UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0822

September Term, 2015

SKYLAR MURPHY, *et al.*

v.

LOUIS F. ELLISON

Berger,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.
Dissenting Opinion by Friedman, J.

Filed: August 23, 2016

Skylar and Adrianna Murphy filed suit in the Circuit Court for Baltimore City, alleging that they suffered injuries from exposure to lead-based paint at an apartment where they resided during the early 1990s. The court granted summary judgment in favor of one of the defendants, Louis F. Ellison, on the ground that the Murphys had failed to produce evidence of any lead-based paint hazards at the property. The Murphys dismissed the remaining defendants and noted an appeal.

We conclude that the Murphys produced sufficient evidence of chipping, peeling, or deteriorated lead-based paint at the property at the relevant time to survive a motion for summary judgment. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Early Childhood Lead Exposure of Skylar and Adrianna Murphy

Skylar Murphy was born in June 1991. When Skylar was an infant, his mother, Adrienne Nelson, frequently took him on visits to family members, including visits to her uncle's apartment on the first floor of 2731 Parkwood Avenue. Viewed in the light most favorable to the Murphys, the facts suggest that by March 1992 Ms. Nelson had moved into the Parkwood apartment with Skylar and Skylar's older brothers.[1]

At that time, the Parkwood property was owned by L.F.E. No. 1, Inc., one of several Maryland corporations created and wholly owned by Louis F. Ellison.

[1] A March 1992 laboratory report from the Department of Health and Mental Hygiene listed Skylar's address as 2731 Parkwood Avenue. Ms. Nelson did not sign a lease until several months later.

Before moving into the Parkwood apartment, Ms. Nelson asked the property manager, Malcolm Snyderman, to fix flaking and peeling paint throughout the apartment. In response to Ms. Nelson's request, Snyderman applied a fresh coat of paint in many areas in the interior of the apartment. Even after she moved in, however, Ms. Nelson continued to observe flaking and peeling paint on the walls, floors, windows, and doorways throughout the apartment. Snyderman responded to several more of her requests by adding more paint to the affected areas.

While she was living at the Parkwood apartment, Ms. Nelson began to notice unusual and aggressive behavior from Skylar and his two older brothers. She took her children to the hospital, where doctors tested their blood-lead levels. Skylar's first test, taken in March 1992, when he was nine-months-old and living at Parkwood, showed that he had an blood-lead level of 5μg of lead per deciliter of blood. Later tests showed that his blood-lead level had increased to 6μg per deciliter by July 1992, to 11μg per deciliter by February 1993, and to 15μg per deciliter by July 1993, shortly after his second birthday.

Skylar's younger sister, Adrianna Murphy, was born in December 1993. Tests showed that Adrianna had a blood-lead level of 7μg per deciliter in April 1994, which increased to 9μg per deciliter by June 1994.

Skylar and Adrianna continued to reside with their mother at the Parkwood apartment until 1995. During that period, Ms. Nelson regularly took her children to daycare and to visit family members at other residences.

B. The Murphys' Negligence Action and Early Discovery

On May 31, 2012, after both Skylar and Adrianna had reached adulthood, they filed a complaint in the Circuit Court for Baltimore City. The complaint named three defendants: Louis F. Ellison, Malcolm Snyderman, and L.F.E. No. 1, Inc. The Murphys alleged that those defendants owned, operated, and maintained the property at 2731 Parkwood Avenue from 1991 through 1995.

According to the Murphys, the defendants had violated the Baltimore City Housing Code by failing to keep the property free of any flaking, loose, or peeling lead-based paint; that Skylar and Adrianna Murphy, as young children, had ingested lead-based paint and paint dust in areas of the dwelling that were accessible to them; and that their exposure to lead resulted in ongoing impairments, including permanent brain injuries.

During discovery, the Murphys retained Arc Environmental, a lead inspection company, to survey the Parkwood premises for lead-based paint. An Arc technician tested the interior and exterior of the property in January 2013. According to the Arc report, most surfaces tested negative for the presence of lead, but lead-based paint was detected above the Maryland standard on the following components: the "basement window casing" and "upper door casi[n]g" on the property's "front exterior"; the "wall surface" on the "right exterior"; and the "wall surface[,] door threshold and header" on the "rear exterior." The report classified the paint on each of those surfaces as in "poor" condition, meaning that "[m]ore than 10% of the surface [wa]s peeling, chalking, flaking, blistering, or otherwise separated from the substrate."

Ms. Nelson gave deposition testimony in March 2013 about her children's medical history, their residential history, and the condition of the Parkwood residence. She recalled seeing loose and deteriorated paint on the walls, floors, windows, and doorways throughout the apartment in areas that were accessible to her children.

Ms. Nelson identified several other locations that she and the children had regularly or occasionally visited between 1991 and 1995, but she was asked no questions about the condition of those "visitation" properties. Among the other properties, she stated that she had lived with her grandmother at 2624 Woodbrook Avenue at the time of Skylar's birth in June 1991. After moving to the Parkwood property, she and her children would visit her grandmother at the Woodbrook property, and the family would "sit out front during the summer[] and spring days" on "[a]ny day it was nice."

C. Ellison's Motion for Summary Judgment and the Murphys' Response

One of the defendants, Louis Ellison, moved for summary judgment on December 5, 2013. As the primary ground for his motion, Ellison argued that he could not be held personally liable for the alleged injuries suffered at the Parkwood property. Ellison asserted that in November 1991, four months before Skylar's first blood test, he had assigned ownership of the property to a company bearing his initials "L.F.E." He stated that Snyderman took over the day-to-day management of the property at that time.

As a separate ground for his motion, Ellison argued that the Murphys could not establish that their injuries resulted from lead exposure at the Parkwood property. Ellison relied on the report from Arc Environmental, which had detected lead-based paint on several "exterior" components. He pointed out that Ms. Nelson did not recall problems

with the paint on the outside of the building. He argued that the Murphys could not show that any paint hazards inside the dwelling also contained lead. Ellison further argued that the Murphys could not show that the Parkwood property was the source of their lead exposure through circumstantial evidence because there were "many possible alternative sources of exposure" and "numerous other properties" that "may have caused their documented blood lead levels[.]"

Shortly after Ellison filed his summary judgment motion, the Murphys deposed two experts who rendered opinions about the source of their lead exposure. Mr. R. Shannon Cavaliere, a certified lead-risk assessor for Arc Environmental, opined that door and window components inside the apartment, which Ms. Nelson had described as sources of chipping paint when she had lived there, had been covered with the same types of lead paint that inspectors found on other parts of the structure in 2013. Dr. Alma Robinson-Josey, a pediatrician, concluded that the Parkwood property was a substantial contributing source of the elevated blood-lead levels that Skylar and Adrianna experienced while they resided there. According to Dr. Robinson-Josey, Ms. Nelson had reported that each of the other properties that the children visited regularly were in good condition and that the children had not been exposed to known lead sources other than paint. Dr. Robinson-Josey concluded that the source of "substantial exposure" for the children would have been "the Parkwood property," but that it was "impossible" to "completely" rule out exposure at the property on Woodbrook Avenue.

The Murphys' response to the summary judgment motion relied on the Arc report, Ms. Nelson's deposition testimony, and excerpts from the depositions of the two experts.

They contended that this evidence was sufficient in the aggregate to show that they had been exposed to lead-based paint hazards at the Parkwood residence.

On the issue of Ellison's individual liability, the Murphys produced excerpts from the transcript of a 2011 deposition from a separate case.[2] During that deposition, Ellison had testified that his involvement with the properties owned by the "L.F.E." companies had continued for several years after 1991. The Murphys argued that Ellison's statements generated a genuine factual dispute about the extent of his ownership and control of the Parkwood property.

D. The Summary Judgment Hearing and Ruling

The parties argued their respective positions at a hearing before the circuit court on February 10, 2014. Ellison had not submitted a written reply, and so the hearing represented the first and only occasion on which he addressed the additional materials attached to the Murphys' response to his summary judgment motion.

On the issue of ownership and control of the Parkwood property, Ellison submitted an errata sheet for the 2011 deposition, in which he had changed some of his answers about his role with the "L.F.E." companies in the early 1990s. Notwithstanding that submission, the court concluded that there were genuine disputes regarding the degree of Ellison's involvement with the property during that period and that the disputes were material to whether he could be held personally liable as an owner of the property.

[2] Louis F. Ellison and a company called L.F.E. No. 2, Inc., were defendants in *Tavon Harrington, et al. v. Martin M. Zelones, et al.*, Case No. 24-C-09-004331 in the Circuit Court for Baltimore City.

During the hearing, Ellison's attorney explained that the depositions of the two experts had occurred after the filing of the original motion. Counsel for Ellison did not ask the court to exclude either expert's testimony, but instead criticized some aspects of the experts' rationales. In response to those criticisms, the Murphys pointed out that Ellison had not challenged the admissibility of the testimony from either expert. The Murphys argued that those expert opinions, as well as also the other evidence, including the Arc report and Ms. Nelson's testimony, were sufficient to show a fair probability that the Parkwood property was a substantial source of their lead exposure. The court made no rulings on the admissibility of evidence offered by the parties.

The court commented that the issue of whether the Murphys had presented sufficient evidence of lead exposure at the Parkwood property was a "difficult" one to decide. The court reasoned that Ms. Nelson's testimony afforded a sufficient basis to conclude that there were paint hazards at the property in the form of chipping, flaking, or peeling paint. According to the court, however, it was "undisputed that there [wa]s no positive evidence of a lead paint hazard" at the property, because there was "no positive evidence of whether that paint – or any other paint hazard – at the address contained lead." The court did not discuss the testimony of Mr. Cavaliere, who had rendered his own opinion that there had probably been lead paint hazards on the interior door and window components of the property in the early 1990s.

