Circuit Court for Baltimore City
Case No. 24-C-13-003901

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 419

September Term, 2015

DRAYON TINDALL

v.

STANLEY ROCHKIND, ET AL.

Woodward, C.J.,
Kehoe,
Leahy,

JJ.

Opinion by Woodward, C.J.

Filed: July 24, 2018

This appeal originates from a complaint filed by Drayon Tindall, appellant, against several property owners, including Stanley Rochkind, Charles Runkles, N.B.S., Inc., and Dear Management Construction Company, appellees, for damages allegedly caused by exposure to lead-based paint while visiting or residing at properties owned or managed by appellees from 1992 to 1999. After a hearing, the Circuit Court for Baltimore City granted appellees' motion for summary judgment, ruling that appellant failed to adduce sufficient evidence that appellees' property located at 4131 West Rogers Avenue ("West Rogers Avenue"), Baltimore, Maryland,[1] was a reasonably probable source of appellant's lead exposure and subsequent injuries.

On appeal, appellant presents two questions for our review, which we have rephrased as follows:[2]

[1] Unless otherwise specified, all properties are located in Baltimore, Maryland.

[2] The issues as presented in appellant's brief are as follows:

I. Whether the trial court erred when it granted appellees' motion for summary judgment.

A. In a circumstantial evidence case, where there is a dispute of material fact as to when a lead poisoned child resided at the defendant landlord's property – as opposed to other properties – in order to make a *prima facie* case as to the source of the child's lead exposure, must the child eliminate the disputed properties as a source of lead exposure?

B. Assuming *arguendo* that appellant needed to go through the "exclusion" exercise, did the trial court err when it required appellant's medical expert to exclude other "potential" sources of lead – as opposed to other "reasonably probable" sources of lead?

1. Did the circuit court err in granting appellees' motion for summary judgment?

2. Did the circuit court abuse its discretion when it denied appellant's motion and supplemental motion for reconsideration pursuant to Maryland Rule 2-534?

We answer both questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

On June 13, 2013, appellant filed a complaint against appellees alleging that he suffered injuries resulting from exposure to chipping and flaking lead-based paint while living at West Rogers Avenue. Appellees filed answers to the complaint denying any liability.

Discovery revealed a conspicuously vague residential history for appellant. Taking all evidence in the light most favorable to appellant, we attempt to recreate appellant's residential history from his answers to interrogatories[3] and the deposition of appellant's

II. Whether the trial court abused its discretion when it denied appellant's motion for reconsideration.

   A. Did the trial court abuse[] its discretion when it failed to recognize and remedy its error of law?

   B. Did the trial court abuse[] its discretion when it applied the incorrect standard when ruling on appellant's motion for reconsideration?

[3] Appellant's answers to interrogatories are curious and perplexing, because appellant signed his name in *cursive* and *under the penalties of perjury* despite appellant's own expert, Dr. Klein, writing in his expert report:

mother, Cheryl Woods Tindall, who had difficulty remembering the specifics of appellant's residential history. *See, e.g.*, *Rowhouses, Inc. v. Smith*, 446 Md. 611, 631 (2016) ("[The appellate court] review[s] the record in the light most favorable to the non-moving party[,] and construe[s] any reasonable inferences that may be drawn from the well-plead facts against the moving party." (alterations in original) (citations omitted)).

Appellant was born prematurely on June 15, 1992, requiring him to stay in the hospital for the first two weeks of his life. After appellant's release, he began residing at 904 Collington Avenue ("Collington Avenue") with several family members. Tindall described the condition of the house at Collington Avenue as "ran [sic] down. Had a little peeling. Little paint chips. Basement was real bad." During this time, appellant also visited his father at 3525 West Belvedere ("West Belvedere") and lived with his father and other family members at West Belvedere while Tindall was incarcerated for about thirty-

> Drayon had little success in school although he received special education services. He had a full neuropsychological evaluation on 9/18/04 by Dr. McCullough. During the testing, he **showed a lack of awareness of the surroundings** & tester; & needed continuous guidance from his mother. He displayed rhythmic swaying. **He showed no awareness of symbolic meaning of words,** although the mother reported some pairing of words with common activities & the ability to take her hand & lead her to what he wanted. **His adaptive ability was at the one year level & his I.Q. was in the severely retarded range of 25-30 with autistic features.** He was untestable by Dr. Hurwitz in 2006.

