

**STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**Docket No. 2019-0092**

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**Sandra Moscicki –v- Charles Leno, et. al.**

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**BRIEF OF APPELLEE  
CHARLES AND HEIDI LENO**

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**Christopher J. Seufert will present oral  
argument on behalf of Charles and Heidi Leno**

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### **QUESTION PRESENTED**

Whether in this jurisdiction in a toxic tort case the dose-response relationship for the toxin at issue as recognized in the scientific literature is an inherent or implicit and necessary component of the methodology that an expert witness must consider and/or include in his or her opinion as a condition or prerequisite for admissibility at trial under RSA 516:29-a, and, if not considered or included, must the expert's testimony be excluded where the expert's opinion is otherwise based on reliable data and methodology.

## **RELEVANT STATUTORY PROVISIONS**

### **516:29-a. Testimony of Expert Witnesses.**

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**I.** A witness shall not be allowed to offer expert testimony unless the court finds:

- (a)** Such testimony is based upon sufficient facts or data;
- (b)** Such testimony is the product of reliable principles and methods; and
- (c)** The witness has applied the principles and methods reliably to the facts of the case.

**II.**

**(a)** In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:

- (1)** Have been or can be tested;
- (2)** Have been subjected to peer review and publication;
- (3)** Have a known or potential rate of error; and
- (4)** Are generally accepted in the appropriate scientific literature.

**(b)** In making its findings, the court may consider other factors specific to the proffered testimony.

### **516:29-b. Disclosure of Expert Testimony in Civil Cases.**

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**I.** A party in a civil case shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the New Hampshire rules of evidence.

**II.** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report signed by the witness. The report shall contain a complete statement of:

- (a)** All opinions to be expressed and the basis and reasons therefor;
- (b)** The facts or data considered by the witness in forming the opinions;
- (c)** Any exhibits to be used as a summary of or support for the opinions;
- (d)** The qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;
- (e)** The compensation to be paid for the study and testimony; and
- (f)** A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.

**III.** These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required in accordance with the court's rules.

**IV.** The deposition of any person who has been identified as an expert whose opinions may be presented at trial, and whose testimony has been the subject of a report under this section, shall not be conducted until after such report has been provided.

**V.** The provisions of this section shall not apply in criminal cases.

## **STATEMENT OF THE CASE AND STATEMENT OF THE FACTS**

1. Matthew Leno and Maureen Leno, (fraternal twins with DOB 7/8/08), were exposed to chipping and peeling lead paint in an apartment rented to the Leno family by Moscicki (Appellee, Brief Addendum, p. 30-37).
2. Prior to moving into the rental, Matthew and Maureen were healthy children, normal pregnancy, birth, neonatal and infancy period were all within normal limits. Matthew walked at 11 months, Maureen at 10. (Moscicki App. p. 64-65, 76)
3. When the twins were 14-months old, the family moved into the subject rental on a 1-year lease. (Moscicki App p. 20). Maureen's blood lead level was tested shortly thereafter, and was 3.7 ug/dl. Matthew's was 4.6. (Moscicki App. p. 66 & 77). Both levels show exposure to lead.
4. The twins blood lead levels were again tested on July 29, 2010 where Maureen's had risen to 19, and Matthew's to 17. (Moscicki App. p. 66 & 77).
5. The Center for Disease Control establishes childhood lead poisoning level at 5 ug/dl, but cites the current "research as showing that no safe blood level has been identified" (Moscicki App. p. 451), therefore the twins testing shortly after moving in was just under this, but 8-months later, had risen to substantially above.
6. The family vacated the rental in July 2010. (Moscicki App. p.32)
7. Shortly after leaving the rental, Matthew became involved in home-based therapeutic services with assessments showing delays in expressive language, receptive language, cognitive skills, fine motor skills and social/emotional functioning. Matthew's parents reporting that he had been consistently using 1-3 word phrases from March 2010 until June 2010, but was no longer using these phases. (Moscicki App. p. 483-484)
8. Matthew has an IEP in developmental delay (global), is below grade level in math, reading, and writing, is not able to read, write or calculate. He can follow routine but melts down if there is a change in daily routine. He is described as anxious, defiant, stubborn, and inattentive. (Moscicki App. P. 75-76)
9. As for Maureen, she had Title 1 supports beginning in Kindergarten and into first grade, but does not have an IEP. Her first grade teacher stated that Maureen was

below grade level in reading and math, and far below grade level in writing. She has difficulty understanding directions, completing work, reading, and writing and knew only basic (easy) math. She is described as having difficulty finishing tasks, sitting still, following directions, and concentrating on her work. (Moscicki App. 64).

10. Leno' psychology expert, Peter Isquith, PhD. issued an expert report that concludes that Maureen has ...weaknesses in immediate and working memory and speed of processing and is at risk for attention deficit and academic deficits. Elevated blood lead levels, particularly in the first few years of life, are an established risk factor for adverse developmental outcomes, and are associated with lower IQ, attention problems, and poorer long-term academic achievement. Given the known associations between lead exposure and adverse developmental outcomes and the specifics in this case, it is more likely than not that lead is a substantial contributing factor to Maureen's ongoing attention and self-regulatory vulnerability and her academic performance deficits.