The court reasoned that the Murphys could "prov[e] the presence of lead inside the house circumstantially" only by "exclud[ing] all other *potential* sources" of lead exposure during the time that the Murphy children had elevated blood-lead levels. (Emphasis

added.) *But see Rowhouses, Inc. v. Smith*, 446 Md. 611, 659 (2016) (holding, after the circuit court decision in this case, that in a case involving circumstantial, rather than direct, evidence of exposure to lead-based paint, a plaintiff need only rule out other "reasonably probable" sources of lead exposure). The court stated that the medical expert, Dr. Robinson-Josey, "couldn't exclude the Woodbrook property entirely." On that basis, the court reasoned that the Murphys could not connect their blood-lead levels to the Parkwood property.

By an order entered on February 12, 2014, the circuit court granted summary judgment in Ellison's favor on all counts. After the entry of that order, the Murphys filed a notice of appeal. Ellison responded by filing a notice of cross-appeal, in which he purported to challenge the court's ruling on the issue of his personal liability.

The summary judgment order did not constitute a final, appealable judgment, because it did not resolve the pending claims against the other two defendants, Malcolm Snyderman and L.F.E. No. 1, Inc. One year later, at the Murphys' request, the circuit court entered an order dismissing the remaining claims against those parties, with prejudice. Within 30 days after the entry of that judgment, the Murphys filed a second notice of appeal, and Ellison filed a second notice of cross-appeal.

QUESTION PRESENTED

In their appeal, the Murphys present the following question:

> Did the circuit court err as a matter of fact and law in granting [Ellison's] Motion for Summary Judgment on the ground that [the Murphys] failed to establish by direct or circumstantial evidence that [the Murphys] were exposed to deteriorated lead-based paint at [Ellison's] rental property, 2731 Parkwood Avenue, and that any deteriorated paint at [Ellison's] rental

property was a substantial causal factor of [the Murphys'] lead exposure, elevated blood levels and resulting injuries?

We conclude that the circuit court erred when it granted summary judgment on the ground that there was no evidence of lead-based paint hazards at the subject property.

DISCUSSION

We apply well-known standards when reviewing a grant of summary judgment. The circuit court may grant a motion for summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). An appellate court reviews a summary judgment ruling without deference, by independently examining the record to determine whether the parties generated a genuine dispute of material fact and, if not, whether the moving party was entitled to judgment as a matter of law. *See, e.g.*, *Rowhouses, Inc. v. Smith*, 446 Md. at 630. The appellate court considers the record in the light most favorable to the non-moving party, drawing any reasonable factual inferences against the moving party. *Id.* at 631. "Furthermore, it is a settled principle of Maryland appellate procedure that ordinarily an appellate court will review a grant of summary judgment only upon the grounds relied upon by the trial court." *Hamilton v. Kirson*, 439 Md. 501, 523 (2014) (citations and quotation marks omitted).

In Ellison's motion, he argued that the Murphys could not establish a prima facie case of negligence.[3] Generally, a plaintiff raising a negligence claim "'must show 1) that the defendant was under a duty to protect the plaintiff from injury, 2) that the defendant breached that duty, 3) that the plaintiff suffered actual injury or loss, and 4) that the loss or injury proximately resulted from the defendant's breach of the duty.'" *Hamilton v. Kirson*, 439 Md. at 523-24 (quoting *Taylor v. Fishkind*, 207 Md. App. 121, 148 (2012)) (further quotation marks omitted). In cases "where there is an applicable statutory scheme designed to protect a class of persons which includes the plaintiff, . . . the defendant's duty ordinarily 'is prescribed by the statute' or ordinance and . . . the violation of the statute or ordinance is itself evidence of negligence." *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 78 (2003) (quoting *Brown v. Dermer*, 357 Md. 344, 358-59 (2000)).

The Baltimore City Housing Code is one such protective statute. It establishes minimum standards for the maintenance of dwellings in Baltimore City to protect the health, safety, and welfare of the occupants of those dwellings. *See* Baltimore City Code (1997 Repl. Vol.), Art. 13, § 103. The Housing Code requires that "[e]very building . . . used or occupied as a dwelling . . . be kept in good repair, in safe condition, and fit for human habitation." *Id.* § 702. One specific standard is that "[a]ll walls, ceilings, woodwork, doors and windows shall be kept clean and free of any flaking, loose[,] or

[3] The complaint included counts for unfair or deceptive trade practices and negligent misrepresentation. This opinion focuses only on the negligence count because neither the circuit court nor the parties analyzed these counts separately. *See Hamilton v. Kirson*, 439 Md. at 506 n.1.

peeling paint." *Id.* § 703(2)(c). By enacting these provisions, "the City Council sought to protect children from lead paint poisoning by putting landlords on notice of conditions which could enhance the risk of such injuries." *Brown v. Dermer*, 357 Md. at 367.

In negligence actions based on the Housing Code, a plaintiff must show both that the defendant violated the Code and that the violation proximately caused the plaintiff's injury. *Brooks*, 378 Md. at 79. "[C]ausation in lead paint cases may be proven by showing that the defendant's negligence was a 'substantial factor' in causing the plaintiff's injury." *Ross v. Hous. Auth. of Baltimore City*, 430 Md. 648, 667 (2013) (quoting *Bartholomee v. Casey*, 103 Md. App. 34, 56 (1994)). To be a substantial factor in causing the injuries, the subject property must have been a source of the plaintiff's exposure to lead, and that exposure must have been substantial enough to contribute to the alleged injuries. *Ross*, 430 Md. at 668. Put differently, to show that the conditions at the defendant's property caused the alleged injury, "the plaintiff must tender facts admissible in evidence that, if believed, establish two separate 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 victim's exposure to lead." *Hamilton v. Kirson*, 439 Md. at 529-30.

The cases have drawn a distinction between direct and circumstantial proof that a property contained lead-based paint. Plaintiffs may rely on direct proof when they can show that the property currently contains lead-based paint (typically beneath many layers of other paint) or that the owner received notices of violations of the lead-paint ordinances at or around the time when the plaintiffs lived there. *See, e.g.*, *Hamilton v.*

Dackman, 213 Md. App. 589, 613 (2013) (recognizing "documents, real-time tests[,] or inspections of the property" as forms of direct evidence that a property contained lead); *see also Rowhouses*, 446 Md. at 619-20 (noting that plaintiff had no direct evidence that the subject property contained lead-based paint because the property "had not been tested for lead-based paint, and there were no violation notices issued for lead-based paint hazards"). Plaintiffs must rely on circumstantial proof when the property was demolished or substantially renovated after the plaintiff lived there. *See West v. Rochkind*, 212 Md. App. 164, 166 (2013). In a typical circumstantial case, plaintiffs attempt to show that they had elevated blood-lead levels while living at the property and that they had no other reasonably probable sources of exposure to lead. *See, e.g.*, *Hamilton v. Kirson*, 439 Md. at 530-31 (analyzing *Dow v. L & R Props., Inc.*, 144 Md. App. 67 (2002)). At the summary judgment phase of that kind of circumstantial case, the plaintiff need only demonstrate a "reasonable probability" or "fair likelihood" that the subject property contained lead-based paint and was a source of the plaintiff's lead exposure. *Rowhouses*, 446 Md. at 659.

The circuit court determined that the evidence generated a genuine dispute as to whether the owners and operators of the Parkwood property had violated the Housing Code by failing to keep the dwelling free of loose and deteriorated paint. According to the court, however, the Murphys had "no positive evidence" that those paint hazards contained lead. The court therefore concluded that the Murphys could not show that the Code violations caused their injuries.

On appeal, the Murphys contend that the "[t]he trial court erred in failing to consider all evidence in the record and reasonable inferences deducible therefrom in a light most favorable to the [Murphys] before granting summary judgment." We agree with that assessment for three independent reasons. First, the record does not show whether the court considered the opinion testimony from the lead-risk assessor, Mr. Cavaliere. Second, the court discounted Dr. Robinson-Josey's expert testimony, because she could not "completely" rule out the possibility of exposure at another site, which the Court of Appeals has now said is unnecessary. *Rowhouses*, 446 Md. at 659. Finally, even without the expert testimony, the Murphys had adduced enough evidence to show, circumstantially, that there were lead-based paint hazards on the rear door jambs, because they had direct evidence of lead on adjacent components, such as the threshold and header. The circuit court erred when it concluded that there was no evidence of a lead-based paint hazard at the subject property.

A. Consideration of Testimony from Certified Lead-Risk Assessor

The Murphys correctly assert that their lead-risk assessment expert, Mr. Cavaliere, opined that the Parkwood property "more likely than not contained deteriorated lead-based paint" during the time when the Murphys occupied it. That evidence, if believed, could establish a reasonable probability that there were lead-based paint hazards inside the property when the Murphys lived there.

The Murphys deposed Mr. Cavaliere shortly after Ellison moved for summary judgment. Before the deposition, Mr. Cavaliere had reviewed Ms. Nelson's deposition testimony, permit records indicating that the property had been renovated substantially in

2009, pictures of the property from the January 2013 survey, and the inspection report that indicated the presence of lead paint hazards on certain exterior surfaces. In addition, he had questioned Ms. Nelson about specific components of the property. Based on those sources, he opined that the Parkwood apartment probably contained lead-based paint from 1992 through 1995 when the Murphys resided there. He said: "Because of the deterioration and the location of the deterioration, I believe that lead-based paint hazards existed during the tenancy and that lead-based paint and those lead-based paint hazards would have been a source of exposure to the plaintiffs . . . while they were living in or visiting the property."

