

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	- v -
STATEMENT OF CORPORATE RELATIONSHIPS	- xii -
PRELIMINARY STATEMENT	2
STATEMENT OF INTEREST OF AMICI CURIAE	5
Public Interest Organizations	5
Medical Doctors and Health Organizations	17
QUESTION PRESENTED	21
STATEMENT OF FACTS	22
A. Childhood Lead Poisoning From Paint Results in Irreparable and Costly Harms and Yet Is Entirely Preventable	22
B. Childhood Lead Poisoning Is Rampant in New York State	25
C. Lead-based Paint Is Widespread in New York State's Housing Stock — More So than Any Other State — and Thus Poses a Grave Danger to Children	27
D. Plaintiffs' Facts	29
1. <u>Chapman</u>	29
2. <u>Stover</u>	34
PROCEEDINGS BELOW	40
ARGUMENT	41
I. LANDLORDS HAVE A DUTY TO PROTECT TENANTS FROM FORESEEABLE HARM SUCH AS PEDIATRIC LEAD POISONING FROM PAINT IN OLDER DWELLINGS	41
A. Landlords Have a Duty to Provide Safe and Habitable Living Conditions And To Protect Tenants from Foreseeable Harm	41
B. The Foreseeability of Harm and the Duty of Care Must be Viewed in the Context of Present General Knowledge	43
C. Given the Present State of General Public Knowledge of the Hazards of Lead Paint, A Jury Could Find that a Reasonable Owner Should Have Foreseen that Deteriorated Paint in an Older Dwelling Rented to a Family With a Young Child Could Cause Lead Poisoning	46
D. The Third Department's Decisions in <u>Stover</u> and <u>Chapman</u> Ignore the Widespread Knowledge of the Toxic Propensities of Paint in Older Dwellings	52

II. THIS COURT SHOULD DECLARE THAT IN THE PRESENT DAY LANDLORDS SHOULD BE CHARGED WITH A DUTY OF REASONABLE CARE TO INSPECT FOR LEAD HAZARDS IN OLDER BUILDINGS. 56

A. Sound Principles of Law Require That This Court Declare a Duty to Inspect for Lead Hazards 56

B. Rather than Permit the Continuation of an Outdated Legal Principle That Encourages Reckless Conduct, as a Matter of Public Policy This Court Should Enunciate a Standard That Encourages Landlords to Act Responsibly 61

CONCLUSION 64

TABLE OF AUTHORITIES

CASES

Acosta v. Irdank Realty Corp., 38 Misc.2d 859 (S. Ct. N.Y.Co. 1963) 46

Andrade v. Wong, 251 A.D.2d 609 (2d Dep't 1998) 46

Antwaun A. v. Heritage Mutual Insurance Company, 228 Wis. 2d. 44, 596 N.W.2d. 456, reconsideration den., 230 Wis. 2d 277, 604 N.W.2d 574 (1999) 47-49, 51, 62

Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968) 44

Campbell v. Metropolitan Property and Casualty Insurance Co., 239 F.3d 179 (2d. Cir 2001) 18

Cartagena v. Tang, 260 A.D.2d 337 (2d Dep't 1999) 58

Chapman v. Silber, 275 A.D.2d 122 (3d Dep't 2000), leave to app. granted, 96 N.Y.2d 709 (2001) passim

City of New York v. Lead Industries, 190 A.D.2d 173 (1st Dep't 1993) 22, 47

Codling v. Paglia, 32 N.Y.2d 330 (1973) 7

Declara v. Barber Steamship Lines, 309 N.Y. 620 (1956) 59

Espinal v. 570 156th Assoc., 174 Misc.2d 860 (S. Ct. N.Y. Co. 1997), aff'd, 258 A.D.2d 309 (1st Dep't 1999) 47

Garcia v. Freeland Realty, Inc., 63 Misc. 2d 937 (Civ. Ct. N.Y. Co. 1970) 46

Gilmore v. Memorial Sloan-Kettering Cancer Center, 159 Misc. 2d 953 (Sup.Ct. N.Y. Co. 1993) 44, 53

Gobrecht v. Beckwith, 82 N.H. 415, 135 A. 20 (1926) 43

Henry v. City of New York, 94 N.Y.2d 275 (1999) 7

Hines v. RAP Realty Corp., 258 A.D.2d 440 (2d Dep't 1999), lv. to app. den., 93 N.Y.2d 812 (1999) 46

Hoemke v. New York Blood Center, 912 F.2d 550 (2d Cir. 1990) 44, 45, 53

<u>Javins v. First National Realty Corp.</u> , 428 F.2d 1071 (D.C. Cir. 1970), <u>cert. den.</u> , 400 U.S. 925 (1970)	45
<u>Jones v. Mid-Atlantic Funding Company</u> , 362 Md. 661, 766 A.2d 617 (2001)	50, 51
<u>Juarez v. Wavcrest Mgt. Team</u> , 212 A.D.2d 38 (1st Dep't 1995), <u>modified</u> , 88 N.Y.2d 628 (1996)	7, 22
<u>Juarez v. Wavcrest Mgt. Team</u> , 88 N.Y.2d 628 (1996)	<u>passim</u>
<u>Kline v. 1500 Mass. Ave. Apt. Corp.</u> , 439 F.2d 477 (D.C. Cir. 1970)	45
<u>Kush v. City of Buffalo</u> , 59 N.Y.2d 26 (1983)	63
<u>MacPherson v. Buick Motor Co.</u> , 217 N.Y. 382 (1916)	43, 63
<u>Marsh Wood Products Co. v. Babcock & Wilcox Co.</u> , 207 Wis. 209, 240 N.W. 392 (1932)	45
<u>Mason v. U.E.S.S. Leasing Corp.</u> , __ N.Y.2d __, 2001 N.Y. LEXIS 1865, 2001 WL 735745 (2001)	42
<u>Micallef v. Miehle Co.</u> , 39 N.Y.2d 376 (1976)	7, 63
<u>Miner v. Long Island Lighting Co.</u> , 40 N.Y.2d 372 (1976)	45
<u>New York City Coalition to End Lead Poisoning v. Koch</u> , 138 Misc. 2d 188 (Sup. Ct. N.Y. Co. 1987), <u>aff'd</u> , 139 A.D.2d 404 (1st Dep't 1988), <u>lv. to app. den.</u> , 1988 N.Y. App. Div. LEXIS 8081 (1st Dep't 1988) (“ <u>NYCCELP I</u> ”)	5, 6, 22, 29
<u>New York City Coalition to End Lead Poisoning v. Koch</u> , N.Y.L.J., July 21, 1989, at 18 (Sup. Ct. N.Y. Co.), <u>aff'd</u> , 170 A.D.2d 419 (1st Dep't 1991), <u>lv. to app. den.</u> , 1991 N.Y. App. Div. LEXIS 8028 (1st Dep't 1991) (“ <u>NYCCELP II</u> ”)	6, 22, 57
<u>New York City Coalition to End Lead Poisoning v. Koch</u> , N.Y.L.J., May 12, 1993, at 29 (Sup. Ct. N.Y. Co.) (“ <u>NYCCELP III</u> ”)	6
<u>New York City Coalition to End Lead Poisoning v. Koch</u> , 216 A.D.2d 219 (1st Dep't 1995) (“ <u>NYCCELP IV</u> ”)	6, 22
<u>New York City Coalition to End Lead Poisoning v. Giuliani</u> , slip. op. (Sup. Ct. N.Y. Co. Nov. 27, 1995) (“ <u>NYCCELP V</u> ”)	6
<u>New York City Coalition to End Lead Poisoning (NYCCELP) v. Giuliani</u> , 245 A.D.2d 49 (1st Dep't 1997), <u>lv. to app. den.</u> , 245 A.D.2d 49 (1st Dep't 1997) (“ <u>NYCCELP VI</u> ”) ...	5, 6, 22

<u>New York City Coalition to End Lead Poisoning v. Giuliani</u> , 173 Misc. 2d 235 (Sup. Ct. N.Y. Co. 1997), <u>aff'd</u> , 248 A.D.2d 120 (1st Dep't 1998), <u>lv. to app. den.</u> , 1998 N.Y.App. Div. LEXIS 8108 (June 25, 1998) (“ <u>NYCCELP VII</u> ”)	6
<u>New York City Coalition to End Lead Poisoning v. Giuliani</u> , 187 Misc. 2d 425 (Sup. Ct. N.Y. Co. 2000) (“ <u>NYCCELP VIII</u> ”)	6
<u>New York City Coalition to End Lead Poisoning v. Vallone</u> , N.Y.L.J., October 16, 2000, at 26 (Sup. Ct. N.Y. Co.)	7, 11-13, 49
<u>New York Public Interest Research Group v. Cohen</u> , N.Y.L.J., July 23, 2001, at 28 col. 5 (Sup Ct. N.Y. Co.)	13
<u>Nwaru v. Leeds Mgt. Co.</u> , 236 A.D.2d 252 (1st Dep't 1997)	58
<u>Palka v. Servicemaster Mgt. Services, Inc.</u> , 83 N.Y.2d 579 (1994)	63
<u>Palsgraf v. Long Island R.R. Co.</u> , 248 N.Y. 339, <u>rearg. den.</u> , 249 N.Y 511 (1928)	43
<u>Park West Management Corp. v. Mitchell</u> , 47 N.Y.2d 316, <u>cert. den.</u> , 444 U.S. 992 (1979)	41, 42, 45, 59
<u>Perry v. Uccellini Enters.</u> , 275 A.D.2d 495 (3d Dep't 2000)	54, 55
<u>Preston v. State</u> , 59 N.Y.2d 997 (1983)	59
<u>Queeney v. Willi</u> , 225 N.Y. 374 (1919)	55
<u>Rivas v. 1340 Hudson Realty Corp.</u> , 234 A.D.2d 132 (1st Dep't 1996)	58
<u>Sage v. Fairchild-Swearingen Corp.</u> , 70 N.Y.2d 579 (1987)	7
<u>Smith v. Saget</u> , 258 A.D.2d 641 (2d Dep't 1999)	46
<u>Stover v. Robilotto</u> , 277 A.D.2d 801 (3d Dep't 2000), <u>leave to app. granted</u> , 96 N.Y.2d 709 (2001)	<u>passim</u>
<u>Sweet v. Sheahan</u> , 235 F.3d 80 (2d Cir. 2000)	48
<u>The T.J. Hooper</u> , 60 F.2d 737 (2d Cir. 1932), <u>cert. den. sub. nom. Eastern Transp. Co. v. Northern Barge Corp.</u> , 287 U.S. 662 (1932)	45
<u>Tonetti v. Penati</u> , 48 A.D.2d 25 (2d Dep't 1975)	41

<u>Toth v. Community Hosp. at Glen Cove</u> , 22 N.Y.2d 255 (1968), <u>rearg. den.</u> , 22 N.Y.2d 973 (1968)	44
<u>Waters v. NYC Housing Authority</u> , 69 N.Y.2d 225 (1987)	7
<u>Williamsburg Around the Bridge Block Ass'n v. Giuliani</u> , 167 Misc. 2d 980 (S. Ct. N.Y. Co. 1995), <u>aff'd</u> , 223 A.D.2d 64 (1st Dep't 1996)	6, 22, 23
<u>Woolfalk v. New York City Housing Authority</u> , Index No. 112405/93 slip op. (S. Ct. N.Y. Co. May 12, 1998)(Goodman, J.), <u>aff'd</u> , 263 A.D.2d 355 (1st Dep't 1999), <u>leave to app. den.</u> , slip op. (1st Dep't, Sept. 28, 1999)	57, 58

STATUTES AND REGULATIONS

24 Rules of the City of New York § 173.13	27
New York City Administrative Code § 27-2008	57
New York City Administrative Code § 27-2013(h) (Local Law 1 of 1982)	40, 46, 57-59, 62
22 N.Y.C.R.R. § 500.11(e)(3)	2
New York Multiple Dwelling Law § 78	42
New York Public Health Law § 1370	49
New York Public Health Law § 1370-b.	17
New York Real Property Law § 235-b	41
16 C.F.R. Part 1303	27
24 C.F.R. § 35.92(b)	48
40 C.F.R. 745 Subpart E	49
40 C.F.R. 745 Subpart F	48
40 C.F.R. § 745.113(b)	48
42 U.S.C. § 4852d	48

OTHER AUTHORITIES

American Law Institute, <u>Restatement (Second) of Torts</u> § 290 (1965)	52
Brockel and Cory-Slechta, <u>Lead-induced Decrements in Waiting Behavior: Involvement of D2-like Dopamine Receptors</u> , 63 <i>Pharmacol. Biochem. Behav.</i> (3) 423-34 (1999)	19
Brockel and Cory-Slechta, <u>The Effects of Postweaning Low-level Pb Exposure on Sustained Attention: a Study of Target Densities, Stimulus Presentation Rate, and Stimulus Predictability</u> , 20 <i>Neurotoxicology</i> (6) 921-933 (1999)	20
Chisolm, <u>The Road to Primary Prevention of Lead Toxicity in Children</u> , 107 <i>Pediatrics</i> (3) 581-583 (March 2001)	23
Cory-Slechta, Crofton, Foran, Ross, Sheets, Weiss, and Mileson, <u>Methods to Identify and Characterize Developmental Neurotoxicity for Human Health Risk Assessment. I: Behavioral Effects</u> , 109 <i>Environ. Health Perspect.</i> (1) 79-91 (March 2001)	19
Dolan, <u>Rasch's New York Real Property Practice</u> , (4th ed. 1998)	41
Harper, James & Gray, <u>The Law of Torts, Second Edition</u> , (2d ed. 1986)	43, 63
Keeton, <u>Prosser and Keeton on the Law of Torts</u> (5th ed. 1984)	43, 45
Lanphear, BP. Byrd RS. Auinger P. Schaffer SJ. <u>Community Characteristics Associated with Elevated Blood Lead Levels in Children</u> , 101 <i>Pediatrics</i> (2) 64-71 (Feb. 1998)	14
Lanphear, <u>Cognitive Deficits Associated with Blood Lead Concentrations < 10 µg/dL in US Children and Adolescents</u> , 115 <i>Public Health Reports</i> 521-29 (Nov.-Dec. 2000)	23, 26
Lanphear, <u>Subclinical lead toxicity in U.S. children and adolescents</u> , 47 <i>Pediatric Research</i> (4) 152A (2000)	23
Lanphear, <u>The Paradox of Lead Poisoning Prevention</u> ; <i>Science</i> 281:1617-1618 (1998)	61
Markowitz, <u>A Study of Blood Lead Levels in Bronx Children and History of Building Code Violations</u> , (2000) (unpublished).	62
National Academy of Sciences National Research Council, <u>Measuring Lead Exposure in Infants, Children, and Other Sensitive Populations</u> (1993)	27

New York City Department of Housing Preservation and Development and Department of Health, Request for Grant Assistance for Lead-Based Paint Hazard Control July 31, 1997 (grant application to U.S. Department of Housing and Urban Development) 26, 27, 29

New York City Public Advocate, Lead & Kids: Why are 30,000 NYC Children Contaminated?, February 2, 1998 22, 26, 27, 29

New York State Attorney General, Look Out for Lead - A Guide for Tenants with PreSchool-Age Children (February 1996) 50

New York State Department of Health, Maternal, Child and Adolescent Health Profile, New York State 1995 25

New York State Department of Health, Protecting Our Children - The Success of New York's Efforts to Prevent Childhood Lead Poisoning, May, 2000 28, 50

New York State Division of Housing Conservation and Renewal, New York State Consolidated Plan: Federal Fiscal Years 1996-1997 26, 28

New York State Lead Poisoning Prevention Advisory Council, 1998 Report for the Program Years 1995-1996 26

Rogan, The Effect of Chelation Therapy with Succimer on Neuropsychological Development in Children Exposed to Lead, 344 New England Journal of Medicine (19) 1421-1426 (May 10, 2001) 24

Rosen, Sequential Measurements of Bone Lead Content by X-Ray Fluorescence in CaNa₂EDTA-Treated Lead-Toxic Children, 93 Env'tl. Health Perspectives 271 (1991) 24

Salkever, Updated Estimates of Earnings Benefits from Reduced Exposure of Children to Environmental Lead, 70 Env'tl. Res. 1 (1995) 25

Sargent, The Association Between State Housing Policy and Lead Poisoning in Children, 89 Am. J. Pub. Health (11) 1690 (1999) 24

Schwartz, Societal Benefits of Reducing Lead Exposure, 66 Env'tl. Res. 105 (1994) 25

United States Department of Health & Human Services, Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children (1991) 18, 22-25, 27

United States Department of Health & Human Services, Centers for Disease Control and Prevention, "Children with Elevated Blood Lead Levels Attributed to Home Renovation

and Remodeling Activities — New York, 1993-1994," Morbidity and Mortality Weekly Report, Jan. 3, 1997 at 1122 28

United States Department of Health & Human Services, Centers for Disease Control and Prevention, Strategic Plan for the Elimination of Childhood Lead Poisoning (1991) 23-25

United States Department of Housing and Urban Development, Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995, revised 1997) 62

United States Department of Housing and Urban Development, National Survey of Lead and Allergens in Housing, Final Report, Volume I: Analysis of Lead Hazards, Peer Review Draft, Jan. 12, 2001 27-29, 62

United States Public Health Service, Agency for Toxic Substances and Disease Registry, The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress (1988) 18, 27

STATEMENT OF CORPORATE RELATIONSHIPS

Chinese Progressive Association; Committee for Hispanic Children and Families, Inc.; Community Service Society of New York; Environmental Advocates; Make the Road by Walking; Metropolitan Council on Housing; Mount Vernon United Tenants; New York City Coalition to End Lead Poisoning; New York City Environmental Justice Alliance; New York Lawyers for the Public Interest; New York Public Interest Research Group, Inc.; New York State Tenants & Neighbors Coalition, Inc.; Physicians for Social Responsibility; Public Health Association of New York City; Puerto Rican Legal Defense and Education Fund, Inc.; Utica Citizens in Action; and West Harlem Environmental Action, Inc. are non-profit corporations with no parent companies and no subsidiaries or affiliates.

