UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2392

September Term, 2013

ON REMAND FROM COURT OF APPEALS

---

MICHAEL DAVON CHRISTIAN

v.

STEWART LEVITAS

---

Eyler, Deborah S.,
Arthur,
Wilner, Alan M.
(Retired, Specially Assigned)

JJ.

---

Opinion by Eyler, Deborah S., J.

---

Filed: August 1, 2016

In the Circuit Court for Baltimore City, Michael Davon Christian, the appellant, sued Stewart Levitas, the appellee, for negligence in a lead paint case. Mr. Christian had lived at 3605 Spaulding Avenue, in Baltimore City ("the Spaulding Property"), from birth until October of 1992, when he was 2½ years old, and again for four years beginning in 1993. Mr. Levitas owned the Spaulding Property at the relevant times. Mr. Christian's blood was tested for lead at least twice when he was living at the Spaulding Property, and the test results were elevated.

Mr. Levitas filed a motion *in limine*, seeking to preclude Mr. Christian's pediatrician expert witness, Howard Klein, M.D., from testifying about medical causation and about source of lead causation, and also filed a motion for summary judgment. The court granted the motion to exclude and denied a motion for reconsideration. The parties stipulated that without Dr. Klein's medical causation testimony, Mr. Christian could not put on a *prima facie* case of negligence. On that ground, Mr. Levitas filed a renewed motion for summary judgment, which the court granted.

Mr. Christian noted an appeal, and on January 12, 2015, we filed an unreported opinion affirming the judgment on both causation issues. *Christian v. Levitas*, No. 2392, Sept. Term, 2013. We held that the court did not abuse its discretion in ruling that Dr. Klein was not qualified to express an opinion about medical causation, because he lacked experience administering IQ tests relevant to the mental injuries Mr. Christian was claiming to have suffered as a result of lead paint poisoning. We also held that the court did not abuse its discretion in ruling that there was not an adequate foundation for Dr.

Klein's lead source opinion because Dr. Klein had not been furnished information about potential sources of lead exposure other than the Spaulding Property. We noted that during the three year period in which Mr. Christian's blood lead levels were elevated, he lived at the Spaulding Property and also at another nearby residence.

Mr. Christian filed a petition for writ of *certiorari* in the Court of Appeals. On October 16, 2015, the Court of Appeals filed its opinion in *Roy v. Dackman*, 445 Md. 23 (2015). On November 23, 2015, in this case, the Court granted the writ and issued a *per curiam* order vacating this Court's judgment and remanding with directions to reconsider our decision in light of *Roy*. *Christian v. Levitas*, 445 Md. 240 (2015). We have done so and shall reverse the judgment of the circuit court.

**1. <u>Source of Lead Causation</u>**.

In *Roy*, the plaintiff alleged that he had been exposed to lead-based paint at the subject property, where he had lived for nearly two years as a toddler. His mother testified in deposition that the interior paint at that property was chipping, peeling, and flaking. The plaintiff's blood lead levels were elevated when he was living at the property.

The plaintiff named Henry Sundel, M.D., as his expert witness on source of lead causation. In deposition, Dr. Sundel testified that the plaintiff's "medical injuries" had been caused by exposure to the lead-based paint at the subject property. 445 Md. at 33. His opinion that lead-based paint was present at that property was based on circumstantial evidence of the age of the home and the fact that testing of the exterior of

the property had revealed the presence of lead paint. (The interior of the home had not been tested.) The circuit court precluded Dr. Sundel from giving an expert opinion at trial on source of lead.

The Court of Appeals agreed with the circuit court's ruling on the source of lead causation issue. It explained that Dr. Sundel's source of lead opinion was based on "scant circumstantial evidence" that did not "rule out other probable sources" of lead exposure:

> There is no discussion in the record of Dr. Sundel's methods to eliminate other environmental sources of lead exposure. His conclusion . . . appears to be based solely on the assumption that a child's home is the "most probable source of elevated blood lead levels 'until proven otherwise,' particularly if the house was built before 1970."

*Id.* at 47–48 (quoting *Ross v. Hous. Auth. of Baltimore City*, 430 Md. 648, 660 (2013)). That ruling did not affect the outcome of the case, however, because the plaintiff had another source of lead expert, whose testimony had not been excluded.

More recently, in *Rowhouses, Inc. v. Smith*, 446 Md. 611 (2016), the Court of Appeals considered the quantum of circumstantial evidence of source of lead causation necessary to survive summary judgment. The Court explained the links of circumstantial evidence necessary to make a showing of source of lead causation:

> "To connect the dots between a defendant's property and a plaintiff's exposure to lead[-based paint], the plaintiff must tender facts admissible in evidence that, if believed, establish two separate inferences: (1) that the [subject] property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the [plaintiff's] exposure to lead[-based paint]."