More specifically, Mr. Cavaliere concluded that there had probably been lead-based paint on door and window components that Ms. Nelson had described as areas with chipping and peeling paint. He reasoned that the property probably contained "original components" at the time the Murphys resided there. He stated that Ms. Nelson's description of the door handles at the property matched the kind of "old" and "ornate" handles that would be found on an "original style door, the typical piece of hardware that you would see on a property in Baltimore City that had not been renovated." He emphasized Ms. Nelson's statements that the windows were difficult to open and that paint chips would fall whenever she would open a window. In his opinion, the "old, wooden window sashes with chains in the window jambs" that she had described were "clearly over-under window sashes, typical Baltimore-style windows." He said that her descriptions were "typical" of "100-year-old or 80-year-old windows" that would "become stuck and difficult to operate" as a result of "being painted time after time."

Mr. Cavaliere explained that, in his assessment, the components in place during the tenancy had probably been removed during a rehabilitation around 2009. He agreed, however, with a statement from the Murphys' attorney that "the lead-based paint that [Arc] found selectively on the property during the [2013] inspection was more than likely on the interior as well" prior to that renovation. The exchange continued:

> [COUNSEL FOR THE MURPHYS:] Is it your opinion to a reasonable degree of scientific probability that the windows that were in the property at the time that Ms. Nelson lived there are more likely to be consistent with and covered with the same types of pigment as the basement window at 2731 Parkwood?
>
> [COUNSEL FOR ELLISON:] Objection.
>
> THE WITNESS: The basement window that was tested to be positive?
>
> [COUNSEL FOR THE MURPHYS:] Yes.
>
> [THE WITNESS:] Yes. In my opinion, those windows are the type that would typically be painted a lead-based paint based on the description of the windows, their being wood, and replacement windows not being wood.

The Murphys' written response to the summary judgment motion relied in part on "Mr. Cavaliere's opinion as to the likelihood that deteriorated lead-based paint was present on the interior of 2731 Parkwood during the [Murphys'] tenancy[.]"

At the hearing, Ellison's attorney responded that the "two experts obviously offered evidence that is in [the Murphys'] Response that was not available to me at the time of filing my original Motion for Summary Judgment." Ellison's attorney made an oblique reference to part of the rationale of Mr. Cavaliere's opinion by arguing that the 2009 renovation did not itself prove that the property contained lead paint before the

renovation. Nonetheless, counsel for Ellison did not ask the court to exclude Mr. Cavaliere's testimony, nor did she make any argument that his opinion was inadmissible.

In response, the Murphys' attorney pointed out that Ellison had not asked the court to exclude the source opinions:

> [COUNSEL FOR THE MURPHYS]: . . . Now, if we could back up just a couple of steps. There's no argument that the Plaintiffs . . . have elucidated sufficient testimony that if, on its face, it were admissible, we would defeat the motion as it pertains to substantial contributing factor of causation.
>
> I haven't heard any arguments that the expert's opinions were unfounded and/or inadmissible. So I haven't – appealing under obligation – to address any that haven't been raised.
>
> * * *
>
> Yes, there was lead on an exterior window casing. Well, that window isn't hung in an abstract; it's got two sides. That window – as per the testimony of [Mr. Cavaliere], was much more likely to be indicative of the types of components that were in this property during the time the family lived here.
>
> And he wasn't pulling that out of smoke; he talked to the Plaintiffs' mother before the deposition.
>
> THE COURT: I'm not going to extrapolate from an exterior finding to an assumption that there was lead inside.

Without any mention of Mr. Cavaliere's opinion about the door and window components, the court concluded that the Murphys had produced no evidence of lead-based paint hazards. The Murphys argue that the court failed to consider Mr. Cavaliere's opinion about the presence of lead-based paint at the Parkwood property.

In this case, it is difficult to evaluate precisely how the court opted to handle Mr. Cavaliere's expert testimony. We cannot determine whether the court excluded some or

all of the testimony on its own initiative, whether it overlooked the testimony, or whether it rejected the testimony as untrue. *See Davis v. Goodman*, 117 Md. App. 378, 395 (1997) (reversing the entry of summary judgment where the trial judge had "characterized what [an expert] said as 'not true' and thus rejected the opinions set forth in [his] affidavit"). The court's only apparent comment on Mr. Cavaliere's expert opinion was: "I'm not going to extrapolate from an exterior finding to an assumption that there was lead inside."[4]

Although it is conceivable that the court "implicitly" excluded Mr. Cavaliere's opinion (*e.g. Hamilton v. Kirson*, 439 Md. at 520) without any motion or argument on the issue, Ellison does not make that argument on appeal. In fact, Ellison expressly asks this Court to consider much of Mr. Cavaliere's testimony. Citing one of Mr. Cavaliere's statements (a concession that there was "no quantifiable data" directly showing lead on the interior of the property from 1992 through 1995), Ellison argues that the Murphys, "by the testimony of their own expert," proved that there were no lead-based paint hazards inside the property at the relevant time. Ellison's brief does not acknowledge Mr. Cavaliere's ultimate opinion that windows and doors at the property probably had chipping and flaking lead-based paint during the early 1990s.

[4] Based on the comment that it would not "extrapolate from an exterior finding to an assumption that there was lead inside the house," one might theorize that the court disregarded the opinion on the ground that it lacked an adequate factual basis. *See Taylor v. Fishkind*, 207 Md. App. at 144 ("the circuit court could reasonably conclude that the presence of lead-based paint on the exterior of the house is not sufficient evidence that the interior of the house . . . also contained lead-based paint"). The ARC report, however, included a finding of deteriorated lead-based paint on the threshold of the rear door, which the court recognized was "is, in one sense, both interior and exterior."

Under these circumstances, it would be improper for this Court to supply new arguments that Ellison could have made or to speculate as to evidentiary rulings that the court could have made. The current record does not show that the admissibility of some or all of Mr. Cavaliere's testimony has even been challenged, let alone that the testimony had been excluded for any particular reason. Similarly, the record does not show what additional arguments and evidence the Murphys could have offered in response to a motion to exclude the testimony.

Mr. Cavaliere's opinion, if credited, could establish that the doors or windows at the Parkwood property had lead-based paint hazards when the Murphys lived there. On remand, Ellison is free to argue that the court should exclude some or all of Mr. Cavaliere's opinions under Md. Rule 5-702 or for some other reason. In response to such a motion, it is conceivable that the court might exclude the testimony after considering Mr. Cavaliere's qualifications, the factual bases for his opinion, and whether his opinion would be helpful to a trier of fact. At the very least, however, the Murphys are entitled to have some notice of the potential grounds for exclusion and to make an argument about why the testimony should be admitted.[5]

[5] The dissent proceeds on the premise that Mr. Cavaliere's opinion is circumstantial evidence of lead-based paint hazards during the tenancy. The Murphys, however, characterized Mr. Cavaliere's opinion as direct evidence. As this Court recently explained, direct evidence is evidence that "if believed, proves existence of fact in issue without inference or presumption." *Rogers v. Home Equity USA, Inc.*, ___ Md. App. ___, ___, 2016 WL 4036089, at *12 (July 26, 2016) (citations and quotation marks omitted). A factfinder who credited Mr. Cavaliere's testimony could reasonably conclude that lead-based paint hazards existed during the tenancy without relying on any inferences or presumptions. The dissent's criticisms of Mr. Cavaliere's testimony go to a separate question of whether he had an adequate basis for his opinion (continued…)

B. Interpretation of Testimony from Medical Expert

Separately, the Murphys contend that the opinion testimony of their medical expert was sufficient to show that the Parkwood property was a probable source of their early childhood lead exposure.

In her deposition, Dr. Robinson-Josey explained that she formed an opinion about the source of the Murphys' lead exposure based on her review of blood tests taken while the children resided at 2731 Parkwood Avenue, Ms. Nelson's deposition testimony, and an interview with Ms. Nelson about other potential sources of lead. According to the doctor, Ms. Nelson told her that that each of the properties that the children visited regularly were in "good condition," meaning that she had observed no chipping, flaking, or peeling paint at them.[6] For instance, the attorney asked the doctor: "And with regards to 2624 Woodbrook, what specifically did Ms. Nelson tell you about observing the chipping, peeling or flaking paint at that property during the time when she was living at Parkwood?" Dr. Robinson-Josey answered: "Well, according to her that property was in good condition."

(and thus whether his testimony should have been excluded). We express no view on that issue, as it was neither raised nor decided in the circuit court.

[6] In response to general questions about the condition of certain visitation properties, Dr. Robinson-Josey recounted Ms. Nelson report that the property was in "good condition" and that she had observed no chipping, flaking, or peeling paint. In response to specific questions about whether Ms. Nelson had reported seeing any chipping, flaking, or peeling paint at those properties, Dr. Robinson-Josey answered that, according to Ms. Nelson, those properties were in "good condition." From this context, it can be inferred that Dr. Robinson-Josey used the shorthand description of properties being in "good condition" to mean that they had no observable defects in the paint. *See Smith v. Rowhouses, Inc.*, 223 Md. App. 658, 668 n.9 (2015), *aff'd*, 446 Md. 611 (2016).

Dr. Robinson-Josey added that, according to Ms. Nelson, the children did not live near any factories, smelters, highways, or automobile repair shops and did not have access to other sources of lead, such as fishing weights, bullets, battery casings, ceramics, or folk medicine. The examination concluded:

> Q: With regards to the evidence in this case that you've reviewed, what is the most likely and the most substantial source of Skylar and Adrianna's childhood blood-lead levels while they were living at Parkwood?
>
> A: That would be the Parkwood property with some exposure at Woodbrook, not being able to rule it out completely, that was impossible, the exposure at Woodbrook.
>
> I think the substantial exposure would have been the property where they were living at, the Parkwood property.

Dr. Robinson-Josey did not explain why she did not completely rule out the possibility that the children had been exposed to lead at the Woodbrook property, which Ms. Nelson had described to her as being in "good condition" like the other visitation properties. The Murphys' attorney did not follow up with questions about that property.