(Moscicki App. p. 73)

11. Dr. Isquith also evaluated Matthew and found that he has ...global deficits in cognition and communication complicated by deficits in motor planning and sequencing, ability to adjust to change, self-regulation, and anxiety with the majority of test scores very low, but his teachers and family view him as a sweet little boy who is generally happy and cooperative and who is making slow gains in school. He meets the criteria for Intellectual Disability. While Matthew's neurodevelopmental disorder is striking in the context of the known risk factors, there were no neonatal problems, and medical history reveals no concerns. Matthew's elevated blood lead levels are the most prominent risk factor. Levels between 10 and 20, and onset between 15 and 24 months, have known association with loss of intellectual function and increased risk of other developmental deficits affecting attention, self-regulation, visuospatial functioning and other domains. It is more likely than not that the lead exposure is a substantial contributing factor to Matthew's deficits.

(Moscicki App. p. 85-86)



**12. Leno's medical pediatric expert, Robert Karp, MD. issued an expert report on**

Maureen that concludes that ...Maureen is a well socialized child with developmental concerns and interventions of a special Title I program to address learning issues. The underlying elements of information processing are likely to affect her future development, and will affect the skills achieved, and are likely to have an impact on her future work and life achievements. Maureen's birth was normal, no evidence of substance or alcohol abuse during pregnancy...all vaccines were given on schedule, growth was appropriate. She was never anemic. The only abnormality noted in the record was lead exposure and poisoning. In my opinion, to a reasonable degree of medical certainty, Maureen Leno was exposed to lead, experienced lead poisoning at a young age, at high levels, and over a sustained period of time.

(Moscicki App. p. 281-285)

**13. Dr. Karp conclusions regarding Matthew are that ...Matthew has global delays in his academic skills, inability to go beyond one step commands, many errors in speech itself, a difficult time with fine motor, visual motor and gross motor tasks, a loss of intellectual functioning and an increased risk of developmental deficits affecting attention, self-regulation, visual special functioning and other domains. Matthew birth was normal, no evidence of substance or alcohol abuse during pregnancy, all vaccines were given on schedule, growth was appropriate. He was never anemic. Matthew was likewise exposed to lead at least by 15 months of age at levels recognized as poisoning, with a peak of 17 and persistence of poisoning through 36 months of age. In my opinion, to a reasonable degree of medical certainty, Matthew Leno was exposed to lead, experienced lead poisoning at a young age, at high levels, and over a sustained period of time, the consequences of lead poisoning are readily apparent. These are certain to affect his achievement of his full potential for employment or life satisfaction.**

(Moscicki App. p. 282-286)

**14. Moscicki's psychological expert, Robert McCaffrey, Ph.D issued a report that states that ...in Maureen case, her overall cognitive status is within normal limits... Based on my review of the medical records**

and educational records they provide no evidence to support a diagnosis for Attention-Deficit/Hyperactivity Disorder. None of the teacher ratings fell within the clinically significant range. Maureen is consistently meeting expectations (i.e., produces quality work) in Mathematics, Social Studies, and Penmanship, while meeting some expectations (i.e., requires extra practice and assistance) in Reading, Writing and Dictation/Spelling.

(Moscicki App. p. 487)

15. As for Matthew, Dr. MacCaffrey concludes that ...Matthew has developmental history, neuropsychological profile, and adaptive skills characteristic of child with an Intellectual Disability of at least moderate severity. He has required special education services, and has made slow progress academically, which is consistent with a child with at least a moderately severe Intellectual Disability. Matthew's history of elevated blood lead levels cannot account for his current status. There have been many epidemiological studies identifying an association between elevated blood lead levels and intellectual functioning and some of this research has yielded estimates regarding the decrement in intellectual functioning associated with various blood lead levels, but the findings from these epidemiological studies are not directly applicable to the individual. The extrapolation of findings from epidemiological studies to a single individual is known as the *ecological fallacy*, which refers to the erroneous conclusion that a statistical relationship demonstrated at a group level also holds when applied to an individual, but the results from epidemiological studies regarding elevated blood lead level and intelligence would in no way account for degree of Intellectual Disability that Matthew exhibits.

(Moscicki App. 486-487)

16. Moscicki has also retained a medical expert, David Mandelbaum, MD, who issued a report that states ...Matthew and his twin sister Maureen have a history of lead exposure, with the peak lead levels of 17 and 19 respectively. Maureen is doing well and shows no evidence of adverse sequelae from her history of lead exposure. Matthew, whose lead level was slightly lower than his sister's has significant neurodevelopmental problems that cannot be attributed to his history of lead exposure.

(Moscicki App. p. 480)

### SUMMARY OF THE ARGUMENT

17. Moscicki's principal argument, that Leno must show that the lead poisoning is **the cause, or the sole cause, or even the proximate cause** of the children's present presentation, is contrary to a long line of NH jurisprudence, and is not what Leno's experts are saying. Leno's experts are only saying that the lead paint poisoning of the children is a **substantially contributing cause** of their deficits, and this is all that NH law jurisprudence requires.
18. Leno's experts say that the modern research is now nearly universal that there is no "threshold effect" below which lead poisoning does not cause injury to children, so to suggest that the *Lipitor* type caselaw is controlling is a false premise.
19. Leno's experts acknowledge the large body of research showing the multiple effects of childhood lead poisoning, from loss of IQ, to loss of executive function, developmental issues and behavioral dysfunction, so to suggest that loss of IQ is the best, or only measure, is a false premise. While IQ is very important in terms of population studies, a child's associated losses from lead poisoning cannot be measured simply by IQ.

