UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1671

September Term, 2013

REGINALD BYRD

v.

HARRY BELMAN, ET AL.

Krauser, C.J.,
Berger,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: February 18, 2016

This appeal arises out of a lead paint action filed in the Circuit Court for Baltimore City by Reginald Byrd ("Byrd"), appellant, against appellees Wendy Perlberg, Harry Belman, and Stephen Hoffman (collectively, "the Appellees") alleging injuries and damages arising out of alleged lead exposure at two residential property owned, operated, managed, and/or controlled by the Appellees. Byrd alleged that he was injured by lead at Perlberg's property located at 2751 Tivoly Avenue ("the Tivoly property"). Byrd further alleged that he was injured by lead at Belman and Hoffman's property located at 2501 E. Oliver Street ("the Oliver property").

On appeal, Byrd presents five questions for our review, which we have consolidated and rephrased as a single question:[1]

[1] The questions, as presented by Byrd, are:

> I. Whether the trial court erred and/or abused its discretion in granting Appellees Belman and Hoffman's Summary Judgment.
>
> II. Whether the trial court erred and/or abused its discretion in granting Appellee Perlberg's Motion for Summary Judgment.
>
> III. By following this court's decision [in] *West v. Rochkind*, 212 Md. App. 164, 66 A.3d 1145 (2013), did the trial court continue the improper change to and undermining of the bedrock common law principle that the law makes no distinction between the weight to be given to circumstantial evidence and direct evidence and that no greater degree of certainty is required of circumstantial evidence than of direct evidence?

(continued...)

> Whether the circuit court erred by granting the Appellees' motions for summary judgment.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Baltimore City.

FACTS AND PROCEEDINGS

Byrd was born on March 1, 1992. During Byrd's peripatetic childhood, he resided in several different houses in Baltimore, including the Tivoly property.[2] In addition, Byrd regularly visited his paternal grandparents' residence on 32nd Street[3] as well as his maternal grandmother's home. For part of Byrd's childhood, Byrd's maternal grandmother resided at the Oliver property.

Byrd resided at the Tivoly property from birth until sometime between September 1992 and early 1993. In late 1992 or early 1993, Byrd and his family moved to 1433 North

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[1] (...continued)

> IV. Did this Court's decision in *West* improperly change a Plaintiff's burden of proof in a circumstantial evidence case from "preponderance of the evidence" to one greater than "beyond a reasonable doubt"?
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> V. With regard to Appellee Perlberg, [d]id the trial court improperly invade the province of the finder of fact by weighing the evidence and determining that Appellant was not residing at the Tivoly Property when he had his first elevated blood-lead level?

[2] Byrd's mother identified seven separate addresses at which Byrd resided between 1992 and 2001.

[3] The precise address of the 32nd Street property is unclear from the record.

Milton Avenue. Precisely when Byrd moved from the Tivoly property is unclear. In her deposition, Byrd's mother, Teresa Byrd ("Ms. Byrd"), testified that she and Byrd stopped residing in the Tivoly property when Byrd was six months old in September of 1992. A medical record from January 29, 1993, however, still listed the Tivoly property as Byrd's address.[4]

Byrd's maternal grandmother also resided at the Tivoly property. After Byrd moved from the Tivoly property, his maternal grandmother continued to reside there. Byrd visited his maternal grandmother at the Tivoly property occasionally. Beginning on November 1, 1993, Byrd's maternal grandmother resided at the Oliver property. Byrd visited the Oliver

[4] Ms. Byrd reported the following residency history at her deposition:

Property	Date Byrd Resided at the Property	Byrd's Age When He Left the Property
Tivoly property	1992	6 months
1433 Milton Ave.	1992-1994	2 years old
20th St.	1994-1995	3 ½ years old
1709 Bradford St.	1995-1997	5 years old
513 Glover St.	1997-1999	7 years old
512 Belnord Ave.	1999-2000	8 years old
2116 Federal St.	2000-2001	9 years old

Ms. Byrd referred to the property located at 1433 Milton Avenue as located on Oliver Street. She explained, however, that the property was located on the corner of Oliver and Milton. The property faced Milton Street, but because the entrance was on the side of the building, Ms. Byrd thought of the house as being located on Oliver Street.

property "twice every two weeks sometimes." When asked to clarify what she meant by "sometimes," Ms. Byrd responded, "We ain't always go over there." Ms. Byrd did not specify how long a typical visit would last, but explained that there were sometimes overnight visits.