The Murphys attached portions of Dr. Robinson-Josey's deposition to their written response. In addition, they provided a chart summarizing Dr. Robinson-Josey's account of Ms. Nelson's descriptions of the condition of seven properties that the Murphys visited during the first few years of their lives. According to the Murphys, their medical expert "testified that she could, in fact, determine that those properties were not likely a significant source of [the Murphys'] blood-lead levels because" Ms. Nelson told her that "none of the properties contained deteriorated paint."

At the hearing, Ellison's attorney did not challenge the admissibility of Dr. Robinson-Josey's testimony. Instead, she argued that the doctor had identified the site where the Murphys had attended daycare as a probable source of lead exposure.[7] The court did not accept that argument, but it went on to ask about the doctor's comments on the Woodbrook property. The Murphys' attorney responded that the doctor had stated only that it was "impossible" to "completely" rule out the Woodbrook property and had added that "the substantial exposure would have been at . . . the Parkwood property[.]" According to the Murphys' attorney, the doctor's testimony meant that the Woodbrook property was a *possible* source of lead exposure, but that she had identified the Parkwood property as the only *probable* source.

The court ultimately disagreed with this interpretation of the testimony:

> THE COURT: And here, it's admitted that there are a whole series of other properties which might have been sources of lead at the time. . . .
>
> The Plaintiffs' expert quickly dismisses all of the other properties because the mother says the paint was intact; no chipping, flaking or peeling paint. And, of course, that's also very easily the basis for incriminating this property.
>
> But what's most significant to me is that even Dr. Josie [sic], trying to exclude the other properties, apparently felt in her professional judgment that she couldn't exclude the Woodbrook property entirely.
>
> And I do not understand her testimony to be simply saying that, "it's never possible" to say "it's impossible" that that was a source. She – after several pages of testimony, summarizing different possible exposures – she singled out Woodbrook as the one she could not exclude.

[7] This argument was largely based on excerpts from the deposition transcript that were read out loud at the hearing, but were not included as part of the appellate record.

On appeal, the Murphys contend that the court misinterpreted the doctor's statements. They argue once again that Dr. Robinson-Josey stated only "that it was *impossible* to rule out the children's visitations at another address," but that "the only property that she was able to rule in as a likely and substantial factor in the children's exposure to lead paint and elevated blood-lead levels was the [Parkwood] property[.]"

In our view, the circuit court did not correctly evaluate Dr. Robinson-Josey's testimony. Especially in light of the Court of Appeals' decision in *Rowhouses, Inc. v. Smith*, which the circuit court could not have considered because it was decided over two years after the summary judgment ruling, the Murphys did not have to completely rule out all *possibility* of lead exposure at any other property.

In *Rowhouses* the Court of Appeals held that, at the summary judgment stage in a lead-paint case in which the plaintiff has no direct evidence that the property contained lead paint, a plaintiff need only show a "reasonable probability" that a "property was a source of the plaintiff's lead exposure." *Rowhouses,* 446 Md. at 657. "Obviously, by the very nature of the phrase, a 'reasonable probability' is not a 'certainty,'" and thus a plaintiff need not "demonstrate to a certainty that the subject property contained lead-based paint and was a source of the plaintiff's lead exposure." *Id.* at 658. "In the context of lead-based paint cases, any property in which a plaintiff has resided or visited could be a *possible* source of the plaintiff's lead exposure," but each possible source does not become a reasonably probable source of lead exposure "without additional evidence that elevates the mere chance that the property contained lead-based paint and was a source of lead exposure to [a] fair likelihood[.]" *Id.* at 659 (emphasis added).

As the Court explained (*id.* at 633-35), the leading case *Dow v. L&R Properties, Inc.*, 144 Md. App. 67 (2002), illustrates one method of showing circumstantially that a particular property contained lead. The plaintiff in that case, Dow, had produced no on-site testing or other evidence to show directly that there had been lead-based paint on the subject property. *Dow*, 144 Md. App. at 70, 73. Dow's evidence showed only that, as a child, she had ingested paint chips inside a home that had been built when lead-based paint was frequently in use, that she had been diagnosed with lead poisoning during a time when she spent virtually all of her time inside that home, and that she did not have contact with other known sources of lead. *Id.* at 75-76. This Court concluded that this evidence "[i]f believed . . . could establish that the chipping and peeling paint inside [the property] was the only possible source of Dow's lead poisoning." *Id.* at 76. In sum, Dow had produced circumstantial evidence through which a factfinder could reason backward, through a process of elimination, to infer that the lead discovered in the child's blood probably came from lead-based paint at the residence.[8]

In *Rowhouses* the Court stated that, "where a plaintiff proceeds under a *Dow* theory of causation," the plaintiff "need only produce circumstantial evidence that, if believed, would rule out other reasonably probable sources of lead." *Rowhouses*, 446 Md. at 660-61. The Court observed that expert testimony can be helpful in ruling out

[8] As this Court later wrote, "a plaintiff in a lead paint case can prove that a property contained lead paint by producing circumstantial evidence showing that she suffered from lead poisoning while living in the home *and* by producing evidence that her exposure did not occur elsewhere." *Barr v. Rochkind*, 225 Md. App. 336, 344 (2015), *cert. denied*, 446 Md. 291 (2016).

other sources, but that "circumstantial evidence that rules out other reasonably probable sources may take the form of a lay witness's testimony at a deposition or averment in an affidavit that a property other than the subject property did not contain deteriorated, chipping, or flaking paint and was in good condition." *Id.* at 661. Previously, the Court had suggested other possible methods of ruling out a visitation property, such as evidence that the property was built after a period when lead paint was likely to be used or testimony that a child's visits at another property were very short or closely supervised so that the child would not ingest paint. *See Hamilton v. Kirson*, 439 Md. at 545-46.[9]

Under the facts of *Rowhouses*, the Court concluded that that the "possible" sources of the child's lead exposure included paint at the subject property, paint at two other properties, and lead from sources other than paint in the child's environment. *Id.* at 663. The plaintiff produced circumstantial evidence to rule out those other sources as reasonably probable sources, including lay testimony that the other properties did not have deteriorated paint and that the child did not have contact with known sources of lead other than paint. *Id.* at 664-65. The plaintiff also produced circumstantial evidence to "rule[] in" the subject property as a reasonably probable source, including evidence that the child experienced elevated blood-lead levels while living at a property that had chipping paint in areas accessible to the child. *Id.* at 666-67. The Court concluded that,

[9] *Rowhouses* uses the phrases "reasonably probable cause" and "reasonable probable cause" as though they are interchangeable. They are not. A "reasonable probable cause" is a cause that is both reasonable and probable. *Rowhouses*, however, is not concerned with the reasonableness of a cause, but with its level of probability – specifically, whether it rises above the level of mere possibility to become "reasonably probable."

even without direct testing or expert testimony, the combination of evidence formed a sufficient basis to conclude that the subject property contained lead-based paint. *Id.* at 666, 668-69.

Returning to the present case, we conclude that under *Rowhouses* the Murphys generated enough evidence to implicate the Parkwood property as a reasonably probable source of exposure to lead. The Murphys offered (and the court did not exclude) the following circumstantial evidence: (1) Ms. Nelson's testimony that she and Skylar visited the Parkwood apartment after his birth in June 1991 and before they actually moved there in or before March 1992; (2) Ms. Nelson's testimony that paint at the Parkwood apartment was in poor condition before she and Skylar moved into the apartment in early 1992; (3) Ms. Nelson's testimony that, despite the manager's repairs, she continued to observe chipping paint on walls, floors, windows, and doorways even after she moved in; (4) Ms. Nelson's testimony that she first observed aggressive behavior from Skylar and his older brothers while they were living at the Parkwood property and that Skylar was "marking up the doorway of the apartment";[10] (5) a March 1992 lab report that listed the nine-month-old Skylar's address as 2731 Parkwood Avenue and showed that he had 5μg of lead per deciliter of blood; (6) additional lab reports that showed that Skylar's blood-lead levels steadily increased, tripling to 15μg of lead per deciliter, over the next 16 months, while he lived at the Parkwood property; (7) lab tests that showed that after her

[10] The Murphys use this term as if its meaning is self-evident, which it is not. We assume it means that Skylar was scratching, biting, or otherwise making marks of some kind on a door.

birth in December 1993 Skylar's younger sister, Adrianna, had elevated blood-lead levels and that those levels increased while she lived at the Parkwood property; (8) Ms. Nelson's testimony that all of her children had elevated blood-lead levels while living at the Parkwood property, including Adrianna who was born in December 1993; (9) the opinion from the expert lead-risk assessor, Mr. Cavaliere, that the windows and doors at the property that had chipping paint during the 1990s were probably original components from the early 20th century; (10) the January 2013 survey that revealed lead-based paint in poor condition on the right and rear exterior wall surfaces, the front exterior basement window casing, the front exterior upper door casing, and the rear exterior door threshold and header; and (11) records indicating a substantial renovation of the property around 2009, which explained the negative readings on other surfaces.[11]

The Murphys could have ruled out all other reasonably probable sources if, for instance, they had offered testimony that the paint at the other visitation properties was in good condition and that the Murphy children did not have contact with other known sources of lead. *See Rowhouses*, 446 Md. at 664-65. For whatever reason, the Murphys offered those statements only as part of the basis of Dr. Robinson-Josey's opinion, and not as independent evidence in the form of a deposition or affidavit from Ms. Nelson.

[11] The circumstantial evidence that rules in the Parkwood property as a reasonably probable source is similar to the evidence that the Court found sufficient to rule in the property in *Rowhouses*, 446 Md. at 666-67. The dissent disregards many of the items listed here and instead asserts that the only evidence to rule in the Parkwood property came from Mr. Cavaliere and from the Arc report. If the evidence here is not enough to elevate Parkwood from a possible source to a reasonably probable source, it is difficult to imagine how the evidence in *Rowhouses* could have been sufficient.

