

LEAD PAINT PLAYGROUND HAZARD EVIDENCE

James C. Kozlowski, J.D., Ph.D.

© 2007 James C. Kozlowski

The injured plaintiff in a personal injury lawsuit bears the burden of proof to allege sufficient facts which could establish by a “preponderance” of the evidence (i.e., better than 50-50) that defendant’s alleged negligence was indeed the “proximate cause” of plaintiff’s injury. In other words, more likely than not, plaintiff would not have been injured, or injured as severely, absent the alleged negligence of the defendant. Anything less than 50-50 amounts to mere conjecture and speculation regarding the legal cause of plaintiff’s injury, among other possibilities. Under such circumstances, plaintiff’s negligence claim should fail for lack of evidence.

In general, landowners owe a legal duty to their invitees (i.e., those authorized to enter and use the premises for public or business purposes) to keep the premises reasonably safe under the circumstances. A landowner may be liable for ordinary negligence where an unreasonably dangerous condition on the premises causes injury to an invitee. To impose liability for ordinary negligence, a judge or jury must find, more likely than not, the injury sustained by the invitee would not have occurred in the absence of an unreasonably dangerous defect on the premises.

Lead paint on playground equipment has been generally recognized as a potentially unreasonably dangerous condition on the premises. In 1996, the U.S. Consumer Product Safety Commission (CPSC) issued a report indicating “public playground equipment could have chipping and peeling lead paint, which is a potential lead poisoning hazard primarily for children six years old and younger.” According to the report, an analysis of a number of playgrounds in various cities found levels of lead in the paint on older playground equipment that were “high enough to be recognized as a federal priority for lead hazard control measures.”

While noting that deteriorating lead paint in older homes was the leading cause of lead poisoning in children, the report found “the effects of ingesting lead are cumulative.” As a result, the CPSC report concluded that exposure to lead paint from older playground equipment could also contribute to the lead poisoning hazard.

Lead poisoning in children is associated with behavioral problems, learning disabilities, hearing problems, and stunted growth. CPSC found that in some of the paint chips from playground equipment, the levels of lead were high enough that a child ingesting a paint chip one-tenth of a square inch—about the size that could fit on the tip of a pencil eraser -- each day for about 15 to 30 days could have blood lead levels at or above the 10 microgram per deciliter amount considered dangerous for children, especially those six years old and younger.

At the time of its 1996 report, the CPSC did “not consider playground equipment with lead paint that is intact and in good condition a hazard.” Rather, the CPSC found paint containing lead created a hazard once it deteriorated due to weather or normal wear and tear, creating paint chips and dust containing lead which could be ingested by young children. As noted by the 1996 CPSC report, “[t]he 1992 Residential Lead-Based Paint Hazard Reduction Act sets 0.5 percent

AUGUST 2007 LAW REVIEW

lead by weight as the level of lead in paint that should be targeted for lead hazard control.” As a result, the CPSC recommended that “local and state jurisdictions give high priority to controlling the lead paint hazard from playground equipment with chipping and peeling paint containing lead at or above the 0.5 percent level.”

The CPSC report also advised concerned parents to “look for deteriorating paint on playground equipment”:

Parents concerned about this hazard can look for deteriorating paint on playground equipment. If they find deteriorating paint, they should contact the playground's owner or local officials and ask them to test the paint. Parents should also make sure that children do not put their hands in their mouths while playing on equipment with deteriorating paint and wash their hands thoroughly afterward.

If your child's playground is found to have high levels of lead, community, city, state, or school officials should take appropriate control measures. Parents who are concerned about whether their child has lead poisoning should consult with the child's physician.

Despite such warnings about the lead paint hazard from playground equipment, the CPSC acknowledged that it had “no reports of children with lead poisoning from paint on playground equipment.”

As illustrated by the *Gonzalez v. Curt Realty* opinion described below, the mere existence of lead paint on playground equipment is not sufficient to impose landowner liability for negligence. On the contrary, Curt Realty had the burden of proof to show that any lead on the playground had, more likely than not, been ingested by the child, resulting in the generally expected injury (i.e., lead poisoning). Moreover, since the parent in this particular case made sure that her child did not put anything in her mouth during visits to the playground in the city park, there was no evidence that the child was ever exposed to the foreseeable risk of injury associated with painted playground equipment, i.e., lead ingestion. Accordingly, the court found no evidence to indicate that the high level of lead in this child's blood was, more likely than not, caused by any cumulative effect from ingesting lead in both the home and visits to the public playground. Since Curt Realty had failed to show any evidence that the child was exposed to hazardous lead paint while visiting the playground in a city park, summary judgment dismissing claims against the city parks and recreation department was warranted.

EXPOSURE PROOF

In the case of *Gonzalez v. Curt Realty*, 2007 NY Slip Op 31327, Jaqueline Gonzalez, age 3, was allegedly injured after being exposed to lead paint in an apartment owned by defendant Curt Realty. In 1995, three months after moving into the apartment with her parents, Gonzalez was diagnosed with an elevated level of lead in her blood. The city health department inspected the apartment and observed the child “picking or gnawing the paint containing lead violations.”

Defendant Curt Realty complied with the health department's order to abate the lead hazard in the apartment. Curt Realty subsequently hired its own inspector who "discovered that there were high levels of lead on playground equipment in a nearby City owned park, where infant plaintiff played." As a result, Curt Realty filed a third party negligence claim against the New York City Parks and Recreation Department alleging the high levels of lead in the playground were also responsible for the child's lead exposure. Curt Realty, therefore, contended that the City should also be held liable for damages associated with the child's condition.