Ms. Byrd testified that she and her children would visit the Oliver property during the time period when they were residing at 1433 Milton Avenue between 1992 and 1994. Ms. Byrd recalled that the 1433 Milton Avenue residence had chipping paint on the walls, ceiling, and on an interior window ledge. According to the State Department of Assessments and Taxation, 1433 Milton Avenue was constructed in 1900.

Byrd has a history of lead exposure, which is summarized below:

Date of testing	Lead level (micrograms/deciliter)
01/29/93	8
02/01/93	8
03/24/94	8
05/17/95	10
09/25/95	11
03/22/96	11
01/08/99	8
05/19/00	6
05/20/02	2

Byrd's blood levels reflect lead exposure in the time period during or shortly after Byrd resided at the Tivoly property as well as during the time period Byrd resided at the Oliver property. Byrd alleges that he suffered permanent injuries as a result of his childhood lead exposure.

On November 21, 2011, Byrd filed a negligence suit against the Appellees, alleging that he was exposed to lead-based paint while living at the Tivoly property and while visiting the Oliver property. Discovery occurred over approximately two years, but neither the Tivoly property nor the Oliver property were tested for lead. On June 25, 2013, Belman and Hoffman filed a motion for summary judgment with respect to the Oliver property. On July 2, 2013, Perlberg filed a motion for summary judgment with respect to the Tivoly property. The Appellees argued that there was no direct evidence of lead at either the Oliver or Tivoly properties and that there was insufficient circumstantial evidence to support an inference that either property contained lead. Following a hearing, the circuit court granted the Appellees' motions for summary judgment. This appeal followed.

STANDARD OF REVIEW

The entry of summary judgment is governed by Maryland Rule 2-501, which provides:

> The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Md. Rule 2-501(f). The Court of Appeals has described the applicable standard for appellate review of a trial court's entry of summary judgment in a lead paint case as follows:

> [T]he standard for appellate review of a trial court's grant of a motion for summary judgment is simply whether the trial court was legally correct, and is subject to no deference.
>
> As such, in reviewing a grant of summary judgment, we review independently the record to determine whether the parties generated a dispute of material fact and, if not, whether the moving party was entitled to judgment as a matter of law. We review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the well-pled facts against the moving party.
>
> That our appellate review is premised on assumptions favoring the non-moving party does not mean that the party opposing the motion for summary judgment prevails necessarily. Rather, in order to defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute as to a material fact by proffering facts which would be admissible in evidence. Consequently, mere general allegations which do not show facts in detail and with precision are insufficient to prevent summary judgment.
>
> The mere existence of a scintilla of evidence in support of the plaintiffs' claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff.

Hamilton v. Kirson, 439 Md. 501, 522-23 (2014) (internal quotations and citations omitted).

DISCUSSION

Byrd contends that the circuit court erred by granting summary judgment in favor of the Appellees because, in his view, he presented sufficient evidence to establish that he was exposed to lead-based paint at both the Tivoly and Oliver properties. The parties agree that there is no direct evidence in the record proving that either of the Appellees' properties contained lead-based paint. The issue before us, therefore, is whether there is sufficient

circumstantial evidence in the record to establish a *prima facie* negligence case. As we shall explain, precedent from both the Court of Appeals and our court compels us to conclude that the circumstantial evidence presented by Byrd was insufficient.

"The plaintiff in a lead paint lawsuit alleging negligence has the burden of proving 1) that the defendant was under a duty to protect the plaintiff from injury, 2) that the defendant breached that duty, 3) that the plaintiff suffered actual injury or loss, and 4) that the loss or injury proximately resulted from the defendant's breach of the duty." *Barr v. Rochkind*, ___ Md. App. ___, No. 1152, Sept. Term 2014 (filed Sept. 29, 2015, reconsideration denied Dec. 3, 2015), slip op. at 9-10 (internal quotation and citation omitted). The Court of Appeals has commented that, "in the typical lead-paint case, the theory of causation has multiple analytical layers." *Hamilton*, *supra*, 439 Md. at 529. The Court explained:

> "The theory of causation presented in [a lead paint] case can be conceived of as a series of links: (1) the link between the defendant's property and the plaintiff's exposure to lead; (2) the link between specific exposure to lead and the elevated blood lead levels, and (3) the link between those blood lead levels and the injuries allegedly suffered by the plaintiff."

Id. (quoting *Ross v. Housing Authority of Baltimore City*, 430 Md. 648, 668 (2013)). In order to satisfy the causation element, a plaintiff in a lead paint case "must tender facts admissible in evidence that, if believed, establish two separate inferences: (1) that the property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the victim's exposure to lead. At times, these separate

inferences may be drawn from the same set of facts, but parties would do well to remember that these inferences are separate and often will require different evidentiary support." *Id.* at 529-30.

