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Matthew Stegman

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RECENT DEVELOPMENT

HAMILTON V. KIRSON: THE COURT OF APPEALS OF MARYLAND HELD THAT CIRCUMSTANTIAL EVIDENCE OFFERED TO SATISFY THE CAUSATION ELEMENT OF A *PRIMA FACIE* CLAIM OF NEGLIGENCE IN LEAD PAINT CASES MUST DEMONSTRATE A REASONABLE PROBABILITY, NOT MERE POSSIBILITY, THAT THE SUBJECT PROPERTY WAS THE CAUSE OF LEAD EXPOSURE.

By: Matthew Stegman

The Court of Appeals of Maryland held, in two consolidated cases, that circumstantial evidence presented to prove injuries from lead paint exposure was insufficient to survive a motion for summary judgment on the issue of causation. *Hamilton v. Kirson*, 439 Md. 501, 96 A.3d 714 (2014).

In the first case, Candace and Brian Alston (“the Alstons”) sued their landlords for maintaining homes that contained chipping, peeling, and flaking lead paint in violation of Baltimore City’s Housing Code, alleging the homes were a proximate cause of their lead poisoning. The Alstons lived in multiple residences during the time of the alleged poisoning. The Alstons employed an expert who identified the landlords’ properties as being the source of their lead poisoning based on the facts that the Alstons lived in or visited the subject properties during the time they exhibited elevated blood lead levels; that the residences had chipping, flaking paint during the time the Alstons had lived in or visited them; that the residences were older homes in Baltimore City; and, finally, that the Alstons exhibited elevated lead levels during the time they lived in the properties.

In the second case, Christopher and Ricky Hamilton (“the Hamiltons”) also relied on circumstantial evidence to support their contention that the landlords’ properties caused their lead poisoning. The Hamiltons employed an expert who, after being denied entry to one of the subject properties, performed testing on several exterior surfaces that indicated the presence of lead. Following the test, they employed a medical expert who concluded that the ages of the children and the periods during which they tested positive for elevated blood lead levels made it likely, though not conclusive, that the subject properties were the proximate cause of the Hamiltons’ lead exposure.

Following discovery, the landlords filed motions for summary judgment. The Circuit Court for Baltimore City granted the motions, finding there was insufficient evidence to establish causation. Both the Hamiltons and Alstons appealed. The Court of Special Appeals of Maryland affirmed both decisions. The Hamiltons and Alstons both petitioned for a writ of certiorari, which the Court of Appeals of Maryland granted. The court then consolidated the cases due to the similar evidentiary issues presented.

The Court of Appeals of Maryland began its analysis by stating the requirements for a prima facie showing in a negligence action for lead paint poisoning stemming from a statutory violation. A plaintiff must show that (1) the defendant is in violation of a statute or ordinance designed to protect a specific class of persons to which the plaintiff belongs; and (2) the violation of that statute or ordinance is the proximate cause of the plaintiff's injury. *Hamilton*, 439 Md. at 525, 96 A.3d at 728 (quoting *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 79, 835 A.2d 616, 621 (2003)). Because the court elected to decide the case on the issue of causation, the court accepted that there was peeling, flaking, and chipping paint which constituted a violation, sufficient to overcome the first prong. *Hamilton*, 439 Md. at 526-27, 96 A.3d at 729. A code violation permits the inference of *prima facie* negligence on the part of the landlord; however, a plaintiff must still prove that the landlord's negligence was a proximate cause of his or her injury. *Hamilton*, 439 Md. at 525-26, 96 A.3d at 728.

The court has repeatedly recognized that a plaintiff may prove proximate cause through circumstantial evidence. *Hamilton*, 439 Md. at 527, 96 A.3d at 730. In a lead paint poisoning action, plaintiffs must establish facts that support two 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 lead exposure. *Hamilton*, 439 Md. at 530-31, 96 A.3d at 731-32. It is also well established that such circumstantial evidence must amount to a reasonable likelihood, rather than a mere possibility, that the subject property was the proximate cause of lead exposure. *Id.*, 439 Md. at 527-28, 96 A.3d at 730 (citing *Peterson v. Underwood*, 258 Md. 9, 16-17, 264 A.2d 851, 855).