Legal Services for New York (LSNY) is a New York non-profit corporation with no parent company, with the following sub-grantees or delegate corporations: Bronx Legal Services, Brooklyn Legal Services Corp. A., Brooklyn Legal Services Corp. B., Bedford Stuyvesant Legal Services, Harlem Legal Services, MFY Legal Services, and Queens Legal Services.

Utica Community Action, Inc. is a New York non-profit corporation with no parent company. The following are subsidiary and/or related corporations affiliated with Utica Community Action, Inc.: C.W.B. Housing Development Fund Corporation (owner of a § 811 housing complex for the disabled); Lansing Miller Housing Corporation (owner of a § 811 housing complex for the disabled to be constructed); Ankh Construction (inactive corporation to carry out construction activities), and Community Helpers Assistance Program, Inc. (inactive corporation to carry out home health care and related services).

Greater New York Labor-Religion Coalition, Rochester Lead Free Coalition, Utica Citizens in Action, and United Parents Against Lead are unincorporated associations.

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JAMES C. CHAPMAN and SALLIE A. CHAPMAN,
as Individuals and as Natural Parents and Guardians
of JAQUAN CHAPMAN, a minor,

Plaintiffs-Appellants,

- against -

DENNIS SILBER, GERTRUDE SILBER, JAY
SILBER, JUDITH HARRINGTON,

Defendants-Respondents.

Third Department Appeal Nos. 87003

Albany County Clerk's Index No.
6827-95

CARLISA STOVER, Individually and as Parent and
Guardian of EVERTON LEWIS, an Infant,

Plaintiffs-Appellants,

- against -

YOLANDO ROBILOTTO, as Executor of the Estate
of JAMES O'CONNOR, Deceased

Defendant-Respondent.

Third Department Appeal No. 87486

Albany County Clerk's Index No.
4621-95

BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS OF AMICI CURIAE NEW YORK CITY COALITION TO END LEAD POISONING; CHINESE PROGRESSIVE ASSOCIATION; COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES, INC.; COMMUNITY SERVICE SOCIETY OF NEW YORK; ENVIRONMENTAL ADVOCATES; GREATER NEW YORK LABOR-RELIGION COALITION; LEGAL SERVICES FOR NEW YORK, LEGAL SUPPORT UNIT; MAKE THE ROAD BY WALKING; METROPOLITAN COUNCIL ON HOUSING; MOUNT VERNON UNITED TENANTS; NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE; NEW YORK LAWYERS FOR THE PUBLIC INTEREST; NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.; NEW YORK STATE TENANTS & NEIGHBORS COALITION, INC.; PHYSICIANS FOR SOCIAL RESPONSIBILITY, NEW YORK CITY; PUBLIC HEALTH ASSOCIATION OF NEW YORK CITY; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.; ROCHESTER LEAD FREE COALITION; UNITED PARENTS AGAINST LEAD; UTICA CITIZENS IN ACTION; UTICA COMMUNITY ACTION, INC.; WEST HARLEM ENVIRONMENTAL ACTION, INC.; DEBORAH A. CORY-SLECHTA, Ph.D.; PHILIP LANDRIGAN, M.D.; I.H. MAUSS, M.D.; and JOHN F. ROSEN, M.D.

The foregoing public interest organizations and concerned physicians, appearing as amici curiæ pursuant to permission granted by this Court, respectfully submit this consolidated brief in support of plaintiffs-appellants in the two above-captioned cases. The plaintiffs-appellants are two lead poisoned children and their families.

PRELIMINARY STATEMENT

Reversal of the Third Department's decisions and orders in these two appeals¹ is crucial to reducing the tragic epidemic of childhood lead poisoning in New York. On behalf of New York's young children — our state's future — living in dwellings ridden with immediately hazardous lead paint conditions that make their housing unsafe, amici curiæ, representing these children's families and the public, submit this brief.

While plaintiffs-appellants ably support their contention that the decisions below should be reversed, amici present additional legal and policy arguments and background information regarding the scope New York State's pediatric lead poisoning problem to assist this Court in its understanding of important policy and legal issues implicit in these cases, and thus amici's brief should be considered under 22 N.Y.C.R.R. § 500.11(e)(3).

In the instant cases, the landlords:

- ! were in the business of owning and managing rental property for income for many years;
- ! knew that the subject premises were quite old;²

1. Chapman v. Silber, 275 A.D.2d 122 (3d Dep't 2000), leave to app. granted, 96 N.Y.2d 709 (2001); and Stover v. Robilotto, 277 A.D.2d 801 (3d Dep't 2000), leave to app. granted, 96 N.Y.2d 709 (2001).

References to the Record on Appeal in Chapman will be indicated herein in braces {C-} with the page numbers prefaced with the letter "C." Likewise, references to the Record on Appeal in Stover will be indicated herein in braces {S-} with the page numbers prefaced with the letter "S."

2. In Chapman, the landlords knew the premises was built in the early 1900s;{C-160} in Stover, the landlord and his family owned the building since 1944 and thus knew it was at least 50 years old. {S-110}

- ! knew that most older buildings have lead paint, and that the old paint in the premises had not been removed;
- ! knew of the hazards of lead-based paint to children;
- ! knew that young children lived in the dwellings;
- ! had been notified and/or observed that paint was deteriorated or damaged; and
- ! had a right to re-enter to make repairs.

In addition, in Stover the defendant landlord had been notified a decade prior by the County Health Department that a child had become lead poisoned in another building he owned a few doors away on the same street.

Yet the Third Department, in essence, ruled that no jury could possibly find that the totality of these circumstances constituted foreseeable risk of harm from lead hazards, and granted summary judgment to the landlords in both cases.

The Third Department's decisions, like some other courts, continue severe limitations on children's ability to obtain compensation for their entirely foreseeable injuries (see cases cited in Chapman, 275 A.D.2d at 124-25), basing their decisions on property owners' declarations of total ignorance of the possibility of lead hazards in the dwellings they leased to families with young children. Such proclamations, however, have become far less credible over the years as the state of general public knowledge of lead paint hazards has expanded.

These decisions' rigid insistence that plaintiffs always prove that actual knowledge of lead content in peeling or otherwise deteriorated paint promotes bad public policy by inducing property owners to act recklessly. This case law encourages landlords not to know about lead paint hazards in leased property housing small children — because if they know, they will have to act. As a matter of sound law and public policy, it is far past the time to declare a legal doctrine that encourages landlords to act reasonably and responsibly, rather than the reverse.

As set forth herein, given the widespread persistence of toxic lead paint in New York State's housing, the enormous number of children who needlessly suffer lead poisoning every year, and the ever expanding public knowledge of the hazards of lead paint, these cases present this Court with an important opportunity to reverse the widespread and pernicious impact of outdated precedent.

The social and economic costs of failing to prevent the severe and frequently permanent developmental and neurological harm to New York State's children from lead poisoning are far too high for these children — and society as a whole — to bear.

STATEMENT OF INTEREST OF AMICI CURIAE

Public Interest Organizations

Amicus NEW YORK CITY COALITION TO END LEAD POISONING (“NYCCELP”) is a membership organization founded in 1983, in response to widespread noncompliance with New York City's and State's lead poisoning prevention laws. NYCCELP exists for the purpose of educating and advocating for children at risk of lead poisoning and eliminating that risk.

NYCCELP's most significant constituents are parents of children at risk of lead poisoning. Other members work on behalf of such parents and their children, and include lead poisoning experts. The most vulnerable of this parent group — who suffer most from lead poisoning and landlords' lack of prevention efforts — are low-income parents of children actually poisoned. In the daily work of NYCCELP's members on behalf of families at risk, NYCCELP members assist families with young children who have been exposed to lead paint hazards or are lead poisoned. NYCCELP members screen children for lead poisoning. NYCCELP members educate and advocate for the families to obtain inspections of their apartments for lead paint and to secure abatement of all lead hazards.

Since 1985, NYCCELP has maintained litigation against New York City and New York State to actively press for compliance with lead poisoning prevention laws, and in that litigation the court has certified a plaintiff class against the City of “all children in New York City under age seven years living in a multiple dwelling where a complaint of lead paint has been made which defendants have not timely and adequately inspected and abated.” N.Y.C. Coalition to End Lead Poisoning (NYCCELP) v. Giuliani, 245 A.D.2d 49 (1st Dep't 1997), lv. to app. den., 245 A.D.2d 49 (1st Dep't 1997) (“NYCCELP VI”); see also, NYCCELP v. Koch, 138 Misc. 2d 188 (Sup. Ct. N.Y. Co. 1987), aff'd, 139 A.D.2d 404 (1st Dep't 1988), lv. to app. den., 1988 N.Y. App. Div. LEXIS 8081

(1st Dep't 1988) (“NYCCELP I”); NYCCELP v. Koch, N.Y.L.J., July 21, 1989, at 18 (Sup. Ct. N.Y. Co.) {C-525, S-631}, aff'd on opinion below, 170 A.D.2d 419 (1st Dep't 1991), lv to app. den., 1991 N.Y. App. Div. LEXIS 8028 (1st Dep't 1991) (“NYCCELP II”); NYCCELP v. Koch, N.Y.L.J., May 12, 1993, at 29 (Sup. Ct. N.Y. Co.) {C-525, S-653}, appeal withdrawn, Stipulation (Feb. 24, 1995) (“NYCCELP III”); NYCCELP v. Koch, 216 A.D.2d 219 (1st Dep't 1995) (“NYCCELP IV”); NYCCELP v. Giuliani, slip op. (Sup. Ct. N.Y. Co. Nov. 27, 1995), {C-544, S-661}, appeal withdrawn, Stipulation (Oct. 8, 1996) (“NYCCELP V”); NYCCELP v. Giuliani, 173 Misc. 2d 235 (Sup. Ct. N.Y. Co. 1997), aff'd, 248 A.D.2d 120 (1st Dep't 1998), lv. to app. den., 1998 N.Y.App. Div. LEXIS 8108 (June 25, 1998) (“NYCCELP VII”); NYCCELP v. Giuliani, 187 Misc. 2d 425 (Sup. Ct. N.Y. Co. 2000)(“NYCCELP VIII”).

These decisions have resulted, inter alia, in declarations clarifying the meanings of, and duties under, these laws; NYCCELP I; NYCCELP II; NYCCELP V; NYCCELP VII; orders directing New York City's enforcement of these laws; NYCCELP II; NYCCELP III; NYCCELP V; NYCCELP VI; NYCCELP VII; and contempt orders against the City for its failure to comply with those orders; NYCCELP III; NYCCELP VI; NYCCELP VII.

NYCCELP was also a petitioner in a successful Article 78 proceeding enjoining New York City from sandblasting hazardous lead paint from bridges without proper environmental review. Williamsburg Around the Bridge Block Ass'n v. Giuliani, 167 Misc. 2d 980 (S. Ct. N.Y. Co. 1995), aff'd, 223 A.D.2d 64 (1st Dep't 1996).

Most recently, in 1999 NYCCELP brought an Article 78 proceeding that resulted in a declaration nullifying recent changes in New York City lead paint laws, which had weakened the protections for young children against lead poisoning, because the City enacted those changes without proper environmental review. NYCCELP v. Vallone, N.Y.L.J., Oct. 16, 2000, at 26 (Sup. Ct. N.Y. Co.).

In addition, NYCCELP appeared as an amicus curiæ in the landmark decision setting out landlords' duties concerning lead paint, Juarez v. Wavecrest Management Team, both before the First Department, 212 A.D.2d 38 (1st Dep't 1995), and before this Court, 88 N.Y.2d 628 (1996). This Court, in Henry v. City of New York, N.Y.L.J. Feb. 22, 1999, at 26, also permitted NYCCELP to appear as amicus curiæ in support of the motion for leave to appeal in that case, resulting in a decision, Henry v. City of New York, 94 N.Y.2d 275 (1999), clarifying the infant tolling provisions of CPLR § 208 — an important element for ensuring the right to civil justice for lead poisoning children. And this Court granted NYCCELP leave to appear as amicus curiæ in support of the motions for leave to appeal in both of the two instant cases, Chapman, {C-667-68} and Stover, {S-816-17}.

NYCCELP is concerned 1) that the damage caused by lead poisoning be prevented, (2) that the economic benefits of eliminating lead paint exposure be realized, and (3) that statutes and regulations created to protect children from lead poisoning be applied and obeyed. While NYCCELP's purpose is the prevention of childhood lead poisoning, the organization recognizes that imposing liability on parties responsible for preventing the injury of innocent persons (such as children) from hazards (such as lead paint) serves an important public policy of encouraging compliance with such responsibilities. Sage v. Fairchild-Swearigen Corp., 70 N.Y.2d 579, 587 (1987); Waters v. NYC Housing Authority, 69 N.Y.2d 225, 230 (1987) (“possibility of tort liability arising from injury to tenants or others on the premises provides a strong incentive to landlord to keep locks and other security systems in good repair”); Micallef v. Miehle Co., 39 N.Y.2d 376, 385 (1976); Codling v. Paglia, 32 N.Y.2d 330, 340-42 (1973). If negligent property owners can evade the economic consequences of the devastating injuries lead poisoning inflicts upon the children of this state, insufficient incentives will exist to make landlords take preventative measures.

Amicus CHINESE PROGRESSIVE ASSOCIATION (“CPA”) is a non-profit organization serving the Chinese community in New York City. Since 1993, CPA has conducted a lead poisoning prevention and outreach program in New York's Chinese community. As part of this program, CPA conducts an annual environmental health fair, bilingual educational workshops, and street outreach. CPA also helps Chinese immigrant families of lead poisoned children overcome language barriers, know their rights, and get the help they need. CPA has also developed Chinese language educational literature, displays, children's activities, and games related to lead poisoning. Lead poisoning affects many children in the New York Chinese community, and thus CPA is greatly concerned with the outcome of these cases.

Amicus COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES, INC., (“CHCF”) has worked since 1982 to improve the lives of Latino children and families. The agency was founded by a group of Latino health and human service professionals in response to the lack of culturally sensitive and linguistically appropriate services. CHCF was established as an advocacy agency, and has subsequently developed programs in critical areas of need, not only to provide services to the community, but as well to inform its Center for Advocacy and Community Building of the changing and growing needs of the Latino community. Unlike other direct service agencies that serve minority communities, CHCF has developed a unique system of utilizing its presence and activities within the community to obtain information on the changing needs of the Latino population and advocate for systemic reform. Lead poisoning disproportionately affects the Latino community, with devastating consequences not only for children but their families as well. CHFC therefore has an interest in the outcome of this case, and strongly supports public policy changes to reduce and eliminate the entirely preventable disease of lead poisoning.

Amicus COMMUNITY SERVICE SOCIETY OF NEW YORK, INC. (“CSS”) works cooperatively with community-based organizations and other social policy and advocacy groups to

fight poverty through research, advocacy, community development, and direct service. Since its founding in the 1840s, the CSS has advocated for the health and welfare of New York City's poor residents. Through its activities, CSS has promoted and increased the affordable housing stock for poor and homeless families in New York City and used legal intervention to protect the rights of poor tenants. CSS's projects specifically seek to ensure that New York City residents are protected from environmental health hazards. Thus, the organization has a significant interest in the outcome of these cases. CSS also appeared as an amicus in Juarez.

Amicus ENVIRONMENTAL ADVOCATES (“EA”) is a non-profit organization, with thousands of individual supporters and over 130 organizational members throughout New York State. For more than 31 years, EA has served the people of New York as a watchdog and advocate on virtually every important state environmental issue. Through advocacy, coalition building, citizen education and policy development, EA works to safeguard public health and preserve our unique natural heritage. EA has long been active in working to reduce the incidence of lead poisoning, one of the chief environmental health hazards facing children and adults alike.

Amicus GREATER NEW YORK LABOR-RELIGION COALITION (“GNYLRC”) is a network of trade union and religious leaders concerned with human rights. Lead poisoning is not a new human rights issue to this organization. After all the years society has known about lead poisoning's devastating effects on its most vulnerable citizens and how to prevent it, it is a tragedy that the persons responsible for the major source of that poisoning, lead paint in housing, have not eliminated it. These cases bear directly on this central concern of the GNYLRC, which was also an amicus in Juarez.

Amicus LEGAL SERVICES FOR NEW YORK CITY, LEGAL SUPPORT UNIT, (“LSNY LSU”) is composed of the attorneys and legal advocates from the 15 neighborhood legal services offices that provide free legal services to low-income tenants and families throughout New York

City. LSNY LSU also co-chairs the Housing Advocates Task Force, a group of tenant advocates dedicated to protecting the constitutional, statutory, and regulatory rights of low-income tenants and families, a goal that these cases' outcomes will either support or undermine. LSNY LSU was also an amicus in Juarez.

Amicus MAKE THE ROAD BY WALKING, INC., (“MTRBW”) is a membership-led, community-based, not-for-profit organization committed to promoting collective action and expanding the opportunities for self-determination among residents of Bushwick, Brooklyn, through collaborative learning, organizing and activism, and community support. MTRBW's Environmental Justice project is working to achieve solutions to the environmental problems that plague the Bushwick community. One of the most serious of these problems is childhood lead poisoning, as Bushwick had the highest rate of new cases of childhood lead poisoning in New York City, according to the most recent available data from the City Department of Health. The majority of MTRBW members and clients live in dwellings in the Bushwick community. The majority of Bushwick's housing stock was built before 1960 and has not been renovated. Many of MTRBW's members live in pre-1960 multiple dwellings or one- and two- family homes in New York City and are parents or legal guardians of young children. Indeed, more than half of Bushwick households in this predominately Latino community have children under age 18. MTRBW was also a plaintiff in NYCCELP v. Vallone.

Amicus METROPOLITAN COUNCIL ON HOUSING (“Met Council”) is a New York City-wide tenant organization dedicated to decent, affordable, and integrated housing. Many Met Council members live in buildings where lead paint poses a severe health hazard to children. Met Council therefore is greatly concerned with the outcome of these cases. Met Council was also a plaintiff in NYCCELP v. Vallone, and an amicus in Juarez.

Amicus MOUNT VERNON UNITED TENANTS (“MVUT”) is a 20-year-old city-wide tenant membership organization that fights to protect and extend tenants rights. Mount Vernon has an aging housing stock that suffers from much deferred maintenance. Lead-based paint hazards are a clear and present danger to many of Mount Vernon residents. MVUT supports all efforts to remediate threats to the health and safety of its members and other Mount Vernon residents.

Amicus NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE (“NYCEJA”) is a not-for-profit membership organization promoting a healthful environment, equal environmental protection, and open participation in developing environmental policy, especially environmental policies that affect New York City's low-income and minority communities. In particular, it is concerned with proper implementation of environmental laws to protect low-income people and people of color from toxic environmental hazards. NYCEJA has identified childhood lead poisoning as having a significant adverse impact on these communities. NYCEJA's Minority Worker Training Program provides training to youth recruited from neighborhoods with high rates of lead poisoning, such as Harlem, South Bronx, Williamsburg, and Central Brooklyn, in environmental work such as lead abatement. NYCEJA is greatly concerned that the Appellate Division's decisions in these cases is reversed. NYCEJA was also an amicus in Juarez, as well as a plaintiff in NYCCELP v. Vallone.

Amicus NEW YORK LAWYERS FOR THE PUBLIC INTEREST (“NYLPI”) is a not-for-profit public interest law firm founded in 1976. Staff attorneys engage in advocacy and test case litigation in the areas of disability, health, education and environmental law on behalf of low-income communities and communities of color. In recent years, the public and experts alike have increasingly recognized that New York's communities of color and low-income communities have borne an unfair burden of environmental harm from many different pollution sources, such as solid waste transfer stations, incinerators, sewage treatment plants, and power plants. In addition, these communities suffer from environmental and health hazards created by unsafe housing. These hazards

include exposure to lead, mercury, mold and other toxins. NYLPI's Environmental Justice and Community Development Project seeks to address these problems by offering legal assistance and community organizing resources to environmentally distressed neighborhoods. NYLPI's goal is to strengthen communities' abilities to assert their right to a healthy environment while promoting economic development, safe and affordable housing, open space, and community services. NYLPI joins in this matter as amicus curiae because reversal of the Third Department's decisions in these cases will help reduce New York's epidemic of childhood lead poisoning, which is particularly prevalent in many of the low-income communities of color NYLPI represents.

Amicus NEW YORK PUBLIC INTEREST RESEARCH GROUP FUND, INC. ("NYPIRG") was formed in 1973 as a non-profit, non-partisan group to bring about policy reforms while training students and other New Yorkers to be advocates. NYPIRG is New York State's largest organization that works on issues such as environmental preservation, consumer protection, voter registration and matters affecting public health, including lead paint poisoning. NYPIRG's members include parents who live in older dwellings and who are legal guardians of children at risk of lead poisoning. NYPIRG has a long history of involvement in the area of lead poisoning prevention, beginning in 1992 when it began a Lead Poisoning Prevention Awareness Campaign. In 1993, NYPIRG produced Get the Lead Out, a consumer handbook on lead poisoning prevention. NYPIRG also has published the LEADletter, which reports on lead poisoning issues statewide. NYPIRG was a plaintiff in NYCCELP v. Vallone, and in a recent Article 78 petition that resulted in a ruling requiring the New York City Department of Health to provide access to electronic data on childhood lead poisoning. NYPIRG v. Cohen, N.Y.L.J., July 23, 2001, at 28 col. 5 (Sup Ct. N.Y. Co.).

Amicus NEW YORK STATE TENANTS & NEIGHBORS COALITION, INC. ("NYSTNC") is a state-wide tenants' rights lobbying and advocacy membership organization. The organization lobbies the New York State Legislature on laws affecting tenants' rights and protections, the

allocation of funds for affordable housing, and the preservation of housing. NYSTNC therefore has a substantial interest in these cases. NYSTNC was also a plaintiff in NYCCELP v. Vallone, and an amicus in Juarez.

Amicus PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. (“PRLDEF”) is a non-profit organization founded in 1972. It seeks to ensure equal protection of the laws and to protect the civil rights of Puerto Ricans and other Latinos. It has been involved in numerous cases seeking to vindicate the rights of Puerto Ricans and other Latinos related to housing, including NYCCELP v. Koch. PRLDEF was an amicus in Juarez.

Amicus ROCHESTER LEAD FREE COALITION (“RLFC”) is an organization committed to eliminating childhood lead poisoning in Rochester and Monroe County, New York, with members from the medical and public health field, education, community and neighborhood groups, civil rights organizations, public interest law firms, housing groups, scientific and business organizations and local government. Rochester and Monroe County have a significant problem with lead poisoning. In 1995, 37.5% of Rochester children under 5 years old who were tested had blood lead levels over 10 micrograms of lead per deciliter of blood (“ $\mu\text{g}/\text{dL}$ ”) (the level that the Center for Disease Control assigns as dangerous). Lanphear, BP. Byrd RS. Auinger P. Schaffer SJ. Community Characteristics Associated with Elevated Blood Lead Levels in Children, 101 Pediatrics (2) 64-71 (Feb. 1998). In some areas of Rochester over 50% of children tested had lead levels higher than 10 $\mu\text{g}/\text{dL}$. Id. The vast majority of the housing stock in Rochester was built before 1940, and experts estimate that over 80,000 units in Rochester have lead contamination. Of these, 34,600 units have been identified as having particularly high risk because they are rental units built before 1940 occupied by low-income tenants. RLFC has been actively working to raise awareness about the danger of childhood lead poisoning and to develop and obtain agreement from all stakeholders on a program to increase the screening of both housing and children for the presence of dangerous lead

levels. RLFC has sponsored two community-wide lead summits to educate decision makers and the public and to gather input on priorities for action. RLFC therefore is greatly concerned with the outcome of these cases.

Amicus UNITED PARENTS AGAINST LEAD (“UPAL”) is a New York state-wide non-profit group whose members are parents of lead poisoning children. UPAL engages in community education about lead poisoning prevention and organizes conferences on lead poisoning. UPAL members are located primarily in upstate communities and cities (such as Buffalo) where there are few or no local governmental mandates or efforts to effectuate primary prevention of lead poisoning. UPAL is thus greatly concerned with the outcome of these cases.

Amicus UTICA CITIZENS IN ACTION, (“UCA”) a multi-issue public interest association affiliated with Citizen Action of New York, was founded in 1997 to address critical social, economic and environmental issues facing residents of Oneida, Herkimer, and Madison Counties. Members of UCA work to empower low- and moderate-income Central New York residents to participate in shaping the policies that affect their lives, such as those concerned with economic justice, the environment, housing, education, economic development, health care, public benefit programs, and consumer issues. UCA projects include research and policy development, public education on a wide range of public policy issues, development of educational materials, community outreach and grassroots organizing, coalition development, training, and lobbying. UCA and its members are concerned with the outcome of these cases, as lead poisoning affects many residents in the area. Some 446 children in Oneida County have elevated blood levels (blood levels of greater or equal to 10 $\mu\text{g}/\text{dL}$). (New York State Department of Health, 1999 prevalence data). Of New York counties outside New York City, Oneida County has the 5th highest rate of children tested who have elevated blood level rates ranging from 10 to 19 $\mu\text{g}/\text{dL}$ and the 7th highest rate for children with rates equal to or greater than 20 $\mu\text{g}/\text{dL}$. Id. The 13501 zip code, which is situated in Utica’s

inner-city, was ranked the 11th highest of all zip codes in the state (excluding New York City) of children with blood lead levels of 10 µg/dL or greater. Id.

Amicus UTICA COMMUNITY ACTION, INC. (“UCAI”) is a regional and multi-service human service, job training and literacy provider, and housing and community development agency established in 1965 to advocate for and provide direct service to limited income families, youth, disabled persons, and the elderly, in the City of Utica as well as in Oneida, Herkimer, and Madison Counties. UCAI's mission is to develop, operate, and advocate for programs and services that invest in human potential and empower individuals, families, and communities to achieve self-sufficiency and lasting economic viability. In conjunction with the City of Utica, UCAI manages the Lead Safe Utica Project, which is a comprehensive lead hazard control and prevention program financed by the United States Department of Housing and Urban Development. Services of the program include community education, outreach, risk assessment, direct lead hazard control, financial assistance to property owners, and clearance testing. UCAI also operates a New York State Department of Health funded relocation program for families displaced because of lead contaminated housing. The UCAI Construction Services Component consists of personnel trained in EPA-accredited programs for Lead Abatement Supervisors and Lead Abatement Workers and an application has been approved for the agency to be an EPA-accredited Lead Abatement firm. UCAI has been a leading advocate for increased funding and public support for lead prevention and hazard control programs in New York State.

UCAI is concerned with the outcome of these cases, as Utica is a high-risk community for childhood lead poisoning based on the prevalence of poisoned children, percent of housing built before 1940, and the proportion of very low- and low-income residents. Utica is one of the state's poorest cities, with a poverty rate (21%) exceeding that of cities of comparable population such as Schenectady, Albany, Niagara Falls and Binghamton. Of all metropolitan areas in New York State,

the City of Utica has one of the oldest housing stocks: 97% of all housing units were built before 1978. The rate of substandard housing in Utica's lower income neighborhoods ranges from 40 to 60%.

Amicus WEST HARLEM ENVIRONMENTAL ACTION, INC. (“WE ACT”) is a non-profit community-based environmental justice organization working to improve environmental protection, safeguard public health, and secure environmental justice, including the prevention of lead poisoning in children. Many children in Northern Manhattan live in buildings where lead paint poses a severe health hazard. WE ACT therefore is greatly concerned with the outcome of these cases. WE ACT was an amicus in Juarez.

Medical Doctors and Health Organizations

Amicus PHILIP LANDRIGAN, M.D., is a pediatrician and Chair of the Department of Community and Preventive Medicine at the Mount Sinai School of Medicine. For more than 30 years, he has undertaken research into childhood lead poisoning, and has led efforts nationally and locally to protect children against lead. He has served since 1993 as Chair of the New York State Advisory Council on Lead Poisoning Prevention, created pursuant to New York PHL § 1370-b.

Amicus I.H. MAUSS, M.D., Professor Emeritus of Clinical Pediatrics, Cornell University School of Medicine, is a Board member of Physicians for Social Responsibility. In his practice, he has seen first-hand how young New York children suffer elevated lead levels unless every precaution is taken to remove lead paint from where it can become accessible to the children in residential housing; otherwise, the dangers to child health are immediate, profound, and devastating. He has seen how lead poisoning's effects hamper all the skills critical for educational success. Unnecessary exposure to lead paint and lead paint dust causes the children to incur irreparable brain injuries and physical trauma and causes their families to suffer associated emotional distress, knowing the irreversible, devastating effects of lead poisoning, and knowing also that lead poisoning

is entirely preventable. Given these facts, Dr. Mauss, like his colleagues, believes it is intolerable, indecent, and uncivilized to subject children to this insidious disease. Dr. Mauss was also an amicus in Juarez.

Amicus JOHN ROSEN, M.D., is Professor of Pediatrics and Head of the Division of Environmental Sciences at Albert Einstein College of Medicine and Attending Pediatrician at Montefiore Medical Center, Bronx, New York. Dr. Rosen's entire professional career has been dedicated to clinical treatment, research, and writing in the field of mineral and heavy metal metabolism, and he has published numerous articles in peer reviewed journals on these areas. In 1984-85 and 1990-91, he served as Chair of the Childhood Lead Poisoning Prevention Advisory Committee of the Centers for Disease Control and Prevention (CDC), United States Department of Health and Human Services. The CDC's Statement, Preventing Lead Poisoning in Young Children, issued in 1985 and again in 1991, sets forth the standards of the health profession and the United States Public Health Service on testing for and management of lead poisoning and abatement (de-leading) of housing in the United States and is recognized as the definitive federal statement on prevention of lead poisoning in children.

