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Recent Developments: Brown v. Dermer: Lead Paint Plaintiffs Need Only Show Landlord Had Reason to Know of Chipping Paint

Todd R. Chason

Brown v. Dermer

Lead Paint Plaintiffs Need Only Show Landlord Had Reason to Know of Chipping Paint

By Todd R. Chason

The Court of Appeals of Maryland held that a plaintiff in a lead paint action survives summary judgment by merely alleging that a landlord has knowledge of flaking, chipping, or otherwise loose paint. *Brown v. Dermer*, 357 Md. 344, 744 A.2d 47 (2000). It is not necessary to allege that the landlord knew the paint was lead based; here, mere evidence that the landlord had knowledge of deteriorating paint created an issue of material fact.

The Browns, and their twins born in January of 1984, lived in a home rented from the Dermers. One month prior to becoming pregnant with the twins, Ms. Brown allegedly gave notice to the landlords that there was chipping paint in the home. The landlord denied receiving this notification, and the condition went uncorrected. In 1985, both children were diagnosed with increased levels of lead in their bloodstream. Upon investigation of the residence, the Baltimore City Health Department found thirty violations related to lead paint, which the landlords were given one week to correct; however, they failed to comply for almost three months. The Browns subsequently filed suit for negligence.

The Circuit Court for Baltimore City granted the Dermer's motion for summary judgment, which was affirmed by the court of special appeals. The Court of Appeals of Maryland granted certiorari. The issue before the court of appeals was what must a plaintiff allege in a lead paint case to survive summary judgment. Specifically, whether evidence must be offered that the landlord knew or had reason to know a danger existed due to lead-based, chipping paint, or whether mere allegations of knowledge of chipping paint were sufficient.

The court of appeals noted that pursuant to Maryland Rule 2-501(e), the plaintiffs must allege sufficient facts from which a jury could conclude that the defendants acted negligently. *Brown*, 357 Md. at 354, 744 A.2d at 53. The court stated that "summary judgment is generally not appropriate for issues concerning knowledge, motive, or intent because the facts concerning the defendant's knowledge and conduct, and the circumstances in which they existed . . . are best left for resolution by the trier of fact at trial." *Id.* at 355, 744 A.2d at 53 (quoting *Federal Sav. & Loan Ins. Corp. v. Williams*, 599 F.Supp. 1184 (D. Md. 1984)).

The court turned its analysis to Maryland law regarding negligence, noting that a plaintiff must prove (1) a duty upon the defendant to protect the plaintiff from injury, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the injury and defendant's breach. *Id.* at 356, 744 A.2d at 54. The court recognized that the requisite duty may be established by statute; thus, the violation of a statute may provide evidence of a breach of duty. *Id.* at 358, 744 A.2d at 55. Finally, a prima facie case of negligence is made by showing a nexus between violation of the statute and the resulting injury. *Id.* at 359, 744 A.2d at 55.

The court of appeals examined the Baltimore City Housing Code, which provides that in order to properly maintain property, "interior walls, ceilings, woodwork, doors and windows shall be kept clean and free from any flaking, loose or peeling paint and paper." *Id.* (quoting Baltimore City Code (1983 Repl. Vol.), Art. 13 § 703(2)(c)). The court found a statutory obligation existed to eradicate deteriorating paint conditions about which the landlord knows, regardless of lead content. *See id.* at 359-60, 744 A.2d at 55-56. Otherwise stated, a violation is established merely by showing "that there was flaking, loose or peeling paint . . .." *Id.* The court held that this statutory violation constituted evidence of negligence by the landlord. *Id.* at 359, 744 A.2d at 55.