## ARGUMENT

### SUBSTANTIAL CONTRIBUTING CAUSE

20. Moscicki's argument is that Matthew has impacts that cannot have been "caused" by his lead paint poisoning, but this misses the point.
21. NH Civil Jury Instruction 6.1 (2014 edition) states that... *"in determining whether the defendant's conduct was the legal cause of the plaintiff's injury, you need not find that the defendant's conduct was the sole cause of the injury. You need only find that it was a substantial factor in bringing about the injury, even though other factors may also have contributed to cause the injury."*
22. Moscicki's M.D. expert, Mendelbaum, position to the trial court, was:
- Q. *"Is there anything in the scientific literature that would support the concept that a dose of 17 micrograms per deciliter can **cause** that catastrophic loss [loss of 60 IQ points]?"*
- A. *There is not.*
- (Moscicki App. p. 196)
23. Moscicki's Ph.D. expert McCaffrey position was:
- Q. *"Now doctor, would you agree with me that there are no facts or data to support the opinion of Dr. Isquith that lead **could have this severe** an effect given this level of lead?"*
- A. *"I'm aware of no published literature, case study or anything else that would indicate that a 17 microgram per deciliter **would result** in an IQ of 40 when the expectant IQ would have been somewhere in the average range"*<sup>1</sup>
- (Moscicki App. p.248)

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<sup>1</sup> Moscicki attempts to support its theoretical "60 point drop in IQ" based upon a set of assumptions, the primary being that Matthew should have had an IQ of 100 when born, and to be at a 40 IQ when tested in 2014, must have "dropped" 60 points. The Trial Court highlighted this fallacy in its 10/11/17 order: *"In addition, [Moscicki's] argument regarding a 60-point drop in IQ presupposes that Matthew's IQ would have been 100 had he not been exposed to lead. While Dr. Isquith did testify that one would expect an otherwise healthy boy in Matthew's position to be in the average range, the fact remains that his expected IQ is impossible to know. Therefore, while the precise drop in Matthew's IQ was likely significant, it is not as clear cut as [Moscicki] would argue."*

(Moscicki App. p. 9)

24. But this line of testimony misses the point. As this Court has previously held,...*“It is for this reason that instructions to the jury that they must find the defendant’s conduct to be ‘the sole cause’, or ‘the dominant cause’ or ‘the proximate cause’ of the injury are rightly condemned as misleading error”*. Peterson -v- Gray, (137 NH 374 @ 378). *“The principals governing causation require that the defendant’s conduct be both the cause-in-fact of the plaintiff’s harm and a substantial factor, rather than a slight one, in producing that harm”* Bronson -v- Hitchcock Clinic, (140 NH 798 @ 809). *“The inquiry focuses on whether the defendant’s negligence caused or contributed to cause the accident... not on whether the defendant’s negligence was the sole cause or the proximate cause...the question of proximate cause is generally left for the trier of fact”*. Brookline School Dist. -v- Bird Inc., 142 NH 352 @ 355.
25. California jurisprudence, Calif. Civil Jury Instructions 430. Causation: Substantial Factor elucidates the test as follows:

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

“The term ‘substantial factor’ has not been judicially defined with specificity, and indeed it has been observed that it is ‘neither possible nor desirable to reduce it to any lower terms.’ The courts have suggested that a force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term ‘substantial.’ For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the ‘but for’ test, has been invoked by defendants whose conduct is clearly a ‘but for’ cause of plaintiff’s injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test ‘undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.’ ” (*Rutherford, supra*, 16 Cal.4th at pp. 968—969, internal citations omitted.)

"The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (<https://www.justia.com/trials-litigation/docs/caci/400/430/>)

26. This California jurisprudence follows New Hampshire, the harm must be more than slight. Once that level is reached, the issue is left for the ultimate trier of fact.

27. Leno's M.D. expert Dr. Karp conceptualizes this best in this line of testimony:

*"... if the child had a level of 17 (lead poisoning), I would say -- whatever else is going on in the child's life, lead was a significant contributor. Maybe the lead tipped it from an 85 {IQ} to 75 or whatever, the other factors are known or unknown, fine, but lead would be --but we're getting into the and, will, or may, could or is. Could it be? Well, it could be. I would not take it alone of course..."*

(Moscicki App. p. 179)

28. Dr. Karp further clarified:

*"I'll put it in my own words, the lead level --the lead experienced by Matthew...show that he was exposed to lead at a time of sensitive development to a high level sufficient to be a contributing cause to his learning overall capacity, behavioral problems, attention problems and learning problems."*

(Moscicki App. p. 182)

29. Leno's PhD expert, Dr. Isquith put it this way:

Q. *Did what you find as far as deficit in Matthew -- were they consistent with the literature about children who had child lead poisoning?*

A. *Yes and no.*

Q. *Okay, tell us about that.*

A. *Okay. Lead is a well-known risk factor for numerous deficits -- lowered IQ, poor self-regulation or executive function, problems with attention, problems with behavior, low achievement -- there's language function. Matthew's deficits are pretty extreme and much more so than we would expect based on the numerous studies- about lead.*

Q. *Okay. So, what impact did lead have in his overall global functioning to global deficits?*

A. *I believe that lead was a substantial contributing factor.*

(Moscicki App. p. 139-140)

30. Even Moscicki's expert, Dr. Mandelbaum, conceded the following harm to Matthew's IQ:

*... "I cannot dismiss the possibility that 10 to 12 points [IQ] were attributable to lead."*

