

Jury awards \$6 million in lead paint case, finds three firms responsible for lead poisoning of three kids in Milwaukee

Bruce Vielmetti, Milwaukee Journal Sentinel Published 12:27 p.m. CT May 30, 2019

In the first verdict of its kind, a federal jury Friday awarded \$2 million each to three young Milwaukee men who suffered lead poisoning as toddlers from the residue of paint they ingested in their homes and found three major paint and pigment companies liable.

Under Wisconsin's unique and controversial "risk contribution theory," established by the state Supreme Court in 2005, the plaintiffs did not have to prove which specific product poisoned them.

All four defendant companies had to convince the jury they were not marketing or providing their products in Milwaukee at the pertinent times in order to escape responsibility.

Only Atlantic Richfield Co., the successor to Anaconda Copper Mining Co. which used to make white lead carbonate used in paint in the 20th century, was able to do so.

The jury of eight women and three men decided the other defendants — Sherwin-Williams, Armstrong Container Corp. and DuPont — acted unreasonably in marketing lead paint without proper warnings of its danger to poison children.

Each would be liable for a share of the damages, based on their share of the market. The same jury will consider how to slice that pie during a second phase of the trial next week.

"It's a great day for Milwaukee," said Milwaukee lawyer Peter Earle, who began planning the litigation strategy with a Rhode Island law firm 20 years ago. "And this is just the beginning."

Before the Legislature passed a law nullifying the risk contribution theory in 2011, more than 150 other plaintiffs sued the lead paint industry. Several are lined up to be tried in the same court, before U.S. District Judge Lynn Adelman.

The verdicts followed a day of deliberations and three weeks of testimony about neurological testing, chemical analysis of old paint, the history of the lead paint industry and the growing public health concern that finally banned its use in 1978.

An attorney for Sherwin-Williams said it will appeal the verdict, which he said is "at odds with the facts and the law."

Antonio Dias, with Jones Day, said: "Sherwin-Williams Co. has a strong history of working together with public health officials to remove lead from paints decades before the government banned lead paint for residential use and to provide information to the public about the potential risks of deteriorated lead paint.

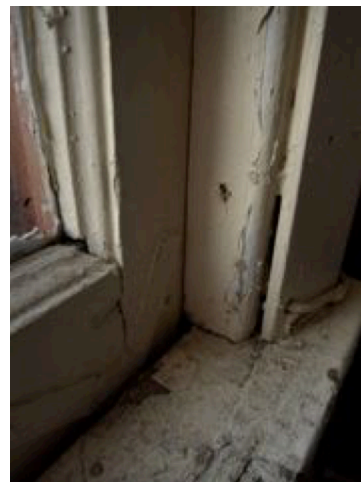
"This litigation serves as a diversion from the underlying problems associated with substandard housing and lead in water," he said, and that "policymakers should focus on proven ways to protect children from landlords who choose to ignore the law and deliberately expose families to a myriad of health risks."

Mayor Tom Barrett said the verdict "underscores what we've been saying for a long time, which is that we have to be doing everything we can to address the issue of older homes and lead paint.

"But this recognizes that there obviously was a liability on behalf of the paint manufacturers."

Glenn Burton Jr., 18, Ravon Owens, 28, and Cesar Sifuentes, 20, spent their earliest years in Milwaukee homes built in 1902, 1899 and 1915, respectively. They all had severely elevated blood lead levels of 32 to 53 micrograms per deciliter — well above the level of 5 ug/dl now considered poisonous.

Small children are most vulnerable to lead poisoning because they're on the floor a lot, touching things and putting their hands in their mouths while their brains are developing rapidly.



Window sill at a Milwaukee home undergoing lead abatement in 2002 (Photo: File photo)

All three young men struggle to read with comprehension as a result of childhood lead poisoning, their attorney Fidelma Fitzpatrick told jurors in closing arguments Wednesday.

"Lead is a weight on their shoulders, holding them back" from certain career choices and opportunities, Fitzpatrick said.