(Emphasis added). Moreover, Dr. Klein stated that appellant has an "inability to learn to the level of being able to communicate or take care of himself." We, however, will consider appellant's answers the interrogatories admissible despite the extremely odd circumstances surrounding its creation, because no party challenged its admissibility at the trial level.

eight days in 1992. Tindall testified that the West Belvedere house was "nice" and did not have chipping or flaking paint.

Sometime in 1993, appellant and Tindall began living at 4719 Old York Road ("Old York Road") with appellant's great grandmother and several other family members. Tindall described the property at Old York Road as "all right[,]" "nice[,]" and absent of chipping paint. During this time, the record does not contain any testimony or documentation concerning whether appellant visited any other properties.

Sometime in 1994, appellant began residing at West Rogers Avenue with several family members including his parents, sister, aunt, uncle, and cousins. Tindall testified that she, appellant, appellant's father, and appellant's sister all lived in the basement, which had "peeling [ ] paint, a little chipping[,] and a lot of dust." Tindall also stated that there was chipping paint in the bedrooms upstairs and living room. While living at West Rogers Avenue, Tindall stated that she visited her grandmother at Old York Road and her in-laws at 4309 Ridgewood Avenue. According to Tindall, she spent about "one and a half [w]inter[s]" at West Rogers Avenue and was kicked out of West Rogers Avenue "one snowy day." Appellant's answers to interrogatories state that appellant lived at West Rogers Avenue until 1995. Tindall testified that after leaving West Rogers Avenue, she moved to 4309 Ridgewood Avenue with her husband, daughter, and appellant.

Appellant's first elevated blood-lead level of 26 µg/dL was from a blood sample taken on January 5, 1995. Tindall could not remember where she lived when she first discovered that appellant had elevated blood-lead levels. Moreover, it is unclear whether appellant had any hand to mouth activity during his residency at West Rogers Avenue,

because the only evidence in the record concerning this topic is in appellant's answers to interrogatories:

> INTERROGATORY NO. 10: Set forth in detail a description of the non-food objects you claim to have eaten and chewed, stating the location of each described thing and object and the name and address of each person who witnessed such eating and chewing by you.
>
> ANSWER: [Appellant] routinely mouthed fingers and toys.

Appellant's answers to interrogatories do not state when appellant put his fingers and toys in his mouth or where he was living at the time. Tindall's deposition testimony does not provide any additional information, because she did not testify to any mouthing activity by appellant.

On November 17, 2014, Rochkind filed a motion for summary judgment. Rochkind claimed that appellant's medical records for the January 5, 1995 test listed appellant's address as Old York Road, not West Rogers Avenue,[4] and that appellant had failed to produce any experts on causation. On November 25, 2014, the other appellees filed a line joining Rochkind's motion for summary judgment.

On December 9, 2014, appellant filed his opposition to the motion for summary judgment. Appellant argued that there was a genuine dispute of material fact as to when he resided at West Rogers Avenue. Appellant also produced for the first time an affidavit and expert report from a medical expert, Howard Klein, M.D. Dr. Klein is a pediatrician who has diagnosed and treated hundreds of children for lead poisoning. In his affidavit,

[4] The slip for the January 1995 blood-lead test lists appellant's address as 4719 Old York Road.

Dr. Klein concluded that,

> even without direct evidence of lead, given all the other evidence in this case, including, but not limited to, the age of the property, the time [appellant] lived and/or visited there, [appellant's] blood-lead levels and the condition of the painted surfaces, it is my opinion, within a reasonable degree of medical probability, that 4131 W. Rogers Avenue contained lead based paint and was a substantial contributing [factor] to [appellant's] exposure to lead and [his] resultant injuries.

A hearing on the motion for summary judgment was held on January 26, 2015. Rochkind argued that appellant failed to produce evidence that he lived at West Rogers Avenue during a time period that coincided with his elevated blood-lead levels and that appellant failed to produce any medical expert on causation.

