[Cite as *Patterson v. Ahmed*, 2010-Ohio-4160.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Deirdre Patterson, et al.	Court of Appeals No. L-09-1222
Appellants	Trial Court No. CI0200805272
v.	
Tahira Ahmed, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: September 3, 2010

* * * * *

Lawrence J. Buckfire, for appellants.

Janet Callahan Barnes and Robert B. Holt, Jr., for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas regarding claims against a landlord for damages resulting from the ingestion of lead-based paint. Through a sole assignment of error, plaintiffs-appellants, Deidre Patterson, individually and on behalf of her children, Tiarra B. and Shaniece K.,

challenge an order granting summary judgment in favor of defendants-appellees, Tahira and Sajjad Ahmed[1]:

{¶ 2} "The trial court erred to the prejudice of plaintiffs-appellants when it granted summary judgment to defendants-appellees because there were genuine issues of material fact on whether the defendants-appellees had actual and/or constructive notice of the existence of lead-based paint hazards on their rental property, prior to being informed that the minor plaintiff had lead poisoning."

{¶ 3} The undisputed facts of this case are as follows. In March 1996, appellant and her children moved into a rental home at 304 Hillwood in Toledo, Ohio. The home was owned by appellee Sajjad Ahmed ("Sajjad") and the rental payments were funded by the Section 8 program of the United States Department of Housing and Urban Development ("HUD"). On March 16, 1996, a blood test revealed that Tiarra, then approximately five months old, had a blood lead level of 5 micrograms per deciliter ("ug/dl"). On October 16, 1996, Tiarra's blood lead level had increased to 11 ug/dl, and by January 16, 1997, it had reached 23 ug/dl. In July 1995, Shaniece, then four years old, had a blood lead level of 7 ug/dl. Approximately three months after moving into 304 Hillwood, Shaniece's blood lead level had increased to 12 ug/dl. A blood lead level of 10 ug/dl or above is sufficient to be classified as lead poisoning according to standards

[1]The parties agree that Tahira Ahmed was dismissed from this case by stipulation of the parties. The record, however, contains no filed stipulation and the trial court's judgment on appeal refers to "defendants." We will, therefore, refer to appellees (plural) throughout this decision although appellants' claims all appear to be based on the alleged actions of Sajjad Ahmed.

promulgated by the Centers for Disease Control. At some point, although it is not clear precisely when, the home was repainted and the children's blood lead levels dropped. Appellants continued to live in the home until 2000.

{¶ 4} The home at 304 Hillwood is approximately 90 years old. Sajjad bought the property in January 1996 to use as a rental property. Several years earlier, Sajjad had become a licensed real estate agent, but testified that he only worked in that position for two days as he did not like it. At the time of the proceedings below, Sajjad owned 18 rental properties and was in the business of being a landlord, but the home on Hillwood was one of the first properties he bought for this purpose. When Sajjad purchased the home, the previous owner had freshly painted the entire interior and Sajjad testified at his deposition that the home was in excellent condition. Because appellants were Section 8 tenants, the Lucas County Metropolitan Housing Authority ("LMHA") inspected the house before they moved in. Sajjad could not produce the inspection report, but testified that the home passed inspection. Indeed, because appellants moved in, we presume that the home did pass inspection.

{¶ 5} In January 2006, appellants filed a complaint in the court below seeking damages for injuries to Tiarra and Shaniece they claimed were the result of exposure to lead-based paint hazards while they lived at the Hillwood home. Appellants alleged that appellees knew or should have known of the presence of lead paint in the home and that children susceptible to harm by lead paint would be occupying the structure. Appellants further asserted that appellees' failure to adequately and timely abate the dangerous

condition violated the warranty of habitability, local and state building ordinances and safety codes, and federal disclosure laws[2]. Ultimately, the trial court granted appellees' motion for summary judgment. Although appellees asserted in their summary judgment motion that appellants could not show that appellees had notice of any defective condition in the premises and could not produce evidence that there was, in fact, a lead hazard in the house during their tenancy, the lower court granted appellees summary judgment upon finding that appellants presented no evidence that the paint in the house was the proximate cause of the children's injuries or that the children were, in fact, injured.

