISONING Due to widespread lack of knowledge in the medical profession of the causes and diagnosis of lead poisoning, as well as the fact that it is not a reportable disease and the factor of deliberate "covering up," no useful estimate of its prevalence in the adult population is possible. Although its incidence in the painting trade has undoubtedly lessened substantially in the last several decades, Dr. Robert A. Kehoe, Director of the Kettering Laboratory and an internationally recognized authority on this subject, gave the opinion in an address on November 19, 1952 at the annual meeting of the Industrial Hygiene Foundation, of which Mr. Fletcher is the Chairman, that plumbism is as common in industry today as it was in much earlier times.

MLE 5559

Exh0039

Lead Industries Association

60 EAST 42ND STREET

NEW YORK 17, N.Y.

ANDREW FLETCHER, PRESIDENT
R.C. BROWNELL, VICE PRESIDENT
J.A. MARTINO, VICE PRESIDENT
M.M. ZOLLER, VICE PRESIDENT
ROBERT LINDLEY SIEGFELD, SECRETARY-TREASURER

MANFRED BOWDITCH
DIRECTOR OF HEALTH AND SAFETY

December 26, 1957

Robert A. Kehoe, M. D.
Director, Kettering Laboratory
University of Cincinnati
Eden Avenue
Cincinnati 19, Ohio

Dear Bob:

Elston Belknap had with him in Cincinnati last week a Kettering report dated November 18, 1957 with the title "The Occurrences and Significance of Lead in the Paint Used on Toys." I had opportunity to no more than glance through it, and as the subject is of material concern to me, I would appreciate your having a copy sent to me.

As you are very likely unaware, the whole problem of lead poisoning in children is one to which I have given a large proportion of my time over a period of years, and the pediatricians and others, here and abroad, with whom I have conferred and corresponded on it would make a long list indeed. Of major importance in this connection have been the studies sponsored by our organization at Johns Hopkins, the arrangement which we have with the Children's Medical Center in Boston, whereby we foot the bills for detailed home investigations of all their cases by a highly competent physician and receive copies of his reports, and the contacts which we maintain with the poison control centers and interested state and local health departments throughout the country. In short, with due respect to Kettering and others concerned, I doubt if there is a greater accumulation of information on this particular subject anywhere than right here in this office.

Without fear of successful contravention, I can say:

1. That the overwhelmingly major source of lead poisoning in children is from structural lead paints chewed from painted surfaces, picked up or off in the form of flakes, or adhering to bits of plaster and subsequently ingested.

2. That of some, but secondary importance is lead paint mistakenly applied by ignorant parents to cribs, play pens and other juvenile furniture and subsequently chewed off and ingested.

LEAD INDUSTRIES ASSOCIATION — MORE ON LEAD

MLE 6298

3. That any poisoning that there may be from lead-painted toys is of quite minor concern in comparison with the two above sources.

4. That childhood lead poisoning is essentially a problem of slum dwellings and relatively ignorant parents.

5. That it is almost wholly confined to the older cities of the eastern third of the country and is practically nonexistent west of Milwaukee, Chicago, St. Louis and New Orleans.

6. That, in all too many cases, the slum child, diagnosed, hospitalized and cured, returns to the same environment and to another routine of lead paint ingestion.

7. That the importance of the problem lies primarily, not in the number of cases, but in the likelihood of permanent brain damage and in the great difficulty of instituting really effective preventive measures.

8. That, until we can find means to (a) get rid of our slums, and (b) educate the relatively ineducable parent, the problem will continue to plague us.

9. And finally that, if you know the answer to those two, you are even more of a genius than I think you.

Perhaps this letter is just another instance of "carrying coals to Newcastle," but the misunderstanding of the fundamentals of this problem is so widespread, and frequently where one would least expect it, that I find myself impelled to sound off in this fashion once in so often.

Sincerely yours,

MB:GW

cc: Albert L. Chapman, M. D.
Harold L. Magnuson, M. D.

MILWAUKEE CHILDREN EBL CASES AND CHELATION EVENTS (1996)

	1996
Cases EBL >10 ug/dL % Prev	6,842 34.74%
Cases EBL >20 ug/dL % Prev	1464 7.43%
Chelation events	106

Source: Milwaukee Surveillance Prevalence Data (1996-2005), (Exh 285) (Exh 286)
Milwaukee Health Department Chelation Database, (Exh 287)

APPENDIX CERTIFICATION

I hereby certify that filed with this Petition, either as a separate document or as a part of this petition, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of December, 2008.

VON BRIESEN & ROPER, S.C.
Attorneys for Plaintiff-Appellant

By: