UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Sherrod, Teed, Vanderhagen and Ware, Plaintiffs, v. VNA and LAN, Defendants.	Case No. 5:17-cv-10164-JEL-KGA Hon. Judith E. Levy Flint Water Cases Bellwether I

JOINT FINAL PRE-TRIAL ORDER

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I. JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1367. Bellwether Plaintiffs ("Plaintiffs") brought claims under 42 U.S.C. § 1983, for violations of the Thirteenth and Fourteenth Amendments of the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, as well as claims under state law. This Court has federal-question jurisdiction over Plaintiffs' federal-law claims under 28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiffs' state-law claims under 28 U.S.C. § 1367, because those claims arise from the same case or controversy as the federal-law claims. No party contests the Court's jurisdiction.[1]

II. PLAINTIFFS' CLAIMS[2]

Plaintiffs assert professional negligence claims under Michigan state common law against two groups of defendants: the LAN Defendants and the VNA Defendants.

Plaintiffs are four children who lived in Flint, Michigan during the public health crisis that has become known as the "Flint Water Crisis." The Flint Water Crisis began when the City of Flint's drinking water source was switched on April 25, 2014 from already-treated water provided by the Detroit Water and Sewerage

[1] The Court continues to have supplemental jurisdiction over Plaintiffs' state-law claims even though Plaintiffs have settled their federal-law claims. *See Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 196 F.3d 617, 620 (6th Cir. 1999).

[2] Each of the parties provided their own statement of claims and/or defenses.

Department ("DWSD") to water from the Flint River. The Flint Water Treatment Plant ("FWTP"), which had largely been dormant for approximately fifty years, was incapable of treating the raw Flint River water. Unlike the treated DWSD water, the raw Flint River water was seriously corrosive, especially without the use of a corrosion inhibitor, and caused lead to leach from the pipes and into drinking water. Each Plaintiff consumed and was exposed to lead contaminated water throughout the Flint Water Crisis, from the time the switch to the Flint River occurred, through the switch back to the DWSD in October of 2015.

The two groups of Defendants are engineering companies whose professional negligence contributed to the crisis in different ways. Starting in 2013 and 2014 (the period leading up to and including the switch of the source of Flint's water), the City of Flint retained Lockwood, Andrews & Newnam, P.C. as a consulting engineer. Lockwood, Andrews & Newnam, P.C. is a wholly owned subsidiary of Lockwood, Andrews & Newnam, Inc., which is itself a wholly owned subsidiary of Leo A. Daly Company. All of Lockwood, Andrews & Newnam, P.C.'s employees are, in reality, employees of Leo A. Daly Company.

Beginning in 2013 continuing through their engagement with the City of Flint, Lockwood, Andrews & Newnam, P.C. did not properly recommend appropriate corrosion inhibitor, and did not adequately warn of the dire consequences of operating the FWTP without doing so. A reasonable, similarly situated professional

engineer would have recommended employing a corrosion control inhibitor to avoid causing foreseeable harm to Flint's water users, including Plaintiffs, and would have warned about the consequences of not doing so.

In 2014, the VNA Defendants were engaged in a consulting relationship with DWSD and the State of Michigan. The VNA Defendants had responded to a request to bid in April 2014 after undertaking due diligence, submitted a bid in May 2014, and completed a final, comprehensive peer-reviewed report to the Governor's office in November 2014. As a part of that consulting relationship, the VNA Defendants obtained key information about the DWSD water system, including Flint's prior and long-term purchasing of water from DWSD that was properly treated with corrosion inhibitors. During this same time, VNA was retained as a consulting engineer by General Motors ("GM"). In October 2014 (at the same time that VNA was analyzing the DWSD and preparing its Peer Review Report), GM stopped purchasing water from Flint because it was corroding auto parts, and VNA was aware of this.