A plaintiff is not required to present direct evidence that a particular property contained lead, but rather, can prove circumstantially that a property contained lead-based paint. *Barr*, *supra*, slip op. at 10. Indeed, it is well established that "a negligence case may be proven using only circumstantial evidence, so long as it creates a reasonable likelihood or probability rather than a possibility supporting a rational inference of causation, and is not wholly speculative." *West v. Rochkind*, 212 Md. App. 164, 170-71, *cert. denied*, 435 Md. 270 (2013) (internal quotation omitted). In recent years, both this Court and the Court of Appeals have addressed the issue of how a plaintiff may prove circumstantially that a property contains lead-based paint and that the lead-based paint caused the plaintiff's injury.

The first in the line of cases addressing this issue is *Dow v. L & R Properties Inc.*, 144 Md. App. 67 (2002). In *Dow*, a plaintiff sought to establish the causation element of a lead paint negligence claim by circumstantial evidence. There was no direct evidence that lead paint had been present in the subject property, but the plaintiff produced evidence that there was chipping and peeling paint inside the subject property and that the subject property was built as early as 1935.[5] *Id.* at 75-76. The plaintiff had been observed ingesting flaking or

[5] It was undisputed that homes built before 1950 often contain lead-based paint. *Id.* at 76.

chipping paint in the subject property and had high blood lead levels at the time child resided in the property. Furthermore, the plaintiff produced evidence indicated that the plaintiff "did not spend time anywhere else [other than the subject property] and was never exposed to any other sources of lead." *Id.* at 76. We held that the evidence presented in *Dow* "could indeed support an inference that the paint in question contained lead." *Id.*

We revisited *Dow* in *Taylor v. Fishkind*, 207 Md. App. 121 (2012), in which we held that a plaintiff had failed to establish the presence of lead paint at a particular property when she was unable to rule out other sources of lead. We affirmed the trial court's grant of summary judgment in favor of the defendant "because, unlike in *Dow*, [the *Taylor*] plaintiff could not rule out all other sources for her lead exposure." *Id.* at 146.

We reached a similar conclusion in *West, supra*, 212 Md. App. 164. In *West*, a plaintiff alleged that he suffered injuries from ingesting chipping and flaking lead-based paint while residing with his grandmother in a property owned and leased out by the defendants. The subject property had been razed and had not been tested for the presence of lead. During her deposition, the plaintiff's mother acknowledged that the plaintiff had resided or spent significant amounts of time at a variety of houses during the first six years of his life. The trial court entered summary judgment in favor of the defendants, finding that due to the plaintiff's "uncertain residential history and the lack of any direct evidence that [the subject property] ever contained lead paint," there was insufficient circumstantial

evidence to support the conclusion that the subject property was the source of the plaintiff's lead poisoning. *Id.* at 166.

We affirmed. We explained that, unlike in *Dow*, in which "the process of elimination showed ineluctably that [the subject property] had to have been (not could have been, but had to have been), a place containing lead paint," the West plaintiff was unable to show, "by process of elimination," that the subject property was the source of his lead poisoning. *Id.* at 172, 176. We explained:

> It is the teaching of *Dow* that, even in the absence of direct proof, the presence of lead paint at a particular site can be inferred by the process of elimination, but only if we have 1) the effect of lead poisoning in the plaintiff and 2) the fact that the site in question was the exclusive possible source of the plaintiff's lead paint exposure. It was the truth of that premise that [the plaintiff] failed to establish in this case, not the validity of the conclusion proceeding from the premises. Exclusivity was not required at B. It was required at A, before one even gets to B.

Id. at 176. Accordingly, we held that "[a]t best, [the plaintiff] can show that he may have been exposed to lead at any or all of the three or four residences where he spent substantial time as a child. By definition, that does not trigger the process of elimination, and [the plaintiff] thereby failed to establish the threshold premise that lead was even present in the paint at" the subject property. *Id.*

Although we had issued multiple opinions on the "process of elimination" theory of causation in lead-based paint cases, the Court of Appeals did not address the issue until 2014. The Court of Appeals granted certiorari in two cases, *Hamilton v. Kirson*, No. 78,

September Term, 2013, and *Alston v. 2700 Virginia Avenue Associates*, No. 100, September Term, 2013, which were consolidated for purposes of appeal because they raised the same issue. *Hamilton*, *supra*, 439 Md. at 501.[6]

In *Hamilton*, the Court of Appeals affirmed the analytical framework applied by the Court of Special Appeals in *Dow*, *Taylor*, and *West.* After discussing *Dow* and *West* at length, *see id.* at 530-36, the Court of Appeals explained that it was largely in agreement with the approach undertaken by the Court of Special Appeals:

