

Md. Appeals Court Clarifies Lead Paint Legal Standards

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In its recent opinion *Rowhouses Inc. v. Smith*, No. 60, Sept. Term 2015, 2016 Md. LEXIS 99 (Mar. 25, 2016), the Court of Appeals of Maryland further clarified the causation standard applicable to lead paint lawsuits in Maryland. In doing so, the court provided a roadmap to attorneys and courts for presenting, evaluating and countering circumstantial evidence in such cases.

In *Rowhouses*, the Court of Appeals considered whether the Circuit Court for Baltimore City properly granted the motion for summary judgment of the defendant, Rowhouses Inc. as to the lead exposure claims of the plaintiff, Myishia Smith, which were premised solely upon circumstantial evidence. Although the evidence that Smith presented indicated that she lived in multiple homes as a child, Smith targeted the subject property as the location of her alleged lead exposure and the property responsible for her injuries.

At the outset, the court explained that when a plaintiff relies solely on circumstantial evidence in advancing a lead paint exposure case, it does so under a Dow theory of causation. See *Rowhouses*, 2016 Md. LEXIS 99 at *28-34 (citing *Dow v. L & R Properties Inc.*, 144 Md. App. 67 (2002)). According to the court, to withstand summary judgment when relying on Dow, a plaintiff must present sufficient circumstantial evidence such that the evidence, when viewed in a light most favorable to the plaintiff, supports a finding that the subject property was the only possible source of the alleged injury. In other words, “[u]nder 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.” *Id.* at *58 (emphasis added) (quoting *Hamilton v. Dackman*, 439 Md. 501, 531 (2014)). The court further explained that, under Dow, circumstantial evidence may, on its own, support a negligence determination “if it amounts to a *reasonable likelihood or probability* rather than a possibility.” *Id.* at *32 (emphasis added) (quoting *Dow*, 144 Md. App. at 75). Where, on the other hand, the circumstantial evidence produced shows, at most, a possibility, not a probability, that the subject property was a source of the plaintiff’s lead exposure, courts have granted summary judgment.

In light of Dow and its progeny (which are explained at length in *Rowhouses*), the question before the court in *Rowhouses* became whether Smith had presented sufficient circumstantial evidence such that a trier of fact, when viewing that evidence in a light most favorable to Smith, could find that the subject property was a “*reasonably probable*” source of her alleged injuries. The court explained that, for Smith to withstand summary judgment, her evidence must support three separate findings: (1) the subject property contained lead; (2) the subject property was a “*reasonably probable*” source of Smith’s alleged



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lead exposure; and (3) there were no other “*reasonably probable*” sources of exposure.

The Meaning of “Reasonably Probable”

Under its analysis, the court initially considered the meaning of “reasonably probable.” The court first recognized that Maryland courts had already organized “more likely than not,” “reasonably probable” and “possible” into separate degrees of probability. Indeed, according to the court, prior case law established that “more likely than not” (i.e., the preponderance of the evidence standard, or 50.1 percent likely or greater) was a higher degree of probability than “reasonably probable”:

In the context of an alleged Brady violation, and, specifically, whether evidence was material even if helpful and even if suppressed, in *Adams v. State*, 165 Md. App. 352, 435-36 (2005), writing for the Court of Special Appeals, Judge Charles Moylan explained that a reasonable probability is not synonymous with more likely than not and that more likely than not is the higher standard:

An obvious weakness of the term of art “reasonable probability” is that the unwary reader may readily confuse it with the informal and commonplace notion of “probability.” To the untutored ear, probability sounds like something that is more likely true than not. As we have analyzed at length, however, ... “reasonable probability” implies no such thing. ... The court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a “reasonable probability” of a different outcome if the evidence withheld had been disclosed. The court rightly cautions that the standard intended by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence. ... [T]he continued use of the term “probability” raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, “more likely than not.” (Citations, emphasis and paragraph breaks omitted).