*Id.* at 649 (quoting *Hamilton v. Kirson*, 439 Md. 501, 529-30 (2014) (alterations in *Rowhouses*). With respect to the first inference, if a plaintiff relies upon circumstantial evidence to prove the presence of lead-based paint at the subject property, he or she must "'rule out other reasonably probable sources of lead exposure in order to prove that it is probable that the subject property contained lead-based paint.'" *Id*. at 650 (quoting *Hamilton*, 439 Md. at 536). A plaintiff need not present direct evidence of the absence of lead paint at other properties to rule them out, however, but may rely on circumstantial evidence that, "if believed, would rule out other reasonably probable sources of lead." *Id*. at 661. While expert testimony might be helpful in that regard, it is not necessary at the summary judgment stage. *Id*. Lay witness testimony at a deposition or in an affidavit stating that another property did not contain any deteriorated paint during a plaintiff's residency is sufficient to create an inference that another property was not a "reasonably probable" source of lead exposure. *Id*.

We return to the case at bar. The evidence on the summary judgment record, viewed in a light most favorable to Mr. Christian, showed that he lived at the Spaulding Property with his mother, Nickolas Skinner ("Ms. N. Skinner"), and his grandmother, Betty Skinner ("Ms. B. Skinner"), from his birth on February 12, 1990, until October 1992, when he was 2½ years old. The Spaulding Property was built in 1944. In October 1992, Ms. N. Skinner and Mr. Christian relocated to 4946 Denmore Avenue, Baltimore

City ("the Denmore Property"), for approximately one year.[1] In September 1993, Ms. N. Skinner and Mr. Christian moved back to the Spaulding Property, where they continued to live until approximately 1997. As relevant here, Mr. Christian's blood was tested for lead five times between 1992 and 1993. The results were as follows:

| **Date** | **Blood Lead Level** | **Mr. Christian's Address[2]** |
|---|---|---|
| February 20, 1992 | 9 µg/dL | Spaulding Property |
| February 18, 1993 | 10 µg/dL | Denmore Property |
| July 16, 1993 | 17 µg/dL | Denmore Property |
| September 2, 1993 | 12 µg/dL | Denmore Property |
| October 6, 1993 | 14 µg/dL | Spaulding Property |

On February 24, 2012, Arc Environmental, Inc. ("Arc"), performed x-ray fluorescence ("XRF") testing on the interior and exterior surfaces of the Spaulding Property. The XRF testing revealed 31 interior painted surfaces and 5 exterior painted surfaces that were positive for the presence of lead-based paint. Inside the property, door jambs, window casings, baseboards, and door casings all tested positive.

[1] In his complaint, Mr. Christian also sued the owners of the Denmore Property, alleging that he was exposed to lead-based paint at that property. He subsequently dismissed the Denmore Property defendants with prejudice.

[2] We list the address for Mr. Christian that corresponds with the dates of residency provided in his answers to interrogatories, and confirmed by Ms. N. Skinner at her deposition, as those were the dates Dr. Klein relied upon in rendering his expert opinion. In many cases, this address differs from the address reflected in the laboratory records for Mr. Christian.

In deposition, Ms. N. Skinner testified that when she moved into the Spaulding Property around 1989, it had "nice, fresh paint," but that "as time went on [the] paint started peeling." The back balcony where Mr. Christian often played was deteriorated, with "wood dry rotting[ and] paint chips on the balcony porch." The interior paint began deteriorating about "a year after [she began] living there," which would have been around the time of Mr. Christian's birth. Mr. Christian played in interior areas where there was deteriorated paint. While Ms. N. Skinner worked, Mr. Christian was cared for by relatives at the Spaulding Property. He occasionally visited other relatives and friends in their homes and spent the night with his godparents, who lived next door at 3603 Spaulding Avenue. Ms. N. Skinner described the Denmore Property as "neat and clean, fresh paint, tile floors." She did not have any "problems with the condition of the paint on the walls" at the Denmore Property.

In rendering his source of lead opinion, Dr. Klein relied upon Mr. Christian's answers to interrogatories, Ms. N. Skinner's deposition testimony, property records for the Spaulding Property and the Denmore Property, Mr. Christian's medical records, and the Arc Report for the Spaulding Property. He testified in deposition that Mr. Christian had been exposed to lead-based paint while living at the Spaulding Property and that that exposure was a substantial contributing factor causing his injuries. He explained that he based his opinion to that effect on the age of the Spaulding Property, the deteriorated condition of the paint there during Mr. Christian's residency, and the Arc report "saying that it had lead."

The circuit court ruled that Dr. Klein was not qualified to offer an opinion as to source of lead causation because he was not provided information by Mr. Christian's counsel about "other possible sources" of lead exposure. The decision in *Rowhouses* makes clear, however, that a plaintiff must rule out other reasonably probable sources of lead exposure *if* he or she is seeking to prove the presence of lead-based paint in the subject property by *circumstantial evidence*. In the instant case, the Arc Report was *direct evidence* of the presence of lead-based paint throughout the interior of the Spaulding Property. With this direct evidence that the Spaulding Property contained lead-based paint, Mr. Christian was not obligated to rule out the Denmore Property or any other reasonably probable sources of lead paint exposure.