> We agree with the *West* court's analysis for application to those cases where a plaintiff relies on a *Dow* theory of causation. Under a *Dow* theory of causation, a plaintiff must rule out other reasonably probable sources of lead exposure in order to prove that it is probable that the subject property contained lead-based paint. Where the plaintiff fails to rule out other reasonably probable sources, the necessary inferences for a *Dow* theory of causation cannot be drawn with sufficient validity to allow the claim to survive summary judgment. *See also Taylor*, 207 Md. App. at 136, 150, 51 A.3d at 752, 760–61 (concluding that the trial court granted aptly the defense motion for summary judgment on the grounds that "[t]he evidence in this case does not come close to the kind of circumstantial evidence that the Court found sufficient in *Dow* and that . . . it's not simply the age of the house and even the peeling").

[6] Indeed, this appeal was stayed pending the outcome of the *Hamilton* case before the Court of Appeals. In his motion to stay appeal, Byrd argued that "the result in this case will be almost entirely dependent on . . . the Court of Appeals' future decisions in *Alston v. 2700 Virginia Avenue Associates*, Petition No, 356, September Term, 2013 and *Christopher D. Hamilton v. Benjamin Kirson, et ux*. - Case No. 78, September Term, 2013." Byrd argued that "given that the law of circumstantial evidence may drastically change in light of the Court of Appeals' rulings [in *Alston* and *Hamilton*], it is in the interests of the parties and in the interests of judicial economy that this case be stayed pending the Court of Appeals' decision in *Alston and Hamilton*."

Id. at 536-37.[7] Since *Hamilton*, we have applied the "process of elimination" reasoning in two reported opinions. *See Barr*, *supra*, slip op. at 8-9 ("[A] lead paint plaintiff who relies on circumstantial evidence to establish the elements of her prima facie negligence case -- including proof that the defendant's property contained lead paint -- has a burden of production to present evidence ruling out any reasonable probability that her elevated blood lead levels were caused by other potential sources of lead exposure.")[8]; *Smith v. Rowhouses, Inc.*, 223 Md. App. 658 (2015) ("[I]f "a plaintiff relies on a *Dow* theory of causation . . . ,

[7] The Court of Appeals emphasized, however, that a plaintiff who is unable to establish a *Dow* theory of causation may be able to prove the causation element with circumstantial evidence in another way. *Id.* at 537 ("That certain facts are missing to establish a *Dow* theory of causation, however, does not mean that the lead-poisoned plaintiff has no way to prove circumstantially a *prima facie* negligence case. To the extent that *West* suggests that a lead-paint plaintiff must exclude all other sources of lead exposure in every instance of circumstantial proof, we do not agree necessarily with that conclusion."). The Court presented one such example of how a plaintiff may prove that a subject property contained lead-based paint in the absence of direct evidence and without excluding all other sources of lead. In the Court's hypothetical, the subject property had been razed, but was built at the same time and owned as a group with the two bordering rowhouses. The two bordering rowhouses had tested positive for lead-based paint. The Court explained that "in this hypothetical (at least in the absence of evidence of lead abatement measures), the plaintiff is able to present circumstantial evidence from which a jury could infer reasonably that the subject property contained lead-based paint—without having to exclude all other sources of potential exposure to lead-paint poisoning." *Id.* at 538.

Although the Court of Appeals left open the possibility of presenting circumstantial evidence which would prove the presence of lead-based paint without having to exclude all other sources of potential exposure, this case does not involve such facts.

[8] Byrd asserts that *Barr* was incorrectly decided because it misapplied the law set forth by the Court of Appeals in *Hamilton*, *supra*. We reject this characterization of *Barr.* In *Barr*, we applied the same law set forth in *Hamilton* when we held that a plaintiff must rule out any reasonable probable sources of lead exposure. *Barr*, *supra*, slip op. at 13-16.

[she] must rule out other reasonably probable sources of lead exposure in order to prove that it is probable that the subject property contained lead-based paint.") (quoting *Hamilton*, *supra*, 439 Md. at 536), *cert. granted*, 445 Md. 19 (2015).

Having set forth the applicable law, we turn to the facts of the present case. Byrd concedes that he did not produce any direct evidence of lead at either the Tivoly or Oliver properties. The evidence put forth by Byrd in relation to the Tivoly property is (1) evidence indicating that Byrd resided at the Tivoly property; (2) a lab slip dated January 29, 1993 indicating a blood lead level of eight micrograms per deciliter, which listed the Tivoly property at Byrd's address; (3) testimony that deteriorated paint existed at the Tivoly property; and (4) that the property was build before 1950.

