

Maryland Court Applies Special Standard For Lead Exposure

By **F. Ford Loker** and **Katherine Lawler**

Law360, New York (July 19, 2017, 2:18 PM EDT) --On May 30, 2017, the majority of the Maryland Court of Appeals continued to apply its “reasonable probability” standard in proving “source exposure” and “source causation” in the narrow context of lead-based negligence cases. *Terrence Rogers v. Home Equity USA Inc.*, No. 57, September Term 2016, Md. Ct. App. (Adkins, J.). The Rogers majority reversed the Court of Special Appeals decision at 228 Md. 620 (2016), and held that circumstantial evidence may be used to “rule in” a subject property — not just as a source (i.e. location) of exposure, but also on source causation, which is different from medical causation.



F. Ford Loker

A lengthy dissent was presented by Judge Getty, who advocated for keeping intact the traditional standard of proof — “more likely than not” causation. Judge Getty questioned creating an artificial distinction between lead paint cases and other torts in the absence of a “clearly articulated basis in law or public policy to support such a distinction.” (Dissent, Slip Op. at 16.)

In *Rogers*, the Maryland Court of Appeals considered whether the trial court erred in granting, and the Court of Special Appeals in affirming, defendant’s motion for summary judgment based on plaintiff’s failure to prove that the subject property was the probable source of lead exposure and the cause of elevated blood lead levels in *Rogers*, then an infant residing at that location.



Katherine Lawler

Whether a defendant’s property is a source of a plaintiff’s lead exposure, and whether that exposure is a cause of elevated blood lead levels are the first two layers of causation set forth by the Court of Appeals in *Ross v. Housing Authority of Baltimore City*, 430 Md. 648 (2013). The third, medical causation, was not considered by the court in *Rogers*.

The *Rogers* court differentiated the plaintiff’s burden of proof in lead paint negligence cases from all other negligence cases. Lead-based cases need to connect three separate links: (1) the link between the subject property and plaintiff’s exposure to lead, (2) the link between specific exposure to lead and plaintiff’s elevated blood lead levels and (3) the link between those lead levels and the injuries suffered by plaintiff.

Contrary to the standard in other negligence actions where a plaintiff must prove that it is more likely than not that the injury was caused by defendant’s negligent actions or inactions, in lead-based personal

injury cases in Maryland, plaintiffs need only show “reasonable probability” as to each of the interconnected links. “Reasonable probability” — as opposed to plain old “probability” — is a confusing and undefined term of art, setting a different standard of proof, but only in certain cases, somewhere between “more likely than not” and a “mere possibility.”

The long-used concept of “probability” already implies reasonableness. So what is the difference between the limited and traditional standards of proof? At a minimum, a future opinion might shed light on the how “reasonable” has come to mean “lower” in certain lead paint cases.

Source

The majority opinion reflected on the Court of Special Appeals opinions in *Hamilton v. Dackman*, 213 Md. App. 589 (2013) and *Taylor v. Fishkind*, 207 Md. App. 121 (2012) as to the appropriate level of probability to establish a defendant property as a source of exposure and survive summary judgment. Considering both direct and circumstantial evidence of the presence of flaking lead-based paint at the subject property during Rogers’ tenancy, the court concluded there was a reasonable probability that the subject property was indeed a lead exposure source and the source cause of Rogers’ elevated blood lead levels.

In *Dackman*, the Court of Special Appeals concluded that the plaintiff had not met the reasonable probability standard, but established only a mere possibility that he was exposed to lead at the subject property by failing to prove the interior of the property contained lead based paint during the plaintiff’s tenancy. The positive lead sample was taken from the home’s exterior.

In *Taylor*, again, there was insufficient evidence of lead based paint in the interior of the subject property to establish source and source causation. The court in *Taylor* concluded that the age of the property was alone insufficient for a jury to conclude the subject property was a reasonably probable source of exposure.

Causation

As to causation, Maryland courts have allowed the use of circumstantial evidence to establish that a defendant property was the only source of lead exposure, and therefore a source of causation. In 2002 the Court of Special Appeals held that where a subject property was the only possible source of a plaintiff’s lead exposure, circumstantial evidence could be used establish causation “if it amounts to a reasonable likelihood or probability rather than a possibility.” *Dow v. L & R Properties Inc.*, 144 Md. App. 67, 75 (2002).

Where there are multiple exposure sources, however, Maryland courts have required plaintiffs to rule out all other possible sources as causative to establish that the defendant’s property was the substantial factor in causing the alleged harm. Where, as in *Rogers*, two or more reasonably likely causes of the plaintiff’s lead exposure exist, the plaintiff has been required to rule out the other exposures to survive summary judgment.

The *Rogers* majority includes a chart providing blood lead levels while plaintiff resided at 3 addresses. (Slip Op. at 2.) It was incumbent on plaintiff in this particular circumstance to isolate the one responsible for the harm. Relying on last year’s decision in *Rowhouses Inc. v. Smith*, 446 Md. 611 (2016), the *Rogers* court reasoned that if plaintiff was not going to rule out the other sources of his exposure, he would have to present sufficient evidence to “rule in” the subject property.