The circuit court then rendered the following oral ruling:

> In this case, I think [appellant] is correct that there is a factual dispute, genuine factual dispute about whether the plaintiff ever lived in 4131 West Rogers and when the plaintiff lived there.
>
> It may be that the defense has the much better argument in terms of not having any records of that residency and the relative weakness of the plaintiff's mother's testimony, but it is testimony that claims the period of residence. And it does tie it to one elevated blood lead level result during that time period.
>
> I am troubled, as talked about it, about the issue of Dr. Klein's status, but I'm not going to decide that issue in this case. Because I conclude instead that Dr. Klein lacks a sufficient factual basis for his opinions on medical causation in this case.
>
> Reading his affidavit carefully, it's interesting to have an expert responding to case law in his affidavit, but he states in Paragraph 8 that "I am capable" - - responding specifically to the Ross case, "I am capable of definitively determining the sources of a child's lead exposure. And I do not rely simply on government agencies to make that determination."

> And yet almost the entirety of Dr. Klein's opinion amounts to, "**This is an old property. And I therefore assume or believe that the deteriorated paint which is testified to in the property was lead paint and was a source of exposure for this plaintiff and was [a] substantial cause.**"
>
> * * *
>
> So I conclude that his opinion, even if accepted on a discovery basis, is insufficient to establish the issue of medical causation in this case.
>
> Now, on that basis, I'll grant summary judgment to [ ] Rochkind. I will grant that motion as well for the other, I think it's three other [appellees] in this case.

(Emphasis added).

Although the circuit court used the term "medical causation," we interpret the court's ruling to be that Dr. Klein could not testify concerning the source of appellant's lead exposure. Because appellant failed to present sufficient evidence to either establish West Rogers Avenue as a source of appellant's lead exposure or provide a sufficient factual basis for Dr. Klein to render an expert opinion that West Rogers Avenue was a source, the court entered summary judgment in favor of appellees.

After the circuit court's ruling, appellant filed a timely motion for reconsideration, and then three weeks later filed a supplemental motion for reconsideration, which included, for the first time, a report stating that lead-based paint was present at West Rogers Avenue. Rochkind filed oppositions to both of appellant's motions for reconsideration, and the court subsequently denied appellant's motions without a hearing.

After dismissing the remaining property owners, appellant timely filed this appeal. Additional facts will be set forth below as they become necessary to the resolution of this

appeal.

DISCUSSION

This case is all about causation, and specifically, whether appellant offered legally sufficient evidence of causation to connect his injuries to lead exposure from the West Rogers Avenue property. The circuit court found that he had not, and we agree.

I. Motion for Summary Judgment

In the present case, the circuit court granted appellees' motion for summary judgment, concluding that appellant failed to produce sufficient circumstantial evidence to make out a *prima facie* case regarding the causation element of a negligence claim. The court predicated the grant of summary judgment on the determination that Dr. Klein lacked a sufficient factual basis to conclude that West Rogers Avenue was a source of appellant's lead exposure. Accordingly, the court concluded that appellant could not establish causation and granted appellees' motion.

On appeal, appellant contends that the court erred, because there was a sufficient factual basis for Dr. Klein's opinion *and* sufficient evidence to show that West Rogers Avenue was the only reasonably probable source of appellant's lead exposure. The Court of Appeals quoted our explanation of the dynamics of such an argument in *Hamilton v. Kirson*, 439 Md. 501, 520 (2014):

> "These two arguments go hand in hand because the evidence that the [appellants] presented on causation was the same evidence the experts used to form their opinions. **Thus, the circuit court decision contains two findings: 1) that the experts did not have a sufficient factual basis for their conclusions that the [subject property] was a substantial contributing source, and 2) that the**

> **evidence the experts used as their factual basis was not enough to independently establish causation.**"

(Emphasis added) (quoting *Hamilton v. Kirson*, No. 1530, September Term, 2011, slip op. at 14-15 (Md. App. April 30, 2013), *cert. granted*, 433 Md. 513 (2013)). Despite the "dual nature" of such a decision, the instant case involved the grant of summary judgment, and we review it as such. *See id.* at 520-21.