Dr. Rosen also served as a Peer Reviewer for the Agency for Toxic Substances and Disease Registry (ATSDR) of the United States Public Health Service, which issued the report, The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress; on the United States Environmental Protection Agency (EPA) Peer Review Panel for that agency's Lead Criteria Document; and as a consultant and author for EPA's Air Lead Quality Criteria Document.³

3. Recently, in Campbell v. Metropolitan Property and Casualty Insur. Co., 239 F.3d 179 (2d. Cir 2001), the Second Circuit extensively reviewed Dr. Rosen's qualifications, and ultimately agreed with the trial court's conclusion that he "seems to be a preeminent expert in the field relied on by all the relevant government agencies to establish the policies that the government has adopted." Id. at 186.

Dr. Rosen's clinical treatment and research focus on the pathophysiology, metabolism, and consequences of lead toxicity in children. He is the Director of the Lead Poisoning Prevention Project at Montefiore Medical Center, which tests and treats approximately 7,000 children in the New York City area annually for lead toxicity. These children overwhelmingly reside in the poorest, most deteriorated housing stock. The Division assesses patients' lead sources and provides both medical and environmental intervention. Dr. Rosen and his staff directly investigate the homes of their patients' families to determine what measures are necessary to make the housing safe from the dangers of lead poisoning. Because lead poisoning results in severe and potentially permanent developmental and neurological impairments of children, Dr. Rosen actively seeks to support whatever legal measures can be taken to reduce the risk of this entirely preventable epidemic. Dr. Rosen was also an amicus in Juarez.

Amicus DEBORAH A. CORY-SLECHTA, Ph.D., is Professor and Chair of the Department of Environmental Medicine and Professor of Neurobiology and Anatomy and of Pediatrics at the University of Rochester School of Medicine and Dentistry, Rochester, New York. Her work includes studies addressing the involvement of dopaminergic and glutamatergic (NMDA) neurotransmitter systems in learning impairments and attention deficits as well as other behavioral dysfunctions caused by low-level exposure to lead, with the goal of determining the underlying neurochemical and regional mechanisms of lead-induced behavioral deficits. The findings of her work raise concerns about the extent to which lead exposure serves as a risk factor for other behavioral dysfunctions mediated by these systems, such as schizophrenia and drug abuse, as well as the extent to which lifetime low-level lead exposure contributes to neurodegenerative diseases associated with advancing age. Among her recent published peer-reviewed articles are Cory-Slechta, Crofton, Foran, Ross, Sheets, Weiss, and Mileson, Methods to Identify and Characterize Developmental Neurotoxicity for Human Health Risk Assessment. I: Behavioral

Effects, 109 Environ. Health Perspect. (1) 79-91 (March 2001); Brockel and Cory-Slechta, Lead-induced Decrements in Waiting Behavior: Involvement of D2-like Dopamine Receptors, 63 Pharmacol. Biochem. Behav. (3) 423-34 (1999); Brockel and Cory-Slechta, The Effects of Postweaning Low-level Pb Exposure on Sustained Attention: a Study of Target Densities, Stimulus Presentation Rate, and Stimulus Predictability, 20 Neurotoxicology (6) 921-933 (1999). The incidence of childhood lead poisoning and elevated blood lead levels is particularly high in Rochester, and Dr. Cory-Slechta is greatly concerned that public policy further the prevention of pediatric lead toxicity.

Amicus PHYSICIANS FOR SOCIAL RESPONSIBILITY, NEW YORK CITY, (“PSR”) is a chapter of a national non-profit organization of health professionals whose work is fueled by the clear understanding that health and environmental catastrophes that cannot be cured must be prevented. PSR's focus encompasses the health and environmental effects of all pollutants and specifically environmental lead. Lead poisoning's profound threat to children's health dictates that the most reasonable response is determined prevention. The cases being argued here bear directly on the question of New York property owners' responsibility to protect children's health. As health professionals who reside and work in New York, PSR members have a strong interest in this case. PSR was an amicus in Juarez.

Amicus PUBLIC HEALTH ASSOCIATION OF NEW YORK CITY (“PHA”) is the local affiliate of the 60,000-member American Public Health Association. Its members are professionals who are engaged in public health research, education and practice. For more than six decades it has been working to improve the health of all who live and work in New York City. PHA has a strong interest in the prevention of childhood lead poisoning and the outcome of these cases.

QUESTION PRESENTED

1. Can knowledge of the foreseeability of lead paint contamination be imputed to professional landlords of New York rental properties — where they know the dwellings are at least 50 years old and house young children, and where they have a contractual duty to reenter to make repairs — so that the trier of fact can determine whether such professional landlords acted reasonably?

The Appellate Division, Third Department, ruled as a matter of law that the professional landlords in both these cases — even though they knew their buildings contained deteriorated paint and admitted knowing that most old buildings have lead paint and that lead paint is toxic to children — could not be held liable without actual notice that the peeling paint contained lead.

For the reasons discussed below, this Court should reverse those decisions, either as a matter of law, or alternatively, to permit the trier of fact to determine whether such professional landlords acted reasonably.

STATEMENT OF FACTS

B. Childhood Lead Poisoning From Paint Results in Irreparable and Costly Harms and Yet Is Entirely Preventable

Lead is “a highly toxic metal which, when introduced into the human body, produces a wide range of adverse health effects, especially with regard to children.” Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 66. Lead particles ingested by the human body cause severe damage to the brain and central nervous system, and the courts have repeatedly and consistently held that lead paint causes grievous and terrible, irreparable and lifelong harm to children. NYCCELP I, 138 Misc. 2d at 189, aff'd, 139 A.D.2d 404; NYCCELP II, slip op. at 19 {C-544, S-650}, aff'd, 170 A.D.2d 419; NYCCELP IV, 216 A.D.2d at 220; NYCCELP VI, 245 A.D.2d at 52 (“plaintiffs make a compelling case that this is a serious health hazard requiring immediate action”); Juarez v. Wavecrest Mgt., 212 A.D.2d at 40, modified on other grounds, 88 N.Y.2d 628; Williamsburg Around the Bridge Block Ass'n, 223 A.D.2d at 66; City of New York v. Lead Industries, 190 A.D.2d 173, 176 (1st Dep't 1993).

Lead paint on the interior surfaces of children's homes is the primary cause of lead poisoning. NYCCELP I, 138 Misc. 2d at 189 n.1, aff'd, 139 A.D.2d 404; New York City Public Advocate, Lead & Kids: Why are 30,000 NYC Children Contaminated?, February 2, 1998, at 4 (herein “Public Advocate Report”).⁴ The problem stems primarily from peeling or chalking lead paint on aging or damaged structures. U.S. Dep't of Health and Human Services, Centers for Disease Control (“CDC”), Preventing Lead Poisoning in Young Children (1991) (“CDC Statement”)

4. Available online at www.pubadvocate.nyc.gov

at 18. The paint particles either fall off from natural deterioration or are removed when the structure is repaired.

When lead paint remains in residential housing, the dangers to child health can be immediate, profound, and devastating. The injuries to young children from lead ingestion are diverse, often severe, and generally irreparable, and indeed, blood lead levels “as low as two micrograms per deciliter [“ $\mu\text{g}/\text{dL}$ ”] in children under seven years old lowers IQ, stunts growth and causes behavioral problems.” Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 66; see also Lanphear, Cognitive Deficits Associated with Blood Lead Concentrations < 10 $\mu\text{g}/\text{dL}$ in US Children and Adolescents, 115 Public Health Reports 521-29 (Nov.-Dec. 2000) (finding a one point decrement in reading scores for every 1 $\mu\text{g}/\text{dL}$ increase in blood lead level above 1.0 $\mu\text{g}/\text{dL}$); Lanphear, Subclinical lead toxicity in U.S. children and adolescents, 47 Pediatric Research (4) 152A (2000).

Because lead poisoning is the most common, preventable and devastating environmental disease among children, even at very low exposure levels, the consensus among the public health community and federal officials is to focus efforts on primary prevention, rather than awaiting the poisoning of a child before performing environmental remediation. E.g., CDC Statement, at 7-12; U.S. Dep't of Health and Human Services, CDC, Strategic Plan for the Elimination of Childhood Lead Poisoning (1991) (“Strategic Plan”); Chisolm, The Road to Primary Prevention of Lead Toxicity in Children, 107 Pediatrics (3) 581-83 (March 2001);⁵ Lanphear, Cognitive Deficits

5. Dr. Chisolm, who passed away this June after a lifetime of research in the field of pediatric lead poisoning (see McCoubrey, “J. J. Chisolm, 79, Dies; Lead-Poison Crusader,” New York Times, June 26, 2001, C15), noted in his March, 2001, article that the studies now show “a greatly increased risk of long lasting, if not permanent, cognitive and neurobehavioral deficits” id. at 581, in children with low blood lead (continued...)

Associated with Blood Lead Concentrations < 10 µg/dL in US Children and Adolescents, 115 Public Health Reports 521-29 (Nov-Dec. 2000); Rogan, The Effect of Chelation Therapy with Succimer on Neuropsychological Development in Children Exposed to Lead, 344 New England Journal of Medicine (19) 1421-26 (May 10, 2001).⁶ To reduce lead poisoning's prevalence, lead must not be permitted to remain accessible to children.⁷

In the CDC's Strategic Plan, “which calls for a concerted, coordinated societywide effort to eliminate this disease,” CDC Statement at iii, the CDC used Rosen, Sequential Measurements of Bone Lead Content by X-Ray Fluorescence in CaNa₂EDTA-Treated Lead-Toxic Children, 93 Envtl. Health Perspectives 271 (1991), and other corroborating studies in a cost-benefit analysis. This

5. (...continued)

levels, while there are essentially no medical treatments for such poisonings:

90 to 95% of lead is sequestered in bone [and] we have no chelating agents that remove any significant amount of lead from bone.... bone can be a source of lead in blood for years.

Id. Dr. Chisolm concluded:

When one considers the number of children treated with chelation therapy during the past 50 years and all of the associated cost, proper environmental control would have had a much longer lasting benefit to our population.

Id. at 583.

6. The authors of that study found that medical treatments for children with lead levels below 45 µg/dL “did not improve the cognitive, behavioral, or neuropsychological outcomes” and concluded:

Since lead poisoning and its sequelæ are entirely preventable, our inability to demonstrate effective treatment lends further impetus to efforts to protect children from exposure to lead in the first place.

Id. at 1426.

7. A recent study, Sargent, The Association Between State Housing Policy and Lead Poisoning in Children, 89 Am. J. Pub. Health (11) 1690 (1999), demonstrated the profound difference in public health outcomes as a result of strict controls such as those imposed by Massachusetts. The study compared similar counties in Massachusetts and Rhode Island, with similar housing stock, populations, etc., and found that the incidence of blood lead levels greater than 20 µg/dL was over three times higher among residents in Rhode Island than in the Massachusetts. Id. at 1692 (Table 1). Moreover, the incidence of levels over 30 µg/dL was four times higher. The difference was largely attributed to the strict requirements of lead abatement in Massachusetts.

analysis showed that the costs of not removing lead paint safely from the environment are much higher than of doing so properly. Such costs include, among others, the medical treatment of children and construction workers, special education, and decreases in productivity, competitiveness, and lifetime earnings. Strategic Plan at 10-12, app. II. These studies show that if property owners abated lead hazards so as to reduce blood lead levels in the annual populations of six year olds' by 1 µg/dL, the savings in health care, special education, lost IQ points, lost productivity, and lost earning capacity would yield approximately \$17.2 billion per year. Schwartz, Societal Benefits of Reducing Lead Exposure, 66 *Envtl. Res.* 105 (1994); see also Salkever, Updated Estimates of Earnings Benefits from Reduced Exposure of Children to Environmental Lead, 70 *Envtl. Res.* 1, 4 (1995) (concluding that such reduction in blood lead levels would produce a net present value benefit of \$1,950 per child for all children turning 6 years of age each year).

C. Childhood Lead Poisoning Is Rampant in New York State

Amici believe these cases before the Court present issues of grave importance because of New York's widespread childhood lead poisoning problem. While this Court has already declared that “childhood lead paint poisoning may be the most significant environmental disease in New York City,” Juarez v. Wavecrest Mgt., 88 N.Y.2d at 641 (emphasis added), the impact of lead poisoning is keenly felt throughout the state. Data released by the New York State Department of Health (“NYSDoH”) indicate that in 1994, while only 42% of children under age 3 were screened, some 17,741 children under 3 years of age had blood lead levels of 10 µg/dL or above.⁸ See, NYSDoH,

8. Since 1991 the federal Centers for Disease Control has defined its level of concern as 10 µg/dL, CDC Statement, although there is an emerging consensus that this definition does not at all indicate the threshold for the onset of this disease. See Affirmation of Morri E. Markowitz, M.D. in Support of Motion
(continued...)

Maternal, Child and Adolescent Health Profile, New York State 1995 {C-561, S-661} and New York State Lead Poisoning Prevention Advisory Council, 1998 Report for the Program Years 1995-1996. {C-565, S-671} However, the number of children under six who had elevated blood levels was undoubtedly much higher, as State data indicate that in 1994 only 422,109 out of 1,550,996 children under age 6 were screened.⁹ Id.

Indeed, in New York City alone, based on New York City Department of Health (“NYCDoH”) statistics, the New York City Public Advocate estimated that at least 30,000 additional children would become lead poisoned in 1998 in New York City. Public Advocate Report, at 3. The two main agencies charged with enforcement of lead poisoning laws in New York City have themselves estimated that if all children in the city under age six were tested, more than 35,000 children annually would have blood lead levels of 10 µg/dL or greater. New York City Department of Housing Preservation and Development and Department of Health, Request for Grant Assistance for Lead-Based Paint Hazard Control, July 31, 1997 (grant application to U.S.

8. (...continued)

by New York City Coalition to End Lead Poisoning For Permission to Appear as Amicus Curiae, {C-493, S-599} at 5 note 1, {C-497, S-603} (discussing adverse impacts of lead levels below 10 µg/dL); Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d at 66 (noting levels as low as 2 µg/dL may cause adverse impacts). As a result, there have been calls within the academic community for the CDC to lower the definition to 5 µg/dL or even less. See, e.g., Lanphear, Cognitive Deficits Associated with Blood Lead Concentrations < 10 µg/dL in US Children and Adolescents, 115 Public Health Reports 521-27 (Nov.-Dec. 2000).

9. "Children under 6 years of age are considered to be most at risk of lead-based paint hazards because they are most likely to ingest lead-contaminated paint chips or soil. In New York State there are approximately 1.5 million children who are under 6 years of age." New York State Division of Housing Conservation and Renewal, New York State Consolidated Plan: Federal Fiscal Years 1996-1997, at 71 {C-622, S-728}. However, only “31 percent of the State's 1.5 million children under 6” were tested for lead in 1994. Id. at 73. {C-624, S-730}

Department of Housing and Urban Development [herein “HPD/DoH Grant Application”]), at 19. {C-570, S-676}

The children who are lead poisoned appear to be overwhelmingly found among minority populations: At least 81% of New York City children with blood lead levels of 20 µg/dL were known to be African-American, Latino, or Asian/Pacific, and only 5% were known to be Caucasian. Public Advocate Report, at 17. The disease also appears to affect predominantly poor communities. See e.g., HPD/DoH Grant Application, at 19 {C-570, S-676}(in some health sub-districts with primarily minority residents earning below the median income “up to 30% of one and two year old children had blood lead levels greater than 10 µg/dL”); U.S. Public Health Service, Agency for Toxic Substances and Disease Registry (ATSDR), The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress (1988).

