

## Lead Contamination/Duty to Warn: Indiana Court of Appeals Addresses Claims Related to State Agencies



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The Court of Appeals of Indiana (“Court”) addressed in a June 10th Opinion issues relating to lead contaminated soil in a residential area. See *State v. Alvarez by next friend Alvarez*, 2020 WL 3068449 (Ind. Ct. App. June 10, 2020).

Area residents filed a lawsuit alleging negligence by the State of Indiana, the Indiana Department of Environmental Management (“IDEM”), and the Indiana State Department of Health (“ISDH”) (collectively, “State Defendants”) in failing to inform or safeguard them from lead contamination.

The City of East Chicago built public housing in the 1960’s called West Calumet Housing Complex (“Complex”). The property was formerly occupied by and surrounded by lead smelting operations.

IDEM discovered lead contaminated soil near the Complex in 1985. Further, ISDH determined that children living at the Complex had high levels of lead in their blood.

IDEM and ISDH performed further testing in 1997. This testing revealed lead contaminated soil near the Complex and elevated levels of lead in the blood of the children who lived in the Complex. None of the State Defendants notified the Complex residents about the elevated lead levels.

The United States Environmental Protection Agency (“EPA”) in 1985 began testing the land surrounding the Complex and addressing the contamination. EPA designated the land upon which the Complex was built as a Superfund site that required environmental remediation.

The United States and the State of Indiana filed a complaint in 2014 against two companies that operated on the land where the Complex was built. They reached a \$26 million settlement with the companies to provide cleanup costs.

The EPA in 2016 notified Complex residents that high levels of lead had been found near the Complex. Shortly thereafter, the East Chicago mayor sent a letter to Complex residents advising them that the land upon which it was built was contaminated with lead. The letter advised them to move as soon as possible.

Cristobal Alvarez and over three hundred former Complex residents (“Plaintiffs”) filed suit against the State Defendants and multiple city authorities (“City Defendants”). Plaintiffs alleged that State Defendants:

1. Negligently failed to warn Complex residents about the lead contamination and
2. Committed intentional infliction of emotional distress (“IIED”).

The State Defendants filed a motion for judgment on the pleadings—which the trial court denied—arguing:

1. They were immune from suit pursuant to the Indiana Tort Claims Act (“ITCA”);
2. Plaintiffs’ suit was barred by the statute of limitations; and
3. Plaintiffs failed to state a claim for IIED.

The State Defendants argued that the ITCA granted them immunity from suit because the decision of when and how to warn citizens of possible lead exposure is a discretionary function under the ITCA. The ITCA grants absolute immunity to governmental entities if a loss results from the performance of a discretionary function.

Indiana adopted the planning-operational test to determine if an act qualifies as a discretionary function. Under the test, planning functions, which involve use of official judgment and discretion to weigh alternatives and make public policy choices, are discretionary. However, operational functions which involve execution of already formulated policy are not.

State Defendants contended that their decision not to warn citizens about the lead contamination was a discretionary function. This was based on their argument that it required them to make political, social, and economic judgments. To bolster their contention, they pointed to a federal decision interpreting the Federal Tort Claims Act (“FTCA”).

The FTCA is arguably similar to the ITCA. The Seventh Circuit Court of Appeals held that the EPA’s decision not to warn homeowners about contamination involved political, social, and economic judgments. Therefore, it was held to fall within the discretionary function exception to the FTCA. See *Cisco v. United States*, 768 F.2d 788, (1985).

The Court was not persuaded by State Defendants’ analogy to the FTCA. It noted, first, that, while Indiana courts must use the planning-operational test when evaluating immunity under the ITCA, federal courts do not use the planning-operational test in evaluating discretionary function immunity under the FTCA.

The Court concluded that the FTCA is interpreted more broadly in favor of immunity than the ITCA. Further, under the ITCA, the governmental entity must prove that discretionary function immunity applies to its conduct. The FTCA required that the plaintiff must prove discretionary function immunity does not apply to the governmental entity’s conduct.