(Moscicki App. p. 210)

31. Dr. Mandelbaum also agreed :

Q *Well, what about a (loss of) 12 [IQ points]?*

A *Twelve, it's harder to know. Obviously it's bigger. It starts to get closer to a range where the difference may be meaningful. And I think it would depend on where on the curve the child falls. I think it would have more of an impact actually if he was in the middle to high range. And moving him out of that range, I think if it was in the lower range you would still be dealing with somebody who would get by but with you know I think it would take somebody out of the average to above average range.*

(Moscicki App. p. 205)

32. Moscicki's expert Dr. McCaffrey admitted this to the trial court:

Q *Okay. So if you started from an 85 IQ and went down to a 75, would that be statistically significant in that child?*

A *You know it may or it may not. One of the problems with IQ is everybody assumes that it's the engine that drives the human being.*

Q *Yeah.*

A *And it's not. There's wide ranges of IQs associated with everything, including you know the professionals sitting in this room --*

Q *Yeah.*

A *-- would demonstrate wide ranges. So I'm not exactly certain how I would go about answering that question in a completely --*

Q *Well you're the expert.*

A *-- candid manner.*

Q *I'm trying to find out.*

A *Well that's okay. But you're asking me a hypothetical, through the rabbit hole. And if we went from an 85 to a 75 --*

Q *Yeah.*

A *-- it might is probably the best I could say, knowing nothing else about this hypothetical child.*

(Moscicki App. p. 259-260)

33. Dr. Karp discussed the impact of drop in IQ when he testified as follows:

A *...Let me expand on that one...the limited options at the lower end of the spectrum. If any of us here had a drop in 10 points in our IQ level, it could affect what we were doing. We might not be able to gain entry to law school, whatever job we -- test we had to take, we might not, but I'm certain that everyone in this courtroom would have been able to find something suitable to contribute to their own well being, the well being of their family, the well being of the community, everyone would take pride. My close friend from childhood had a serious learning disability and was the manager of a junkyard and he was fantastic at it. He could tell you what was in a '53 Chevy across the junkyard and what he took out and what he put in and everything. He was able to contribute... But, when you have a developmental level start with 70, 80 -- when you get down below*



*that your options to enter become much more limited to what you can actually do. If you compound all that, the behavioral issues, then you have to ask yourself, can this person hold that job? We expect people...to be able to maintain their composure through difficult times, to be able to react to people in an appropriate way, to not engage in anti-social behavior that might occur if they have no capacity for control of behavior. And that's why lead levels affecting a child who begins at a modest, okay level are so much worse than they are if someone with more capacity has it.*

*Q So, it depends upon where he started out and then he took a hit as to where he ends up?*

*A That is correct.*

(Moscicki App. p. 183)

34. As the trial court noted in its 10/11/17 order:

*"As an initial matter, [Moscicki's] characterization of Dr. Isquith's conclusion mischaracterizes the evidence. First, it presumes that Dr. Isquith is claiming that lead is the sole cause of Matthew's deficits. Dr. Isquith in fact explicitly testified to the contrary, and his report merely concludes that lead was a substantial contributing factor, not the sole cause. Dr. Isquith also testified that he was unable to put an exact number on how much lead contributed to Matthew's deficits, but can estimate based on the literature that Matthew lost approximately 10 IQ points. While Dr. Isquith did testify that one would expect an otherwise healthy boy in Matthew's position to be in the average range, the fact remains that his expected IQ is impossible to know. Therefore, while the precise drop in Matthew's IQ was likely significant, it is not as clear cut as the plaintiff would argue." [internal citations omitted].*

(Moscicki App. p. 9)

35. Once the “more than slight” standard is reach, it becomes an issue for the trier-of-fact to determine. Accordingly, this Court should affirm the trial court’s decision in allowing both side’s experts to testify as such goes to weight of the evidence, i.e., whether lead is a substantial contributing cause to the children’s present presentation.

#### THRESHOLD EFFECT

36. As the trial court ruled, regarding the dose-response argument and the science surrounding the expected drop in IQ resulting from lead poisoning in the range suffered by Matthew:

*“[Moscicki] raises a dose-response relationship, relying in part on the Lipitor case, in which that court held that the expert could not testify because there was no evidence to support a connection between Lipitor in low doses and Type 2 Diabetes. This case is distinguishable because there is a well- established connection between lead exposure and lowered IQ score. The question here is a matter of degree, which is appropriate for cross-examination. As explained in the court's October 4, 2017 order, Dr. Isquith explicitly testified at the hearing and concluded in his report that lead was a substantial contributing factor, not the sole cause of Matthew's deficits”.*

(Moscicki App. p. 15-16)

*“While the precise impact that lead had on Matthew's deficits is up for debate, there appears to be no question that Matthew was exposed to unsafe levels of lead and that such exposure can result in deficits in IQ and executive function.”*

(Moscicki App. p. 13)

37. In the *Lipitor* case Moscicki relies upon, the plaintiffs therein were trying to prove that Lipitor at levels below 80 mg causes diabetes. The *Lipitor* court was concerned as to whether Plaintiff’s experts had a basis to opion that Lipitor can cause diabetes without specifying the precise dose at which this effect begins, in other words, was there a “threshold level” below which there was not a causative

connection. The *Lipitor* Court found that there was no scientific basis to support that Lipitor taken at levels below 80 mg can cause diabetes. This was the “threshold” for harm to be caused.