D. Lead-based Paint Is Widespread in New York State's Housing Stock — More So than Any Other State — and Thus Poses a Grave Danger to Children

For much of the 20th century lead paint was used on both exterior and interior surfaces in the United States. According to the United States Department of Housing and Urban Development (“HUD”), “an estimated 29 million homes have some interior lead-based paint, of which 39 percent have dust lead levels above [federal standards].” HUD, National Survey of Lead and Allergens in Housing, Final Report, Volume I: Analysis of Lead Hazards, Peer Review Draft, Jan. 12, 2001, at ES-3 [herein “HUD National Survey”].¹⁰

10. Available online at www.hud.gov/lea/Vol1finalreport.pdf

Although the federal government virtually prohibited the manufacture of lead paint in 1977 (New York City banned the sale of lead paint in 1960, 24 R.C.N.Y. § 173.13), lead paint remains pervasive; the vast majority of painted structures constructed before 1960 contain lead paint. See CDC Statement, at 18; 16 C.F.R. pt. 1303. Nationally, ninety-nine percent of buildings built before 1940 (and 85% of buildings built before 1960) have lead paint. National Academy of Sciences National Research Council, Measuring Lead Exposure in Infants, Children, and Other Sensitive Populations (1993) at 113. According to HUD, some 43% of the housing stock in the Northeast has significant lead-based paint hazards. HUD National Survey, at 3-5 (Table 3.1).

The problem of lead paint is particularly acute in New York State:

Because the concentration of lead in paint steadily declined before 1978, older homes are more likely to have paint with higher concentrations of lead. The risk for lead exposure associated with this source is greatest in homes built before 1950; in New York, both the number (3,401,416) and proportion (47%) of housing units built before 1950 are greater than any other state.

"Children with Elevated Blood Lead Levels Attributed to Home Renovation and Remodeling Activities — New York, 1993-1994," in Centers for Disease Control, Morbidity and Mortality Weekly Report, (Jan. 3, 1997) at 1122 (emphasis added) {C-625, S-731}. According to the New York State Division of Housing Conservation and Renewal ("DHCR"),

approximately 6 million (or 88 percent) of the State's housing units were built before 1980 and may, therefore, be contaminated with lead-based paint.

...

... 59 percent of all units built before 1940 are inhabited by households with incomes classified by HUD as "low" or "very low".... Low and very low income households also occupy 49 percent of all units built between 1940 and 1979.

DHCR, New York State Consolidated Plan: Federal Fiscal Years 1996-1997, at 71-72. {C-622-23, S-728-29}.¹¹

Likewise, the 1990 Census indicated that New York City has the nation's highest percentage of pre-1950 (47.1%) and pre-1960 (63.5%) residential housing.¹² The New York City Public Advocate estimates that about two-thirds of all New York City housing contains lead paint. Public Advocate Report at 34.¹³ As this Court has noted:

[lead] paint continues to cover the walls of two out of three City dwellings ... Its widespread use thus renders lead poisoning a continuing threat to the health of young children in New York City, especially those in older and poverty-ridden neighborhoods.

11. See also N.Y.S. Department of Health, Protecting Our Children - The Success of New York's Efforts to Prevent Childhood Lead Poisoning, May, 2000 [herein "N.Y.S. DoH, Protecting Our Children"] (available at www.health.state.ny.us/nysdoh/lead/childlead.pdf) (excerpts, Exhibit "A" to the July 27, 2001, Affirmation of Matthew J. Chachère, submitted herewith [herein "Chachère Aff."]), noting that

New York has the highest number of housing units built before 1950 in the nation.

Of the 7,226,891 housing units in this state, 63.4% were built prior to 1960 and 46.9% were built prior to 1950. [HUD] has estimated that 75% of pre-1950 housing contains lead paint.

Lead poisoning can reach across all socioeconomic levels, but poor children tend to be at greater risk. More than 627,000 children under the age of six were eligible for Medicaid benefits during 1998. As a result of their economic standing, these children are more likely to live in older, deteriorated housing with lead paint hazards.

Id. at 1 (emphasis added).

12. By comparison, nationally only 39% of housing stock is pre-1960. HUD National Survey at 2-3 (table 2.1).

13. Indeed, New York City recently estimated that there are "almost 2,000,000 units of housing [within the city] with lead based paint, approximately half of which are occupied by persons of low or moderate income." HPD/DoH Grant Application at 18. {C-569, S-675} The City has further estimated that the number of apartments with lead paint where children under the age of 6 years reside could be as high as 323,000, and of these, the City estimated that some 174,000 of these dwellings are occupied by low income families. Id. at 19. {C-570, S-676}

Juarez v. Wavecrest Management, 88 N.Y.2d at 641 (citing NYCCELP I). Low-income tenants are most likely to fall in this segment because, unfortunately, low-income correlates with deteriorating housing.

E. Plaintiffs' Facts

1. Chapman

Infant plaintiff Jaquan Chapman was born June 16, 1993, and in August of 1994 moved with his family into the subject building (443 Myrtle Avenue, Albany, New York) owned by the defendants in that case. {C-96} His mother plaintiff, Sallie Chapman, executed a two year lease with the landlords, which specifically contained a right to enter by the landlord and made the landlord responsible for repairing defects at the premises {C-96-97}:

8. Entry by the landlord The tenant agrees to allow the landlord to enter the leased premises at any reasonable hour to repair, inspect, install or work upon any fixture or equipment in said leased premises and to perform such other work that the landlord may decide is necessary....

Defendant Dennis Silber's actions also clearly indicated a right and duty to enter the premises for maintenance and repairs during the time he controlled the premises, having entered the apartment, for example, to fix a window. {C-80} At the time of this repair Mr. Silber saw chipping paint on the window sill and frame. {C-118} According to Ms. Chapman, Mr. Silber also saw flaking and chipping paint on the porch and outside of the house. {C-119}

Dennis Silber knew that the property was constructed in the 1920's or 1930's. {C-77} Dennis Silber was part of S&H Associates, a partnership along with defendants Jay Silber and Gertrude Silber, which owned and managed for-profit real estate including 443 Myrtle Avenue, 485 Myrtle Avenue and 33 West Street in Albany. {C-171} Dennis Silber also knew that plaintiffs

James and Sallie Chapman had three children, one of whom was two years old {C-74} and knew about the dangers of lead before Jaquan was lead poisoned, as he testified in his EBT:

Q. At some point did you become aware of the dangers of lead paint?

A. I was aware of the dangers of lead. I knew that lead had a potential for being toxic.

Q: Were you aware that it was toxic to children under six?

A. I was aware that it was toxic to all forms of life {C-62}

Gertrude Silber also knew about the dangers of lead at the time that Jaquan was residing at the premises {C-270} and was a part of S&H Associates, until it was dissolved. {C- 273}

On or about September 13, 1994, Jaquan was tested for lead and found to have an elevated blood lead level of 13 µg/dL. {C-125} Subsequently, defendants Dennis and Gertrude Silber transferred their interest in the premises to the co-defendants on or about September 23, 1994, {C-98-99} thus Jaquan's lead poisoning occurred in part while defendant Dennis Silber owned and controlled the property.

Defendants Jay Silber and Judith Harrington continued to own the premises {C-148} after defendants Dennis and Gertrude Silber conveyed their interest, and subsequently came to the premises to introduce themselves and to inspect the apartment. {C-225} They also had (and did not deny) a right and a responsibility to enter the premises for maintenance and repairs purposes during the time they controlled the premises:

Q: Who was responsible for the maintenance in the Chapman apartment?

A: Dennis, from the point at which we rented to them until he was no longer part of the partnership, then my husband Jay.

(defendant Judith Harrington's EBT). {C-251}

Defendant Jay Silber admitted he had never removed any paint and had just painted over existing paint, {C-158-159} and knew that the premises "was built after the turn of the century ...

could have been the first 10 or 20 years.” {C-160} He knew that there may have been peeling paint in the window tracks since that is a typical condition in older homes, {C-159} and that defendants had never repainted the outside since they bought the property in approximately 1984. {C-169}

Several months before Jaquan’s severe lead poisoning, the Chapman family began to notice the deteriorated condition on the porch. Ms. Chapman noticed that the paint on the window sills and tracks inside the apartment was coming loose and that the window sills had peeling and chipping paint and dust, {C-227} and complained to Jay Silber about the large chunks of peeling paint on the porch. {C-227} Jay Silber confirmed receiving those complaints:

- Q: Prior to August of 1995, did the Chapmans ever make any complaints about the condition of the apartment?
...
A: No. The only things I can recall is ... [the] lock on the door ... if the lock doesn’t work, call me and I will come down immediately and attend to it ... I had to come down a few times; each time I came down, I got it to work ... [t]hen she said I think there is paint peeling on the porch and, you know, if I could paint that, that would be nice.
Q: When did Sallie Chapman mention the paint peeling on the porch?
A: Well, it was that phone call was the first time. Are you asking when he -- when that phone call was? I have no recollection. It was during the summer actually.
Q: Summer of 1995?
A: Yes .

(defendant Jay Silber’s EBT) (emphasis added). {C-179} His wife, Ms. Harrington, part owner of the premises and managing agent, as well testified that she knew that the premises were old and that she had knowledge of lead prior to the infant plaintiff’s diagnosis of an elevated blood lead level:

- Q: Can you tell me what the nature of that information was or what your knowledge was of the understanding of lead-based paint and its hazards?
A: I don’t know in what context it occurred, when specifically, but I know that it -- I know that it’s dangerous. I know that it has been shown to cause delays in children, not a good thing for people to ingest. {C-238}

Q: Rephrase. Prior to learning that Jaquan had an elevated lead level, was it your belief that there was no lead-based paint in this building or did you not have a belief one way or the other?

A: As I told you, I knew that lead at that point was a danger to children. I knew that most of the buildings in Albany for the past 15 years, had layers of lead based paint in them because based on what we had always done in terms of painting

(defendant Judith Harrington's EBT). {C-261}

During the Summer of 1995, Ms. Chapman's daughter saw Jaquan putting paint chips in his mouth, and Ms. Chapman again complained to Jay Silber about the chipping and peeling paint on the porch. {C-228} Ms. Harrington admitted receiving this complaint:

Q: Prior to August of 1995, did they ever make any complaint directly to you about the building?

A: I had a phone conversation with Sallie and it was before her son went into the hospital and I don't know if it was prior to August of 1995, if it was, it was July '95.

Q: What was the sum and substance of that conversation?

A: Sallie told me that her son Jaquan had been left unsupervised while her children was baby-sitting him, that he had been out on the front porch unattended; that one of her children found him ingesting chips of paint. That she furthermore stated that she never allowed him to be unsupervised, but she realized that while her younger daughter was home with him, that she felt that he was unsupervised; that this is shortly before he turned 2 years old, unsupervised on the front porch.

(defendant Judith Harrington's EBT) (emphasis added). {C-240}

In August of 1995, Jaquan was tested for lead and found to have an elevated blood lead level of 39 $\mu\text{g}/\text{dL}$. In response to reports of Jaquan's elevated blood lead levels, the County of Albany inspected the premises for lead hazards. {C-126} The County found several lead hazards at the premises, in part in the same areas that Ms. Chapman had complained about to the defendants. {C-

126-127} Jaquan was retested on August 21, 1995 and his blood lead level had increased to 43 µg/dL; he was subsequently hospitalized for treatment.¹⁴

The defendants in Chapman, therefore, knew that old buildings contained lead paint, knew that the building was built in the early 1900's and knew that lead paint was dangerous, toxic and poisonous to children. In addition, the defendants had a right to enter the premises, had statutory and contractual obligations to maintain and repair the premises and knew that there was chipping and peeling paint at the premises. Clearly, at the least, questions of fact exist as to whether the defendants can be imputed with the knowledge of the foreseeability of lead contamination in the dwelling.

2. Stover

Plaintiff Carlisa Stover moved into a first floor apartment in the subject building (22 Judson Street, Albany, New York) in February of 1993, rented from defendant James O'Connor. {S-403} At the time, she had a young child and was approximately eight months pregnant with the infant plaintiff Everton Lewis. Ms. Stover asserted that Mr. O'Connor was aware of her pregnancy and young child. {S-404} Mr. O'Connor had owned the premises since 1983 {S-110} and his family had owned the premises since 1944; thus Mr. O'Connor knew the building was at least 50 years old. {S-110} Defendant O'Connor had been in the business of owning rental property for many

14. Jaquan appears to have suffered serious, persistent injuries; an evaluation in 1996 at Albany Medical Center Hospital found delays in many areas, including speech and language, fine motor skills, cognitive functioning, personal-social skills, verbal reasoning, receptive and expressive language, and problem solving, and these problems continue. {C-230}

Ms. Chapman averred that after Jaquan's lead poisoning she told Dennis Silber's wife, Diane Delmonico, and that Ms. Delmonico replied that Dennis Silber, Judith Harrington, and Gertrude Silber had known about the deteriorated paint conditions for years and had been trying to get Jay Silber to paint the building for five years. {C-228}

years and, in addition to 22 Judson Street, also owned 34 Judson Street {S-140} and 36 Judson Street, {S-141} which were also used as income property – a total of seven rental units.

Defendant O'Connor also had a right to enter and was responsible for making repairs and maintaining the premises. {S-9} Both Ms. Stover {S-70} and Mr. O'Connor stated that maintenance and repair of the premises were Mr. O'Connor's responsibility. He did the painting {S-128} and other work there, including "mason work, roofing, plumbing, painting and carpentry," {S-129} went into the premises at Ms. Stover's request "two times to look at the door," {S-133} and "put compound in the holes that they made with bicycles going up and down the stairs." {S-139}¹⁵

Prior to the tenancy, defendant O'Connor knew that lead was dangerous to children and that the old paint at the premises had not been removed. In fact, he testified that:

Q: Were you aware that lead paint was dangerous before [notice from the County finding lead hazards at the premises]?

A: Certainly, but I know there's been no lead paint since 1973.

Q: What was your understanding generally about lead paint?

A: I know that lead paint, if a child eats it or anybody, it can cause conditions ... {S-135}

Q: Had you received any pamphlets or literature regarding the dangers of lead-based paint before Ms. Stover rented your apartment?

A: No, but I knew about it, other people telling me.

Q: Could you tell me what it is that you knew about lead-based paint?

A: That it's potentially harmful and they told me in 1973, they told me the paint contained no more lead and that's what you should use. I said, "how can you use anything else?" There was no more lead paint. In other words, it's 1973, there is no longer, unless it's on there before. {S-150}

15. As set forth in Ms. Stover's affidavit:

During the tenancy, it was understood and agreed between Mr. O'Connor and me that he was responsible for the maintenance and repair of the premises. On several different occasions, he and/or his handy man Angelo came into my apartment to fix things including the door to one of the bedrooms, the toilet and the holes in the walls in the hallway. {S-404}

- Q: Since you purchased the property in the mid 1980's, had anyone else done any work on the property besides Angelo?
- A: No. {S-129}
- Q: When you, yourself, painted the downstairs apartment, did you ever remove any existing paint on the wall before you put lead-free paint on?
- A: No ... {S-136}
- Q: O.K. Each time you painted the hallway, did you remove any paint before you put on the new coat of paint?
- A: No, I didn't remove any paint ... {S-138}

(defendant James' O'Connor's EBT) (emphasis added).

Mr. O'Connor incorrectly testified at his deposition as to other properties that he owned that had been inspected and/or found to contain lead hazards. Defendant O'Connor was specifically asked:

- Q: Besides 22 Judson Street, do you own any other rental apartments?
- A: 34 Judson.
- Q: How long have you owned that building?
- A: Around 1955.
- Q: Since you owned that building, have you ever received any notices that the building contained lead-based paint?
- A: No.
- Q: Have you received any notification that any children have been poisoned by lead-based paint in that building?
- A: No.{S-140}

(emphasis added). Mr. O'Connor's testimony was contradicted by the fact that the County of Albany Health Department had inspected 34 Judson Street on about July 9, 1985, and found several lead hazards at the premises. {S-199} The County advised defendant O'Connor by letter dated July 11, 1985, that it had verified that a child at 34 Judson Street was found to have an elevated lead level, {S-200} and provided Mr. O'Connor with "an outline which describes the areas in need of repairs and reviews methods recommended to satisfactorily eliminate these lead hazards." {S-200} The letter included an enclosure advising defendant O'Connor of the areas of rooms to be repaired, and proper abatement methods {S-200} which Mr. O'Connor signed. {S-201} In addition, in 1985, the

County sent to the landlord, also as an enclosure, a document entitled “Lead Paint Removal Precautions,” {S-237}¹⁶ which specifically stated that:

Most buildings constructed before 1940 contain some surfaces which have been painted with lead paint. Chipping or peeling of these surfaces constitutes a hazard for lead poisoning, particularly for children who may ingest lead containing particles ... A person exposed to lead containing dust can absorb lead by breathing in dust as well as by swallowing it. {S-202-203}

(emphasis added).

