UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0406

September Term, 2014

SHANIKA D. CRAFTON

v.

ELLIOT DACKMAN, et al.

Kehoe,
Friedman,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 20, 2015

Psychologists generally agree that people with full scale IQ scores below 70 points can satisfy the diagnostic criteria for mental retardation.[1] People with IQ scores between approximately 50-55 and 70 are considered mildly mentally retarded. Appellant has an IQ score of 62. Expert testimony suggested that exposure to lead paint caused Appellant to lose 4 IQ points. That is to say, that, but for her lead paint exposure, she would have had an IQ score of 66. The trial judge reasoned, therefore, that the loss of 4 IQ points was not an injury because with or without the lead exposure, she would still be mildly mentally retarded. We reject this reasoning based on two fundamental principles of our tort law: (1) that an injury, no matter how small, can be compensable; and (2) that a tortfeasor takes his plaintiff as he finds her.

BACKGROUND

Shanika Crafton was born on August 10, 1991. From her birth until September 1993, when she was 26 months old, she lived at 1823 Ruxton Avenue, a property in the City of Baltimore owned by the Dackmans.[2] On two occasions while living at the Ruxton Avenue

[1] A full scale IQ score is derived from four subtests: two verbal IQ tests and two non-verbal IQ tests. When we reference IQ scores or points, we are referring to full scale IQ points or scores.

[2] Defendants at trial, appellees here, are: Elliot Dackman; River Oaks Properties, LLC; Jackob Dackman & Sons, LLC; and the estate of Sandra Dackman. We will refer to these related entities collectively as "the Dackmans."

property Crafton's blood levels were tested and both tests reflected a level of 6 micrograms per deciliter.[3]

Crafton attended school and had some academic difficulties over the years. She was required to repeat the first grade, and attended summer school in the fifth and tenth grades. She required one-on-one instruction in several core subjects during her middle school years. During her twelfth grade year, she failed two of her four High School Achievement tests. Despite these difficulties, Crafton graduated from high school in 2010 and is currently enrolled at Baltimore City Community College.

On June 28, 2012, Crafton filed this lead paint action in the Circuit Court for Baltimore City against the Dackmans. Subsequent inspections revealed the presence of lead-based paint on both interior and exterior surfaces of 1823 Ruxton Avenue.

At trial, Crafton presented three expert witnesses to offer opinions regarding her exposure to lead-based paint and the effects of that exposure:

- **Dr. Sandra Hawkins-Heitt**. Dr. Hawkins-Heitt is a clinical psychologist who testified to her assessment of Crafton's current cognitive status based on neuropsychological evaluations she administered to Crafton. She was accepted as

[3] According to the federal Centers for Disease Control and Prevention ("CDC"), "[u]ntil recently, children were identified as having a blood lead 'level of concern' if the test result is 10 or more micrograms per deciliter of lead in blood. CDC is no longer using the term 'level of concern' and is instead using [a] reference value [of 5 micrograms per deciliter] to identify children who have been exposed to lead and who require case management." *New Blood Lead Level Information*, Centers for Disease Control and Prevention, http://perma.cc/3AQM-E9ZW.

an expert in psychology, and in administering and interpreting neuropsychological evaluations. Dr. Hawkins-Heitt testified that, based on the evaluations she performed, Crafton's overall IQ was 62. Dr. Hawkins-Heitt also testified that Crafton was deficient or borderline deficient in numerous specific cognitive areas including vocabulary, sentence comprehension, basic math calculation, auditory attention skills, visual working memory, visual attention, ability to switch between tasks, visual motor processing speed, and executive functioning. Dr. Hawkins-Heitt concluded that Crafton suffered from permanent brain impairment.

- **Dr. Arethusa Kirk**. Dr. Kirk is a board-certified pediatrician with experience in treating children with lead exposure. She was accepted as an expert in pediatrics and childhood lead poisoning. Dr. Kirk offered her opinion that Crafton's lead exposure at the Ruxton Avenue property was a substantial cause of Crafton's elevated blood lead levels, which resulted in her neurocognitive brain injury. Dr. Kirk also reviewed Dr. Hawkins-Heitt's neuropsychological evaluations of Crafton and, based on these evaluations, opined that Crafton suffered cognitive impairments and a loss of between 2 and 4 IQ points as a result of her lead exposure. Dr. Kirk also testified that Crafton's lead exposure at the Ruxton Avenue property was a substantial cause of her injury, even if she also sustained subsequent lead exposure elsewhere.