She recapped the voluminous expert testimony to suggest the defendants knew almost a century ago that lead in paint was a deadly cumulative poison but made and marketed lead paint even when nonlead alternatives were available, and didn't adequately warn homeowners of the risks.

Defense attorneys questioned whether the plaintiffs were injured at all, said their products were never in Milwaukee and even if they were, were sold in a reasonable manner, given what public health officials knew at the time.

Atlantic Richfield Co.'s attorney argued that was true in its case, citing its own sales records, and the absence of any ads for its predecessor company in decades of Milwaukee Journal advertising, city directories and consumer surveys.

And where it was selling, said Jonathan Stern, the company was "completely aligned with the public health community" at the time.

A century ago, lead paint was recognized as a workplace hazard for painters, then seen affecting children who gnawed it off cribs and toys. Eventually, researchers realized even chips from wall paint and later dust from deteriorating paint could be easily ingested by children. It was first banned for interior use and then banned completely in the U.S. in 1978.

DuPont argued that its scientific scan analysis of paint chips taken from all three homes where the plaintiffs lived as toddlers showed that none of the 570 layers of paint were lead-based DuPont products.

Armstrong Container, the successor to McGregor Paint, argued sales data and science showed its product wasn't in the plaintiffs' homes. McGregor sold Scotch Laddie exterior paint with a very high percentage of white lead carbonate from 1957 to 1971.

Sherwin-Williams' attorney, Richard Deane, made the most aggressive closing argument, telling jurors that none of the plaintiffs were actually injured by the lead they ingested as toddlers.

Deane noted none had brain swelling, lead in their bones or MRIs of brain abnormalities and have all done OK, succeeding — while not excelling — in school and beginning careers in trades like masonry and carpentry, and two of them supporting their own children.

As to their IQs, Deane suggested their mother's IQ is the strongest indicator of expected scores, and that information was never made available.

In rebuttal, Fitzpatrick said the case is not about hindsight, as defendants' portray it, but the foresight they should have had early in the 20th century when medical journals were flagging the dangers to children of lead paint and calling for legislation to restrict its use.

She said some of the companies' absence from advertising doesn't mean they weren't in the Milwaukee market, via sales to area distributors or by selling lead pigment to master painters who prepared their own formulas, the common practice before the widespread introduction of pre-mixed paints.

And as to her clients, Fitzgerald stressed that lead poisoning independently affects brain function, regardless of other risk factors emphasized by Deane, like low birth weight, language barriers or poor school attendance.

"It's not an either-or proposition," she said, reminding jurors they need only decide white lead carbonate is a cause of the plaintiffs' conditions, not the sole cause.

Fitzpatrick said it was against common and medical sense to believe Sherwin-Williams' argument that the plaintiffs "emerged totally unscathed" from lead poisoning so bad that two had to be hospitalized for blood replacements.

"Yes, they should be commended for what they have accomplished, their resilience to overcome cognitive impairments from lead," she said. "But that's no reason for the defendants to say, 'Well, that's good enough.'"

RELATED: [GOP eases lead paint laws after \\$750,000 in donations](#)

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Daniel Bice, Jason Stein and Patrick Marley, Milwaukee Journal Sentinel Published 9:28 a.m. CT Sept. 14, 2016

Madison — Gov. Scott Walker and the GOP-controlled Legislature approved a measure aimed at retroactively shielding paint makers from liability after a billionaire owner of a lead producer contributed \$750,000 to a political group that provided crucial support to Walker and Republicans in recall elections, according to a report released Wednesday.

Citing leaked documents gathered during a now-shuttered investigation into the governor's campaign, [the Guardian U.S., an arm of the British newspaper, reported](#) that Harold Simmons, owner of NL Industries, a producer of the lead formerly used in paint, [made three donations](#) totaling \$750,000 to the Wisconsin Club for Growth between April 2011 and January 2012.

Simmons' donations were made before and after Republicans approved two laws helpful to the industry — [one in January 2011](#) and the other in June 2013. The 2013 measure was inserted in a budget bill in the middle of the night despite warnings about its constitutionality.