The court, however, was quick to point out that the plaintiff must still establish that the landlord was

provided notice of the violation. *Id.* at 361, 744 A.2d at 57. The court stated this "reason to know" test was the first prong that the plaintiff must satisfy to survive summary judgment. *Id.* at 362, 744 A.2d at 57. The court noted that it must be shown that "the defendant has knowledge sufficient to support an inference of knowledge of the condition is required." *Id.* It is unnecessary that the plaintiff show that the deteriorating paint contained lead. *Id.* The second prong of the test is foreseeability. *Id.* The plaintiff must show that a reasonable person would realize that an injury due to lead paint is possible. *Id.* The Defendant's actual knowledge is not an issue. *Id.*

The court then compared this standard with its prior jurisprudence in the area of lead paint litigation. The court analyzed its holding in *Richwind Joint Venture 4 v. Brunson*, 335 Md. 661, 645 A.2d 1147 (1994), where evidence was presented that the apartment in question, built prior to 1957, was in a state of ill repair, including chipping and flaking paint. *Id.* at 363, 744 A.2d at 57. In *Richwind*, it was further established that the landlord had been a property owner in Baltimore for sixteen years and knew that property constructed before 1957 often contained lead paint. *Id.*

The *Richwind* court found that sufficient evidence existed to defeat the defendant's motion for summary judgment. *Id.* at 364, 744 A.2d at 58. The court in the instant case, however, suggested that the showing in *Richwind* actually exceeded the proof necessary to survive summary judgment. *Id.* at 365, 744 A.2d at 59. The court noted that the jury could have "found that the defendant's breach of statutory duty prescribed by the housing code was proximately related to the injury alleged, without specifically finding that the defendant had actual knowledge or reason to know of the presence or hazards of lead-based paint." *Id.*

The court then analyzed the cases that the landlords offered to support their contention that summary judgment was appropriate. The decisions in both *Winston Properties v. Sanders*, 565 N.E.2d 1280, (Ohio App. 1989) and *Garcia v. Jiminez*, 539 N.E.2d 1356, (Ill. App. 1989) held that mere notice of deteriorating paint "was insufficient to establish liability." *Id.* However, the court distinguished both cases from the case at bar. The Court of Appeals of Maryland noted that in *Winston*, no statute existed prohibiting peeling paint without reference to lead content, and in *Garcia*, there was no applicable statute at all, and the court relied entirely on common law principles. *Id.* at 370, 744 A.2d at 61. Thus, neither case instructed against holding the landlords liable.

In the instant case, the court of appeals found that the reason to know element was satisfied because the plaintiff testified she gave notice to the Dermers regarding the eroding paint. *Id.* at 367, 744 A.2d at 60. Thus, accepting plaintiff's testimony to be true, the first-prong was met. *Id.* Additionally, the foreseeability element was likewise met. *Id.* The court noted that the Housing Code serves to put landlords on notice that lead paint poses a significant danger to children. *Id.* The court stated that even assuming arguendo, that the code was insufficient, during depositions, defendants acknowledged awareness of lead paint laws and regulations prohibiting loose paint. *Id.* at 368, 744 at 60. The court therefore found that it is clear that the lead paint injuries suffered by the plaintiffs were foreseeable, and the second-prong is thus satisfied. *Id.*

The court of appeals's holding in *Brown* represents a significant change in Maryland law regarding summary judgment in lead paint cases. Although the court suggested that "*Richwind* does not establish a factual threshold for all lead poisoning cases," that is precisely how it was viewed by the legal community, including the Court of Special Appeals of Maryland in this case. *Id.* at 365, 744 A.2d at 59. There was no suggestion in *Richwind* or any subsequent case that *Richwind* "satisfied a higher burden" than was required. *Id.* Thus, this ruling greatly lowers the bar that the plaintiff must clear to defeat a defendant's motion for summary judgment. The court's holding practically guarantees that summary judgment will almost never succeed, and plaintiffs will almost always be granted the opportunity to present their case to a jury.

This ruling represents a reasonable bright-line test—if notice is given of defective paint, it must be corrected. The burden is placed on the landlord to investigate claims of deteriorating paint made by tenants. As a result of this ruling, to minimize liability landlords will likely be more responsive to tenants' complaints

regarding paint. If they fail to respond to allegations of deteriorating paint, it is at their own peril.

In sum, requiring knowledge merely of defects in paint rather than knowledge of the presence of lead paint is a common sense approach dictated by the language of the statute. Moreover, it strikes an appropriate balance between the needs of tenants and landlords.