- **Amy Gonzales**. Gonzales is a certified rehabilitation counselor, who testified as an expert in vocational rehabilitation. Gonzales opined that Crafton's academic functioning was deficient and that she had a limited vocational skill set. Gonzales

testified that due to Crafton's cognitive and vocational impairments, she was not competitive among other high school graduates with whom she may compete for employment. Gonzales testified that Crafton is currently making $6,452 less per year than the average high school graduate, and that Crafton's career and earning potential would be improved absent her cognitive deficits.

At the close of Crafton's case-in-chief, the Dackmans moved for judgment, arguing that Crafton failed to present any evidence that she had suffered a compensable injury. The trial court denied this motion, and the Dackmans proceeded to present their case. At the close of the Dackmans' case, they renewed the motion for judgment. This time, the trial court granted the motion, stating:

> The testimony taken at face value, in the light most favorable is that [Crafton] was mentally retarded. And that, even with the increase in IQ that would have happened—if she had not been exposed to lead—she is still mentally retarded.
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> * * *
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> If in fact, [her IQ score of] 62 was an accurate number; if in fact, Ms. Crafton is mentally retarded; and if [lead exposure] cost her 4 points—which is the maximum that Dr. Kirk testified to—then her IQ would be 66, and she would still be mentally retarded.
>
> And there's been no credible evidence introduced in this case at all that that would have resulted in anything different in her life, in terms of her educational attainment; or in terms of her career prospects or her worklife.

In sum, the trial court concluded that Crafton did not present evidence of a compensable injury or economic damages. In granting the Dackmans' motion for judgment, the trial

court made clear that it was disregarding the evidence presented by the Dackmans and only considering the case presented by Crafton. This appeal followed.

DISCUSSION

Crafton argues that the trial court erred in granting the Dackmans' motion for judgment by weighing the testimony of Crafton's experts, rather than viewing all evidence in the light most favorable to Crafton.[4] Specifically, Crafton argues the trial court erred by weighing the testimony of her experts and concluding that she had not presented any evidence of brain injury or impairment due to her lead exposure. Crafton also claims that the trial court erred in granting the Dackmans' motion for judgment by weighing the

[4] Crafton relies heavily on an unreported opinion of this Court in making her argument as to injury. Maryland Rule 1-104 provides:

> **(a) Not Authority.** An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.
>
> **(b) Citation.** An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority….

While Crafton states that the unreported opinion is not being cited as persuasive authority, she goes on to analyze the case exactly as if it were at least persuasive precedent. An unreported opinion may not be cited as authority, even if a party nominally acknowledges that it is not a binding or persuasive authority. Crafton's in-depth analysis of an unreported opinion is not appropriate and we will not consider that opinion in reaching our conclusion. Worse still, Crafton's reliance on the unreported decision wasn't necessary as the unreported decision relied in turn on a prior reported case: *Green v. N.B.S., Inc.*, 180 Md. App. 639 (2008), *aff'd* 409 Md. 528 (2009).

testimony of Crafton's vocational expert and concluding that she had not presented any evidence of economic damages.

We review the trial court's decision to grant judgment to determine if it was legally correct. *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503 (2011). A party is entitled to judgment when, while viewing the evidence in the light most favorable to the non-moving party, the facts and circumstances only permit one conclusion with regard to the issue presented. *Id.* "'[I]f there is any competent evidence, however slight, leading to support the plaintiff's right to recover, the case should be submitted to the jury'" and the motion for judgment denied. *Mahler v. Johns Hopkins Hosp., Inc.*, 170 Md. App. 293, 318 (2006) (quoting *Montgomery Ward and Co., Inc., v. McFarland*, 21 Md. App. 501, 513 (1974)). For the reasons that follow, we reverse the decision of the trial court granting judgment in favor of the Dackmans and return the case to the Circuit Court for trial.