Dr. Klein's opinion that the lead-based paint at the Spaulding Property was a substantial contributing factor causing Mr. Christian's elevated blood lead levels also was supported by an adequate factual basis. Mr. Christian had an elevated blood lead level of 9 µg/dL on February 20, 1992, when he was just over two years old. At that time, he had not lived anywhere except the Spaulding Property. As noted, his mother testified in deposition that the paint at that property was in a deteriorated condition in the two years after Mr. Christian's birth.

Unlike in *Roy*, Dr. Klein's source of lead causation opinion was not based upon "scant circumstantial evidence." It was based upon direct evidence of the presence of lead in the Spaulding Property. Accordingly, the circuit court abused its discretion by precluding him from offering that opinion at trial.

**2. Medical Causation.**

In *Roy,* Dr. Sundel also was named as the plaintiff's medical causation expert. Dr. Sundel testified in deposition that lead exposure at the subject property had caused the plaintiff to suffer a "'loss of IQ points . . . , impaired attention, problems with memory, and problems with coordination.'" 445 Md. at 33. "His testimony established that he was well-read on the literature relating to lead poisoning and its harmful effects on young children[.]" *Id*. at 35. He acknowledged, however, that he had "never studied or treated directly . . . an individual with lead-based poisoning." *Id*. The circuit court precluded Dr. Sundel from offering an expert opinion on medical causation at trial.

The Court of Appeals reversed on that issue. It reiterated its holding in *Radman v. Harold*, 279 Md. 167, 169 (1977), unchanged by Rule 5-702, that "'a witness may be competent to express an expert opinion if he [or she] is reasonably familiar with the subject under investigation, regardless of whether this special knowledge is based upon professional training, observation, actual experience, or any combination of these factors.'" *Roy*, 445 Md. at 41 (alteration in *Roy*). It explained that, under the rule, an expert witness "who proposes to testify on medical injury must base his or her opinion on reliable knowledge, skill, and experience, but is not required necessarily to be a specialist." *Id*. at 43. "It may well be that a 'specialist' who testifies as to certain opinions may receive greater weight by the fact-finder than his or her competing non-specialist, but that is not resolved ordinarily as a threshold matter by a judge. Cross-

examination is the usual crucible for persuading the fact-finder which witness merits the greater weight." *Id*.

The Court further stated:

> Dr. Sundel's academic and experiential qualifications include a three year pediatric residency in New York, a two year pediatric fellowship at Johns Hopkins University Hospital, and more than 20 years in practice. With this experience and as a board-certified pediatrician, Dr. Sundel was shown on this record to possess a sufficient background from which to provide an opinion as to the injuries claimed to have been suffered by [the plaintiff] as the result of alleged exposure to lead. Whether a jury will find his testimony persuasive will depend, in large measure, on the effectiveness of [defendants]' cross-examination and a comparison/weighing by the jury against [defendants]' competing witness(es)' testimony.

*Id*. at 52. The Court observed that, "[a]lthough Dr. Sundel may not be the most qualified expert witness on medical causation, a court's concern at the summary judgment stage is whether his testimony is admissible." *Id*. at 43. In the Court's view, the information about Dr. Sundel's background and the materials he had relied upon in forming his opinions showed that he was at least competent, under the standards set forth in Rule 5-702, to testify as an expert witness on medical causation. Therefore, the circuit court abused its discretion in finding that Dr. Sundel was not qualified to testify as an expert witness on medical causation.

The Court of Appeals decision in *Roy* compels the conclusion that, in the case at bar, the circuit court abused its discretion by precluding Dr. Klein from offering an expert opinion on medical causation. In deposition, Dr. Klein testified that he had experience evaluating and treating patients for lead poisoning both in the Baltimore area, where he had practiced for most of his lengthy career, and in Israel, where he was then practicing.

He had testified in lead paint cases on many occasions in the past. He plainly was qualified by knowledge, skill, and experience to render a medical causation opinion.

The circuit court reasoned that Dr. Klein was not qualified to offer his medical causation opinions because he did not have any experience administering and scoring IQ tests and because he was unable "to explain to the jury how even the psychologist go[t] to those, um, results." It is clear from *Roy*, however, that a pediatrician need not have specialized knowledge in the area of IQ test administration and interpretation to render a medical causation opinion that exposure to lead-based paint resulted in a loss of IQ points.

The circuit court further concluded that Dr. Klein's testimony was not supported by an adequate factual basis because "he[ was] just getting information from everybody else and making this decision." *Roy* makes plain, however, that a pediatrician need not have met with or personally examined a plaintiff in order to render a medical causation opinion. In forming his medical causation opinion, Dr. Klein reviewed Mr. Christian's medical records, his neuro-psychological evaluation, his school records, and deposition testimony from his mother and grandmother. His opinion that Mr. Christian suffered cognitive impairment as a result of his exposure to lead at a young age was supported by an adequate factual basis and the circuit court erred by excluding it.

**3. Grant of Summary Judgment**

In light of our conclusions that the circuit court abused its discretion by precluding Dr. Klein from offering an expert opinion on source of lead causation and medical

causation, it follows that the court erred as a matter of law in granting summary judgment in favor of Mr. Levitas.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY THE APPELLEE.**