{¶ 6} Upon appeal, we reversed the judgment of the trial court on the basis that the court had granted summary judgment on a ground not specified in the motion for summary judgment. See *Patterson v. Ahmed*, 176 Ohio App.3d 596, 2008-Ohio-362. Upon further proceedings in the trial court, appellants dismissed their initial action and re-filed their claims in the present case. Again, appellees filed for summary judgment. In that motion, appellees asserted that under either a statutory or common law theory of recovery, appellants had to, but would be unable to, show that appellees had actual or constructive notice of the lead-based paint hazard before the minors were injured. For the purposes of the motion, appellees accepted that Tiarra's injury occurred no later than

[2]Appellants appear to have abandoned their claims based on violations of local and state building ordinances and safety codes, and federal disclosure laws. We will therefore only address the claims based on negligence and violations of the warranty of habitability.

October 16, 1996, when her blood lead level reached 11 ug/dl, and that Shaniece's injury occurred no later than June 11, 1996, when her blood lead level reached 12 ug/dl. Appellees further asserted that there was no evidence of any lead-related hazard in the home during the time of appellants' tenancy, and that there was no evidence that the minors were injured or damaged as a result of lead exposure. In support of their motion, appellees submitted Sajjad's deposition testimony and affidavit, the deposition testimony of Deidre Patterson, and medical records documenting the minor plaintiffs' blood lead level test results. Appellees asserted that, based on this evidence, it was undisputed that they did not have actual or constructive notice of a lead-paint related hazard or defect in the rental property before the alleged injuries occurred and, so, appellants could not sustain their claims under any theory of recovery.

{¶ 7} In their opposition to appellees' motion, appellants asserted that a genuine issue of material fact remained on the issue of notice because: Deidre Patterson complained to Sajjad about peeling and chipping paint on the windows; the home was built in 1912; Sajjad was experienced in the Section 8 housing program and knew that the program would not approve the rental if there were problems with peeling and chipping paint; there was circumstantial evidence that Sajjad received documents from Section 8 inspections that specifically referenced lead paint as a hazard; Sajjad had extensive experience as a landlord; there was circumstantial evidence that Sajjad received documents from the Ohio Department of Commerce Division of Real Estate that specifically referenced lead paint as a hazard in homes built before 1978 and the required

lead disclosures; Sajjad's real estate classes would have included instruction in state and federal law affecting the real estate industry, including the Residential Lead-Based Paint Hazard Reduction Act, Section 4851 et seq., Title 42, U.S.Code ("Title X"), and the respective required forms which discuss the hazards of lead paint in homes built prior to 1978; and Sajjad had a high level of education.

{¶ 8} On July 28, 2009, the lower court issued an opinion and judgment entry granting appellees' motion for summary judgment and dismissing appellants' complaint. In particular, the court found that there was nothing in the record to suggest that appellees had actual or constructive notice that the property contained lead paint prior to the minor plaintiffs' diagnoses of lead poisoning. Appellants now challenge that judgment on appeal.

{¶ 9} Appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio

St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 10} Appellants assert that the lower court erred in granting appellees summary judgment because genuine issues of material fact remained concerning whether appellees had actual or constructive notice of the existence of lead-based paint hazards on the rental property.

{¶ 11} Appellant Patterson maintains that the source of the lead in her children's bodies was paint chips from the windows in the 90-year-old Hillwood house. A lead-based paint inspection conducted in 2007 found lead-based paint in several areas throughout the house. Construed in appellants' favor, as we must for summary judgment purposes, this court finds, as did the trial court, that the presence of lead-based paint in the home in 2007 creates an inference that it was also there when appellants resided in the home from 1996 through 2000.

{¶ 12} The issue of notice is critical to appellants' claims against appellees. Recently, in *Lowery v. Ondrus*, 6th Dist. No. L-08-1100, 2009-Ohio-46, a case similar to the one now before us, we discussed in detail the issue of notice in cases seeking to recover damages for personal injuries allegedly caused by the ingestion of lead-based paint during a tenancy.

{¶ 13} "R.C. 5321.04(A) pertinently provides:

{¶ 14} "'(A) A landlord who is a party to a rental agreement shall do all of the following:

{¶ 15} "'(1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety:

{¶ 16} "'(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition; * * *.'

{¶ 17} "A landlord's violation of the duties imposed by R.C. 5321.04(A)(1) or (2) constitutes negligence per se; but a landlord will be excused from liability under either section if he neither knew nor should have known of the factual circumstances that caused the violation. *Sikora v. Wenzel*, 88 Ohio St.3d 493, * * * 2000-Ohio-406, syllabus. Either actual or constructive notice is sufficient to constitute 'notice' to the landlord. See *Richardson v. Boes*, 6th Dist. No. L-08-1015, 2008-Ohio-6173.

