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Lawsuit Over Mold in Public Housing Headed to Trial

Plaintiffs Allege 'State Created Danger' Caused Daughter's Asthma Attack



Michael A. Trunk

A federal jury on Monday will begin hearing a civil rights case brought under the "state-created danger" theory in which a family living in public housing claims that the Philadelphia Housing Authority ignored complaints about persistent mold in their home that triggered an acute asthma attack that left their daughter brain damaged.

The trial of *McKinney v. PHA*, which is expected to last three weeks, will pit plaintiffs attorneys **Michael A. Trunk** and **Garabet M. Zakeosian** of Kline & Specter against the defense team of Abbe F. Fletman and Rachel E. Licausi of Flaster Greenberg.

In a 39-page opinion handed down last week, U.S. District Judge Berle M. Schiller ruled that a jury could hold PHA responsible if it concludes that the agency acted with "deliberate indifference" when it approved the home despite problems with leaks, and later when it allegedly delayed the McKinney family's departure from the home by requiring 30-days' notice to the landlord before moving to a safer house.

It was during that waiting period, in March 2006, the suit says, that Ebony McKinney suffered an asthma attack that left her in a coma from a lack of oxygen and led to extensive brain damage that now leaves her in need of round-the-clock care.

Schiller rejected PHA's argument that it cannot be liable for a state-created danger because the McKinneys could have moved out of the troubled house earlier or even repaired the problems themselves.

Instead, Schiller said, the family's ability to move was "severely limited" because PHA was paying all of their rent and the family also lacked the means to repair persistent leaks or move to a different home without government assistance.

"This court will not absolve PHA of all responsibility for its conduct simply because plaintiffs could have avoided the danger by living on the street," Schiller wrote.

But Schiller's opinion also included some significant rulings in PHA's favor. The plaintiffs, he said, were barred from pursuing any claims under the Housing Act because the federal statute does not provide for a private cause of action.

Schiller also dismissed all claims against individual PHA employees, finding that they are all entitled to qualified immunity because of their lack of training about the dangers of mold.

"The evidence strongly suggests that the individual defendants were not aware that their conduct might violate plaintiffs' rights," Schiller wrote. "Without knowledge of these dangers, the individual PHA defendants might have known of plaintiffs' substantive due process right to be free of state-created dangers, but cannot be charged with understanding that what they were doing violates that right."

But the bulk of Schiller's opinion was devoted to an analysis of the state-created danger claim.

To establish such a claim, Schiller said, the plaintiff must satisfy a four-prong test, showing that (1) the harm caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) some relationship existed between the state and the plaintiff that renders plaintiff a foreseeable victim; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

PHA's lawyers argued that the plaintiffs could not meet either the second or fourth prong of the test.

Schiller considered first whether PHA's conduct could be found to "shock the conscience."

In cases where the government conduct is premised on decisions made in a "hyper-pressurized" environment such as a high-speed police chase, Schiller found that plaintiffs must show that the harm was deliberate.

But in the McKinneys' case against PHA, he said, where there was more time for careful decision making, the standard is reduced to one of "deliberate indifference."

Applying that standard, Schiller found that "sufficient evidence exists that PHA acted with deliberate indifference to present the question to a jury."

In 1999, Schiller noted, the U.S. Department of Housing and Urban Development issued a report that focused on preventing health problems in children, and specifically noting that excess moisture was a potential problem.

PHA got a \$1 million grant in 2004, Schiller noted, to fund a project to identify mold and moisture as asthma triggers.

The inspections of the McKinneys' mold-infested home, both before the family rented it and during the time they lived there, could lead the jury to conclude that PHA was aware of the leaks and excess moisture in the house, Schiller found.

"Despite this, the PHA approved the property for inclusion in the [public housing program], continued to make rental payments on the home, and obstructed plaintiffs in their efforts to move out of the home," Schiller wrote.

Schiller also rejected the defense team's argument that none of PHA's conduct could qualify as an "affirmative act."

Trunk and Zakeosian pointed to PHA's initial approval of the property; its payment of monthly rent to the landlords; and its decision to delay the McKinneys' move to afford 30 days' notice to the landlord of the mold-infested house.

But Fletman and Licausi argued that the gravamen of the plaintiffs' claims was an alleged failure by PHA to detect the dangerous condition and failure to intervene to protect the family.

Schiller sided with the plaintiffs, saying "a jury could find that PHA took steps, such as approving the house and making rental payments without which the plaintiffs would never have lived at the property or have been exposed to the alleged dangers therein."

The jury could also find an affirmative act in PHA's decision to delay the family's exit from the home, Schiller said.

"These are, in the most literal sense, affirmative acts that rendered plaintiffs more vulnerable to the harms inside the home. The court rejects PHA's contention that these were, as a matter of law, failures to act," Schiller wrote.