In January and February 2015, the VNA Defendants began a consulting relationship with the City of Flint directly concerning its drinking water. Internal Emails show that key VNA personnel understood that lead in Flint's water was in fact a problem but chose not to disclose it. Indeed, in a public meeting on February 25, 2015, which was covered by the press, high-level VNA employees stood side by side with City of Flint officials and proclaimed that Flint's drinking water was

"safe." VNA already knew, however (and were discussing among themselves), that there was no corrosion inhibitor used to treat the Flint River water, that lead was therefore a problem throughout Flint's water system, and that an immediate return to the DWSD was the best course of action. Again, VNA chose not to disclose this. Moreover, when VNA completed its report in March 2015, the word "lead" did not appear therein, and the need for utilization of a corrosion inhibitor at all was buried in a single paragraph, late in the report, and was only mentioned in the context of aesthetic concerns. A reasonable, similarly situated professional engineer would not have told the public that Flint's drinking water was "safe," but rather, would have stated publicly what they acknowledged privately (that lead was a problem in Flint's drinking water and that an immediate switch back to the DWSD was the best course of action), and would have clearly and strongly recommended employing a corrosion inhibitor so as to avoid lead leaching into the public's drinking water and causing brain damage to the children ingesting it.

The Defendants' respective breaches of their duty of care were substantial contributing factors causing Plaintiffs to ingest and be exposed to lead-containing water and suffer lead poisoning. Plaintiffs' lead poisoning has caused brain damage that manifests as certain neurocognitive, psychological and emotional deficits, which will cause them to struggle academically and vocationally in the future.

Additionally, Plaintiffs' lead poisoning has and will continue to cause them to suffer mental anguish and severe emotional distress.

III. DEFENDANTS' CLAIMS

A. VNA's Statement

In April 2014, in an ill-fated effort to cut costs, the City and State caused the Flint water crisis by switching Flint from Lake Huron water treated by the DWSD to Flint River water treated by the FWTP. FWTP staff had planned to include a corrosion-control chemical, but officials at the Michigan Department of Environmental Quality ("MDEQ"), the state regulator, told the City that it did not need to add corrosion-control chemicals to the water, and City officials instructed FWTP staff not to do anything that State officials did not require. The lack of a corrosion-control chemical caused a temporary increase in lead levels in drinking water in homes with lead service lines in the summer of 2014, because the changed water chemistry disrupted some of the "scale" on the inside of the pipes. Water lead levels returned to pre-switch levels once the water reached a new equilibrium. The effect was limited to the homes and properties with lead service lines, because Flint's water mains did not contain lead.

In February 2015, the City of Flint engaged VNA for a four-week consulting project. VNA's engagement was limited to making recommendations about water quality issues at the City's request specifically with regard to total trihalomethanes

("TTHMs"). The City expressly instructed VNA not to review the decision to switch to Flint River water. At no point did VNA operate or manage any part of the City's water treatment or distribution system. And VNA did not interact with Plaintiffs in any way; the City was VNA's sole client.[3]

VNA did not commit professional negligence during its brief engagement in Flint. VNA did not have any knowledge of a lead problem in Flint water. VNA reviewed the City's lead sampling data and found that the results were within federal and state requirements for drinking water. On the basis of those and other results provided by the City, all of which showed that the City's water was in compliance with federal and state standards, VNA stated that Flint's drinking water was "safe," which it expressly defined to mean in compliance with federal and state standards. Nonetheless, because the lack of corrosion controls could result in lead problems in the future, VNA repeatedly recommended to the City that it work with its state regulator to add a corrosion-control chemical. In fact, VNA listed this as the second highest priority in its final report to the City.

[3] In August 2014 the City of Detroit engaged VNA to review the operations of the DWSD and propose solutions to optimize the DWSD's operational efficiency. That engagement had nothing to do with Flint, and VNA did not learn any non-public information about Flint's post-Detroit plans—in particular, VNA did not learn that Flint was not using a corrosion-control chemical following the switch to Flint River water.