Despite all he knew, defendant O’Connor failed to take any action to warn Ms. Stover or to inspect the premises for the presence of lead hazards.¹⁷

During the tenancy, Ms. Stover testified that defendant O’Connor was clearly made aware of the conditions at the premises many months prior to Everton’s lead poisoning:

Q: When did Trysona first tell you she saw Everton eating dirt or paint chips?

A: I seen him eating the stuff off the wall, it wasn’t like paint chips, holes in the wall, the little rocky -- what is it, dirt, like cement? ... If a hole is in the wall, you knock a hole in the wall, stuff falls out ... I came out of my apartment and found him eating the stuff off the stairs that came off the wall. Two other times my niece came in the front door and found him sitting on the stairs, again twice eating it.

Q: Do you know if there were any requests made to Mr. O’Connor to repair the holes?

A: Yes. My sister told me, came from Section 8.

Q: Do you know when the request was made?

A: Like maybe eight or nine months after we had been there.

Q: And what was the reason that you had him tested in September of 1994?

16. Albany County Inspector David Adey testimony was given in another lead-paint poisoning case, Walton v. Albany Community Development Agency, {S-211-364} regarding the protocols and practices of the Albany County Department of Health.

17. As Ms. Stover set forth in her affidavit:

Despite his knowledge, he never told me or my sister about lead paint or to watch out for chipping and peeling paint and dust. He told me that the apartment was fine when we moved in. He never warned me about the dangers of lead-based paint and he never came back to repaint the apartment for the year and a half that we lived there. {S-404}

A: I had took him there to get like his regular shots and they asked me if I had any other concerns and I let them know from the time I had seen him sitting there eating the stuff. {S-72-76}

(emphasis added) Mr. O'Connor also admitted that, in fact, he went into the premises to “put compound in the holes that they made with bicycles going up and down the stairs.” {S-138}.¹⁸

On or about September 28, 1994, about a year and a half after moving into the premises and nine months after the complaints about the holes in the walls, the infant plaintiff Everton Lewis was tested and found to have a blood lead level of 51 µg/dL. {S-197} This was an extremely high blood lead level and Everton was thereafter hospitalized for five days for chelation therapy. {S- 205-208}

The Albany County Health Department then inspected the premises at 22 Judson Street on or about September 29, 1994, finding several lead hazards at the premises including:

	<u>Room</u>	<u>Area</u>
!	livingroom	woodwork and windowsills;
!	dining room	woodwork and windowsills;

18. As Ms. Stover stated in her Affidavit:

My sister Maxine Clark lived in the upstairs apartment and Everton would go upstairs often. Maxine received Section 8 assistance. Section 8 inspected the premises and Mr. O'Connor was responsible for maintenance and repairs to the building. I now know that he was also responsible to make sure that the apartment was free of lead hazards. The hallway going up the stairs had holes in the walls from the kids bicycles and moving. I caught Everton putting his hands in the holes in the walls and eating the chipping and peeling paint that came off the walls in the hallway. Also, my niece Trysona saw Everton eating the chipping and peeling paint off of the walls in the hallway. Each time, I would wash Everton's hands and mouth and tell him not to do it again, but at the time I did not know that lead-paint would injure my child.

My sister complained to Section 8 about these problems. Section 8 came and made the landlord fix the holes, but the landlord only filled the holes and never fixed the holes the right way. After a while, the holes came back and there were more holes because the kids continued to use the hallway to store their bicycles. My sister told Mr. O'Connor about the holes in the wall and we told him that Everton had been eating stuff out of the walls. Despite his knowledge and conversations with the Section 8 inspector, he never told me or my sister that the property contained lead or that chipping or peeling paint was dangerous to my child.

(emphasis added) {S-405}.

!	kitchen	woodwork and windowsills;
!	bathroom	woodwork;
!	back bedroom	woodwork and windowsills;
!	middle bedroom	walls, woodwork and windowsills;
!	front bedroom	walls, woodwork and windowsills; and
!	back hall	woodwork

{S-191}. The Stover family immediately moved out of the premises and never returned. {S-406}

As set forth in the affidavit of Dr. Joel Redfield, results of Everton's evaluations indicate that

Everton's general intelligence is far below average, in the lowest 4% of children his age. He exhibits a significant delay in language, and impairment in concept learning, attention, executive skills, and motor ability. Everton's academic readiness – particularly in reading and writing – and his acquisition of general knowledge is delayed. Together, these results indicate a mixed disorder of cognitive functioning, affecting skills in multiple areas

Dr. Redfield concluded that

As a result of lead poisoning, there has been emotional, behavioral, cognitive, psychiatric and psychological impairments; loss of intellectual capacity; increased probability of neurological, mental, developmental, emotional, behavioral, cognitive and psychological impairments; Cognitive Disorder Not Otherwise Specified; Attention-Deficit/Hyperactivity Disorder; and Specific Phobia. Everton's lead poisoning, therefore, is considered to have made a substantial contribution and casually related to his deficits in cognitive functioning and behavior problems.

{S-386-389}.

The preceding summary indicates that Mr. O'Connor, in addition to having a contractual obligation to maintain and repair the premises and a right to re-enter for those purposes, knew or should have known that 22 Judson Street (as a building over 50 years old) likely contained lead-based paint and that such paint was hazardous to young children, yet despite this knowledge failed to take proper and adequate actions to protect the infant plaintiff from lead poisoning and warn Ms.

Stover regarding the presence of lead-hazards in the dwelling. This is clear evidence of defendant O'Connor's gross negligence in disregarding an obvious, foreseeable risk.

PROCEEDINGS BELOW

The Court is respectfully referred to the briefs filed by the appellants in Chapman and Stover for the full procedural history of these cases.

In Chapman, the Third Department concluded that “knowledge of peeling paint (even if defendants had such knowledge) is not the legal equivalent of constructive notice of the presence of hazardous lead-based paint” and that a landlord cannot be liable unless he had “actual or constructive knowledge” of lead paint. 275 A.D.2d at 124 (emphasis added). The court asserted that this Court's Juarez decision was distinguishable because there a local New York City statute¹⁹ provided the constructive notice.

Likewise, in Stover, the Third Department repeated this conclusion. Noting that “the actual or constructive notice rule is premised on the concept that some observable condition exists that the landlord either has discovered or, in the exercise of reasonable case, should have discovered and remedied,” 277 A.D.2d at 803, it dismissed the case because the “existence of a lead paint hazard is not observable.” Id.

This Court granted NYCCELP leave to appear as amicus curiæ in support of the motions for leave to appeal in both Chapman, N.Y.L.J., April 5, 2001, at 18 col. 1, and Stover, N.Y.L.J., April 5, 2001, at 18 col. 3. {C-667-68, S-816-17}. Leave to appeal in both cases was granted on April 3, 2001. 96 N.Y.2d 709.

19. New York City's Local Law 1 of 1982, N.Y.C. Admin. Code § 27-2013(h) (herein “LL 1”) .

ARGUMENT

I. LANDLORDS HAVE A DUTY TO PROTECT TENANTS FROM FORESEEABLE HARM SUCH AS PEDIATRIC LEAD POISONING FROM PAINT IN OLDER DWELLINGS

A. Landlords Have a Duty to Provide Safe and Habitable Living Conditions And To Protect Tenants from Foreseeable Harm

“The law concerning landlord and tenant came into existence in the infancy of civilization” and has gradually accreted “new rights, privileges, and principles during the centuries of its development.” Dolan, Rasch's New York Real Property Practice, § 1:1 (4th ed. 1998). Landlords today have a duty of care to their tenants to supply them with not only a roof over their heads but also safe and healthy living conditions, a duty that arises both out of the contractual leasehold agreement, as interpreted by modern common law principles, and as well from various statutory mandates, as applicable.

The common law duty, enunciated in cases such as Tonetti v. Penati, 48 A.D.2d 25 (2d Dep't 1975), and subsequently codified in New York Real Property Law § 235-b, L 1975, ch. 597, overturned the prior common law rule of caveat lessee whereby the tenant leased the premises from the landlord “as is.” Tonetti declared that the old rule had no place in a “modern, urban society,” 48 A.D.2d at 28, and declared an “implied warranty of habitability,” which enlarged the landlord's duty from merely supplying the tenant with “realty” to a duty to maintain the premises in a habitable condition. Id. at 30.

This Court clarified and further expanded this duty in Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, cert. den., 444 U.S. 992 (1979), holding that a residential lease is equivalent to a “sale of shelter and services” from the landlord to the tenant, warranting, inter alia,

not only that the “premises were fit for human habitation” but also that the “tenants were not subjected to any conditions endangering or detrimental to their life, health or safety.” Id. at 325. Thus, this Court declared that a landlord’s duty of care to a tenant was not simply to supply a habitable living environment, but rather an affirmative duty to assure that dangerous conditions are not present in the living environment, both “at the inception of the tenancy” and “throughout the lease term.” Id. at 327. This expansion of duties was necessary, this Court said, because landlords had failed to act without a duty imposed on them, “especially in low-income neighborhoods.” Id. at 324.

Moreover, while duties pertaining to the safety and habitability of leased premises may also arise from statutory sources, see, e.g., Juarez, 88 N.Y.2d at 644 (discussing specific mandate of local housing code pertaining to lead paint); id. at 643 (discussing more generalized mandate in New York Multiple Dwelling Law § 78 to keep multiple dwellings “in good repair”), Park West declared that such housing codes are not a “complete delineation of the landlord’s obligation” but rather merely set “minimal standards” that landlords must follow. 47 N.Y.2d at 328. Park West further stated that landlords must take steps to cure any conditions that present “threats to the health and safety” of tenants regardless of whether a code exists which addresses the particular harm. Id.

This issue was most recently revisited in Mason v. U.E.S.S. Leasing Corp., __ N.Y.2d __, 2001 N.Y. LEXIS 1865, 2001 WL 735745 (2001), wherein this Court reiterated that “landlords have a common law duty to take minimal precautions to protect tenants from foreseeable harm . . .” (emphasis added). 2001 N.Y. LEXIS 1865 at * 3. Since the landlord in that case apparently had knowledge of a third party’s prior criminal activity, this Court could not “conclude as a matter of law” that an attack by that third party on a tenant “was not a significant foreseeable possibility” to the landlord.

Thus, the matter at hand turns on the question of foreseeability, and amici assert that a reasonable landlord — especially knowing what the landlords in the instant cases knew — should have foreseen the possibility of injury from lead contained in the peeling and deteriorated paint conditions (of which these landlords had both constructive and actual notice). “The risk reasonably to be perceived defines the duty to be obeyed.” Palsgraf. v. Long Island R.R. Co., 248 N.Y. 339, 344, rearg. den., 249 N.Y. 511 (1928). That a landlord may choose to remain ignorant of these dangers is no defense to negligence. “Where a duty of care is imposed and where knowledge is necessary to careful conduct, voluntary ignorance is equivalent to negligence.” Gobrecht v. Beckwith, 82 N.H. 415, 420, 135 A. 20, 22 (1926); Keeton, Prosser and Keeton on the Law of Torts § 32, n.13 (5th ed. 1984).

B. The Foreseeability of Harm and the Duty of Care Must be Viewed in the Context of Present General Knowledge

Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

MacPherson v. Buick Motor Co., 217 N.Y. 382, 391 (1916). Thus, “[w]hat is excusable ignorance today may be negligence tomorrow.” Harper, James & Gray, The Law of Torts, Second Edition § 16.5 (2d ed. 1986). Advances in science as well as greatly expanded means of disseminating information often require the law to expand liability for behavior that, although acceptable at one time, has now become negligent. See Prosser and Keeton, § 32. The law imposes a duty on individuals to stay current with changes in their area of expertise or even within everyday actions, and adjust their behavior accordingly.

This shifting duty of care is quite commonly seen in cases concerning professional misconduct. For example, it has been held that a doctor must not only exercise “the degree of care and skill of the average qualified practitioner” but also must “tak[e] into account the advances in the profession.” Brune v. Belinkoff, 354 Mass. 102, 109, 235 N.E.2d 793, 798 (1968). Thus, doctors’ duties of care are constantly evolving as they are required to learn about new treatments and other advances in knowledge as to what may be beneficial — or harmful — to their patients, and cannot avoid liability by simply asserting that they were following the common practice of their profession.

Indeed, even if an entire industry has been slow to adopt new precautions in recognition of emerging generalized knowledge about hazards, defendants cannot use this rationale as a defense to negligence. See, Gilmore v. Memorial Sloan-Kettering Cancer Center, 159 Misc.2d 953, 961 (Sup. Ct. N.Y. Co. 1993); cf. Hoemke v. New York Blood Center, 912 F.2d 550, 552 (2d Cir. 1990). Both Gilmore and Hoemke concerned claims arising from the failure to screen donor blood for human immunodeficiency virus (HIV). Both cases recognized that within the scope of just a few years — from 1981 to 1983 — the foreseeability of contracting HIV via blood transfusion was such that by the time of Gilmore a genuine issue of material fact existed such that dismissal as a matter of law was no longer warranted. Gilmore, 159 Misc.2d at 960-61; Hoemke, 912 F.2d at 552.

This Court has held that there is indeed no policy justification for not requiring a medical professional, “who knows or believes there are unnecessary dangers in the community practice . . . to take whatever precautionary measures” are deemed appropriate. Toth v. Community Hosp. at Glen Cove, 22 N.Y.2d 255, 263 (1968), rearg. den., 22 N.Y.2d 973 (1968); see also Hoemke v. New York Blood Center, 912 F.2d at 552 (“if a given industry lags behind in adopting procedures

that reasonable prudence would dictate be instituted, the [the Court is] free to hold a given defendant to a higher standard of care than that adopted by the industry”).

Similarly, manufacturers have a duty to be aware of changes in their industry that may require them to change their behavior. Historically, courts have found that where a customary practice by a manufacturer led to negligence, that manufacturer may not use the common practice argument to escape liability. See Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 218-19, 240 N.W. 392, 396 (1932); The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), cert. den. sub. nom. Eastern Transp. Co. v. Northern Barge Corp., 287 U.S. 662 (1932). In fact, common or industry practices are “not dispositive of due care but constitutes only some evidence thereof.” Miner v. Long Island Lighting Co., 40 N.Y.2d 372, 381 (1976); see also Prosser and Keeton, § 33, at 195. Thus, the duty of care in any given industry is not permanently fixed, but rather must meet the demands of a constantly changing world.

Likewise, landlords have a duty to be reasonably cognizant of evolving knowledge of hazards that could foreseeably lead to injuries to their tenants. Like professionals and manufacturers, courts have recognized that landlords have superior skills in their fields over the ordinary person, particularly their tenants. See Park West, 47 N.Y.2d at 324; Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970); Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), cert. den., 400 U.S. 925 (1970). In Kline, the District of Columbia Circuit concluded that if a landlord, through the “exercise of reasonable care . . . ought to know” of a dangerous situation, such landlord might face liability for failing to protect the tenant against such a situation. Id. at 484 (citations omitted).