Consequently, the Murphys cannot rely on precisely the same circumstantial formula as the one used in *Rowhouses*.

As the Court has recognized, however, a plaintiff can use expert testimony as a method of ruling out other properties as reasonably probable sources of lead exposure. *See Rowhouses*, 446 Md. at 661; *see also Ross*, 430 Md. at 668-69. The Murphys' medical expert formed her source opinion based on blood tests, the mother's deposition answers, and an interview of the mother about alternative sources.[12] Dr. Robinson-Josey concluded that the most likely and the most substantial source of the lead in Skylar's and Adrianna's blood would have been "the Parkwood property," that it was "impossible" to "completely" rule out "some exposure at Woodbrook," but that "the substantial exposure would have been the property where they were living at, the Parkwood property." This testimony, if believed and if viewed in the light most favorable to the Murphys (especially in the context of the doctor's other statements about information she considered about the Woodbrook property), afforded a sufficient basis to conclude that the Parkwood property was the only reasonably probable source of substantial lead exposure, even though the Woodbrook property was a "possible" source.

Under the standard that the Court enunciated in *Rowhouses*, 446 Md. at 655-59, a lead paint plaintiff need not completely eliminate all other possible sources of exposure but need only rule out other reasonably probable sources. A trier of fact could have found that the Murphys' expert did exactly that. The comments about the Woodbrook

[12] The mother's statements, although not directly admissible, could be considered for the purpose of evaluating the expert's opinion. *See* Md. Rule 5-703(b).

property and the daycare property (while important in evaluating the weight of the testimony) would not go to the question of evidentiary sufficiency.[13]

We make no determination about whether some or all of Dr. Robinson-Josey's testimony would have survived an objection under Md. Rule 5-702 had Ellison made such an argument. Without the benefit of the Court of Appeals' decision in *Rowhouses*, the court granted summary judgment in Ellison's favor based on its reasoning that Dr. Robinson-Josey had not completely ruled out every possibility that the Woodbrook property was a source of the Murphys' lead exposure. Because the court imposed a higher burden on the Murphys than they now have under *Rowhouses*, we are constrained to reverse that aspect of the decision.[14]

[13] The circuit court found it significant that Dr. Robinson-Josey herself "singled out Woodbrook" and made no mention of the several other properties that the Murphys visited as children. In weighing Dr. Robinson-Josey's testimony and deciding whether Woodbrook was or was not a reasonably probable source of the Murphys' exposure, the trier of fact may find it significant that the expert seems to have placed that property on a different footing from all the others. A court, however, cannot weigh a witness's testimony on summary judgment. *See*, *e.g.*, *Hamilton v. Kirson*, 439 Md. at 523.

[14] The standard we have applied here has evolved substantially since the circuit court here made its ruling. When the circuit court granted summary judgment in February 2014, it may have been influenced by this Court's pre-2014 opinions, which had suggested that in a circumstantial case a plaintiff needed to eliminate all other "possible" sources. *E.g. West v. Rochkind*, 212 Md. App. 164, 175 (2013) ("[w]e may only infer the existence of lead paint at [the subject property] from [the plaintiff's] condition if lead paint at [the subject property] is shown to have been *the only possible explanation* for [the plaintiff's] condition" (emphasis added)); *Taylor v. Fishkind*, 207 Md. App. at 146 (affirming summary judgment where plaintiff failed to show that the subject property "was *the only possible source* of [the plaintiff's] elevated blood lead level" (emphasis in original)). The Court of Appeals' subsequent decisions have announced a less exacting standard. *See Rowhouses*, 446 Md. at 659 (holding that a plaintiff proceeding under a *Dow* theory of causation "must rule out other reasonably probable sources"); *Hamilton v. Kirson*, 439 Md. at 536 (same); *see also Roy v. Dackman*, 445 Md. 25, 47 (2015) ("it is not enough for an expert to (continued…)

C. Inferences Drawn from Lead Testing and Occupant's Testimony

The Murphys contend that, even without the medical expert's testimony ruling out alternative sources of lead exposure, the remaining direct and circumstantial evidence was enough to show the presence of a lead-based paint hazard at the Parkwood property when they lived there in the early 1990s. The Murphys point to two main sources of evidence: Ms. Nelson's testimony about the location of paint hazards in the Parkwood property and the 2013 lead inspection report from Arc Environmental. The Murphys argue that, in tandem, this evidence showed that lead-based paint hazards were probably present on the rear door of the Parkwood property while the Murphys lived there.

In her deposition, Ms. Nelson recalled specific areas of the property where the paint was in poor condition:

> Q: The certain things that you wanted fixed before you moved in, what were they?
>
> A: All of them?
>
> Q: Yes.
>
> A: When you went into the apartment, there was this brown, whatever this paint was on the floor that used to flake and peel, I needed that redone. There were some parts on the doorway that needed to be fixed.
>
> Q: When you say, parts on the doorway that needed to be fixed.
>
> A: The house needed to be painted.

conclude that a certain property is the source of the child's exposure to lead when other probable sources have not been eliminated").

According to Ms. Nelson, the Parkwood apartment had a back door attached to the kitchen. She stated that the children sometimes played in the backyard. She testified that, even after the initial repairs, problems continued to recur with the paint on the doorways, windows, walls, and floors throughout the apartment.

> Q: Do you remember any problems with any paint anywhere other than the kitchen and the floor?
>
> A: Just the door jambs, they would – it was the same brown paint. So it would peel off and they would have to touch it up.

Ms. Nelson further testified that she took Skylar and his older brothers to have their blood tested after she noticed that Skylar was "marking up the doorway of the apartment" and his older brothers were behaving aggressively. When doctors first discovered that her children had elevated blood-lead levels in 1992, she followed her doctors' advice to use cleaning products to help combat dust in the home.

> Q: Did you ever recall seeing dust in your home at Parkwood at that time?
>
> A: I recall seeing chipped paint, all of that. So they told me all the things I needed to do to clean.
>
> Q: And by "chipped paint," is that in the kitchen that you talked about earlier?
>
> A: That was everywhere. That was the floors – that's why I called them constantly to do the floors. That was the door jambs, where the paint would flake off and fade. And that was the windowsills and all.
>
> * * *
>
> Q: All this chipping paint that you are talking about, the floors, the door jambs, the windowsills, is this the paint problem – are these the paint problems you referenced earlier –

A: Yes.

No scientific testing of the Parkwood property occurred until January 2013, when inspectors from Arc Environmental surveyed the residence to determine lead concentration on interior and exterior surfaces. The Arc report states: "The focus was to test chewable, friction, and impact surfaces in an effort to determine the potential of lead-based paint hazards that might exist in the dwelling." The report stated:

> Lead-based paint was detected above the Maryland standard (> 0.7 mg/cm^2) on the following components at this property:
>
> | *Room* | *Component* |
> |---|---|
> | front exterior | basement window casing; upper door casig [*sic*] |
> | right exterior | wall surface |
> | rear exterior | wall surface; door threshold and header |

On a data sheet in the report, the inspector wrote that the paint condition on each of those leaded surfaces appeared to be "Poor." A note in the report explained:

> ***Poor:*** More than 10% of the surface is peeling, chalking, flaking, blistering, or otherwise separated from the substrate. "Poor" paint conditions should be addressed as a top priority because the likelihood of these components generating leaded dust.

The data sheet indicated that all other surfaces tested at the property had intact paint that tested negative for lead.

In their written response to Ellison's summary judgment motion, the Murphys contended that Arc found deteriorated, lead-based paint on "the same areas" where Ms. Nelson had observed deteriorated paint in the early 1990s. In particular, they characterized the rear doorway as a "high-traffic, high-impact component" that was accessible to the children. At the hearing, their attorney argued: "[Y]ou can look at the

testimony where she says, there was chipping paint around the doors. You can look at the testing where lead is found around the doors. You can look at the testing where lead is found on the threshold under the door."

Ultimately, the court rejected the inferences suggested by the Murphys:

> THE COURT: It is undisputed that there is no positive evidence of a lead-paint hazard; there is evidence which I take as true, for purposes of this motion, from the Plaintiffs' mother that there were paint hazards – that is, that there was from time to time, chipping, peeling or flaking paint; particularly, the paint on the floor at that address, which had to be repainted.
>
> But we had no positive evidence of whether that paint – or any other paint hazard – at that address included lead. We certainly have no test of the floor. The only testing much more recently shows lead on the exterior components of the house including the threshold which is, in one sense, both interior and exterior.

On appeal, the Murphys again argue that "a factfinder could conclude that when Ms. Nelson refer[red] to deteriorated paint in areas around the doorway and the door jambs, she [wa]s including the front and back door components of the home that [Arc] found to contain lead-based paint" – i.e., the threshold and header of the rear door.

In support of their position, the Murphys cite *Ross v. Housing Authority of Baltimore City*, 430 Md. 648 (2013), and *Hamilton v. Kirson*, 439 Md. 501 (2014). In *Ross*, the Court of Appeals partially reversed a grant of summary judgment in favor of a property owner. Although the Court concluded that the circuit court had properly excluded an expert opinion on the source of lead poisoning (*Ross*, 430 Md. at 662-65), the Court remanded the case for consideration of whether the plaintiff could independently establish the necessary inferences through other circumstantial evidence.

Id. at 669-71. In addition to citing evidence that the child's blood-lead levels increased after she had been exposed to paint chips and dust at the property, the Court stated that it was reasonable to conclude "that the lead investigation reports for the [] home accurately identified lead on the property." *Id.* at 670. Two inspections during the plaintiff's tenancy had indicated the presence of lead paint on exterior walls, but "[t]he only direct evidence of an indoor source of lead was [a] 2009 ARC environmental survey that indicated the presence of lead on an interior stair riser, though it [was] not indicated in the record whether that location was tested earlier or whether it was in a deteriorating condition in the early 1990s." *Id.* at 670 n.23.