The Court found that the decision not to warn citizens of possible lead exposure is not a planning function. It was, therefore, not shielded from liability under the ITCA. The trial court was held to not have erred in denying State Defendants’ motion regarding discretionary function immunity.

Second, State Defendants argued that, under the ITCA’s vicarious liability immunity, they could not be held liable where the duty to notify the Plaintiffs of the presence of lead in the soil fell to the City Defendants. The Court noted that the ITCA grants governmental entities immunity from acts or omissions of anyone other than the governmental entity or its employees.

The Court rejected this argument. It found that even though Plaintiffs alleged wrongful conduct by both the State Defendants and the City Defendants, they maintained that State Defendants were liable for their own actions, not those of the City Defendants. Thus, State Defendants were not entitled to judgment on the pleadings of the ground of vicarious liability immunity.

Third, State Defendants argued that 109 of the 315 Plaintiffs were barred from filing the lawsuit because their personal injury action was required to be filed within two years of the date the Plaintiffs discovered or should have discovered the lead contamination. State Defendants contended that Complex residents knew or should have known about the elevated lead levels and exposure after the EPA designated the area surrounding the Complex a Superfund site in 1993.

The Plaintiffs responded that they did not realize there was a possibility of harm until the Mayor sent the July 2016 letter advising the Complex residents to move.

The Court determined that Plaintiffs alleged facts indicating they might prevail on their claim notwithstanding the statute of limitations issue. The question of when the Plaintiffs discovered or should have discovered the lead contamination was deemed a factual dispute to be decided at trial rather than on a pre-trial motion. The trial court did not err in denying State Defendants' motion based on the statute of limitations.

Fourth, the State Defendants argued the doctrine of issue preclusion prohibited the 109 Plaintiffs from suing because they attempted to intervene in a previous lawsuit concerning the lead contamination. Their motion to intervene was denied.

The Court explained that issue preclusion bars any later litigation of a fact or issue that has already been ruled upon in a prior lawsuit. Complex residents filed a motion to intervene in the previous lead contamination lawsuit because of the lack of progress the EPA was making in cleaning up the area surrounding the Complex. In denying their motion, the Circuit Court noted that the Complex residents filed suit more than two years after the previous lead contamination case had been closed.

The Court, disagreeing with State Defendants' argument, noted that the considerations determining whether to allow intervention into a federal lawsuit are different and more complex than those determining whether the statute of limitations bars suit. Accordingly, the statute of limitations issue was not ruled upon in the prior lead contamination lawsuit and issue preclusion did not bar Plaintiffs' suit.

Finally, State Defendants argued that Plaintiffs failed to sufficiently state a claim for IIED because:

1. The alleged conduct of State Defendants was not extreme and outrageous and
2. The complaint does not allege any intentional action by an individual State actor.

The Court explained that to establish an IIED claim, Plaintiffs must show that State Defendants engaged in extreme and outrageous conduct which intentionally or recklessly caused severe emotional distress. Further, it stated that if reasonable people could have different opinions as to the outrageousness of the alleged conduct, the matter should not be dismissed on a pre-trial motion.

The Court found that, based on the Plaintiffs' allegations, a reasonable person could conclude that State Defendants' conduct was extreme and outrageous. Thus it should not be dismissed on a pre-trial motion.

The Court also noted that the lawsuit was at the pleading stage and the Plaintiffs had not yet been able to conduct discovery. It determined that, although Plaintiffs had not yet alleged any intentional action by an individual State actor, discovery would allow the Plaintiffs to determine which individual State employees acted intentionally to cause their emotional distress. The trial court did not err in denying the State Defendants' motion regarding the IIED claim.

The Court affirmed the trial court's denial of State Defendants' motion for judgment on the pleadings.

A copy of the Opinion can be downloaded [here](#).