UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0420

September Term, 2015

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HEATHER DAVIS

v.

LEWIN REALTY, III, et al.

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Kehoe,
Friedman,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

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Opinion by Wilner, J.
Dissenting opinion by Friedman, J.

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Filed: May 25, 2016

This is a lead paint poison case. Two issues are raised: (1) whether the Circuit Court for Baltimore City erred in striking two affidavits filed by the plaintiff (appellant) in opposition to the defendants' motion for summary judgment, and (2) having struck those affidavits, the court erred in granting the motion. We shall hold that the court erred in both respects and therefore shall reverse the resulting judgment.

The case was initiated by a 20-count complaint against ten defendants regarding flaking, chipping, and peeling paint in three different houses in the City where, as a young child, appellant lived with her mother and siblings – 911 North Rose Street, 706 North Bradford Street, and 3420 Mondawmin Avenue. We are concerned here with action against the alleged owners of 911 North Rose Street, where appellant lived for the first six months of her life, from August 1992 to February 1993.

The motion for summary judgment was based on assertions that appellant had failed to provide any evidence of flaking, chipping, or peeling paint at the Rose Street property or of any blood lead levels while she lived there. Attached to the motion as Exhibit 1 was the deposition of appellant's mother, Maria Copeland, which, prior to the filing of the motion, constituted all of the evidence regarding the condition of the property during the relevant period – from the time Ms. Copeland rented the house, about a year-and-a-half prior to appellant's birth, until the family moved to the Bradford Street property.

The deposition started off somewhat confrontational, especially with respect to questions regarding personal family details -- who fathered Ms. Copeland's eight

children, including appellant, or why those children eventually were removed from her care and custody by the Department of Social Services. She refused to answer many of those questions and claimed ignorance or a loss of memory regarding other personal details concerning some of the children. Notwithstanding that the deposition took place more than 20 years after she vacated the house, she was able to answer most of the questions regarding the condition of the property. She recalled that it was a row house that had no front yard or porch but did have a fenced back yard. She described in some detail the layout of the first and second floors and the basement, and described which rooms the children slept in.

Ms. Copeland was never asked, nor did she volunteer, whether there was flaking, chipping, or peeling paint in the house. The questions put to her regarding the condition of the property were all general ones. She was asked whether there was anything that needed to be done when she rented the place, and she said "no"—that it looked like "everything was done." She said that the walls had been freshly painted, that there was carpeting on the stairs and in the living room and linoleum in the kitchen. She said she did not remember whether the landlord ever came to do any work at the property or whether there was any work that needed to be done.

Counsel for the defendants was more specific when questioning Ms. Copeland regarding the condition of the Bradford Street property. She asked directly whether there was any chipping, peeling or flaking paint in that property, and Ms. Copeland responded that that condition existed "all over" – in the living room, the dining room, the hallway,

on the living room windowsill, the baseboards and light switches -- and that she kept the children away from the windowsills. No corrections to the deposition were requested by either side.

The motion for summary judgment pointed out that no evidence had been presented that any misstatement was made regarding the condition of the Rose Street property that induced Ms. Copeland to enter the lease, that there was no evidence that there was defective paint at the inception of the lease or at any time during the lease. Attached to appellant's response to the motion were two affidavits – one from Ms. Copeland and one from Dr. Howard Klein, a pediatrician licensed to practice medicine in Maryland and Israel. Ms. Copeland's affidavit, which was in proper form and on personal knowledge, consisted of four short paragraphs, the critical one being paragraph 4, which stated:

> "When we first moved into 911 N. Rose Street the property was freshly painted but the paint was not smooth, it was lumpy and bumpy. When we lived at 911 N. Rose Street there was chipping, peeling and flaking paint on the exterior front door, the interior doors and doorframes, the baseboards throughout the house, the steps, the banister, the handrail and the walls in the bedroom."

Dr. Klein's affidavit was far more extensive, but the crux of it was his opinion that, based on Ms. Copeland's affidavit that there was flaking, chipping, and peeling paint in the home and the fact that lead paint was found in the property in 2002, appellant suffered childhood lead poisoning as a result of lead paint at 911 N. Rose Street and was injured as a result of her exposure to lead at that address.