In *Hamilton v. Kirson*, the Court characterized *Ross* as "a very instructive case" and an example of a case where the plaintiff offered "sufficient circumstantial evidence for the drawing of separate and reasonable inferences of the presence of lead at the subject property." *Hamilton v. Kirson*, 439 Md. at 531-32. The Court went on to explain that "[a] lead-paint poisoned plaintiff may prove circumstantially that the subject property contained lead-based paint in a number of ways." *Id.* at 537. As one hypothetical example, the Court discussed a scenario in which the evidence showed that the subject property shared common walls with two, adjacent rowhouses, which were both built in the early twentieth century at the same time as the subject property, which were owned as a group with the subject property, and which both tested positive for lead-based paint. *Id.* at 537-38. "[I]n this hypothetical (at least in the absence of evidence of lead abatement measures), the plaintiff is able to present circumstantial evidence from which a jury could infer reasonably that the subject property contained lead-based paint –

without having to exclude all other sources of potential exposure to lead-paint poisoning." *Id.*; *see also Rowhouses*, 446 Md. at 668 (finding circumstantial evidence that property was a reasonably probable source of lead poisoning because adjacent property was cited twice for violations of lead-paint ordinance).

At the summary judgment stage here, "all reasonable inferences must be taken in favor of [the Murphys] as the non-moving part[ies]." *Ross*, 430 Md. at 670. A factfinder was entitled to credit Ms. Nelson's testimony that, in 1992, the Parkwood residence had deteriorated paint "everywhere," including on "some parts on the doorway" and "the door jambs." In addition, a factfinder could conclude that the Arc's inspectors had "accurately identified" (*id.*) deteriorated, lead-based paint on the rear door header and threshold in 2013. Based on those findings, a trier of fact could infer that the deteriorated, lead-based paint discovered on the threshold and header of the rear door in 2013 was the same type of paint as the deteriorated paint that Ms. Nelson had identified on adjacent parts of the doorways in 1992.[15]

As Ellison points out, the Murphys did not present the same type of evidence as in the adjacent-houses hypothetical discussed in *Hamilton v. Kirson*. Instead, the Murphys offered evidence about the adjacent components of a doorway. The door jambs that reportedly had paint hazards in 1992 were only inches away from the door threshold and

[15] To bolster this conclusion, a factfinder could also credit the opinion from the lead-risk assessor that the Parkwood property likely had an "original-style door, the typical piece of hardware that you would see on a property in Baltimore City that had not been renovated." Ellison has not challenged the admissibility of that testimony. In his brief, Ellison does not dispute that the property "had old style window and door components[.]"

header that tested positive for lead-based paint hazards in 2013. In those circumstances, it was reasonable to infer that Ms. Nelson's description of paint hazards on "some parts on the doorway" would have included the surfaces directly above and below the door jambs. The premise that an owner would have used the same types of paint on adjacent parts of the doorway is certainly no weaker than the premise that that an owner would have used the same types of paint inside adjacent rowhouses, which is the foundation of the hypothetical in *Hamilton v. Kirson*.

The circuit court issued its summary judgment ruling several months before the Court of Appeals' opinion in *Hamilton v. Kirson*. In that opinion, the Court expressly disapproved of some of the analysis from this Court's opinions in *West v. Rochkind*, 212 Md. App. 164 (2013), and *Hamilton v. Dackman*, 213 Md. App. 589 (2013), which had suggested that *Dow* illustrated the only method of circumstantial proof that a property contained lead. *See Hamilton v. Kirson*, 439 Md. at 542 ("[t]o the extent that the Court of Special Appeals's opinions discussed in this opinion suggest that the only way to prove a *prima facie* negligence case circumstantially is to eliminate every other reasonable possibility as an alternative source, we do not agree with the exclusivity of such a conclusion"). It is understandable that, without the benefit of the *Hamilton v. Kirson* opinion, the circuit court was skeptical of the argument that the Murphys could establish the necessary inferences about the existence of lead at the property through the combination of other evidence that they offered.[16]

[16] The dissent appears to operate under the old paradigm, analyzing the Murphys' arguments about the threshold and the doorjambs as a *Dow*-style circumstantial (cont.)

In sum, the circuit court erred when it concluded that it was "that there [wa]s no positive evidence of a lead paint hazard" at the Parkwood property. The Murphys presented at least enough circumstantial evidence to create a triable issue as to whether the surfaces on the rear doorway of the Parkwood property had chipping, flaking, or peeling lead-based paint when the Murphys lived there. Having crossed that evidentiary threshold, the Murphys would be able to move forward with evidence that a lead paint hazard in that location was a source of their lead exposure and contributed to their injuries.[17]

CROSS-APPEAL

In addition to arguing that the judgment should be affirmed for the reasons relied upon by the circuit court, Ellison has taken a cross-appeal from the judgment. His cross-appeal poses the following question:

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argument instead of as an alternative method of circumstantial proof under *Hamilton v. Kirson*. The dissent also argues that the Murphys are categorically barred from using testing of "exterior" surfaces as part of their negligence case. We are skeptical that such a bright-line rule ever existed in Maryland. *See Butler v. S & S P'ship*, 435 Md. 635, 652-54 (2013) (holding that court abused its discretion in excluding results of exterior lead testing as a discovery sanction and noting that such a test "constitutes a crucial piece of evidence in a lead paint case, capable of making or breaking the plaintiff's case"); *Davis v. Goodman*, 117 Md. App. at 395-96 (reversing grant of summary judgment where circuit court concluded that exterior surfaces that tested positive for lead could not have injured child). To the extent that such a bright-line rule exists, it would not apply here because the circuit court recognized that the threshold is not a purely exterior surface.

[17] The parties' arguments focus on the correctness of the court's stated conclusion that there was no evidence of lead-based paint hazards at the property. To prove causation, the Murphys would also need to link that hazard to their lead exposure and show that those lead-based hazards were a substantial contributor to their injuries. *See Hamilton v. Kirson*, 439 Md. at 530. The circuit court did not reach those additional issues, and thus we do not reach any additional grounds not relied upon by the court.

> Did the Trial Court err as a matter of law when it denied Cross-Appellant's Motion for Summary Judgment on the issue of whether he could be held personally liable as an "Owner" or "Operator" when his involvement in the corporation that owned and operated the property was solely as a shareholder?

As a procedural matter, Ellison's cross-appeal is improper. "'[O]nly a party aggrieved by a court's judgment may take an appeal and . . . one may not appeal or cross-appeal from a judgment wholly in his favor.'" *Wolfe v. Anne Arundel Cnty.*, 374 Md. 20, 25 n.2 (2003) (quoting *Offutt v. Montgomery Cnty. Bd. of Educ.*, 285 Md. 557, 564 n.4 (1979)). The circuit court's ultimate determination was entirely in Ellison's favor, "even though it was not on the ground that [Ellison] apparently preferred." *Ins. Comm'r of State of Maryland v. Equitable Life Assurance Soc'y of U.S.*, 339 Md. 596, 612 n.8 (1995). A cross-appeal is not the proper means for Ellison to seek an order that would be identical to the existing judgment.

Nevertheless, like any other party who receives a wholly favorable judgment, Ellison had the option to argue any alternative grounds for affirmance in his appellate brief. *See Wolfe*, 374 Md. at 25 n.2. This Court has sometimes treated the arguments raised through an improper cross-appeal as alternative arguments for affirming a judgment. *See Comptroller of Treasury v. Colonial Farm Credit*, 173 Md. App. 173, 176 n.3 (2007); *Cattail Assocs., Inc. v. Sass*, 170 Md. App. 474, 480 n.1 (2006); *Glenn v. Morelos*, 79 Md. App. 90, 95-96 (1989); *see also Doe Mountain Enters., Inc. v. Jaffe*, 171 Md. App. 1, 15 n.9 (2006). Although the dismissal of Ellison's cross-appeal would be

appropriate here, we will explain why the circuit court was correct when it concluded that Ellison was not entitled to judgment on this alternative ground.[18]

A. Genuine Factual Dispute as to Ellison's Involvement with the Property

Ellison contends that the circuit court erred when it found genuine factual disputes about the extent of his ownership and control of the Parkwood property during the period in which the Murphys were injured. Before addressing that contention, some additional exposition is necessary.

Although the court eventually granted Ellison's motion on the issue of causation, Ellison had asserted as his primary argument that he "was not the owner or operator of 2731 Parkwood Avenue at the time of the [Murphys'] documented blood-lead levels." According to Ellison, he purchased the Parkwood property in 1989, but "transferred" it two years later to a company that he owned. He submitted a copy of a deed that assigned his interest in the property to L.F.E. No. 1, Inc., on November 1, 1991. The assignment occurred four months before the initial documentation of Skylar's elevated blood-lead levels and over two years before Adrianna's birth.

In an affidavit accompanying his motion, Ellison stated that, as of November 1991, "[t]he property at 2731 Parkwood Avenue was owned by L.F.E. No. 2, Inc. and managed by L.E. Realty and Malcolm Snyderman." Ellison stated that Snyderman "ran

[18] By presenting his arguments by way of an improper cross-appeal, Ellison has greatly exceeded the relevant page limits for appellate briefs. At the time that Ellison submitted his brief, Maryland Rule 8-503(d) required that an appellee's brief could not exceed 35 pages. Ellison's brief as appellee/cross-appellant includes 48 pages of text. He later submitted an 11-page cross-appellant's reply brief.

the day-to-day operations of L.F.E. No. 2, Inc." and "made all decisions regarding the rental and maintenance of 2731 Parkwood Avenue[.]"[19] Ellison further stated that he "did not take any actions that affected title" of the Parkwood property after selling it in November 1991. Based on those statements, Ellison argued that he could not be held personally liable for the injuries to Skylar or Adrianna Murphy.