Notably absent from the evidence presented was *any* suggestion that Byrd spent all or substantially all of his time at the Tivoly property. Indeed, there are multiple other properties that could have been the source of Byrd's lead exposure which resulted in a positive blood lead level in January of 1993. Accordingly to Byrd's mother, the family had moved from the Tivoly property as early as September of 1992 and was residing in the Milton Avenue property in January 1993. The Milton Avenue property was built prior to 1950, and, according to Mother, the Milton Avenue property contained deteriorating paint. Furthermore, although Byrd continued to "occasionally" visit his maternal grandmother at the Tivoly property after he moved to the Milton Avenue residence, there was also evidence that Byrd visited his paternal grandparents at a residence on 32nd Street.

Pursuant to the *Dow* line of cases, the burden was upon Byrd to rule out other reasonably probable sources of lead exposure in order to prove that it was probable that the Tivoly property contained lead-based paint. *Hamilton*, 439 Md. at 536 ("[A] plaintiff must rule out other reasonably probable sources of lead exposure in order to prove that it is probable that the subject property contained lead-based paint."). Byrd failed to do so. Because Byrd failed to rule out the Milton Avenue property as well as the 32nd Street property, he has failed to prove, by circumstantial evidence, that it is probable that the Tivoly property contained lead-based paint. Accordingly, the circuit court did not err in granting Appellee Perlberg's motion for summary judgment.

Byrd similarly failed to put forth sufficient circumstantial evidence which would permit an inference that the Oliver property contained lead-based paint and that any lead-based paint at the Oliver property caused Byrd's injury. Byrd never resided at the Oliver property. Indeed, during the time frame when Byrd visited the Oliver property, he resided in the Milton Avenue property. As discussed *supra*, the Milton Avenue property was built prior to 1950 and contained deteriorated paint. Because Byrd did not rule out the Milton Avenue property as a source of his lead exposure, he has not proved that it is probable that the Oliver property contained lead-based paint. Accordingly, the circuit court did not err in granting Appellees Belman and Hoffman's motion for summary judgment.

Further, to the extent that Byrd argues that the defendants have the burden to identify other reasonably probable sources of a plaintiff's lead exposure, Byrd misstates the law. Our

cases, as well as the Court of Appeals' opinion in *Hamilton*, make clear that it is the responsibility of the "plaintiff [to] rule out other reasonably probable sources of lead exposure in order to prove that it is probable that the subject property contained lead-based paint." *Hamilton*, *supra*, 439 Md. at 536. *See also Barr*, *supra*, slip op. at 13 ("[T]he burden is on the plaintiff to rule out other reasonably probable sources of exposure, and the defendant has no obligation to identify other likely sources of lead in order to trigger a plaintiff's obligation to rule out other reasonably probable sources of exposure."); *West*, *supra*, 212 Md. App. at 185 (holding that a plaintiff is required to "show by the process of elimination that [the subject property] was the only possible cause for the critical effect of lead poisoning"). Accordingly, we reject Byrd's assertion that the Appellees bore any responsibility to identify other reasonably probable sources of lead exposure. We note, however, that in this case the Appellees *did*, in fact, identify the Milton Avenue property as well as the 32nd Street property as reasonably probable sources of Byrd's lead exposure.

Moreover, we reject Byrd's contention that the circuit court improperly resolved a factual dispute with respect to the time period when Byrd resided in the Tivoly property.[9] The circuit court did not make any finding with respect to when Byrd moved from the Tivoly property to the Milton Avenue property. Rather, the ambiguity prevented an inference that the Tivoly property was the probable source of Byrd's lead exposure. Byrd

[9] As discussed *supra*, the evidence was ambiguous as to whether Byrd moved from the Tivoly property in the fall of 1992 or not until the winter or spring of 1993.

produced some evidence -- in the form of his mother's testimony -- that he was no longer residing at the Tivoly property in January of 1993. Accordingly, the other residence at which Byrd was potentially residing at the time -- the Milton Avenue property -- was a reasonably probable source of Byrd's lead exposure. As discussed *supra*, the Milton Avenue property was not ruled out by Byrd as a potential source of Byrd's lead exposure. In short, the circuit court did not invade the province of the fact-finder when acknowledging that Byrd's location of residence in January 1993 was ambiguous.

In the present case, Byrd failed to produce evidence which would permit the jury to infer that either the Tivoly property or the Oliver property contained lead-based paint which was the cause of Byrd's injury. We, therefore, affirm the circuit court's grant of the appellees' motions for summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.