C. Given the Present State of General Public Knowledge of the Hazards of Lead Paint, A Jury Could Find that a Reasonable Owner Should Have Foreseen that Deteriorated Paint in an Older Dwelling Rented to a Family With a Young Child Could Cause Lead Poisoning

The Third Department's decisions in the instant cases are apparently premised on the belief that in this late day and age, the general state of knowledge of lead paint and lead hazards is so limited that a jury could never find that a reasonable owner in New York State could or should have known of the possibility of lead hazards in an older dwelling unit where a young child resides.²⁰

The time is well nigh to reexamine this premise, as many courts have begun to do. After all, as one court noted in a lead paint case some thirty-one years ago,

It is a matter of common knowledge in New York City, that ... as successive layers of paint peel away, the paint underneath becomes a menace to any young child who can pick off the flakes and put them in his mouth.

Garcia v. Freeland Realty, Inc., 63 Misc. 2d 937, 940 (Civ. Ct. N.Y. Co. 1970) (emphasis added).

And indeed, even some seven years prior to Garcia, a New York court held — in a case involving a lead poisoning that occurred in 1959 (before virtually any laws were on the books restricting the use of lead paint), that a landlord

should have known that the paint on the walls of this apartment contained lead which might be harmful to the occupants of the apartment.

Acosta v. Irdank Realty Corp., 38 Misc.2d 859, 860 (S. Ct. N.Y.Co. 1963).

20. The Second Department as well has repeatedly rejected landlord liability in cases arising in non-multiple dwellings in New York City (where LL 1 did not apply) or outside of New York City. See, e.g., Hines v. RAP Realty Corp., 258 A.D.2d 440, 441 (2d Dep't 1999), lv. to app. den., 93 N.Y.2d 812 (1999) (Westchester County case, “notice cannot be imputed based on evidence of the widespread media reports addressing the prevalence of lead hazards in older dwellings”); Andrade v. Wong, 251 A.D.2d 609, 610 (2d Dep't 1998) (non-multiple dwelling, notice as to lead-based paint cannot be predicated upon conclusory assertion that use of lead-based paint in older buildings was commonly known); Smith v. Saget, 258 A.D.2d 641 (2d Dep't 1999) (same).

As the First Department noted in 1993, “the danger that lead-based paint presents to human health and safety, especially with regard to children, is today virtually beyond debate.” City of New York v. Lead Industries Association, Inc., 190 A.D.2d at 176; see also Juarez v. Wavecrest Management Team, 88 N.Y.2d at 640 (“serious health hazard posed to children by exposure to lead-based paint is by now well established” (emphasis added)). Building on Juarez, the First Department imputed notice of lead hazards in a day care facility — even though it did not come under the purview of New York City’s LL 1 — because

the issues surrounding lead paint poisoning had been sufficiently publicized to put the landlords of these establishments on notice.

Espinal v. 570 156th Assoc., 174 Misc.2d 860, 865 (S. Ct. N.Y. Co. 1997), aff’d, 258 A.D.2d 309 (1st Dep’t 1999) (emphasis added).

Recently, in Antwaun A. v. Heritage Mutual Insurance Company, 228 Wis. 2d. 44, 596 N.W.2d. 456, reconsideration denied, 230 Wis. 2d 277, 604 N.W.2d 574 (1999) the Wisconsin Supreme Court (breaking with older precedent in other jurisdictions)²¹ held that a landlord of a house constructed prior to 1978 is under a common law duty to test for lead paint when he or she knows — or in the course of ordinary care should have known — that the dwelling contained peeling or chipping paint. The court stated that it was “persuaded that awareness of the dangers of lead paint in 1989 or 1990 is on a different plane than the awareness of such dangers ten, twenty, or thirty years earlier.” 596 N.W.2d at 463. The Antwaun A. court noted a number of factors that formed the basis for this persuasion:

21. A number of these cases are cited in the Antwaun A. decision, but are distinguished based on the changing, evolved facts and law. Id., 596 N.W.2d. at 463.

! That “by the 1990s federal, state, and local legislation identifying the dangers associated with lead paint not only existed, but was well-established.” Antwaun A., 596 N.W.2d at 456.

! Federal disclosure regulations,²² which require sellers of residential housing built prior to 1978 to attach the following statement to the contract to sell:

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning.

Similar warning language is required of lessors. Antwaun A., 596 N.W.2d at 463-64.

! Public service campaigns on the dangers of lead and lead poisoning. Id. at 464.

! Mass media reporting on the dangers associated with lead paint, especially related to children, and especially with regard to older housing. Id. at 464.

The Wisconsin Supreme Court in Antwaun A. concluded that

We are persuaded that by 1989, the dangers of lead paint in residential housing was so extensively known that we would not be ascribing to the landlords “a knowledge and expertise not ascribable ... to people without special training or experience.” ... Instead we conclude that a duty to test for lead paint arises whenever the landlord

22. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(a)(1) directed HUD and the EPA to “promulgate regulations ... for the disclosure of lead-based paint hazards in target housing [basically pre-1978 housing] which is offered for sale or lease.” 42 U.S.C. § 4852d(a)(1). The regulations, found at 40 C.F.R. 745 Subpart F, became effective in late 1996. Sweet v. Sheahan, 235 F.3d 80 (2d Cir. 2000).

Thus, for the last 5 years, every time a lease was made in New York all landlords were required to include a Lead Warning Statement with the following language:

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

New York landlords have also been required to provide a pamphlet discussing the hazards of lead paint and disclose known hazards. 40 C.F.R. § 745.113(b); 24 C.F.R. § 35.92(b).

of a residential property constructed before 1978 either knows or in the use of ordinary care should know that there is peeling or chipping paint on the rental property. Where peeling or chipping paint is present in a pre-1978 residential structure, it is foreseeable that lead paint may be present which, if accurate, would expose the inhabitants to an unreasonable risk of harm.

596 N.W.2d at 464 (citations omitted). All of these factors are more than amply present in New York, if not even more so, especially given that lead paint was banned as early as 1960 in New York City. The lead issue has certainly received extensive coverage in New York as well.²³ And new federal regulations that became effective June 1, 1999, 40 C.F.R. 745 Subpart E (§ 745.80 et seq.), requiring the distribution of lead hazard information prior to commencing renovation work, have spread even further the knowledge of the hazards of lead paint. Moreover, professional organizations for property owners themselves disseminate information concerning lead paint and poisoning.²⁴

Indeed, back in 1970, in an attempt to limit the lead paint poisoning epidemic, the New York legislature enacted Public Health Law § 1370 et seq., finding and declaring that:

The occurrence of the disease of lead poisoning in children has become a major public health concern. Severe lead poisoning cases result in death or mental retardation. It is estimated that children in our nation with abnormally high blood levels of lead number in the hundreds of thousands. Many thousands of children in

23. For example, a search on the Nexis database (on the terms “child! /30 lead /5 poison! and paint”) yields some 644 stories on childhood lead poisoning in New York based print media as of July 27, 2001. Chachère Aff., Ex. B.

24. See Chachère Aff., Ex. C, consisting of excerpts from affidavits and exhibits submitted by the defendants in New York City Coalition to End Lead Poisoning, Inc. v. Vallone, N.Y. County Index No. 120911/99, by the leaders of four major New York real estate trade organizations. These affidavits and the voluminous exhibits they annex offer a sample of their extensive activities to educate members regarding lead paint and lead poisoning, including various bulletins, trainings, and seminars on lead paint and the various relevant local and federal regulations. See also Chachère Aff. Ex. D., consisting of an outline of a April 18, 1995, program presented by the Rent Stabilization Association of New York (as part of its “Professional Education Series”) on “Risk Management,” which included a three hour panel discussion on the subject of “The Biggest Risk to Residential Property Owners Today: Lead Paint.”

the cities of our state are actual or potential victims of lead poisoning. The disease of lead poisoning is most prevalent in areas of old and deteriorating housing where leaded paint and plaster in a peeling condition is accessible for ingestion by young children.

McKinney's PHL § 1370, Historical and Statutory Notes, at 451 (emphasis added).

As a result, New York State agencies have for years distributed public education materials, pamphlets, video, on the hazards of lead. See, for example, Press Release, New York Department of Health (September 19, 1996) {C-603, S-709} (noting that the Health Department has been "mounting a statewide outreach and public education campaign to alert homeowners" about lead hazards, including requests to paint retailers to distribute a State Health Department brochure, Get Ahead of Lead: What Home Owners Need to Know about Removing Lead-Based Paint) and additional State Health Department materials annexed thereto {C-605-17, S-711-23}; New York State Attorney General, Look Out for Lead - A Guide for Tenants with PreSchool-Age Children (February 1996) {C-581, S-687}; N.Y.S.DoH, "Protecting Our Children" (Chachère Ex. A) at 2 (noting that "There have been active Childhood Lead Poisoning Prevention Programs in New York State since the early 1970s"); *id.* at iv ("The Department is working to ensure that families, consumers and landlords are educated about lead hazards.... using a variety of means to ensure an educated public, including radio scripts, videos, posters and mini-posters...."); and *id.* at 28-29 (describing N.Y.S.DoH's efforts at "public awareness and education for parents and landlords").²⁵

Earlier this year, in Jones v. Mid-Atlantic Funding Company, 362 Md. 661, 766 A.2d 617 (2001), the Maryland Court of Appeals reversed summary judgment for the landlords in a lead poisoning case and in so doing enunciated a two-part test for such cases. The inquiry requires

25. Protecting Our Children also contains an order form for some 20 different educational publications distributed free of charge to New York residents, many in both English and Spanish. *Id.* at 76.

significantly less than “actual” knowledge of lead paint hazards: Plaintiffs must show 1) whether “the landlord knew or had reason to know of a condition on the premises posing an unreasonable risk of physical harm to persons” in the home, 766 A.2d at 625 (emphasis added); and 2) whether “a landlord of ordinary intelligence with the same knowledge, should realize the risk of lead poisoning.” 766 A.2d at 626.

In Jones, the first part of the test was satisfied by, among other things, evidence that a landlord received a lead paint violation from the Baltimore City Health Department for a different property some five years prior. Id., 766 A.2d at 628-29. Likewise, in Stover, according to plaintiffs, the landlord had been cited for a lead violation in another building on the same block some ten years prior. {S-199-203} The Maryland high court also noted various other communications between the parties that could be construed as notice of deteriorated paint conditions.

The Jones court, in finding the second part of the test satisfied as well, noted the landlords' “expertise and knowledge of the dangers of lead paint.” 766 A.2d at 631. Similarly, in the instant cases, as discussed supra, the landlords knew of the dangers of lead paint and managed rental property for income.

In sum, the cogent analyses presented by the high courts of sister states in Jones and Antwaun A. reflect the evolution of tort law jurisprudence towards the present day understanding of the scope of the lead poisoning problem. These courts have concluded that the present general understanding of lead poisoning makes lead paint hazards foreseeable in older rental properties and thus landlords correspondingly obligated to inspect for them. Similarly, as noted above, New York courts have also noted the public's greatly expanded awareness of lead poisoning. Legislative pronouncements,

executive agency public education efforts, and even in various landlord organizations' own materials also reflect this firmly established recognition of the present public knowledge of lead poisoning. The Third Department's granting of summary judgment inexplicably disregards this present public knowledge, particularly given the extraordinary facts in these cases.

D. The Third Department's Decisions in Stover and Chapman Ignore the Widespread Knowledge of the Toxic Propensities of Paint in Older Dwellings

According to the Restatement (Second) of Torts § 290 (1965) (“What Actor is Required to Know”),

For the purpose of determining whether the actor should recognize that his conduct involves a risk, he is required to know

(a) the... qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community...

The Restatement explains in comment (e) thereto:

As a reasonable man, the actor is required to possess such scientific knowledge as is common among laymen at the time and in the community. Thus, he is required to know the ordinary operation of well-known natural laws. He is required, among other things, to know the poisonous qualities of many drugs, chemicals, and gases and the explosive or inflammable qualities of many chemical compounds and the intoxicating quality of certain liquids..... In general, the actor is required to know everything with respect to the risk of harm which is a matter of common knowledge in the community in which his conduct occurs.

(emphasis added). The Restatement offers the following illustration:

3. A smells gas in his cellar. He strikes a match to look for a leak. A is ignorant of the danger of an explosion, which is a matter of common knowledge in the community. A is negligent notwithstanding his ignorance.

This illustration is particularly pertinent here because natural gas itself actually has no odor — and for this reason utilities add a chemical to the gas they commercially distribute as a means

of signalling a possible hazard. Thus, one who (ignorant or not) “smells gas in his cellar” would actually have no way of knowing for certain whether natural gas actually is present, unless that person had the proper instruments or took a sample to a laboratory for analysis. Yet even without such verification, it would be negligent to strike a match in those circumstances.

Similarly, while a landlord who observed peeling paint in an old building might not be certain that it contained lead unless it was tested with an instrument or sent to a laboratory for analysis, it would nonetheless be negligent to expose a young child to it.

Obviously, this common knowledge of the nature and qualities of substances, particularly hazardous ones, is an evolving one as well. For example, looking to the Gilmore and Hoemke cases discussed supra, it can be fairly stated that perhaps twenty years ago, few laypersons, upon, say, encountering a stranger struck by a car on a city street and in need of immediate first aid, would have had concerns that contact with such person’s blood could be hazardous. Today, few laypersons would not at least have some qualms, given the common knowledge today of the incidence and devastating consequences of HIV and its propagation via contact with infected blood. Yet while the blood is observable, its potentially hazardous infectious qualities are not.²⁶

This principle is directly applicable here. While the deteriorated paint is observable, its potentially hazardous nature — i.e., lead content — is not. Yet as established above, it is now well

26. Or take another example: asbestos — another toxic substance that cannot be identified except through laboratory analysis. While several decades ago the risks of asbestos were far less a matter of common knowledge, today most building managers who encountered old, white or gray cement-like insulation on steam boiler pipes in an older building would probably assume — without testing — that it might well contain asbestos and would know not disturb it without proper precautions; to do otherwise would surely be negligent.

known by the general public — and certainly should be known by professional landlords (as the landlords in the instant cases actually knew) that paint in old buildings very often contains lead.

When this analysis is applied to the two cases on appeal here, the error in the court below's reasoning is apparent. For in Stover, the Third Department asserted that notice — either actual or constructive — was

premised on the concept that some observable condition exists that the landlord either has discovered or, in the exercise of reasonable case, should have discovered and remedied. The existence of a lead paint hazard is not observable. Consequently, without more, the right to reenter and the obligation to repair cannot establish constructive notice of a hazardous lead paint condition.

Stover, 277 A.D.2d at 803 (emphasis in original, citations omitted). Amici respectfully assert that this analysis is flawed. In both these cases, deteriorated paint was plainly observable — and indeed, was observed by the landlords. What is at issue is whether the toxic nature of the deteriorated paint was foreseeable — i.e., whether a reasonable landlord, knowing that the building was old and that most old buildings have lead paint, should have had reason to suspect that the observed deteriorated paint contained lead and should have acted accordingly.

Thus, the allegedly missing “more” the Stover decision claimed was required for constructive notice was in fact fully present in both these cases. Indeed, there is nothing “more” that plaintiffs could have supplied to constitute “constructive notice” short of actual notice — i.e., verified test results indicating lead content in the paint. In effect, the Stover decision eliminated constructive notice from residential lead paint negligence jurisprudence.

Indeed, only a few months before the decisions in the instant cases, the Third Department, in another lead poisoning case, Perry v. Uccellini Enters., 275 A.D.2d 495 (3d Dep’t 2000), held that even though the landlords had never tested the subject apartment, the fact that lead paint had

been previously found in other apartments in the same building was sufficient to create a question of fact as to whether the landlords “had actual or constructive notice of the presence of lead-based paint ‘sufficient for them to take reasonable precautions to remedy the condition or warn others of its existence.’” 275 A.D. 2d at 497 (citations omitted). Yet if the actual “existence of a lead paint hazard [was] not observable” in Stover, 277 A.D.2d at 803, its actual existence was no more “observable” in Perry. The cases cannot be logically reconciled on that basis.