38. With lead poisoning, the CDC has concluded the “research as showing that no safe blood level has been identified.”

(Moscicki App. p. 448)

39. This is also the finding of World Health Organization in its 2010 report :

*...Recent research indicates that lead is associated with neurobehavioural damage at blood levels of 5 mg/dl and even lower. There appears to be no threshold level below which lead causes no injury to the developing human brain... “*

(Moscicki App. p. 395)

40. As Dr. Karp testified in the trial court:

*“When you look at a toxic substance you ask yourself, well, how much of this can I take without any effect. You know, perhaps you can take small amounts and not have a toxic effect...For lead there is no threshold, that's why we use zero or less than 1.4 micrograms per deciliter as a zero..”.*

(Moscicki App. p. 182)

41. As noted by Dr. Karp, at poisoning levels even less than those sustained by the Leno children the body of research show:

A Yes, I'm reading at, in 2012, the U.S. National Toxicology Program of the National Institute of Health reported that after all -- after other risk factors were accounted for, blood concentrations less than five micrograms per deciliter are strongly associated with intellectual deficits, diminished academic abilities, attention deficits, and problem behaviors. Which I believe is an answer to a question that was asked--

Q Less than five?

A *Which is why, in the article I quoted my report, is by Brent and Weitzman, but it's basically the same. There is no threshold for lead. There is no acceptable level; only zero.*

(Moscicki App. p. 168)

42. Even Moscicki's expert, Dr. McCaffrey, when asked about the various scientific studies relied upon by the CDC [Supra 2015 report] in forming their conclusion that there is no threshold effect as to the harmful effects of lead poisoning in children, admitted:

Q *We have table one.*

A *Got it.*

Q *Studies on lead and educational outcomes.*

A *Uh-huh.*

Q *So we have levels on the first study, was the North Carolina study in 2009.*

A *Yes.*

Q *Fifty-seven thousand children in the study.*

A *Uh-huh.*

Q *And they had levels of three or below?*

A *That's what's reported here.*

Q *And the findings were educational impact decreased on all grade test scores.*

A *Correct.*

Q *So that's levels below and up to three?*

A *That's correct. That's what they reported there in that study.*

Q Then we have the North Carolina study as well as the Connecticut study --

A Page 8, Roman numeral eight. I'm sorry, sir, I --

Q *On the graph.*

A *On the graph.*

Q *On the table.*

Q *So we have levels up to four at 3 years of age?*

A *Right, based on --*

Q     *Okay.*

A     *-- 57,000 and 35,000 children.*

Q     *And the findings were on the educational impact, increased likelihood of learning disabled classification in elementary school?*

A     *Yeah.*

Q     *And poor performances on tests?*

A     *That's correct.*

(Moscicki App. 262-263)

43.     While there is no “threshold level” for lead poisoning, which Moscicki’s experts do not refute, the following holding of *Lipitor* court should be noted:

*“...While Pfizer’s expert may disagree about the biological plausibility piece or weigh the small size of the association differently than Dr. Singh is a matter of scientific judgment and a matter of cross-examination, not exclusion”*

(In Re Lipitor, 174 F. Supp 3d 911 @ 921)

44.     *“Thus, as long as an expert's scientific testimony rests upon good grounds, it should be tested by the adversary process — competing expert testimony and active cross-examination — rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.”*  
*Osman*, 169 N.H. 329 at 335 (2016)

45.     This is exactly how the trial court ruled. Accordingly, this Court should affirm the trial court’s order; there is a well- established connection between lead exposure and lowered IQ score, the question here is a matter of degree, which is appropriate for cross-examination.

### **IS IQ THE GOLD STANDARD?**

46.     Moscicki’s argument focuses almost exclusively on IQ deficits, as if that is the litmus test for lead poisoning, but it is not.

47. While Moscicki's expert, McCaffrey, candidly admitted on cross-examination that:

*"...one of the problems with IQ is everybody assumes that it's the engine that drives the human being....And it's not. There's wide ranges of IQs associated with everything..."* (Moscicki App. p. 259).

48. The trial court also heard from Leno's experts on this point, Dr. Isquith:

Q *Okay. And are you also familiar with Tab B, the 2015 CDC report?*

A *Yes. That is a much more concise report.*

Q *Is there something in this concise report on Exhibit B that would give us some indication of what the CDC reports are there's (sic) risk factors for a level poisoning that Matthew sustained?*

A. *The CDC report talks about -- starting on page 138 -- a nice summary of what the data show about IQ -- changes in IQ associated in multiple, multiple studies with lead exposures lower than 10 and then between 10 and 20 [ug/dl]. It then discusses the neural behavioral signature on page 139 where they discuss studies that looked at attentional functioning and that lead is associated with problems with attention, with executive function on page 140, with behavior problems on 141, with speech and language deficits on 142, and on motor skills on 143.*

Q *So any one of those risk factors -- low IQ, attention deficit, processing skills does the CDC say one is more problematic than the other focus on one and not the others?*

A *No.*

(Moscicki App. p. 140)

49. Dr. Karp also testified on this subject:

A *Well, I consider the totality of the experience with lead and I think we're dealing with-- we're not dealing with the heart of the matter when we*