I. Brain Injury or Impairment

Here and below, the Dackmans argue that the trial court's award of judgment was correct because "a loss of … 4 IQ points has occurred without any clinical significance to Ms. Crafton…. [E]ven if Ms. Crafton were to improve her IQ by … 4 points, she would still fall in the range that her expert testified was 'mentally retarded' (under [an IQ score of] 70)."[5] The Dackmans' argument is really two interrelated ideas: (1) that the loss of 4

[5] In fact, the Dackmans characterized the testimony as a loss of "2-4" IQ points. Because at the posture at which we find the case we must accept the evidence in a light most favorable to the plaintiff, for purposes of this opinion, we will assume a loss of 4 IQ points and have modified the Dackmans' argument accordingly.

IQ points was so small as to be *de minimis*—in effect, that it was no injury at all; and (2) that with or without the 4 IQ points, Crafton would still be mentally retarded so, at least for her, there was no injury. We do not hesitate to reject both premises.

The Dackmans' first premise is that a loss of 4 IQ points is so small as not to be an injury at all. Moreover, they wish us to make that finding as a matter of law so that a plaintiff with evidence of a loss of 4 IQ points would not be able to survive a motion for judgment and get her case to a jury. In support of that idea, the Dackmans cite to our decision in *Owens-Illinois v. Armstrong*. 87 Md. App. 699 (1991), *aff'd in relevant part*, 326 Md. 107 (1992).

In *Armstrong*, we held that compensatory damages may not be awarded in negligence or strict liability actions absent a showing of a functional impairment. *Id.* at 735. In that case, the plaintiffs alleged at trial that their exposure to asbestos had resulted in the development of pleural plaques and pleural thickening. *Id*. at 732. But trial testimony also demonstrated that pleural plaques and pleural thickening "alter the pleura, but do not cause any loss or detriment." *Id.* at 734. Basically, the pleural plaques and pleural thickening cause a physical change to the lungs, but they cause no physical harm, pain, or suffering; they are benign. The trial court instructed the jury that it could not award damages based solely on pleural plaques or pleural thickening. *Id*. at 733. We affirmed the trial court's decision, stating:

> In Maryland, compensatory damages are not to be awarded in negligence or strict liability actions absent evidence that the plaintiff suffered a loss or detriment. In the case *sub judice*, the medical evidence was clear and uncontradicted that pleural scarring does not cause a functional impairment or harm ….

Id. at 735. The Dackmans, in essence, ask us to find that Crafton's loss of 4 IQ points is analogous to *Armstrong*'s pleural plaques and pleural thickening.

We reject the request. In *Armstrong*, the testimony was clear that pleural plaques and pleural thickening were benign changes that caused no dysfunction or pain. The same cannot be said here. While the loss of IQ points may not present a tangible, physical alteration, common sense tells us that losing any amount of IQ points is never desirable. The permanent loss of cognitive ability is not a benign event and that the loss manifests no tangible physical changes is immaterial. The loss of IQ points, even a small amount of points, may cause some level of functional impairment. In addition to the loss of IQ points, Crafton's experts testified that she had numerous cognitive impairments in specific areas, and Dr. Kirk causally linked these impairments to Crafton's lead exposure. Even if the effect of Crafton's lead exposure at the Ruxton Avenue property was a small harm or detriment, we cannot say—much less say as a matter of law—that a loss of IQ points and impairments in cognitive functioning are harmless physical changes.[6]

The Dackmans' second premise is that even if Crafton lost 4 IQ points, her IQ would still be in the range of mentally retarded and that, therefore, she suffered no compensable injury. It was on this basis that the trial judge granted judgment, stating:

[6] We note that a better analogy than *Armstrong* may be our decision in *N.B.S., Inc. v. Harvey*, where we affirmed a jury award to a child who had a post-lead exposure IQ of 63, with a purported loss of five IQ points due to lead exposure. 121 Md. App. 334 (1998). There, however, even the defendant-landlord seemed to accept that the loss of 5 IQ points constituted an injury and it was not an issue in the case.