In this Court’s recent decision in Mason v. U.E.S.S. Leasing Corp., the matter of notice (constructive or actual) concerning the presence of a potential criminal on the premises was apparently not at issue, but rather, whether the defendant had sufficiently investigated and responded to his apparently dangerous propensities. This Court held that “more discovery [was] warranted to discern how foreseeable a risk he was and what measures defendants had in place to deal with him.” 2001 N.Y. LEXIS 1865, at *3.

Here too, the question turned on whether knowledge of the often toxic nature of paint (by virtue of its lead content) in older buildings is fairly ascribable to a reasonable professional landlord. “Courts should not speak too confidently in determining as a matter of law what facts may be ignored by prudent people whose duty it is to be reasonably careful of the personal safety of others.” Queeney v. Willi, 225 N.Y. 374, 379 (1919). This is at least a question of fact which should have precluded the granting of summary judgment to the landlords, and sufficient to reverse the decisions below.

II. THIS COURT SHOULD DECLARE THAT IN THE PRESENT DAY LANDLORDS SHOULD BE CHARGED WITH A DUTY OF REASONABLE CARE TO INSPECT FOR LEAD HAZARDS IN OLDER BUILDINGS.

As established above in Point I, the showing that the landlords in the instant cases had actual knowledge about both the deteriorated paint conditions in the older housing they had leased and that their tenants had young children was sufficient to permit the trier of fact to impute knowledge of the hazardous nature of the deteriorated paint. Moreover, amici submit that even if the landlords here had not had such actual knowledge of the deteriorated paint conditions, they had a duty to inspect for them because of the age of the buildings and the presence of young children, and thus they should have been charged with constructive knowledge of those conditions they could have ascertained by reasonable inspections.

A. Sound Principles of Law Require That This Court Declare a Duty to Inspect for Lead Hazards

It should no longer be automatically presumed that a reasonable landlord can choose to remain ignorant of lead paint hazards in a dwelling rented to a family with young children. First, because, as discussed supra in Part I.C, the fact that older buildings in New York State often contain hazardous lead paint is so well known that no reasonable landlord of income property should be able to claim ignorance as a defense. And second, because, as discussed infra, this Court's prior rulings establish that the duty to maintain a dwelling in habitable and safe condition, coupled with the right to reenter the premises for the purposes of doing so, dictate that a landlord must exercise that right of reentry and make reasonable efforts to inspect for lead hazards.

In 1996, this Court's landmark decision in Juarez v. Wavecrest Management Team, 88 N.Y.2d at 647, held that New York City's LL 1 “provide[d] for constructive notice of the hazardous

lead condition” if the landlord knew children under age 7 were present. In reaching this conclusion, the Court noted that 1) LL 1 placed a specific duty to abate lead paint where children under age 7 resided; 2) LL 1 created the presumption that peeling paint in a pre-1960 dwelling contained lead; and 3) that LL 1 in essence (and New York City Administrative Code § 27-2008) gave owners authority to enter to inspect for and repair lead paint hazards. While the Third Department decisions in Chapman and Stover seized on the second prong on this analysis, and distinguished those cases because of the inapplicability to the statutory presumption of lead paint outside of New York City, a closer examination of Juarez, as was undertaken recently by the First Department, greatly curtails the import of the statutory presumption in the present context.

In Woolfalk v. New York City Housing Authority, Index No. 112405/93, slip op.(Sup. Ct. N.Y. Co. May 12, 1998)(Goodman, J.) {C-575, S-681}, aff'd, 263 A.D.2d 355 (1st Dep't 1999), leave to app. den., slip op. (1st Dep't Sept. 28, 1999), LL 1 was held applicable where lead paint was found in a lead poisoned child's home, a New York City Housing Authority building constructed in 1973 — i.e., where the statutory presumption did not apply. The trial court rejected defendant's argument that it “cannot be charged with constructive notice of the lead hazard because the building at issue was constructed after 1960.” Woolfalk, slip op. at 3. {C-578, S-684} Relying on NYCCELP II, the trial court said that the lead paint presumption related only to the City's ability to place violations without testing where it finds peeling paint in pre-1960 buildings.

There is no presumption that peeling paint in post 1960 buildings does not contain lead, nor does the age of the building affect the general prevention and abatement duties imposed on landlords by Local Law 1.

Id. (emphasis added). The trial court went on to reiterate that Juarez had held that LL 1 imposed a duty upon landlords to inspect as well as repair. Woolfalk, slip op. at 4. {C-579, S-685}.

In affirming, the First Department, 263 A.D.2d at 356, first noted this Court's conclusion in Juarez that “the right of entry conferred by Local Law 1 gives a landlord constructive notice of any lead paint hazard within an apartment that the landlord knows is occupied by a child of the specified age.” Juarez, 88 N.Y.2d at 647. It then continued its analysis:

While the Juarez decision twice alludes to the statutory presumption of a hazardous lead condition raised by peeling paint in an apartment occupied by a child under seven in a building erected before 1960 (Juarez, 88 N.Y.2d at 642, 647) the decision ... nowhere expressly says whether the building was erected before or after 1960. Any implication in the decision that that building was erected prior to 1960 does not change the thrust of the above quoted statements. The effect of such statements is clear — absent an issue of fact as to whether an alleged lead paint condition caused the injuries complained of, and absent evidence that reasonable efforts to abate the condition were made before the injuries were sustained (necessarily the case when the landlord does not have actual notice of the condition and does not exercise its right of entry to inspect), the landlord's liability depends purely and simply on whether it had notice of a child under seven living in the apartment, and when the building was built and whether the landlord had actual notice of peeling paint or other indications of a hazard are immaterial. Case law subsequent to Juarez is consistent.

Woolfalk, 263 A.D.2d at 356 (emphasis added).²⁷ Thus, Juarez's constructive notice principle was applied in Woolfalk even though the presumption was wholly unavailable (since it was a post-1960 building); all that mattered was the knowledge of the presence of young children and the right and duty to reenter and repair. This distillation of the essence of Juarez is directly applicable to the instant cases: the landlords had notice of the presence of young children, and had a right of re-entry — and moreover, had in addition notice of peeling or otherwise deteriorated paint.²⁸

27. Citing Rivas v. 1340 Hudson Realty Corp., 234 A.D.2d 132 (1st Dep't 1996); Nwaru v. Leeds Mgt. Co., 236 A.D.2d 252 (1st Dep't 1997); Cartagena v. Tang, 260 A.D.2d 337 (2d Dep't 1999).

28. Indeed, the Court stated in Juarez:

We have held, moreover, that a building owner may be charged with constructive notice of defects in those parts of the building into which it has authority to enter. Thus, the retention

(continued...)

The above should establish that at the very least a duty exists requiring landlords to test for lead based paint hazards within older dwellings rented to families with young children, or to assume that such paint is lead-based and act accordingly. The inapplicability of a specific statutory mandate regarding lead paint, such as LL 1, does not negate this duty. Park West, 47 N.Y.2d at 328 (codes are not a “complete delineation of the landlord’s obligation” and landlords must take steps to cure any hazardous conditions).

Nor does the latent (rather than patent) nature of the existence lead in paint alter this responsibility. For example, in Preston v. State, 59 N.Y.2d 997 (1983), the State was held responsible as an ordinary landowner where it failed to inspect for hidden dangers in areas where it invited the public to swim. Because the State had invited the public to swim in the area where the plaintiff had been injured, this Court found:

[T]he State had a duty either to inspect and remove hazards from the water or to give warnings that the waters were used at the swimmer’s risk. ... There must be some proof that the potential danger reasonably could have been neutralized and that its existence was or should have been discovered by the State.

28. (...continued)
in the lease of the right to enter the interior of an apartment to inspect the premises has sufficed to charge an out of possession landlord with constructive notice of a defect within the apartment.
88 N.Y.2d at 647 (citations omitted). In Juarez the right of reentry was found in local law; in the instant cases the right of reentry was found in the contractual leasehold agreements. See Putnam v. Stout, 38 NY.2d 607, 612 (1976) (holding that lessor “by his contract may be regarded as retaining and assuming the responsibility of keeping his premises in safe condition.”); Declara v. Barber Steamship Lines, 309 N.Y. 620, 630 (1956) (“A landlord who has the right to come and go upon the leased premises as he pleases for the purposes of inspection and repair must be regarded as having thereby reserved a privilege of ownership, sufficient to give rise to liability in tort.”) .

Id., 59 N.Y.2d at 998-99. Likewise, there should be no doubt that landlords have a duty to inspect for and remove latent defects which render a dwelling dangerous to young children and which can be discovered by the exercise of reasonable care.²⁹

Here, indeed, the defendants admitted to having a knowledge of lead paint poisoning hazards, knowledge that lead paint is found in older deteriorating housing, such as the premises in which the infant plaintiffs resided, and despite this knowledge never sought to have any governmental or private agency test for lead. The fact that the lead hazard could have been discovered is made manifest from the fact that the Albany County Health Department did indeed make such findings in both cases. {C-126-27, S-191} Moreover, state and federal agencies advertised testing protocols and procedures to find lead hazards, which were widely known and used.

29. In another “latent defect” case, Queeney v. Willi, 225 N.Y. at 377, tenants were injured when a pipe buried in the ceiling of their apartment burst and the ceiling collapsed. The landlord, who purchased the building only three years prior, “had no actual notice of the potential danger” of the pipe freezing and bursting, id. at 378, although the tenants had previously complained of a damp condition in the walls and ceiling. This Court found that this was an issue of fact:

The chain of reasoning most favorable to plaintiffs might legitimately consist of these links: walls are not so damp in cold weather when the structure is free from defect; their conditions are not consistent with proper repair or construction; damp ceilings may fall, it is probably that they will fall; a prudent landlord will exert himself to ascertain the cause of the dampness before they fall and do harm to the occupants.... The damp walls were plain notice of something to be remedied. The landlord may not sit helplessly by and say that he cannot see what produces such conditions. He must reasonably bestir himself to discover the cause and correct it.

Id. at 378-79.

The same logic should apply here. Peeling or deteriorated paint is not “consistent with proper repair;” peeling paint in an old building is likely to contain lead; children may be poisoned by lead paint; a prudent landlord will ascertain or assume that paint in an old building contains lead and take action before it does “harm to the occupants;” the landlord may not “sit helplessly by and say” she or he “cannot see” whether it is in fact lead paint; rather she or he “must reasonably bestir” and safely correct it.

Landlords are in the best position to know of potential dangers lurking in their leased premises, and thus have a duty to ascertain whether those dangers exist — and they can no longer hide behind claims that they did not know of hazards of lead in paint in older buildings.

B. Rather than Permit the Continuation of an Outdated Legal Principle That Encourages Reckless Conduct, as a Matter of Public Policy This Court Should Enunciate a Standard That Encourages Landlords to Act Responsibly

Decisions such as those of the Third Department in Stover and Chapman render the principle of “every dog is entitled to one bite” equally applicable to the enormous public health problem of permanent, irreparable childhood lead poisoning; in essence, landlords are permitted one free lead poisoned child in each of their properties before they can be charged with notice. Indeed, the illogic of this reasoning leads to perhaps a presumption that a landlord is entitled to one free lead poisoned child in each apartment; or in each room of each apartment; or perhaps in each surface of each room of each apartment, before being charged with the “notice” that deteriorated paint contains lead. Moreover, the policy implications of the Third Department’s Stover and Chapman decisions are pernicious — landlords are fundamentally encouraged to deliberately remain ignorant of lead paint hazards, lest they be charged with “notice.”

The impact of such abhorrent policy is to render vulnerable children guinea pigs; as one prominent expert in the field recently put it, “children will continue to be used as biologic indicators of lead hazards (as canaries in mines) — especially children who are black or impoverished.” Lanphear, The Paradox of Lead Poisoning Prevention; *Science* 281:1617-1618 (1998).³⁰

30. Canaries were formerly used by miners to detect the release of toxic gases. The death of the canary served as a warning that toxic gases were present. Id. at 1617.

(continued...)

Whatever the prior doctrinal reasons underlying such outcomes may have been in the past, in this day and age such practices must be soundly rejected. As the Wisconsin Supreme Court noted in Antwaun A., in discussing prior cases that had required actual notice of lead hazards, “we are not persuaded that their rationales continue with as much force as they may have at one time.” 456 N.W.2d at 463.

Conversely, this Court's 1996 decision Juarez has had a profoundly beneficial impact on public health and sound public policy, as demonstrated by a recent study conducted by Montefiore Medical Center in the Bronx. A Study of Blood Lead Levels in Bronx Children and History of Building Code Violations, {C-515, S-621} annexed to the accompanying affirmation of one of its authors, Morri E. Markowitz, M.D. [herein “Markowitz Aff.”] {C-493, S-599}.

As explained by Dr. Markowitz, the study analyzed the housing of children lead poisoned between April 20, 1998, and April 20, 1999, in the Bronx. A key finding of the study was that some 44% of the moderately lead poisoned children studied resided in non-multiple dwellings — i.e., housing that fell outside the purview of LL 1 and thus the explicit application of Juarez as well —

30. (...continued)

In reality, despite the widespread prevalence of lead paint in this state's housing stock noted above, the actual extent of the lead contamination in an average building may be comparatively small, readily ascertainable, and indeed, surely remediable. See, e.g., HUD, Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995, revised 1997), Ch. 7 (Lead-based Paint Inspection). HUD recently found that

although a large number of homes have lead-based paint, most of them have relatively small surface areas of it. The average home with lead-based paint has an estimated 259 square feet of interior lead-based paint ...

HUD National Survey at ES-1. This figure approximates the wall area of a small, eight foot by eight foot room.

even though such housing comprised only 17% of the housing stock in the Bronx. Markowitz Aff. ¶¶ 13-14. {C-498-99, S-603-04}

Put another way, it appeared that children living in housing not directly subject to the “constructive notice” jurisprudence of Juarez were nearly four times more likely to be lead poisoned than children living in housing where — by strict application of Juarez — landlords were presumed to know of lead hazards and thus encouraged to act far more responsibly.

As this Court has noted,

Common-law experience teaches that duty is not something derived or discerned from an algebraic formula. Rather, it coalesces from vectored forces including logic, science, weighty competing socioeconomic policies and sometimes contractual assumptions of responsibility. These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis.

Palka v. Servicemaster Mgt. Services, Inc., 83 N.Y.2d 579, 585 (1994). And as this Court declared in Micallef v. Miehle Co.,

What constitutes “reasonable care” will, of course, vary with the surrounding circumstances and will involve “a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm.”

39 N.Y.2d at 386 (quoting 2 Harper & James, Torts, § 28.4); see also MacPherson v. Buick Motor Co., 217 N.Y. at 395 (“The obligation to inspect must vary with the nature of the thing to be inspected. The more probable the danger, the greater the need for caution.”); Kush v. City of Buffalo, 59 N.Y.2d 26, 31 (1983) (in “light of the foreseeability of the risk and the potential severity of harm,” reasonable care required securing of dangerous chemical to prevent unsupervised access by children). The grave and foreseeable harm — lifetime, devastating, and costly injuries inflicted

upon young children — must be juxtaposed with the comparatively minor burden of landlords carrying out a duty to investigate for lead hazards.

Thus, not only because of the fundamental tort principles outlined above but also as a matter of public policy, this Court should reverse the pernicious impacts of the line of cases represented by Chapman and Stover, and declare that, as in Juarez, “the adequacy of a landlord's efforts to discharge its duty to remedy a hazardous lead condition is to be governed by a standard of reasonableness,” 88 N.Y.2d at 645, and that such reasonableness must encompass a duty to make appropriate efforts to inspect for and abate lead hazards.

CONCLUSION

For all the reasons discussed above, as well as the reasons ably and cogently set forth in plaintiffs' briefs, the decisions below should be reversed.

Dated: New York, New York
July 30, 2001

Respectfully Submitted,

Kenneth Rosenfeld, Esq.
Northern Manhattan Improvement Corp. Legal Services
BY: Matthew J. Chachère
Theodora Galacatos
Attorneys for Amici Curiae
76 Wadsworth Avenue
New York, NY 10033
212-822-8300

On the brief:
Rodrigo Sanchez-Camus, law student