In their response, the Murphys contended that Ellison was required to comply with the Baltimore City Housing Code at the time the Murphys lived there because Ellison was an "owner" or "operator" of the Parkwood property at that time. They also contended that Ellison could be held liable as an individual because there was evidence that he personally participated in maintenance decisions for the property.

As support, the Murphys relied on statements that Ellison made during a 2011 deposition in a separate lead paint action. There, Ellison had testified that he created a number of companies whose names included his initials "L.F.E." in April 1991, and that his "involvement" with those companies continued "for a few years" thereafter, until "at least" 1993 or 1994. He went on to testify that, during the time when he was sole shareholder of those companies, he would make final decisions about whether the L.F.E. companies would buy or sell houses; he would review repair bills and invoices for his "L.E. Realty" company that managed the properties owned by the L.F.E. companies; and

[19] In their response, the Murphys pointed out that Ellison's affidavit and his motion both referred to "L.F.E. No. 2, Inc." and not "L.F.E. No. 1, Inc." The Murphys asserted that Ellison "regularly files a similar Motion for Summary Judgment in lead-poisoning cases alleging . . . virtually identical reasons[.]" At the summary judgment hearing, Ellison submitted a "corrected affidavit," which the court accepted. That affidavit was not included in the record that was transmitted to this Court.

he would sometimes approve requests from the property manager, Malcolm Snyderman, for expensive repairs such as lead abatements at the various L.F.E. properties.

At the hearing, Ellison's attorney submitted a copy of an "errata sheet" that Ellison had written after his 2011 deposition in the separate lead paint case. Without explaining the significance of the document, Ellison's attorney asserted that the errata sheet "clarifies any potential dispute of fact as to what role he did or didn't have" with respect to the Parkwood property during the period in question.[20]

In the handwritten errata sheet, Ellison had made a few corrections to his 2011 deposition answers. He did not assert that the deposition transcript itself was inaccurate. Nor did he attempt to revise his statements that he was the sole shareholder of the L.F.E. companies for a few years after their creation and that his "involvement" with the companies continued until at least 1994. Rather, he attempted to give new answers to questions about the nature of his involvement with the properties after 1991.

Ellison had answered a simple "yes" to a series of three questions about his activities when he was the sole shareholder. Specifically, he testified: (1) that he had final decision-making power over sales of L.F.E. properties; (2) that he would review repair bills and invoices for those properties through his management company, L.E. Realty; and (3) that he would approve Snyderman's requests for certain repairs at those properties. On his errata sheet, Ellison wrote that his answer to each question was still "yes" but only through the "end of 1991." As his explanation for these changes, Ellison

[20] The parties included a copy of the errata sheet in the record extract even though the document was not included as part of the record that was transmitted to this Court.

wrote that he became "confused" by the phrasing of the second question in the series of three.

The circuit court received a copy of this errata sheet as part of the summary judgment record. Without any comment on the document, the court concluded that factual issues regarding Ellison's degree of involvement with the Parkwood property should be resolved by a jury. Ellison contends that the court was required to grant summary judgment on the issue of his personal liability.[21]

Relying on the errata sheet, Ellison asserts that there is no genuine dispute that his ownership of and involvement with the Parkwood property entirely ceased before the end of 1991. His argument focuses on Md. Rule 2-415, which governs the procedure for depositions. Under Md. Rule 2-415(d), a deponent has the opportunity to review the deposition transcript and to "attach to the transcript a separate correction sheet stating the changes and the reason why each change is being made." The Rule states: "The changes contained on the correction sheet become part of the transcript." *Id.* According to

[21] Even if there had been no genuine disputes of material fact on the issue of Ellison's personal liability, the circuit court would not have been required to grant Ellison's motion on those grounds. The circuit court has discretion to deny a motion for summary judgment and to require a trial so that the decision can be supported by a more complete factual record. *See, e.g.*, *Dashiell v. Meeks*, 396 Md. 149, 165 (2006). This Court will affirm a grant of summary judgment on a ground not relied upon by the trial court only in cases where the court lacked discretion to deny summary judgment. *See, e.g.*, *Washington Mut. Bank v. Homan*, 186 Md. App. 372, 402-03 (2009). "It is only when the motion is based upon a pure issue of law that could not properly be submitted to a trier of fact[] that we will affirm on an alternative ground." *Davis v. Goodman*, 117 Md. App. at 395 n.3.

Ellison, the circuit court had to treat the errata sheet as if it erased the answers that he had originally given at the deposition.

We agree with the Murphys that Ellison has misconstrued what it means for a correction sheet to "become part of the transcript" under Rule 2-415. In *MEMC Electronic Materials, Inc. v. BP Solar International, Inc.*, 196 Md. App. 318, 350-51 (2010), this Court held that a trial court erred by refusing to permit a party to cross-examine a witness about deposition testimony that was changed by an errata sheet. In that case, the trial court had erroneously sustained an objection based on an argument that the deposition testimony was "no longer part of the transcript." *Id.* at 350. For similar reasons, we reject Ellison's argument that the statements from his original deposition create no genuine dispute of fact.

In effect, Ellison made two sets of statements: his sworn answers to the questions as originally worded and the handwritten changes and explanations on the signed errata sheet. Both sets of statements are "part of" the deposition transcript. A jury could credit either version of his answers; it need not accept the explanation that he was "confused" about questions about the time when he was the sole shareholder of the companies. Ellison was not entitled to compel the court to resolve the inconsistencies between the two parts of the transcript in his favor.

In sum, the Murphys demonstrated the existence of a genuine dispute about the extent of Ellison's involvement with the Parkwood property after 1991. A factfinder could conclude that Ellison was the sole shareholder of L.F.E. No. 1 until at least 1994 and that during that period he would decide whether the company would buy or sell

properties, review repair bills and invoices related to the management of the properties, and approve large and expensive repairs.

B. Materiality of Evidence of Ellison's Involvement with the Property

Ellison contends that even if there is some dispute about his involvement with the Parkwood property until 1994, those facts are not material. He argues: first, that he owed no statutory duty to the Murphys because he was not an "owner" or "operator" of the Parkwood property; and second, that he could not be held personally liable for the violations even if he was an "owner" or "operator" responsible for complying with the Housing Code. On this record, a jury would not have been compelled to agree with either of those conclusions.

The Baltimore City Housing Code is "liberally construed" to effectuate its "remedial" purposes that are "essential to the public interest." Balt. City Code (1997 Repl. Vol.), Art. 13, § 103. Under the Code, "[a]ny person who is either an owner or operator of a property subject to this Code shall be responsible for compliance with all of the provisions of the Code." *Id.* § 310(a). The Code defines an "owner" as "any person, firm, [or] corporation . . . who, alone or jointly or severally with others, owns, holds, or controls the whole, or any part, of the freehold or leasehold title to any dwelling or dwelling unit, with or without accompanying actual possession thereof[.]" *Id.* § 105. Moreover, the Code requires that "[a]ny person deemed to be [an] owner within the definition of [that] term, shall be bound to comply with the provisions of th[e] Code to the same extent as if he were the actual owner[.]" *Id.* § 301.

Construing these provisions, the Court of Appeals has held that the term "owner" in the Housing Code has "a broader meaning than it does in the traditional sense[,]" reaching "not only . . . those who actually own the title to a dwelling, but also those who 'hold[] or control[]' that title as well." *Allen v. Dackman*, 413 Md. 132, 148 (2010) (quoting Balt. City Code (2000 Repl. Vol.), Art. 13, § 105(jj)). According to the Court, "the City Council intended to expand the meaning of the term 'owner' so that it referred not only to those who own the title to a dwelling, but also to a wider group of individuals who hold or control the title." *Allen v. Dackman*, 413 Md. at 149. To determine whether someone other than the actual title holder is deemed to be an "owner" under the Code, "the relevant determination . . . is whether [the person] had 'an ability to change or affect the' title to the property at issue[.]" *Id.* "The ability to buy and sell the property . . . is an example of controlling the title to a dwelling." *Id.* at 151 n.13.

Ellison's deposition testimony established that, although Malcolm Snyderman was responsible for day-to-day operations of the L.F.E. rental companies and the L.E. Realty management company, Ellison was "the one that decided whether or not L.F.E. would buy new houses or sell houses that it already owned[.]" When asked whether Ellison had actually "direct[ed] that some houses that were held by L.F.E. No. 2 or No. 3 or No. 4 be sold[,]" Ellison responded: "If Malcolm [Snyderman] was going to buy or sell something, he would let me know about it, and, yes, I would be involved in deciding whether we should or shouldn't." In addition, Ellison testified that, after selling homes, he typically

requested that "all of the monies go to pay off the mortgages" for which Ellison himself was personally responsible.[22]

Based on his testimony that he was ultimately responsible for decisions affecting the title of properties owned by L.F.E. companies, a factfinder could reasonably conclude that Ellison "was the person who made decisions affecting the title to the property." *Allen v. Dackman*, 413 Md. at 150. Even if Ellison did not actually direct a sale or acquisition of the Parkwood property during that time period, his testimony supported the conclusion that he at least "had the 'ability'" to affect the title to the property. *See id.* Therefore, a reasonable trier of fact could find that Ellison was an "owner" who was charged with responsibility for complying with the Housing Code.[23]

Ellison also contends that, even if the Housing Code imposed a duty on him as an "owner" of the property, he should still be shielded from personal liability because, he says, there was no evidence that he personally committed the Code violations. In *Allen v. Dackman*, 413 Md. at 152-56, the Court held that a member of a limited liability company that owned title to a subject property could not be held individually liable as an

[22] Ellison argues that these deposition answers do not relate to L.F.E. No. 1, the company that owned the Parkwood property. Earlier questions in the deposition had referred to "a slew of other companies with similar names," had specifically mentioned "L.F.E. No. 1," and had referred generally to "the companies" or to "L.F.E." with no number. From this context, one could infer that Ellison was involved with L.F.E. No. 1 to a similar extent as with the other companies that he created at the same time. As mentioned previously, even Ellison's summary judgment motion and his affidavit had failed to distinguish between L.F.E. No. 1 and L.F.E. No. 2.