Unbeknownst to VNA, the City, State, and Federal officials were aware of potential lead problems in Flint water and were suppressing that information. In February 2015, while VNA engineers were onsite at the FWTP, the City learned of elevated lead levels at the home of LeeAnne Walters. The City informed MDEQ and the United States Environmental Protection Agency ("EPA"), of those results, but not VNA. No action was taken; on the contrary, in March 2015 the Emergency Manager specifically overruled the City Council's vote to return to Detroit water. In April 2015, after VNA left Flint, the EPA learned that Flint was not using corrosion controls; Miguel Del Toral of the EPA concluded, based on information not provided to VNA, that the City likely was violating federal drinking-water regulations. No action was taken. In June and July 2015, at MDEQ's direction, the City manipulated its lead testing results to remain within federal standards for lead. Further investigation by Dr. Marc Edwards and Del Toral discovered that the City's sampling process was faulty because the City was not sampling locations that were at higher risk for lead. No action was taken.

VNA also did not cause or contribute to Plaintiffs' alleged injuries. No Plaintiff has any evidence of exposure to elevated levels of lead or other contaminants in Flint water due to VNA. Plaintiffs' homes did not have lead service lines, and Plaintiffs either stopped or greatly reduced their consumption of unfiltered Flint water by the end of 2014, well before VNA arrived in Flint. Plaintiffs also

cannot establish that the City, State, or Federal officials in charge and in control in Flint would have implemented corrosion controls or switched back to Detroit water if only VNA had more strongly insisted that it do so or that, if they had done so, water lead levels would have decreased.

Further, any injuries Plaintiffs suffered due to exposure to Flint water was caused entirely by other actors, including but not limited to city, state, and federal officials. In particular, the City of Flint and its Emergency Managers rushed the FWTP into full-time operation without implementing proper corrosion-control treatment. Emergency Managers, acting at the direction of the Governor's Office and Department of Treasury, repeatedly rejected efforts to return the City of Flint to the DWSD throughout the crisis. The MDEQ failed to effectively enforce drinking water regulations and protect public health, including by not requiring corrosion-control treatment at the FWTP and instead misleading the EPA and the public about Flint's water-quality and lead issues. The MDHHS failed to investigate and respond to growing concerns over poor water quality and lead poisoning in Flint. The EPA delayed action in enforcing violations of the Lead and Copper Rule in Flint despite its knowledge of actual lead issues. The Governor's Office and Department of Treasury, which participated in the decision-making regarding the switch to the Flint River, continued for 18 months to place money and politics over public health, waiting until October 2015 to exercise the control they had all along to switch the

City of Flint back to DWSD. At minimum, these and other actors bore a substantial share of the responsibility for causing Plaintiffs' alleged injuries. Any awards of damages against VNA would have to be reduced by the amount of fault attributable to LAN and theses other actors.

B. LAN's Statement

Defendants LAN, Inc. and LAN, P.C., (collectively "LAN") and the Leo A. Daly Company ("LAD") deny all allegations of professional negligence made by Plaintiffs. LAN was not negligent for allegedly failing to recommend that the City of Flint ("COF" or the "City") and the Flint Water Treatment Plant (the "FWTP") utilize a corrosion inhibitor or other corrosion control treatment and failing to warn of the need for same. To the contrary, while LAN initially proposed involvement in water treatment decisions when it was initially consulted about doing work in Flint in 2013, the COF and the MDEQ expressly narrowed LAN's scope of work to only limited design upgrades at the FWTP. The City told LAN and others that the COF would retain responsibility for water treatment decisions, including water quality, monitoring and control, the decision to use corrosion control treatments/inhibitors and what type(s) would be used.

While LAN had no obligation to address water quality or the use of corrosion control treatments including, but not limited to, corrosion inhibitors in light of its limited scope of design work for the City, LAN nevertheless voluntarily made

recommendations of the potential need for these both in 2011 and at various times before the COF temporarily switched water sources to the Flint River. This included LAN making recommendations to the City of Flint about the need to evaluate and potentially use corrosion inhibitors, such as orthophosphates, in preliminary reports completed in 2011, during meetings with the City and the DEQ in June 2013 and in subsequent rate studies completed in November 2013. LAN further recommended that the City conduct a 60–90-day plant test run to evaluate water quality parameters prior to distributing water to the public. In response, City of Flint officials regularly reiterated that the City and MDEQ were making the water treatment decisions and that, since the MDEQ did not require the use of a corrosion control treatment or inhibitor (and instead directed the City to complete two, 6-month testing cycles), the City would not do anything more than the DEQ required or directed.

While LAN was not involved in the treatment decisions and was left out of discussions about it, LAN nevertheless periodically and casually asked the City of Flint employees about the status of the FWTP and the overall water quality of the treated Flint River water after it was put into operation in April 2014. LAN was always told in response that the City was "making its numbers," meaning it was meeting water quality parameters. LAN was not told of potential issues relating to water corrosivity, the leaching of lead from pipes in the distribution system and any

public concern until late August or early September 2015, approximately 18 months after the City began distributing water from the Flint River.

Although Plaintiffs attempt to place blame for the Flint Water Crisis at the feet of LAN**,** this claim is baseless and without merit. The problems in Flint were not caused by the alleged failures of outside engineers. They were instead entirely caused by the epic failure of the local and State and Federal government at every level as recognized by the Flint Water Advisory Task Force and as admitted to by then-governor Richard Snyder. This included failures by the City, the MDEQ, the MDHHS, the Governor's Office, the State Department of Treasury, the US EPA and others.

Finally, the individuals doing limited design work on the Flint Water Treatment Plant from 2013 to 2015 on behalf of LAN were under the direct supervision and control of LAN. They were never subject to LAD's day-to-day control. In fact, the employees in question took direction from LAN superiors and held themselves out at all times as LAN employees. LAD was not the alter ego of LAN and LAD was not otherwise involved in any work in the City of Flint during the times in question.

IV. STIPULATION OF FACTS

The parties have not stipulated to any facts.

V. ISSUES OF FACT TO BE LITIGATED

1. Whether VNA breached a professional duty of care owed to each or any of the Plaintiffs;

2. Whether VNA's breach of a professional duty of care was a but-for and proximate cause of any Plaintiff's injuries;[4]

3. Whether LAN breached a professional duty of care owed to each or any of the Plaintiffs;

4. Whether LAN's breach of a professional duty of care was a but-for and proximate cause of any Plaintiff's injuries;

5. Whether Lockwood, Andrews & Newnam, P.C., Lockwood, Andrews & Newnam, Inc., and Leo A. Daly Company are alter egos.

6. Whether Leo A. Daly Company leased employees to Lockwood, Andrews & Newnam, P.C. for work being done in the City of Flint and whether Leo A. Daly Company is vicariously liable for torts committed by these employees.

[4] VNA maintains that to prove causation Plaintiffs must prove a number of intermediate factual issues—*e.g.*, whether government officials would have acted sooner than they did to address water quality concerns if VNA had not allegedly been negligent—as the Court recognized in its order on VNA's motion for summary judgment. Plaintiffs object to listing those factual issues in this order. VNA agrees not to list the issues in this order without prejudice to its argument that Plaintiffs will be required to prove those factual issues at trial. Similarly, Plaintiffs have objected to identifying but-for causation and proximate causation as separate factual issues. VNA agrees to identify only proximate causation in this order without prejudice to its argument that Plaintiffs must prove both but-for and proximate causation at trial.