> The testimony taken at face value, in the light most favorable, is that [Crafton] was mentally retarded. And that, *even with the increase in IQ that would have happened—if she had not been exposed to lead—she is still mentally retarded*.

(Emphasis added). Shortly thereafter, the trial court said:

> If in fact, [her IQ score of] 62 was an accurate number; if in fact, Ms. Crafton is mentally retarded; and if [lead exposure] cost her 4 points—which is the maximum that Dr. Kirk testified to—then her IQ would be 66, and she would still be mentally retarded.

We reject this line of reasoning too. It is an established principle of tort law that a defendant takes a plaintiff as he finds her. Tortfeasors cannot be absolved of the injuries they cause because of any particularities of the plaintiff. This principle is premised on the idea that the fact that a plaintiff's condition made her particularly susceptible to injury does not excuse the defendant from the consequences of his wrong. *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333, 357 n.11 (2014). "'In other words, the fact that the injury would have been less serious if inflicted upon another person should not affect the amount of damages to which the plaintiff may be entitled.'" *Id.* (quoting MPJI–Cv 10:3); *see also* W. Page Keeton, *Prosser & Keeton on the Law of Torts* 292 (5th ed. 1984) (discussing foreseeability and the plaintiff with the "eggshell skull"). This principle works the other way too—a defendant is not absolved of the injury he caused if the plaintiff's particularities make her arguably less susceptible. If a plaintiff has evidence that she has suffered a compensable injury—and this one does—she has a right to present that evidence to a jury and let it determine the appropriate compensation for that injury. We reverse the grant of judgment and return the case to the Circuit Court for Baltimore City for trial.

We wish to make two additional observations. *First*, it is our view that the trial court's analysis grants too much importance to an arbitrary line and leads to arbitrary results. Imagine Plaintiff A, who has an IQ of 62 after losing 4 IQ points due to lead exposure attributable to Defendant's property. Under this theory, Plaintiff A cannot recover. Imagine Plaintiff B, who has an IQ of 67 after losing 4 IQ points. Plaintiff B can recover because her loss dropped her below the 70 point threshold for mental retardation. Now imagine Plaintiff C, who has an IQ of 69 after losing 2 IQ points. Plaintiff C can also recover, despite having a lesser exposure than Plaintiff A. It wouldn't be fair.

Second, we reject the idea that the loss of a "few" IQ points somehow matters less to someone with a lower IQ. As Dr. Kirk testified at trial, the loss of a few IQ points "can be quite substantial for those [who] are on the lower end of the IQ curve." The loss of 4 IQ points might mean more to Shanika Crafton than the same loss would mean to Albert Einstein. More importantly, such a view is simply not compatible with a modern view of the rights of persons with mental disabilities to participate fully in our society and their potential to contribute. *See generally*, Americans with Disabilities Act, 42 U.S.C. § 12101 (a) (1) ("The Congress finds that … physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination").

II. Economic Damages

In rendering its decision, the trial court additionally found that Crafton had produced no evidence of economic damages. The trial court found that because Crafton's injury was minimal (loss of 4 IQ points) and because she would still be mildly mentally retarded absent any IQ loss, there was no indication that her career trajectory was negatively impacted by her injury. Thus, the trial court concluded that there was no proof of economic damage for which Crafton could recover. Because the trial court's conclusion that there was no evidence of economic damages was premised on its erroneous ruling on the injury element that we discussed above, we reverse the trial court's ruling on this issue.

Given that we determined there was sufficient evidence of an injury presented, the issue of economic damages turns on whether Gonzales, the vocational rehabilitation expert, offered any evidence that Crafton's career and earning potential was negatively impacted by the injury sustained from her lead exposure. Crafton argues that there was sufficient evidence of economic loss that the question should have gone to the jury. Specifically, she argues that Gonzales opined that Crafton would have had greater career and earning potential absent her cognitive and educational deficits, which Dr. Kirk linked to Crafton's lead exposure at the Ruxton Avenue property. By contrast, the Dackmans contend that the trial court properly found that there was no evidence of economic damages because Gonzales's opinion regarding Crafton's career trajectory was not based on her parental educational and vocational history, which the Dackmans claim is the only proper means for assessing an injured child's educational and vocational potential.