{¶ 18} "As stated by this court in *Richardson,* supra, 'The concept of "actual notice" is not limited to notice that a specific condition exists and that it is harmful.' Id. at ¶ 29. "'[I]f it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make an inquiry, or having begun it fails to prosecute in a reasonable manner, then, also, the inference of actual notice is necessary and absolute."' *G/GM Real Estate Corp. v. Susse Chalet Motor Lodge of Ohio, Inc.* (1991), 61 Ohio St.3d 375, 380, * * * (quoting *Cambridge Prod. Credit Assn. v. Patrick* (1942), 140 Ohio St. 521, 532-33 * * *).

{¶ 19} "'Constructive notice,' on the other hand, refers to 'that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge.' *Cox v. Estate of Wallace* (Dec. 31, 1987), 12th Dist. No. CA87-06-078. Constructive notice of an unsafe condition can be proven by showing that the unsafe condition 'existed in such a manner that it could or should have been discovered, that it existed for a sufficient length of time to have been discovered, and that if it had been discovered it would have created a reasonable apprehension of a potential danger or an invasion of private rights.' *Beebe v. Toledo* (1958), 168 Ohio St. 203, * * * paragraph two of the syllabus.

{¶ 20} "Notice that paint is chipping and peeling, by itself, is 'not tantamount to notification of the presence of lead-based paint in the premises.' *Winston v. Sanders* (1989), 57 Ohio App.3d 28, * * *; *Murphy v. Leo Baur Realty, Inc.* (Oct. 21, 1993), 8th Dist. No. 63756. 'However, when combined with other evidence demonstrating the landlord's knowledge that lead-based paint probably exists on the premises, such notice is relevant to the question of whether the landlord knew or should have known of the hazard of lead-based paint exposure on his premises.' *Richardson*, supra at ¶ 41." Id. at ¶ 17-24.

{¶ 21} In *Lowery*, we further determined that, given the relevant City of Toledo Health and Housing codes, including Toledo Municipal Code Chapter 1759 – Toxic Substances, and its attendant regulation, Lead Paint Poisoning Regulation A 1-72, the landlords were charged with constructive knowledge of the hazards of lead-based paint in

housing, particularly as they relate to children. Id. at ¶ 25 and 32. Toledo Municipal Code 1759.02(c) provides in relevant part:

{¶ 22} "Every owner of a dwelling, dwelling unit, rooming house and/or rooming unit * * * shall maintain such dwelling, dwelling unit, rooming house and/or rooming unit * * * free from hazards to health due to the presence of lead based paint or other toxic substances. * * *."

{¶ 23} Toledo Municipal Code 1759.02(a) then declares that a "lead based paint hazard" exists "when an interior or exterior surface coated with lead based paint is readily accessible to and chewable by children under six years of age even though such surface is intact and its integrity is uninterrupted, or when the integrity of a surface containing lead based paint is interrupted or not intact."

{¶ 24} These provisions of the Toledo Municipal Code were in existence when Sajjad bought the Hillwood home in 1996. Consistent with our decision in *Lowery*, we find that appellees are charged with constructive knowledge of the hazards of lead-based paint in housing, particularly as they relate to children.

{¶ 25} The critical issue in this case, however, is when appellees knew or should have known that the Hillwood home contained lead-based paint. In the proceedings below, the deposition testimony and affidavits of Sajjad and Deidre Patterson, along with documentary evidence, were submitted in support of the parties' motions. That evidence reveals the following.

{¶ 26} Sajjad testified that he is originally from Pakistan and moved to the United States in 1978. While he became a licensed real estate salesperson in the early 1990s, he stated that his class work and licensing test never covered the issue of lead-based paint, and that he first learned of the dangers of lead-based paint, particularly as they relate to children, when he received a letter from appellants' attorney regarding the lawsuit. While at the time of the deposition he owned approximately 18 rental properties in Toledo, Sajjad stated that the home on Hillwood was one of the first rental properties that he bought. When he bought the home in January 1996, it had been freshly painted and appeared to be in excellent condition. Deidre Patterson and her children, who moved in in March 1996, were the first tenants. Prior to their tenancy, however, the house had to pass an inspection by the Section 8 program through the LMHA. While Sajjad did not have a copy of the inspection report, he testified that the inspection included looking for chipping paint in the window sills and that the home passed the inspection. With regard to appellants, Sajjad denied that Deidre Patterson ever told him that her children had been diagnosed with lead poisoning while she lived in the home and denied that Patterson ever asked him to paint any portion of the property while she lived there. In his affidavit, Sajjad similarly denied that Patterson ever notified him of any problem or concern regarding lead-based paint at the home.