Rowhouses instructs on the evidence necessary to “rule in” a property as an exposure source. The court held that where other possible sources of exposure exist, a plaintiff must rule in a defendant property by showing a reasonable probability that it was a cause of plaintiff’s elevated blood lead levels.

In setting the reasonable probability standard, the Rowhouses court diluted the “more likely than not” standard for lead paint cases. Now, with its opinion in Rogers, the Court of Appeals has further defined reasonable probability — and distinguished its use from a Dow theory of causation in which the subject property is the sole exposure source.

The thoughtful concurring opinion by Judge Watts in Rogers stressed the distinction between competing tests of sufficiency of evidence to defeat a defense motion for summary judgment in lead-based cases. There is the Dow test discussed above, and there is the test in *Hamilton v. Kirson*, 439 Md. 501 (2104.)

As the concurring opinion in Rogers states, “In other words, under a Kirson theory of causation, a plaintiff in a lead-based paint case who presents sufficient circumstantial evidence from which a jury could reasonably infer that the subject property contained lead-based paint and was a reasonable probable source of lead exposure is not required to rule out all other reasonable probable sources of lead exposure.” (Concur., Slip Op. at 2.) Distinguishing the Dow and Kirson standards thus calls for analysis of the quality and quantity of the circumstantial and direct evidence supporting source, source causation and medical causation.

Kirson may save a plaintiff with more and better circumstantial evidence from losing a defense motion for summary judgment. It seems clear that lower courts deciding future dispositive motions in lead-based cases will need to use a sliding scale of proof rather than a bright-line test.

The majority in Rogers distinguished its own 1970 case (*Peterson v. Underwood* (258 Md. 9, 17 (1970)) which defined plaintiff’s burden of proof at the summary judgment stage. There, the Court of Appeals established that the burden of proof as to causation was whether the plaintiff has shown that the defendant’s property was a probable — or more likely than not — source of his lead injuries.

Therefore, when there were two or more reasonably likely causes of the plaintiff’s lead-related injuries, as occurred in this case, the plaintiff had to prove that the defendant’s property was the more probable source of the harm than the other(s) to survive summary judgment. The Rogers court concluded that plaintiff Rogers had accomplished that with his evidence of the presence of lead at the subject property vis-à-vis the other two.

All three opinions in Rogers make clear that the issue at hand is not whether two or more residences substantially contributed to a plaintiff’s lead-related injuries. Where there are multiple, separate, successive “sources” of lead exposure, any and all may be shown to be a source cause, not the source cause. In this instant appeal, the question of source was either/or, not both.

Impact on Future Cases

The Rogers majority concluded that the causal links between a property and a plaintiff’s lead exposure (source) and between a specific exposure to lead and elevated blood lead levels (source causation) may be established by circumstantial evidence to defeat a defense motion for summary judgment. According to the dissent, this opinion lowers the bar for this limited class of plaintiffs by holding that circumstantial evidence of an exposure as a “reasonably probable” — as opposed to “more likely than not” — cause of injury is sufficient to prevent a defendant from obtaining summary judgment.

Although beyond the scope of this article, cursory review of similar opinions in other jurisdictions revealed public policy considerations to ease the difficulty in proving events affecting minor children which occurred decades in advance of litigation.

See, e.g., *Clark v. American Cyanamid Co.*, 877 N.W.2d 117 (2016) (Wisconsin court allowed suit under a risk-contribution theory, which relaxed the burden to prove causation when harmed by a product but the exact manufacturer is not known); *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 614 (7th Cir.2014) (describing the Wisconsin Supreme Court's recent rulings in lead paint cases as "relaxing the traditional cause-in-fact requirement" and holding that this relaxed causation standard comports with due process); *Hamilton v. Miller*, 2014 NY Slip Op 04230, 2014 WL 2608461 (2014) (relaxing rule on expert causation reports in lead paint cases).

While too soon to define a trend, it appears the Maryland Court of Appeals is not alone in adjusting the standard of proof for causation under such circumstances. What is the statutory or policy basis for carving out a distinct causation standard for lead paint plaintiffs separate and apart from other tort plaintiffs in Maryland? By defining the "reasonable probability" standard as falling somewhere along a continuum between more than a "mere possibility" and less than "more likely than not," exactly how much circumstantial evidence of causation is necessary to rise above "mere possibility" and tip the scales in favor of plaintiffs at the summary judgment stage?

Will trial courts be able to fairly and consistently apply this sliding scale standard without further appellate guidance on the amount of evidence — direct or circumstantial — necessary to advance a lead-based case to the jury? No doubt the well-reasoned positions of the concurring and dissenting judges in *Rogers* will inform the debate on the future path of lead paint litigation. Litigants will have to wait to learn the answer to these questions as the changing landscape of lead paint litigation in Maryland evolves.

F. Ford Loker is a principal in Miles & Stockbridge PC's mass torts and products liability practice group. Katherine A. Lawler is an associate in the firm's mass torts and products liability practice group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.