The Dackmans rely on *Gholston* for the proposition that parental educational and vocational history are the means by which economic damages should be measured. *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 341-42 (2012). The Dackmans, however, stretch the meaning of *Gholston* and characterize this Court's acceptance of parental educational and vocational history as evidence of damages as if that were the only acceptable evidence to show economic damages. In *Gholston*, we determined that parental educational and vocational history are an accepted means of estimating a child's educational and vocational potential. There we stated:

> Even if the legal sufficiency issue were preserved for review, we would not find merit in it. [The expert witness] testified that [the plaintiff's] deficits will limit his ability to work in jobs suitable to the education he likely will be able to attain, thus resulting in his being a disabled worker. [The expert witness] testified that, given that [the plaintiff's mother] is college-educated and not disabled, more likely than not, had [the plaintiff] not sustained the impairments resulting from his delayed delivery, he would have graduated from college and had the earning capacity of a male college graduate. With his impairments, it is unlikely that [the plaintiff] will be able to attend college; and, although he probably will graduate from high school, he will not have the earning capacity of a male high school graduate who does not have the physical and cognitive impairments he does. [The expert witness] was able to offer expert testimony about average earnings and a comparison of the amount of future earnings that [the plaintiff] will not enjoy due to his disabilities. On this evidence, reasonable jurors could find, by a preponderance of the evidence, that [the plaintiff] has sustained future lost wages due to the breaches in the standard of care by UMMS agents.

Id. We did not hold that parental educational and vocational history are the exclusive means for estimating a child's pre-injury educational and vocational potential. *Id.* Rather, we said

that using parental educational and vocational history is an acceptable method for estimating a child's pre-injury educational and vocational potential.

Here, Gonzales, the certified rehabilitation counselor, testified that in her profession, it is not simply assumed that an individual's potential is capped at the level of her parents. Instead, the individual and her skills and difficulties are the focus of a vocational evaluation. Although the trial court may have believed that the evidence as to economic damages was weak, it made no finding that Gonzales's opinion was based on an unreliable foundation. We cannot say that Gonzales's trial testimony failed to present any evidence of economic harm. She testified that Crafton's cognitive deficits would inhibit her career options and that those deficits were already contributing to Crafton earning less than the average high school graduate. Dr. Kirk testified that these cognitive deficits were causally linked to Crafton's lead exposure at the Ruxton Avenue property. While the evidence as to economic harm may not have been particularly strong, there was some evidence presented that Crafton's lead exposure had caused, and would continue to cause, economic injury. The weight and credibility to give to Gonzales's testimony was for the jury to decide. As we have already noted, we reject the notion that a plaintiff's preexisting lower IQ and cognitive impairments negate the possibility of further damage caused by lead exposure. The jury may have determined that Crafton's limited vocational potential was due to her preexisting impairments rather than her lead exposure and, thus, awarded no economic damages. Or it may have found the economic damages were important and

made a significant award. But that decision was for the jury to make. The trial court erred in determining that there was no evidence of economic damages presented.[7]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. COSTS TO BE PAID BY APPELLEES.

[7] The Dackmans appear to argue in passing that Crafton did not establish causation because her experts provided only opinions as to general causation, and that an expert opinion based on scientific literature is too speculative to provide the minimum level of evidence for the case to survive a motion for judgment. We rejected a similar argument in *Roy v. Dackman*:

> Although expert testimony is generally used to establish each of the links of causation in a lead-based paint case, certainly, there is no requirement that causation be proved by direct proof or with absolute certainty. Circumstantial evidence may support an inference of causation as long as it "amounts to a reasonable likelihood, rather than a mere possibility."

219 Md. App. 452, 477 (2014), *cert. granted*, 441 Md. 217 (2015) (internal citations omitted).

The testimony that Crafton suffered from various cognitive and academic deficits, coupled with testimony that medical literature supports the conclusion that Crafton suffered some loss of IQ and cognitive function, provided sufficient circumstantial evidence from which a jury could conclude that Crafton's injuries were caused by her lead exposure at the Ruxton Avenue property. Because causation was not the basis for the trial court's decision, however, we need not address this issue further.