7. The amount, if any, of each Plaintiff's damages from injuries caused by lead exposure from Flint water;

8. Whether any person or entity listed in VNA's or LAN's notice of nonparties at fault breached a duty of care owed to each or any of the Plaintiffs;

9. Whether the breach of a duty of care by any person or entity listed in VNA's or LAN's notices of nonparties at fault was a proximate cause of any Plaintiff's injuries;

10. The percentage of fault allocated to any person or entity whose breach of a duty of care caused or contributed to causing any Plaintiffs' injuries.

VI. ISSUES OF LAW TO BE LITIGATED

1. To the extent that the Court has not resolved the issue before trial, whether any person or entity listed in VNA's or LAN's notices of nonparties at fault owed Plaintiffs a legally cognizable duty of care.

2. To the extent that the Court has not resolved this issue before trial, whether Leo A. Daly Company leased employees to Lockwood, Andrews & Newnam, P.C. for work being done in the City of Flint and whether Leo A. Daly Company is vicariously liable for torts committed by these employees.

3. Any other issues of law to the extent that these may be included in the Issues of Fact to be Litigated identified in Section V above.

VII. EVIDENCE PROBLEMS LIKELY TO ARISE AT TRIAL

A. Objections to deposition designations

The parties filed their deposition designations, counter-designations, and objections to opposing parties' designations and counter-designations which await rulings by the Court.

B. Objections to Exhibits

The parties continue to meet and confer regarding their respective exhibit lists and the anticipated exchange of electronic exhibits in accordance with the Court's Practice Guidelines.

C. Filed Motions in Limine

The parties have filed a number of motions in limine. The Court has ruled on some of the motions, and the rest remain pending before the Court. Further, the Court recognized at the January 19, 2022, hearing that some of the motions may raise evidentiary issues that will need to be resolved at trial.

VIII. WITNESSES

Plaintiffs' witness list is attached as Exhibit A. VNA's witness list is attached as Exhibit B. LAN's witness list is attached as Exhibit C.

IX. EXHIBITS

Plaintiffs' exhibit list is attached as Exhibit D. VNA's exhibit list is attached as Exhibit E. LAN's exhibit list is attached as Exhibit F.

X. DAMAGES

Plaintiffs seek compensatory damages including but not limited to lost earning capacity, emotional distress, and mental anguish.

VNA and LAN dispute Plaintiffs' claimed damages, and dispute that any of Plaintiffs' claimed damages can be calculated from objective data.

XI. TRIAL

The parties request a jury trial. Plaintiffs estimate that their proofs at trial will take approximately eight (8) weeks. The VNA Defendants estimate that their proofs at trial will take approximately eight to ten (8-10) weeks. The LAN Defendants estimate that their proofs at trial will take approximately six (6) weeks. The parties do not stipulate to accept a less-than-unanimous verdict. The parties do not stipulate to a verdict of less than six but not less than five if jurors must be excused during the course of trial.

XII. SETTLEMENT

The parties have separately conferred and considered the possibility of settlement. Said discussions have been held by and among the respective counsel for the parties, as well as through the Court appointed mediators. Discussions are currently underway regarding a potential settlement with the LAN Defendants. Special Master Greenspan is acting as a facilitator. Depending on her reporting of progress of these discussions, LAN may request a day long mediation, if warranted. The remaining parties are unable to resolve this case, and do not have any plans for

further discussions. Other than the settlement discussions as to the LAN Defendants, the remaining parties do not request that the Court schedule a settlement conference.

XIII. FILING OF TRIAL BRIEFS, FINDINGS, AND INSTRUCTIONS

Submission of Proposed Final Jury Instructions will be due on a date to be determined by the Court. Pursuant to the conference held on January 5, 2022 trial briefs are not to be filed absent further order of the Court.

XIV. JUROR COSTS

Pursuant to Local Rule 16.2(f), the parties acknowledge that the Court may assess them with juror expenses under Local Rule 38.2.

SO ORDERED.

Date: February 9, 2022
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or first-class U.S. mail addresses disclosed on the Notice of Electronic Filing on February 9, 2022.

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Respectfully submitted,

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Dated: January 27, 2022