{¶ 27} In her deposition, Deidre Patterson testified that when she first moved into the home, the paint was in good condition. When the weather turned warmer, however,

she began opening the windows and it was then that she first noticed peeling and chipping paint.

{¶ 28} "Q. And you saw the chips that had been created by the act of you opening the window?

{¶ 29} "A. Right.

{¶ 30} "Q. So what did you do?

{¶ 31} "A. Well, like I said, I would vacuum the paint up, you know, clean it up the best that I could. Then at the time when I was told that the kids' levels were up and it's probably coming from the house somewhere, then at that time I would contact the landlord, Mr. Ahmed, to come and paint, and like I said, it took time until Section Eight was more forceful with it.

{¶ 32} "* * *

{¶ 33} "Q. Did you do anything to contact Section Eight?

{¶ 34} "A. Section Eight didn't come back into the picture until I was told that they may be getting it from somewhere in the house with the paint and everything, so that's when Section Eight came into the picture as far as the lead.

{¶ 35} "Q. Who told you that the children may be getting lead somewhere in the house?

{¶ 36} "A. One of the doctors I believe that saw them at the time.

{¶ 37} "Q. When did that occur?

{¶ 38} "A. I don't know for sure.

{¶ 39} "Q. Do you know how long in terms of weeks or months or years after you were first notified of high lead levels when someone first said it may be the house?

{¶ 40} "A. Okay. What are you asking me?

{¶ 41} "Q. Well, you were notified that the kids may have high lead levels, correct?

{¶ 42} "A. Correct.

{¶ 43} "* * *

{¶ 44} "Q. All right. Did you know at that point that it could be the house?

{¶ 45} "A. When I was told, yes.

{¶ 46} "Q. So you knew the very first time you were notified that it could be the house?

{¶ 47} "A. I didn't know that until I was told that it could be from the house.

{¶ 48} "Q. All right. And what I'm trying to get at is how much time passed between the notification that there was some high lead level in one of your children and the time when someone told you it could be the house?

{¶ 49} "A. I don't know.

{¶ 50} "Q. Okay. And the first time you did anything with Section Eight was when you were told it could be the house?

{¶ 51} "A. Yes.

{¶ 52} "Q. And you tell me, what did you do with Section Eight?

{¶ 53} "A. Well, I believe Section Eight contacted me with the, about the high lead levels and that the landlord had to be notified, you know, to repaint the house and that at that time on my own I would, you know, notify the landlord and ask for the house to be repainted and nothing was done.

{¶ 54} "I don't know the timeframe or nothing was done until they – you know, they would revoke the rent money unless the house, you know, is up to par, so when that came into the picture, then the house was painted.

{¶ 55} "Q. Okay. I think I follow you. I want to make sure though. Before you notified Section Eight did you talk with Mr. Ahmed about repainting the house?

{¶ 56} "A. I didn't talk to him until I was told that it was the house, that it probably was the house.

{¶ 57} "* * *

{¶ 58} "Q. All right. So Section Eight contacts you and at that point do you contact Mr. Ahmed?

{¶ 59} "A. Yes.

{¶ 60} "Q. Okay. And you tell him what?

{¶ 61} "A. About the lead levels and that the house needed to be painted.

{¶ 62} "Q. What did he say?

{¶ 63} "A. Something to the nature that he would do it."

{¶ 64} Following this deposition, Deidre Patterson executed an affidavit in which she tried to address the notification issues. Patterson attested that immediately upon

discovering the problem of the chipping paint on the window sills, a few months after she moved in, she complained to Sajjad, who promised he would repaint the areas. Patterson further attested, however, that Sajjad did not take action to remove or repaint the areas of peeling and chipping paint until several months later when Tiarra's lead level reached 23 in January 1997 and the Section 8 office got involved and pressured him to make the repairs. In our view, this directly contradicts her deposition testimony that she did not notify Sajjad that there was peeling and chipping paint and that the house needed to be repainted until after she learned that the girls' high lead levels may be coming from the house.