Appellees moved to strike Ms. Copeland's affidavit pursuant to Rule 2-501(e), which requires the court to strike any part of an affidavit to the extent that it contradicts any prior sworn statements of the affiant, including deposition testimony that has not been corrected pursuant to Rule 2-415. They regarded the affidavit as contradictory to Ms. Copeland's deposition statements that the house was freshly painted when she moved in, that nothing needed to be done, and that she had no memory of anything that needed to be fixed or work that needed to be done while she was living there.

Appellant responded that there was nothing in her affidavit that contradicted anything she said during her deposition. She was never asked at her deposition about chipping, flaking, or peeling paint at the Rose Street property and made no statement regarding whether that condition existed or not. As an exhibit to her response, she attached a second affidavit in which she sought to explain some of the answers she gave at her deposition.

In that affidavit, Ms. Copeland said that, when asked whether anything needed to be done when she moved into the Rose Street house, she answered the question as she understood it – there was a stove and refrigerator and the property had been freshly painted. The paint was not smooth but it had covered the old paint. Similarly, when asked whether there was anything unusual or any work that needed to be done, she did not understand that those questions were intended to address the condition of the paint.

The major point she tried to make in her second affidavit was that, having lived in Baltimore City all her life, she regarded chipping, peeling, and loose paint as a normal

thing to see in the kind of house she could afford to rent. If the attorney had asked her about chipping or peeling paint, as she had done with respect to the Bradford Street property, she would have answered that that condition existed on the exterior front door, the interior doors, doorframes, windowsills, baseboards, steps, banister, handrail, and bedroom walls.

At the hearing on the motions to strike the affidavits and enter summary judgment, the court dismissed that explanation, at least in part, as both contradictory to her deposition testimony and simply not credible. In colloquy with counsel and in announcing his findings, the judge concluded that Ms. Copeland must have understood that the questions regarding the condition of the property at the inception of and during the lease included the condition of the paint, to which she responded either that she could not remember or that nothing needed to be corrected.

The court accepted as non-contradictory her deposition statement that the house was freshly painted but that the paint was "bumpy." It concluded, however, that the description in her affidavit of places where there was chipping, flaking, or peeling paint during the period of the tenancy **was** contradictory to her deposition testimony. Although acknowledging that she was never asked directly about chipping, flaking, or peeling paint, the court found that the questions she was asked – was there anything that needed to be fixed, any work that needed to be done – sufficed to focus her attention on the condition of the paint. Her later explanation, it said, "frankly is not credible."

What we are dealing with here is the issue of the "sham affidavit" – an affidavit that directly contradicts prior sworn testimony by the affiant, without any plausible explanation for the contradiction, usually in an attempt to defeat a motion for summary judgment that otherwise may have merit. The Court of Appeals has dealt with that issue in two principal cases and by the adoption of Md. Rule 2-501(e).

The issue first arose in *Pittman v. Atlantic Realty*, 359 Md. 513 (2000), a lead paint poison case in which, in order to defeat a motion for summary judgment, the plaintiff, after the deadline for discovery had passed, filed an affidavit that directly contradicted a statement in the affiant's prior deposition that would have precluded recovery. The Circuit Court struck the affidavit and granted the motion for summary judgment, and this Court affirmed. In a split decision, the Court of Appeals reversed, declining to adopt the sham affidavit rule, as developed largely by the Federal judiciary, on the ground that it "would shift the credibility determination from the trier of fact at trial, where the trier of fact would have the benefit of observing the witness's demeanor on cross-examination, to the trial court on summary judgment, where the trial court would be limited to a paper record." *Id.* at 540. If such a change should be made, the Court added, it should be done through the Rule-making process. *Id.* at 542.

The Court's Standing Committee on Rules of Practice and Procedure took up the challenge and, in 2003, recommended an addition to Rule 2-501 – the Rule dealing with summary judgments – that would allow courts to strike truly contradictory affidavits. As adopted by the Court, Rule 2-501(e):

(1) Permits a party "to move to strike an affidavit or other statement under oath to the extent that it contradicts any prior sworn statement of the person making the affidavit or statement" and

(2) Upon a finding that the affidavit or other statement under oath "materially contradicts the prior sworn statement," requires the court "to strike the contradictory part unless the court determines that (A) the person reasonably believed the prior statement to be true based on facts known to the person at the time the prior statement was made, and (B) the statement in the affidavit or other statement under oath is based on facts that were not known to the person and could not reasonably have been known to the person at the time the prior statement was made or, if the prior statement was made in a deposition, within the time allowed by Rule 2-415(d) for correcting the deposition."