*focus solely on IQ scores. So they're there as an indicator but they're not the indicators that means -- that does not have as much meaning to me as the report on their behavior and the attention deficit hyperactivity, it doesn't have as much meaning to me as the report that I saw from the developmental center that Matthew went to which listed four elements of attention and listed many behavior -- very substantial behavioral issues. Those are the things that are meaningful to me. As a clinician working with children, as a person -- just as a person, as a parent, as someone -- I know that all of us in this room have at one time taken an IQ test and I don't make my judgments about anybody based on IQ tests.*

Q *When we look at your reporting out of the evaluation by Community Bridges, under pertinent history for Matthew.*

A. *That tells me how he's going to function in the world.*

Q *Why so?*

A *That paragraph is very meaningful that this child has a delay in receptive language and language development, that is his comprehension, receptive, he doesn't receive the information well and his language development and cognitive play skills. These are how he's going to function in the world. And that's the meaningful thing in lead poisoned children, not a I'm not diminishing nor overstating the question of IQ, which has been such an important issue here in the discussions, but for me this is the heart of the matter for Matthew.*

Q *And you didn't report out any IQ in your report?*

A *I did not.*

(Moscicki App. p. 173)

50. Dr. Karp puts this IQ question in context as follows:

*"...what we call intelligence is a summation of interactions of genetics and experimental factors...what we call intelligence is a movable target, which changes over time and changes with our perceptions from a fixed something that determined your future to something that's quite malleable and movable*

*and while it's very important in terms of population studies to look at IQ as indicating as what's going on in a community, children's measurement -- children's response to toxic -- to bad experiences cannot be measured simply by IQ. It fits in, but it is not a necessarily predominant measure, it is an imprecise measure. Even though it's -- even if it is measured precisely, it's an imprecise measure. That is, we don't know the multiple effects of different phenomenon of that have occurred in Matthew and Maureen's life, though we do know they were exposed to lead and, therefore, trying to say that this IQ is too low for this exposure when taken alone, this is the point. In the presence of other findings, the other three that I mentioned earlier, [developmental issues, behavior, attention deficit] and it becomes an important finding, but no one has ever claimed that this is the sole cause for -- sole causative factor for these children's deficit. Lead is a contributing factor and that is the main point and one cannot measure it simply by an endless argument over statistical points on an IQ scale...."*

(Moscicki App. p. 166)

51. This testimony is also supported by the medical literature, as summarized by the 2015 CDC report:

*The negative impact of lead on IQ persists in most recent studies following adjustment for numerous confounding and covariate factors. In general, there appears to be a loss of about 4–8 points in full scale IQ as BLLs increase to 10 µg/dL and at least an additional 2–4 point decrement as BLLs reach 20–25 µg/dL. The magnitude of this loss is substantial, amounting to two-thirds of a standard deviation or more.*

*The focus of lead studies on global measures of intellectual aptitude such as tests of IQ has hampered attempts to identify deficits that may be specific to children with HBLLs [high blood lead levels]. The aggregate or full-scale IQ is based on the sum of performance on multiple subtests that tap a vast array of cognitive and psychomotor functions. Thus, efforts to identify a neurobehavioral*



*signature for children with HBLLs have been largely unsuccessful.*

*Due to the relative insensitivity of IQ tests to the precise effects of brain injury, the use of tests of specific neuropsychological abilities has received increasing attention for the description of the effects of lead exposure in children.*

*Recent studies have employed protocols that include finer grain assessments of cognitive, language, memory, learning, sensory, and neuromotor abilities, and a somewhat clearer picture of lead's impact on neurodevelopment has begun to emerge. Areas of neuropsychological performance that appear to be impacted in particular are within the domains of attention, executive functions, visual-spatial skills, social behavior, speech and language, and fine and gross motor skills. None of these domains are independent of each other, but it is helpful at first to consider them separately.* (internal cites omitted)

(Moscicki App. p. 453-454)

52. Indeed, as the World Health Organization (WHO) has found similar to the CDC: *The consequences of brain injury from exposure to lead in early life re: loss of intelligence, shortening of attention span and disruption of behavior. Because the human brain has little capacity for repair, these effects are untreatable and irreversible. They cause diminution in brain function and reduction in achievement that last throughout life.*

(Moscicki App. p. 395)

53. This is why the trial court in its ruling highlighted the following:

*"...While the precise impact that lead had on Matthew's deficits is up for debate, there appears to be no question that Matthew was exposed to unsafe levels of lead and that such exposure can result in deficits in IQ and executive function."*

(Moscicki App. p. 13)

54. The ruling of the trial court is in accordance with RSA 516:29-a, as Leno's experts rely upon a recognized body of recent scientific literature which is almost universal that lead poisoning to children causes not only a loss of intelligence, but also losses of executive function *within the domains of attention, executive functions, visual-spatial skills, social behavior, speech and language, and fine and gross motor skills*, and that these changes are *untreatable and irreversible that last throughout life*.
55. Accordingly this Court should affirm the Trial Court's ruling.