{¶ 65} Appellants assert that Patterson's affidavit creates a genuine issue of material fact as to whether appellees knew there was peeling and chipping paint in the house prior to the health department's involvement. We disagree. It is well settled that "[a]n affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, paragraph three of the syllabus.

{¶ 66} We therefore conclude that the record only supports a finding that appellees neither knew nor should have known of the peeling and chipping paint until after the girls had been diagnosed with lead poisoning. Accordingly, it was only then that appellees learned of the presence of lead-based paint on the property.

{¶ 67} Appellants assert, however, that the facts and circumstances of this case create a genuine issue of material fact as to when appellees had constructive notice of the presence of lead-based paint in the Hillwood home. Appellants contend that given Sajjad's experience with the Section 8 housing program and his education and experience in the real estate business, he had constructive notice of the presence of lead-based paint in the home before the children were injured.

{¶ 68} With regard to Sajjad's experience with the Section 8 housing program, it must be noted that while he may now be experienced in the Section 8 housing program, the Hillwood home was one of his first rental properties. The home had also been freshly painted by the prior owner. Appellants contend, however, that as early as 1992, all landlords participating in the Section 8 program and receiving housing subsidy payments from the LMHA were provided written information regarding lead-based paint and the potential health hazards that might be caused by peeling, chipping, and flaking lead-based paint particles. It is undisputed, however, that the home passed the inspection required by the Section 8 program prior to appellants' tenancy. The actual inspection documents regarding the Hillwood home appear to have been destroyed. Nevertheless, appellants included, in the record below, a Section 8 inspection form that they contend is in all relevant parts the same as the form used to inspect the Hillwood home. Assuming, for purposes of summary judgment, that this is true, the document asks: "Are all interior surfaces either *free* of cracking, scaling, peeling, chipping, and loose paint or *adequately treated and covered* to prevent exposure of the occupants to lead-based paint hazards?"

Connected to this question is the note: "This requirement applies to all painted interior surfaces within the unit * * * that are chipping, peeling, cracking. * * * In order to fail, the paint must be noticeably loose and separating from the surface material. The requirement enables assessment * * * of conditions strongly associated with lead-based paint poisoning. If any surface in the room has chipping, peeling, or cracking paint it fails, regardless of whether the paint has been tested for lead content." Accordingly, the inspection looked for chipping, peeling, or cracking paint, whether lead-based or not. Because the Hillwood home passed the Section 8 inspection upon Sajjad's purchase of the home and prior to appellants' tenancy, we cannot say that appellees should have known that a lead-based paint hazard existed on the property. See, generally, *Lowery*, supra; *Knox v. Clark*, 5th Dist. No. 03 CA 95, 2004-Ohio-4461; *Rice v. Reid* (Apr. 23, 1992), 3d Dist. No. 3-91-34; *Murphy v. Leo Baur Realty, Inc.* (Oct. 21, 1993), 8th Dist. No. 63756.

{¶ 69} Appellants next contend that given Sajjad's education and experience in the real estate business, a question of fact remains regarding whether he had constructive notice, prior to the children's diagnosis, that the home may contain lead-based paint. Appellants assert that because Sajjad attended classes and obtained his real estate license in 1990, his instruction likely would have included the federal laws affecting lead-based paint in residential properties, particularly the Residential Lead-Based Paint Hazard Reduction Act, Section 4851 et seq., Title 42, U.S.Code, commonly referred to as Title X.

{¶ 70} The record reveals that in August and September 1990, Sajjad took four real estate classes at Davis College in Toledo, Ohio: real estate finance, real estate appraisal, principles and practices, and real estate law. Nothing in the record indicates the specific topics that were covered in these courses. Regardless, Title X was not passed until 1992 and Sajjad only worked as a real estate salesman for two days in approximately 1991. Appellants have not countered these facts with any additional facts that would raise an issue as to whether Sajjad's experience in the real estate business would put him on notice that the Hillwood property contained lead-based paint.

{¶ 71} We therefore conclude that the record cannot support a finding that appellees had constructive notice that the Hillwood home contained lead-based paint prior to being notified that Deidre Patterson's children had lead poisoning and that it may be from the house. The trial court properly granted appellees summary judgment and the sole assignment of error is not well-taken.

{¶ 72} On consideration whereof, the court finds that substantial justice has been done the parties complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE