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# Battle continues over monitoring fund for Kiddie Kollege alumni

By Jan Hefler, Inquirer Staff Writer

POSTED: March 19, 2013

Two years after a New Jersey judge found three government entities negligent for failing to stop a children's day care from opening in a tainted building, lawyers are still waging a war over legal fees and planning more appeals to eliminate liability.

Superior Court Judge James Rafferty established a \$1.5 million fund to test about 100 babies and children who were exposed to toxic mercury vapors at the former Kiddie Kollege day care in Franklin Township, Gloucester County.

Health experts say mercury vapors can cause neurological and kidney dysfunction.

The now-retired judge had ordered the town, county, state Department of Environmental Protection, and the former building owner to contribute to the medical-monitoring fund.

M. James Maley Jr., who represents Franklin Township, said he planned to appeal the verdict soon even though he won a ruling from the judge's replacement that excuses the town from paying its \$525,000 share.

Maley said he wanted to give the parents less ammunition to sue the township should the children develop illnesses they may try to link to the toxic vapors.

"The liability findings still have an impact on any future claims against the town," Maley said. So far, he said, no parent had filed a personal-injury suit.

The children's class-action lawsuit did not seek damages, only longtime medical monitoring to detect any potential problems they may develop before they reach their 20s.

Only about 35 of the children are participating in the testing program, which was launched last year. James J. Guccio, the lawyer hired to oversee the monitoring, could not be reached for comment last week.

Kiddie Kollege was shuttered after state inspectors discovered the children were in a former thermometer factory where levels of the toxic were later detected in concentrations 30 to 50 times the acceptable level. The discovery spurred legislative action.

Rafferty assessed most of the blame on Franklin, which granted permits and a certificate of occupancy for the day care, and Jim Sullivan 3d and his family businesses, which acquired the bankrupt factory in a tax foreclosure and then failed to perform an appropriate cleanup.

The county Health Department had knowledge of the mercury vapors in the building and failed to take steps to make sure the contamination was addressed before the day care opened.

Shortly before the case went to trial in 2010, the children's lawyers reached a total of \$1.9 million in settlements with the county, the Sullivans, and the day-care operator, Becky Baughman. The money was to be used for the fund and for the lawyers' legal fees.

Rafferty later decided Baughman was not negligent, because she was not aware of the contamination, and Maley argued that her portion of the settlement money - already paid by the insurance company representing her and the Sullivans - could be applied to the township's share.

Superior Court Judge Anne McDonnell, Rafferty's replacement, agreed. She said there was sufficient money in the fund to cover the testing

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and also released the state DEP from its obligation to pay its \$150,000 contribution to the fund.

A battle over the legal fees triggered another round of court fights. Last month, McConnell ruled the five law firms that represented the children were entitled to a total of \$1.6 million in legal fees.

McConnell rejected the lawyers' request for \$3 million, saying some fees were duplications. She also said in a written opinion that she wanted to keep the cost down, recognizing that "the public must ultimately assume the costs of any fees awarded" when government entities are sued.

Michael DeBenedictis, a Haddonfield lawyer involved in the case, said the approved fees were inadequate, considering that the litigation spanned more than six years and included a 24-day trial, numerous motions, and appeals.

He said the children's lawyers struggled to pay the fees of the doctors who testified and to defend against the township's numerous legal maneuvers, including motions for reconsideration, without reimbursement.

"The novelty of the issues and the sheer volume of legal work that had to be done" had hurt his business, he said. "I never thought we would get to the point where the monitoring fund is the least talked about issue" in the case.

Meanwhile, Maley, who is being paid by the county's Environmental Joint Insurance Fund, received more than \$1.4 million in fees as of March 2011. He said he didn't know how much he had made since then on this case.

Maley said he also intended to appeal McDonnell's ruling that holds the township responsible for paying the entire \$1.6 million in plaintiffs' legal fees.

State law prevents the state DEP from being assessed any of those fees, and the settlements with the other defendants covered their share.

"It's clear that no one in the township did anything intentionally" wrong to allow the children inside the Kiddie Kollege building, Maley said. Though he acknowledged mistakes were made, he said the township should not be held liable for what happened or for the legal fees.

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