Rule 2-501(e) now constitutes Maryland's "sham affidavit" rule. The issue, in cases arising under it, is whether the later statement "materially contradicts" the earlier one. The Court of Appeals dealt with that in *Marcantonio v. Moen*, 406 Md. 395 (2008). Applying language from *Kucharczyk v. State*, 235 Md. 334, 338 (1964), the Court regarded statements as contradictory "[w]hen a witness says in one breath that a thing is so, and in the next breath that it is not so." In that situation, the "testimony is too inconclusive, contradictory, and uncertain to be the basis of a legal conclusion." *Marcantonio*, 406 Md. at 410. A contradictory statement is material "if it is significant or essential." *Id.* Accordingly, the Court concluded that a material contradiction under Rule

2-501(e) is "a factual assertion that is significantly opposite to the affiant's previous sworn statement so that when examined together the statements are irreconcilable." *Id.*

Having defined the standard, the *Marcantonio* Court gave some examples as guidance in applying the standard. The statements in *Pittman* were materially contradictory. In deposition, the witness said that the plaintiff had lived in the subject property for only two months, which led the plaintiff's expert to conclude that that was too short a period of exposure to make the property a substantial factor in causing the plaintiff's injuries. In response to a motion for summary judgment, the witness submitted an affidavit stating that the plaintiff resided in the property for more than five months and visited it for seven to eight hours a day before and after living there, which caused the expert to conclude that the property **was** a substantial factor in causing the injuries.

In contrast, the statements at issue in *Marcantonio* – a medical malpractice case – were not regarded as materially contradictory. In deposition, an expert testifying regarding the defendant's departure from the applicable standard of care, said that he would not be rendering an opinion as to the cause of the patient's death, but in a later affidavit he opined that the defendant's failure to properly diagnose the patient's condition was a proximate cause of her death. The Court did not regard that as a material contradiction; the expert did not say on deposition that he **could** not render an opinion as to proximate cause, only that he did not, at the time, intend to do so. Similarly, a second expert's deposition testimony that he would not be expressing an opinion regarding the staging of the patient's cancer in June 2001 or her prognosis in May 2001 was not

materially contradictory to his later affidavit that her cancer would have been curable if properly diagnosed in September 2000. *See also Hinch v. Lucy Webb Hayes Nat. Training*, 814 A.2d 926 (D.C. 2003), cited in *Marcantonio.*

These cases are necessarily fact-specific. In all of them, the trial court first must look carefully at the two statements to see if there truly is an irreconcilable material conflict to the point that both statements cannot be right, and, if it finds that to be the case, determine whether the two conditions stated in Rule 2-501(e) apply. In making those determinations, it must avoid tainting its judgment by considering whether either statement is more credible than the other. In this setting, the judge's view of relative credibility has no play. There either is an irreconcilable conflict or there is not.

Applying these precepts, we believe that the court erred in striking Ms. Copeland's affidavits. There was no irreconcilable material conflict. She was never asked on deposition, and she never volunteered, whether there was chipping, flaking, or peeling paint at the Rose Street property, and her responses to the general questions regarding the condition of the property cannot reasonably be taken as an assertion in that regard. It is difficult, at best, to find an irreconcilable conflict between a statement and no statement, especially when, in the first instance, for whatever reason, no statement was sought. The affidavits should not have been stricken, and, with those affidavits in the record, the entry of summary judgment was inappropriate.

**JUDGMENT REVERSED; CASE REMANDED TO CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS; APPELLEE TO PAY THE COSTS.**

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Dissenting Opinion by Friedman, J.

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Filed: May 25, 2016

I respectfully dissent. At her deposition, the witness testified that "everything was done," that the walls were "freshly painted," and that she didn't remember anything needing landlord repairs. In her subsequently-prepared affidavits, however, she claimed that her recollection had improved and that she now remembered the "chipping, peeling and flaking paint" at the Rose Street property necessary to avert summary judgment. In my view, these affidavits are palpably false and materially contradict the witness's deposition testimony. Thus, I think the trial court was correct in striking the affidavits pursuant to Rule 2-501(e) and I would affirm.