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RECENT DEVELOPMENT

ROGERS V. HOME EQUITY USA, INC.: A LEAD PAINT EXPOSURE CLAIM CAN SURVIVE SUMMARY JUDGMENT BY ESTABLISHING THAT THE SUBJECT PROPERTY WAS A REASONABLY PROBABLE SOURCE OF THE LEAD POISONING.

By: Hayley C. Lucas

The Court of Appeals of Maryland held that a plaintiff can survive summary judgment if the circumstantial evidence demonstrates that the subject property was a reasonably probable source of his lead poisoning. *Rogers v. Home Equity USA, Inc.*, 453 Md. 251, 277, 160 A.3d 1207, 1223 (2017). The court further ruled that a plaintiff's use of purely circumstantial evidence does not require him to rule out other potential sources of lead exposure. *Id.* at 268, 160 A.3d at 1217. Therefore, the trial court erred when it granted summary judgment on the issues of source and source causation. *Id.* at 277, 160 A.3d at 1223.

In October 1996, Terrance Rogers ("Rogers") and his mother moved into a row home owned by Home Equity USA, Inc. ("Home Equity"). They lived at the Home Equity property for approximately six months. Between June of 1995 and August of 1997 Rogers' blood lead levels were tested six times. The test results revealed that Rogers' blood lead levels were elevated and remained elevated during his tenancy at the Home Equity property. In addition, the tests revealed that Rogers' blood lead levels declined after he vacated the Home Equity property.

In May 2013, Rogers filed a complaint in the Circuit Court for Baltimore City against Home Equity for negligence. Rogers alleged that he was poisoned by lead-based paint as a toddler while living at the Home Equity property and suffered permanent brain damage as a result. Rogers introduced evidence that the interior of the Home Equity property had tested positive for lead-based paint in 1976. There was also no evidence indicating that a full lead abatement had ever been performed on the property. In addition, Rogers presented reports from Dr. Simon and Dr. McDaniel, who both concluded that the Home Equity property was a substantial contributing source to Rogers' lead poisoning. Dr. McDaniel testified that it took thirty to forty-five days for blood tests to accurately reflect the level of lead exposure. Therefore, Rogers' increased lead levels while living at the Home Equity property indicated that the property was a significant source of his exposure.

In December 2014, Home Equity moved for summary judgment. Home Equity argued that Rogers had failed to rule out all other possible sources of lead exposure. Therefore, Rogers could not survive summary judgment on the issues of source and source causation of his lead poisoning. The trial court granted summary judgment and Rogers filed a timely appeal. The Court of Special Appeals affirmed the circuit court's judgment on the issue

of source causation alone. Rogers filed a petition for *writ of certiorari*, which the Court of Appeals of Maryland granted.

The Court of Appeals of Maryland reviewed the trial court's granting of summary judgment *de novo*, and in the light most favorable to Rogers. *Rogers*, 453 Md. at 262, 160 A.3d at 1214. Rogers argued that he had presented enough evidence to survive summary judgment on both source and source causation, thus he was not required to rule out other possible sources of lead exposure. *Id.* at 263, 160 A.3d at 1214. The court noted that to defeat a motion for summary judgment, a plaintiff is only required to show a reasonable probability that the property was a source of the lead exposure and poisoning. *Id.* at 264-65, 160 A.3d at 1215. As a result, the plaintiff was not required to conclusively establish the issues of source and source causation. *Id.* at 265, 160 A.3d at 1215.

Next, the court addressed whether Rogers had presented sufficient evidence to survive summary judgment by analyzing the two theories of causation for lead paint cases. *Rogers*, 453 Md. at 265-66, 160 A.3d at 1215-16. The court proceeded under the theory of causation used in *Hamilton v. Kirson* which allows a plaintiff to "rule in" the subject property as a reasonably probable source through substantial circumstantial evidence. *Id.* at 266, 160 A.3d at 1216 (citing *Hamilton v. Kirson*, 439 Md. 501, 527-28, 96 A.3d 714 (2014)). Under a *Kirson* theory of causation, to survive summary judgment Rogers was not required to rule out all other possible sources of lead exposure. *Rogers*, 453 Md. at 266, 160 A.3d at 1216. Instead, he had to present sufficient evidence related to the subject property. *Id.* The court noted the quality and quantity of circumstantial evidence provided by Rogers was sufficient for a jury to reasonably infer that the Home Equity property contained lead-based paint during the time Rogers resided there. *Rogers*, 453 Md. at 270-72, 160 A.3d at 1218-20 (citing *Kirson*, 439 Md. at 544, 96 A.3d 714; *Hamilton v. Dackman*, 213 Md. App. 589, 75 A.3d 327(2013)).

The court next considered Dr. McDaniel's testimony. *Rogers*, 453 Md. at 271, 160 A.3d at 1219. Dr. McDaniel testified that Rogers' blood lead levels would have decreased about thirty days after the exposure had ended. However, they remained elevated until Rogers vacated the Home Equity property. *Id.* From Dr. McDaniel's testimony, a jury could reasonably infer that the Home Equity property was a reasonably probable source of his lead exposure. *Id.* at 272, 160 A.3d at 1219-20. Therefore, the court held that summary judgment was improperly granted on this issue. *Id.* at 273, 160 A.3d at 1220.

Next, the court addressed source causation. Specifically, the court focused on whether Rogers presented sufficient evidence to support an inference that it was reasonably probable that the lead exposure at the Home Equity property contributed to his injury. *Rogers*, 453 Md. at 273, 160 A.3d at 1220. Under *Kirson*, Rogers was only required to show that the Home Equity property was a substantial contributing factor to his injury. *Id.* The court determined that a jury could reasonably conclude from the blood tests

that because Rogers' blood lead levels had not declined while living at the Home Equity property, the property had contributed to his lead poisoning. *Id.* at 276-77, 160 A.3d at 1222-23. Thus, the court held that summary judgment was improperly granted on the issue of source causation. *Id.* Concluding that Rogers had provided enough evidence to establish both source and source causation, the Court of Appeals of Maryland held that summary judgment was improperly granted. *Id.* at 277, 160 A.3d at 1223.

The dissenting opinion argued that the majority extensively reduced the burden of proof a plaintiff must meet to avoid summary judgment in a lead paint negligence claim. *Rogers*, 453 Md. at 284, 160 A.3d at 1227. The dissent further asserted that the majority's "rule in" theory provided no clear basis in law or public policy and, therefore, may be difficult for the trial courts to apply. *Id.* at 287, 160 A.3d at 1228.

In *Rogers*, the Court of Appeals of Maryland held for the first time that a lead paint plaintiff may survive summary judgment through substantial circumstantial evidence without ruling out other possible sources of lead exposure. This decision protects future plaintiffs who may lack the necessary resources to eliminate other potential sources of exposure. Plaintiffs facing the difficulties of proof will now have an alternative method to establish a subject property as a reasonably probable source of lead exposure. In addition, this theory of causation is favorable to plaintiffs who wait to bring their claims until several years after their lead exposure. This is due to the fact that eliminating other potential sources becomes increasingly difficult with the passing of time. Accordingly, this decision sets a guiding principle as to the amount of circumstantial evidence a plaintiff must provide under a "rule in" theory of causation to survive summary judgment. In doing so, *Rogers* resolves the question of how much circumstantial evidence is sufficient and will prevent inconsistencies in the future.