### CONCLUSION

55. "...We review the trial court's decision under our unsustainable exercise of discretion standard. In applying our unsustainable exercise of discretion standard of review, we determine only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made. Under our unsustainable exercise of discretion standard, our task is not to determine whether we would have found differently, but only to determine whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it." [internal citations omitted] Stachulski v. Apple New England, LLC, 171 N.H. 158 @ 164 (2018).
56. Once the "more than slight" impact level is reach, the issue is for the trier of fact to decide. "...While Pfizer's expert may disagree about the biological plausibility piece or weigh the small size of the association differently than Dr. Singh is a matter of scientific judgment and a matter of cross-examination, not exclusion"  
(In Re Lipitor, 174 F. Supp 3d 911 @ 921)
57. This is exactly how the trial court ruled, "*This case is distinguishable because there is a well- established connection between lead exposure and lowered IQ score. The question here is a matter of degree, which is appropriate for cross-examination.*"

58. For all the above reasons, the ruling of the trial court should be affirmed.

June 13, 2019

Respectfully submitted,  
Charles and Heidi Leno,  
By their attorney,

/s/ Christopher J. Seufert, Esq.  
Christopher J. Seufert, Esquire  
Bar #2300  
Seufert Law Offices, P.A.  
59 Central Street  
Franklin, New Hampshire 03235

**STATEMENT WITH RESPECT TO ORAL ARGUMENT**

Charles and Heidi Leno respectfully requests 15 minutes to present oral argument.  
Christopher J. Seufert will represent Charles and Heidi Leno at oral argument.

June 13, 2019

/s/ Christopher J. Seufert, Esq.  
Christopher J. Seufert, Esq.  
Bar #2300

**CERTIFICATION OF WORD LIMIT**

I certify that the total words in this Brief do not exceed the maximum 9,500 words.

June 13, 2019

/s/ Christopher J. Seufert, Esq.  
Christopher J. Seufert, Esq.  
Bar #2300

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the within pleading was served upon Gary Burt, Esquire by electronic service.

June 13, 2019

/s/ Christopher J. Seufert, Esq.  
Christopher J. Seufert, Esq.  
Bar #2300

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH**

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Concord NH 03302-2880

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**RECEIPT OF WRIT**

Case Name: **Matthew Leno, et al v Sandra Moscicki, et al**  
Case Number: **217-2011-CV-00174**

The writ in the above-captioned matter was filed with the Clerk of this Court on: March 22, 2011 at 11:07 a.m.

Matthew Leno; Maureen Leno; Charles Leno; Heidi Leno or his/her attorney is to attach a copy of this Receipt to identical copies of the original writ and deliver them to the Sheriff or other legally authorized entity for service on Sandra Moscicki; Woodland Rose Trust. Sufficient copies shall be provided to allow for a service copy for each named defendant and a copy for each officer completing service to complete the return. The return copies shall be filed with the Court in accordance with Superior Court Rule 3.

BY ORDER OF THE COURT

March 28, 2011

William S. McGraw  
Clerk of Court

(484)

# The State of New Hampshire

## SUPERIOR COURT

MERRIMACK COUNTY

( ) COURT

( ) JURY

### WRIT OF SUMMONS

Matthew Leno , a minor  
Maureen Leno, a minor  
Charles and Heidi Leno

v.

Sandra Moscicki  
and  
Woodland Rose Trust

The Sheriff or Deputy of any County is ordered to summon each defendant to file a written appearance with the Superior Court at the address listed below by the return day of this writ which is the first Tuesday of MAY, 2011 .  
YEAR MONTH

The PLAINTIFF(S) state(s): SEE ATTACHED

and the Plaintiff(s) claim(s) damages within the jurisdictional limits of this Court.

Charles and Heidi Leno  
INDORSER (sign and print name)

3/21/11  
DATE OF WRIT

### NOTICE TO THE DEFENDANT

The Plaintiff listed above has begun legal action against you. You do not have to physically appear in Court on the return day listed above since there will be no hearing on that day. However, if you intend to contest this matter, you or your attorney must file a written appearance form with the Clerk's Office by that date. (Appearance forms may be obtained from the Clerk's Office.) You will then receive notice from the Court of all proceedings concerning this case. If you fail to file an appearance by the return day, judgment will be entered against you for a sum of money which you will then be obligated to pay.

Kenneth McHugh, acting  
Witness, ~~Robert McKinn~~, Chief Justice, Superior Court.

William S. McGraw  
William S. McGraw, Clerk  
NH Superior Court Merrimack County  
PO Box 2880  
Concord, NH 03302-2880  
(603) 225-5501

SIGNATURE OF PLAINTIFF/ATTORNEY

Christopher J. Seufert, Esq.  
Seufert Law Offices, P.A.  
PRINTED/TYPED NAME

59 Central St, Franklin NH 03235  
ADDRESS

603 / 934-9837

PHONE

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

MATTHEW LENO, a minor  
MAUREEN LENO, a minor  
and  
CHARLES and HEIDI Leno

vs.

SANDRA MOSCICKI AND WOODLAND ROSE TRUST

COMPLAINT

The plaintiffs, Matthew Leno and Maureen Leno, minors, by their parents and next of friends, Charles and Heidi Leno, and Charles and Heidi Leno, in their individual capacities all through their Attorney, Christopher J. Seufert, Esquire, make the following allegations against the defendants, Sandra Moscicki and Woodland Rose Trust:

JURISDICTION

The plaintiffs are all residents of Merrimack County.

PARTIES

1. Matthew Leno, plaintiff, a minor, (date of birth 07/08/2008), by and through his parents Charles and Heidi Leno, are citizens and resident of Merrimack County, New Hampshire, with a mailing address of 32 Summer Street, Apt. #3, Penacook, New Hampshire, 03303.
2. Maureen Leno, plaintiff, a minor, (date of birth 07/08/2008), by and through her parents Charles and Heidi Leno, are citizens and resident of Merrimack County, New Hampshire, with a mailing address of 32 Summer Street, Apt. #3, Penacook, New Hampshire, 03303.