[23] Although the parties' arguments focus on whether the Housing Code defined Ellison as an "owner," the Murphys also assert that there was evidence that Ellison was an "operator" of the Parkwood property at the time in question. We do not reach the merits of that contention.

"owner" under the Housing Code unless he personally committed, inspired, or participated in the alleged misconduct. The Court explained that an LLC member generally has no liability for torts committed by the company unless that person commits, inspires, or participates in the torts in the name of the company. *Id.* at 152-53. On the record in that case, the Court concluded that evidence that the LLC member managed the day-to-day affairs of the company that owned title to the property was a sufficient basis to conclude that he personally participated in the negligent maintenance. *Id.* at 155.

In the present case, although Snyderman managed the day-to-day affairs for L.F.E. No. 1, Inc., there was evidence that Ellison participated in maintenance decisions for properties owned by his companies. In his deposition regarding his involvement with L.F.E. properties, Ellison testified that he would review bills and invoices for repairs at the properties and that Snyderman would seek Ellison's approval for large or expensive repairs such as lead abatements. Based on those statements, a trier of fact could conclude that Ellison himself committed, inspired, or participated in decisions regarding the maintenance of the Parkwood property. *See Allen v. Dackman*, 413 Md. at 155; *cf. Toliver v. Waicker*, 210 Md. App. 52, 68-70 (2013) (holding that corporate officer of property management company could not be held personally liable for lead paint poisoning at property where there was no evidence that he was "personally involved with, or informed or consulted about, the rental or maintenance of the [p]roperty"); *Shipley v. Perlberg*, 140 Md. App. 257, 276-79 (2001) (holding that corporate officer could not be held personally liable for resident's lead paint poisoning at property where it was undisputed that officer did not personally participate in management of the property).

As a final argument, Ellison contends that he should have no liability even if he personally participated in negligent maintenance of the dwelling. Ellison distinguishes *Allen v. Dackman* on the ground that Dackman was an LLC member who arguably participated in the alleged tort, but Ellison was a corporate shareholder. Ellison cites no authority for the proposition that a shareholder has no individual tort liability even when the shareholder is an actual participant in a tort. *But cf. Metromedia Co. v. WCBM Maryland, Inc*., 327 Md. 514, 520 (1992) (citing the general rule that corporate officers or agents are personally liable for those torts that they personally commit, or inspire or participate in, even though performed in the name of an artificial body). He includes an extensive, but irrelevant, discussion of the doctrine of corporate veil piercing. *See, e.g.*, *Hildreth v. Tidewater Equip. Co., Inc.*, 378 Md. 724, 733 (2003) ("shareholders generally are not held individually liable *for debts or obligations of a corporation* except where it is necessary to prevent fraud or enforce a paramount equity") (citation and quotation marks omitted; emphasis added). The Murphys do not seek to reach through L.F.E. No. 1 to hold Ellison liable for torts of the corporation because of his status as a shareholder. Instead, their theory is that "he personally committed a wrong" (*Allen v. Dackman*, 413 Md. at 154) that caused their injuries. His mere status as a shareholder does not shield him from liability for his own conduct.

CONCLUSION

For the reasons stated in this opinion, the judgment is reversed. The circuit court did not consider all of the evidence in the light most favorable to the non-moving parties when it concluded that there was no evidence of any lead paint hazard at the subject

property. The court appears not to have considered or excluded an expert opinion about particular lead-based paint hazards; the court rejected the medical expert's testimony, because she could not completely rule out all possibility that another property was a source of lead poisoning, which she is not required to do; and scientific testing and occupant testimony together supported an inference that lead-based paint hazards were present on the rear doorway of the property when the plaintiffs lived there.

The court did not err, however, when it concluded that there were genuine disputes of fact that were material to the issue of Ellison's personal liability for injuries caused by Housing Code violations at the property. Ellison is not entitled to judgment on that ground.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0822

September Term, 2015

SKYLAR MURPHY, *et al.*

v.

LOUIS F. ELLISON

Berger,
Arthur,
Friedman,

JJ.

Dissenting Opinion by Friedman, J.

Filed: August 23, 2016

I respectfully dissent.

To my understanding, plaintiffs' best shot at surviving summary judgment was with a *Dow*-style circumstantial case, by which they would have had to prove (1) that the Parkwood house was built before 1950 so that it is of an age when most homes contained lead-based paint; (2) the plaintiffs had elevated blood-lead levels; and (3) the Parkwood property was the exclusive source of lead to which the plaintiffs were exposed, meaning both (a) that we can "rule-in" the Parkwood property as a reasonably probable source of the lead exposure; and (b) "rule-out" other reasonably probable sources of exposure, including principally, the Woodbrook property. *See Dow v. L & R Properties*, 144 Md. App. 67, 76-77 (2002). *Dow* specifically held that Elements 1 and 2 without more, are insufficient to establish liability, because it is not enough that because of its age, a house likely, or even reasonably probably, contained lead. *Id.* at 73-74. The Court of Appeals in *Rowhouses* did not reject this aspect of *Dow* but, in fact, quoted with apparent approval *Dow*'s statement that "the mere fact that most old houses in Baltimore have lead-based paint does not mean that a particular old Baltimore house has a similar deficiency." *Rowhouses, Inc. v. Smith*, 446 Md. 611, 635 n.9 (2016); *see also Rowhouses*, 446 Md. at 647 (quoting *Hamilton v. Dackman*, 213 Md. App. 589, 612 (2013) (Maryland courts "have for some time required more of a plaintiff than simply a showing that he [or she] lived in an old house with in an area where lead based paint historically was present … a plaintiff bears the burden to establish the presence of lead in the child's environment, and cannot just assume it merely from the age or location of the houses."). (*Rowhouses* did

adjust the quantum of proof necessary to establish Elements 3a and 3b of a *Dow*-style case. *Id*. at 659-61.).

Here, Elements 1 and 2 are not contested, so it comes down to a question of whether plaintiffs' succeeded in establishing a *prima facie* case for Elements 3a and 3b. Stripped to essentials, there are two items that the majority finds sufficient proof to establish Element 3a: Cavaliere's expert testimony, derived from his views regarding the age of the door handles and window sashes in the Parkwood property and an Arc Environmental Report that there was lead-based paint on the exterior of the house, near the back door. Slip op. at 25, 30. I find neither to be persuasive.[1]

As the majority reports, Cavaliere testified that, in his opinion, the existence of this old hardware indicated that the property had not been renovated before the Murphys lived there or during their tenancy. Slip op. at 13-14. Thus, principally, Cavaliere's opinion is that because the hardware hadn't been changed, the house probably contained the original paint. Cavaliere's testimony is precisely akin to Element 1 in a *Dow*-style case: the house is old; the paint is old. But his opinion says nothing about whether the original paint contained lead. In fact, if Cavaliere's testimony is sufficient, it means that *Dow* is dead: it is now enough for a plaintiff to say that because of its age, a house

[1] The majority, in footnote 11, stresses the remaining factors, numbered 1-8 and 11 in the majority's list of relevant evidence in this case, as sufficient in and of themselves to prove liability under *Rowhouses*—even without Cavaliere's testimony and the Arc Report (factors 9 and 10 in the list). While this may be true, factors 9 and 10 seem to drive the analysis in the opinion above. Additionally, the majority spends most of its time discussing these two factors, signaling that it finds these two factors to be important.

probably had lead-based paint. If that's now going to be the rule, I'd like for the Court of Appeals to tell us so.

The Arc Environmental Report says that there was lead-based paint on the exterior of the Parkwood house. But I don't think that the existence of lead-based paint on the *exterior* of a property can help satisfy Element 3a. First, I think that this Court is bound by principles of *stare decisis* to follow the bright-line, exterior/interior line drawn by this Court in *Hamilton v. Dackman* and *Taylor v. Fishkind*. *Hamilton*, 213 Md. App. 589, 617 (2013) (holding that a positive test for lead paint on the exterior of a house is insufficient to show that the interior of a defendant's house contained lead-based paint); *Taylor*, 207 Md. App. 121, 144 (2012) (same). Nothing in *Rowhouses* or any other case has modified that rule. Second and more importantly, I think the bright-line rule makes perfect sense. A builder, building a row of rowhouses, might well have used the same interior paint in each house down the line. Thus, we can say that if a builder used lead-based interior paint in one house, it gives rise to a reasonable inference that the same interior paint was used on each house down the row. *See Hamilton v. Kirson* 439 Md. 501, 537-38 (2014) (discussing a hypothetical case where a plaintiff could "rule-in" a subject property with evidence regarding adjacent properties built in the same year and owned by the same entity). If it mattered, I would also agree that it would be likely that a builder would have used the same exterior paint on each of the houses in the row too. But no builder would ever have used the same paint on the interior and exterior of a home. Interior paint would weather too quickly if used outside. And exterior paint is too expensive for a builder to have used on the interior. Therefore, I don't think that the fact that there was lead-based

paint on the exterior of the Parkwood property says anything about whether there was lead-based paint on the interior of the property.

Without those two pieces of evidence, plaintiffs have no evidence to satisfy their burden of establishing a *prima facie* case for Element 3a, to "rule-in" the Parkwood property, as a reasonably probable source of their exposure. Because they fail on Element 3a, I need not reach whether Dr. Robinson-Josey's testimony was sufficient to "rule-out" the Woodbrook property.