*What can be gleaned from the discussion in Adams is that a reasonable probability is less than more likely than not, which is a higher standard to meet. We agree with the general principle that more likely than not implies a higher degree of proof than the standard of reasonable probability. Id. at *66-67 (emphasis added).*

After recognizing that “reasonably probable” was not equivalent to “more likely than not,” the court then evaluated whether prior Maryland cases had established the lower limits of that term. In doing so, the court noted that “a ‘reasonable probability’ is more than a mere ‘possibility,’” reasoning:

Thus, something that is possible is less probable than something that is reasonably probable; a possibility is a mere chance that something might be true, as opposed to a fair likelihood that something is true. Establishing a possibility requires a lower quantum of proof or evidence (the showing of a chance, not necessarily a fair likelihood) than establishing a reasonable probability. In that regard, a “reasonable probability” is a higher standard than a “possibility.” In the context of lead-based paint cases, any property in which a plaintiff has resided or visited could be a possible source of the plaintiff’s lead exposure. However, a possible source does not become a reasonable probable source without additional evidence that elevates the mere chance that the property contained lead-based paint and was a source of lead exposure to the fair likelihood that the property contained lead-based paint and was a source of lead exposure. *Id. at *71-72 (emphasis added).*

Considering the boundaries of “reasonably probable” previously established by Maryland case law, the court took to crafting a more precise definition for the term “reasonably probable”:

To that end, we further examine the definition of “reasonable probability.” Black’s Law Dictionary (10th ed. 2014) defines “probability,” in pertinent part, as “[s]omething that is likely; what is likely[.]” Similarly, Merriam-Webster defines “probable” as “likely to be or become true[.]” Probable, Merriam-Webster (2015). “Likely,” in turn, means “[a]pparently true ... ; probable” and “[s]howing a strong tendency; reasonably expected[.]” Likely, Black’s Law Dictionary (10th ed. 2014). “Reasonable,” on the other hand, means “[f]air, proper or moderate under the circumstances[.]” Reasonable, Black’s Law Dictionary (10th ed. 2014). Similarly, Merriam-Webster defines “reasonable” as “not extreme or excessive” and “moderate, fair[.]” Reasonable, Merriam-Webster (2015). *Id.* at *68-69.

Taking these definitions together, the court “conclude[d] that a ‘reasonable probability’ is a fair likelihood that something is true.” *Id.* at *69. The court further explained that, in the lead paint context, this “means that the subject property is a reasonable probable source of a plaintiff’s lead exposure where there is a fair likelihood that the subject property contained lead-based paint and was a source of the lead exposure.” *Id.*

The court clarified that, to prove circumstantially that a subject property was a “reasonably probable” exposure source, a plaintiff must present evidence from which a reasonable fact-finder could conclude that: (1) there is a “fair likelihood” that the property contained lead; (2) the subject property is a “fairly likely” exposure source; and (3) there are no other “fairly likely” sources of exposure. In other words, to prevail on summary judgment, a reasonable fact-finder must be able to conclude, based on the evidence presented, that it is more than merely possible (but not necessarily more likely than not) that the subject property contained lead and was an exposure source, and that it is at most a mere possibility that there was another exposure source.

The Expanded Right to Use Circumstantial Evidence in Lead Paint Cases

In addition to clarifying the definition of “reasonably probable,” Rowhouses also extended the permissible use of circumstantial evidence that was established by Dow and its progeny.

As discussed above, to prevail on a Dow theory of causation, a plaintiff must prove three things: (1) that the subject property contained lead; (2) that the subject property was a reasonably probable, or fairly likely, source of the plaintiff’s lead exposure; and (3) there were no other reasonably probable or fairly likely, sources of a plaintiff’s lead exposure. As prior cases have already established, a plaintiff in a lead exposure case may rely on circumstantial evidence in proving elements (1) and (2) of the Dow analysis. *Id.* at *72-73. In Rowhouses, the court extended this principle to the third and final element. Specifically, the court held that “where a plaintiff proceeds under a Dow theory of causation, just as circumstantial evidence may be used to rule in the subject property as a reasonable probable source of lead exposure, circumstantial evidence may also be used to rule out another property as a reasonable probable source of lead exposure.” *Id.* at *75. Put differently, “to rule out or eliminate other reasonably probable sources of lead exposure, a plaintiff does not need to produce direct evidence that another property did not contain lead-based paint — through, for example, a test for lead-based paint.” *Id.*

Rowhouses was not the first Maryland case to recognize a lead paint plaintiff’s right, at the summary judgment stage, to rely exclusively on circumstantial evidence in advancing a case under Dow. Before Rowhouses, however, that right only covered two of the three Dow elements. By extending that right to ruling out other exposure sources, Rowhouses has seemingly closed the loop.

It will be interesting to see how attorneys and courts interpret and apply the Court of Appeals’ new

“reasonably probable” standard moving forward. Given the recency of the Rowhouses decision, however, it remains to be seen what impact the Court’s refined definition of “reasonably probable” and extended right to rely on circumstantial evidence will have on lead paint cases in Maryland (or elsewhere).

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