3. Charles and Heidi Leno, plaintiffs in their individual capacities are citizens and resident of Merrimack County, New Hampshire, with a mailing address of 32 Summer Street, Apt. #3, Penacook, New Hampshire, 03303.
4. Sandra Moscicki , defendant, has an address of P.O. Box 63, Littleton, New Hampshire 03561.
5. Woodland Rose Trust, defendant, has an address of P.O. Box 63, Littleton, New Hampshire 03561.

### **FACTS**

6. The minor plaintiff's family rented the apartment and thereafter resided at 87 Union Street, Apt. 2, Littleton, NH from 9/1/09 – 8/1/10. Defendants owned said property and defendant Sandra Moscicki showed the rental to the plaintiffs. Upon leasing said apartment to plaintiffs, defendants knew the plaintiffs' family contained children under six (6) years of age but failed to investigate, remediate and/or warn Plaintiff's family of the existence of hazardous lead paint in the rental unit. Defendant Sandra Moscicki had knowledge of the dangers of lead paint to children, knew the structure was older, pre-1978 housing, and knew the structure had chipping and peeling paint.
7. On the minor plaintiffs' 2<sup>nd</sup> annual physicals of 07/27/10 Matthew's blood lead level was tested at 17 bdl, and Maureen's tested at 18 bdl. The Center for Disease Control considers 10 bdl as the level of poisoning in children.
8. The poisonings of the minor children prompted an inspection of the target rental by the NH DHHS division of childhood lead protection, which found

chipping, flaking and peeling lead paint throughout the apartment and a lead abatement order was issued against defendants.

**COUNT 1 - Failure to Inform-Federal Title X**

9. Plaintiffs incorporate the above paragraphs as though expressly rewritten.

**Duty**

10. Defendants had a statutory duty as owner/Landlords having control and ownership of the apartment to inform plaintiffs, lessees of lead paint hazards pursuant to Title X, 42 U.S.C. 4852 (d), 24 CFR 35; 40 U.S.C. 745.100.

**Breach and Harm**

11. In wholly failing to comply and inform plaintiffs, lessees pursuant to 42 U.S.C. 4852 (d), 24 CFR 35; 40 U.S.C. 745.100 of the dangers of lead paint, the defendant Landlords breached their statutory duty to the plaintiff parents/lessees causing direct harm to them and indirect harm to their child (Vachon –v- Halford, 125 NH 577) for which they seeks damages.

**COUNT II- Habitable Residence – Negligence-**

**Duty**

12. Plaintiffs restate and incorporate the above paragraphs as if expressly rewritten.

13. The defendants owed a duty to maintain the target premises in a habitable condition. Peeling and flaking paint which contains lead in an apartment where children under six years old will reside constitutes such a hazard as to make the

apartment uninhabitable. Said duty extends to the plaintiffs as lawful tenants of defendant landlords.

**Breach**

14. In renting the target apartment with chipping and peeling lead paint, to a family including children under six (6) years of age, defendants breached their duty to maintain a habitable apartment.

**COUNT III**

**Negligence -failure to warn**

15. Plaintiff expressly incorporates the above paragraphs as though expressly rewritten.

**Duty**

16. The defendants owed a duty to plaintiffs to investigate, remedy, make safe and/or warn Plaintiffs of the dangers of peeling and flaking lead paint present in the target apartment.

**Breach**

17. The defendants negligently failed to investigate, remedy, make safe and/or warn of the dangers of peeling and flaking lead paint present in the apartments.

**Count III- Unfair Business Practices/Consumer Protection Act/Enhanced  
Compensatory Damages**

18. Plaintiffs expressly incorporate the above paragraphs as though expressly rewritten.

**Duty**

19. Defendants were under a statutory duty pursuant to New Hampshire RSA

358-A and New Hampshire common law duty to refrain from unfair methods of competition or any unfair or deceptive act or practice in the conduct of any trade. Rental of apartments is a business. In renting the apartment to a family with young children, the defendants failed to investigate or warn of the dangers of peeling and chipping lead paint to children, when such peeling and chipping paint was obvious to the defendants. Said duty extended to plaintiffs as lawful tenants of the defendants.

#### **Breach**

20. By renting the apartment to a family with young children and failing to investigate or warn of the dangers of peeling and chipping lead paint to children, when such peeling and chipping paint was obvious to the defendants, the defendants breached their duties causing harm to the plaintiffs.

#### **Causation-All Counts**

21. Plaintiffs incorporate as though expressly rewritten the above paragraphs.

22. As a direct and proximate result of the conduct of the defendants and their also breach of state and federal laws and regulations the minor plaintiffs ingested lead paint and suffered lead paint poisoning.

#### **Damages-All Counts**

23. Plaintiffs incorporate as through expressly rewritten the above paragraphs.

24. As a direct and proximate result of the intentional, reckless, wanton or malicious and/or negligence of the defendants, minor plaintiffs have suffered lead paint poisoning and the effects thereof including but not limited to: reduced life expectancy, permanent cognitive and behavioral effective

disorders, brain damage, past and future pain and suffering, loss of expected earnings capacity, and loss enjoyment of life and plaintiff parents have suffered the costs and expense associated with now raising children with lead paint poisoning.

**WHEREFORE**, the plaintiffs demand judgment against the Defendants jointly and severally within the minimum and maximum limits of this Court and attorney's fees, costs, and interests and treble damages where provided by applicable statutes.