In response, the City argued that there was no evidence that infant plaintiff's elevated blood lead level was caused by exposure to a lead paint hazard in the park. In so doing, the City submitted the deposition testimony of Gonzalez's mother, Maria Betancourt, regarding her visits to the city park. In her deposition, Betancourt indicated since "she was able to walk," she would take her daughter to the park in a stroller, but "not too much." Betancourt testified that she never left Jaqueline unattended during visits to the park during the alleged period of exposure to lead paint in 1995. According to Betancourt, she would only take her daughter out of the stroller and "put her down" to "put her in the swing."

According to the lead inspection of the playground conducted by Curt Realty, "high levels of lead were found on the slide handrail, the swing set beam support and the toddler play area gate and fence." Based on Betancourt's deposition testimony, however, the City argued that "the infant plaintiff did not come into contact with any of these areas." Specifically, the City noted that Betancourt had testified that she did not leave the infant plaintiff out of her sight, and that she "did not observe her putting anything in her mouth" while she was on the swings and in the water areas of the park. According to her mother, "[t]he only thing she liked was the swing and the water." Betancourt testified further that she did not notice any peeling paint around the water. Moreover, while visiting the playground, Betancourt testified that she was always holding Jaqueline and would not let her put anything in her mouth that was not food. As a result, the City maintained that Jaqueline "could not have been exposed to lead at the playground."

Based on the deposition testimony of its principal park supervisor, the City also claimed that it "did not have notice of the lead condition which allegedly caused infant plaintiff's injuries." Specifically, the City's park supervisor testified he "never received any complaints about peeling paint at the Emerson Park playgrounds."

The City parks director of environmental control maintained records related to complaints or testing for lead-based paint. According to the director, all records pertaining to such environmental issues were maintained in a filing cabinet in his office. In his deposition, the director stated that he had never received any inspection reports or complaints regarding lead based paint in Emerson Park. Upon receiving a complaint for a particular site, the parks environmental director testified that he would open a file and "call a consultant to go to the site" and/or go to the site himself to "see what was going on."

While acknowledging that the city health department had found lead violations in the apartment it rented to Betancourt, Curt Realty claimed that there was still a "question of fact as to where the infant plaintiff was exposed to the lead which caused her injuries." According to Curt Realty,

Betancourt brought her daughter to Emerson Park from 1992 until 1995, the year she was diagnosed with lead poisoning.

At Curt Realty's request, "a purported expert with certifications issued by the United States Environmental Protection Agency" (Molloy) conducted tests at Emerson Park. According to Mr. Molloy, lead was found on the playground slide handrail, swing set beam, toddler play area, gate and fence in the park. Comparing his park findings with those of the city health department for the apartment, Molloy speculated that it was "far more likely that Jacqueline Gonzalez's positive blood lead level in October 1995 came from the playground, and not from the apartment."

Molloy further contended that the City's "method of repainting playground equipment and park furniture may also have contributed to a risk of lead exposure." When asked what was required before applying new paint to playground equipment with peeling paint, the city's parks director had testified that park workers would typically take a wire brush or scraper and scrape the equipment down. According to Molloy, "this method of preparation and painting the structures in the park exacerbated the risk of lead exposure."

[I]f lead paint was scraped off, the lead particles could have contaminated the area and especially the soil in the area. Once soil has become contaminated with lead, which is not biodegradable, it remains a long term source of lead exposure.

POSSIBLE CAUSE

To avoid having its action against the City dismissed on a motion for summary judgment, Curt Realty had to produce sufficient evidence to support a claim of negligence against the City, i.e., the presence of lead in the playground, more likely than not, had caused Jacqueline Gonzalez's positive blood lead level in October 1995. According to the court, "bald, conclusory allegations, even if believable, are not enough" to support a negligence claim. On the contrary, while acknowledging "the possibility that infant plaintiff's elevated lead levels came from more than one source," the court found "proof of exposure to such other sources is essential and the mere possibility of exposure or speculation regarding such exposure are not sufficient to defeat the motion for summary judgment."

Applying these principles to the facts of the case, the court found Curt Realty had "failed to show that infant plaintiff had contact with a lead source in the park."

While high levels of lead were discovered in the playground which infant plaintiff visited with her mother, there is no evidence the child contacted the offending equipment. Indeed, her mother clearly testifies that her contact with the playground equipment was limited to the swings and water, and that the mother put her in the swings and held her hand while she was in the water.

That the City's method of scraping and painting the playground equipment may have caused lead to contaminate the soil under the swings where infant plaintiff played, without evidence that the child played in that soil, and that the soil itself was tested and yielded evidence of lead, does not raise an issue of fact.

AUGUST 2007 LAW REVIEW

Mr. Molloy, despite his assertions, fails to remark that the deposition testimony reveals that the chains where the child holds on when on the swing are not painted; and he did not test the water or the ground soil where the infant plaintiff played. These are the areas where testimony reveals the child had contact with the play equipment, not the gate or the slide or the beam support of the swing set.

Finally, Mr. Molloy's conclusion that "a toddler's exposure to the lead levels found on the Playground Slide Handrail, the Swingset Beam Support, and/or the Toddler's Play Area Gate and Fence at Inwood Hill Park Playground *possibly can cause* lead poisoning [*emphasis added by court*]" hardly rises to the level of an opinion to a reasonable degree of certainty in the expert's field.

Having "failed to show that infant plaintiff had contact with a lead source in the park," the court held that Curt Realty had "failed to raise an issue of fact sufficient to defeat summary judgment." As a result, the court granted the City's motion for summary judgment dismissing Curt Realty's claims against the City of New York and the New York City Parks and Recreation Department.