To demonstrate the above principles, the court contrasted the facts of both instant cases with those in previous decisions. In *Dow v. L & R Properties, Inc.*, the plaintiff was able to demonstrate a genuine issue of material fact and overcome a motion for summary judgment by offering into evidence that the age of her home suggested the presence of lead paint, that there was chipped paint in the area her child played in, that the child had put paint chips in her mouth, that the child spent most of her time in the home while she lived there, and that the child developed lead poisoning. *Hamilton*, 439 Md. at 530-31, 96 A.3d at 731-32 (citing *Dow*, 144 Md. App. 67, 796 A.2d 139 (2002)). These facts were distinguished from those present in *West*, where the plaintiff had an uncertain residential history and the property that was the alleged source of lead exposure had been razed before it could be tested for lead. *Hamilton*, 439 Md. at 533, 96 A.3d at 734 (citing *West v. Rockkind*, 212 Md. App. 164, 66 A.3d 1145 (2013)).

In the cases sub judice, the plaintiffs did not present evidence sufficient to establish a reasonable likelihood that the subject properties were the proximate causes of their lead poisoning. *Hamilton*, 439 Md. at 542-43, 96 A.3d 740. In the Hamiltons' case, summary judgment was granted because the Hamiltons failed to provide evidence of lead-based paint inside the

subject property and to establish, as in *Dow*, that the children spent a majority of their time in that property. *Id.*, 439 Md. at 542-43, 96 A.3d at 739. Though the Alstons could not identify with certainty the exact house in which they lived while experiencing elevated blood lead levels, the Circuit Court did not base their ruling in favor of summary judgment on uncertainty over where the plaintiffs lived. *Id.*, 439 Md. at 544-45, 96 A.3d at 740. Instead, the court accepted the Alstons' showing that the subject properties contained "deteriorated paint" and that the children exhibited elevated lead levels around the time they lived there, but granted summary judgment because the Alstons had not sufficiently established that the subject properties were the only logical source of their lead exposure. *Id.*, 439 Md. at 545, 96 A.3d at 741.

The court continued to propose ways that a plaintiff may overcome missing facts when looking to establish causation through circumstantial evidence. *Hamilton*, 439 Md. at 537, 96 A.3d at 736. The court presented a diagram showing how the presence of lead paint in other homes on the same block *may* support an inference that the subject property also contained lead paint. *Id.* For instance, where a home has been razed, thus rendering testing for lead paint presence impossible, plaintiffs may rely on positive test results from adjacent homes built during the same time to support an inference that the razed subject property also contained lead-based paint. *Id.*, 438 Md. at 538, 96 A.3d at 736.

The court further cautioned that, while expert opinions can help build a stronger case for causation, an expert cannot transform thin evidence into the required reasonable probability simply by labeling it an expert opinion. *Hamilton*, 439 Md. at 541, 96 A.3d at 738. Finally, the court explicitly rejected the intermediate appellate court's holding that the only way to establish a prima facie negligence case was to eliminate every other reasonable possibility. *Id.*, 439 Md. at 542, 96 A.3d at 739. Thus, the Court of Appeals of Maryland expanded the possible avenues plaintiffs may take in order to establish a prima facie negligence case. *Id.*

The circumstantial evidence presented by the Hamiltons and Alstons to prove injuries from lead paint exposure was insufficient to survive a motion for summary judgment on the issue of causation. As lead paint litigation continues to be a robust civil practice area in Maryland, changes to the standard for establishing causation may have far-reaching effects both for potential plaintiffs and defendants in the state. For plaintiffs, a less demanding standard may open the floodgates for more lead paint actions to be filed with thin evidentiary underpinnings.

In *Hamilton*, the Court of Appeals of Maryland struck a balance between enforcing strict evidentiary standards to establish the causation element of a negligence claim and recognizing how difficult it can be for plaintiffs to obtain direct evidence in such cases. The court's decision should allow cases built on a solid evidentiary foundation, but missing some key facts, to move

forward while making it easier for defendants to defeat less substantial claims.