A circuit court may grant a moving party's 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) (2018) (recodifying Md. Rule 2-501(e) (2014)). Under this rule, trial courts determine only issues of law, resolving no disputed issues of fact. Accordingly, "the standard for appellate review of a trial court's grant of a motion for summary judgment is simply whether the trial court was legally correct, and is subject to no deference." *Kirson*, 439 Md. at 521 (internal quotation marks and citations omitted).

The Court of Appeals has explained appellate review of a grant of summary judgment as follows:

> [I]n reviewing a grant of summary judgment, [the appellate court] review[s] independently 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. [The appellate court] review[s] the record in the light most favorable to the non-moving party[,] and construe[s] any reasonable inferences that may be drawn from the well-plead facts against the moving party.

Rowhouses, Inc., 446 Md. at 631 (alterations in original) (citation omitted).

Appellant contends that the circuit court erred in granting summary judgment in favor of appellees, because there was a dispute of material fact over whether appellant ever lived at West Rogers Avenue and, if so, when he lived there. Appellant argues that he presented sufficient evidence to establish that he was exposed to lead-based paint at West Rogers Avenue through appellant's mother's testimony, and therefore Dr. Klein could opine as to the source of appellant's lead exposure. In addition, appellant asserts that the court erred in holding that he had to exclude other reasonably probable sources of lead. Appellant argues, instead, that he was required to rule out only reasonable probable sources that had been identified, of which there were none.

Rochkind responds[5] that appellant failed to satisfy his burden of proof, because Dr. Klein lacked a sufficient factual basis for his opinion that West Rogers Avenue was the source of appellant's lead exposure. Rochkind asserts that Dr. Klein's factual basis was insufficient, because he failed to rule out other residences as reasonably probable sources of appellant's lead exposure. Rochkind points out that appellant visited two other houses, 4309 Ridgewood Avenue and 4719 Old York Road, during the period that he resided at the subject property, but they were not ruled out by appellant or his expert.

As discussed above, when "reviewing a grant of a summary judgment, we are first concerned with whether a genuine dispute of material fact exists and then whether the movant is entitled to summary judgment as a matter of law." *Grimes v. Kennedy Krieger Inst., Inc.*, 366 Md. 29, 71 (2001) (internal quotation marks and citations omitted). We

[5] Rochkind is the only appellee to file a brief in the instant appeal.

note, as a preliminary matter, that appellant mischaracterizes the nature of the circuit court's ruling. It seems that appellant believes that the court granted appellees' motion for summary judgment by resolving the disputed fact of if and/or when appellant lived at West Rogers Avenue, thus erroneously concluding that Dr. Klein could not have a factual basis to opine as to the source of appellant's lead exposure.

Appellant's view, however, was not the basis for the circuit court's ruling. The court clearly recognized that there was a factual dispute over if and/or when appellant lived at West Rogers Avenue. But, in reviewing appellees' motion, the court construed all reasonable inferences in favor of appellant, and in effect accepted the fact that appellant lived at West Rogers Avenue when his blood test, which showed an elevated blood-lead level, was taken on January 5, 1995. Therefore, there was no genuine dispute of material fact to preclude the grant of summary judgment. The court went on to determine whether appellees were entitled to judgment as a matter of law. Reviewing the evidence adduced in a light most favorable to appellant, the court concluded that appellant had not presented sufficient evidence to establish causation. Because appellant failed to make out a *prima facie* case of negligence, the court ruled that appellees were entitled to judgment as a matter of law. Accordingly, our task now is to determine whether that holding was legally correct. For the reasons stated below, we hold that it was.

To state a claim for negligence, a party 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." *Kirson*, 439 Md. at 523-24. When a

plaintiff alleges negligence based on a violation of a lead paint statute or ordinance, the plaintiff has the burden to present sufficient facts to demonstrate that "(a) the violation of a statute or ordinance designed to protect a specific class of persons which includes the plaintiff, and (b) that the violation proximately caused the injury complained of." *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 79 (2003); *see also Kirson*, 439 Md. at 527 ("It is fundamental that in a negligence action the plaintiff has the burden of proving all the facts essential to constitute the cause of action." (internal quotation marks and citation omitted)).

Part (a) of *Brooks* may be satisfied by showing that a defendant violated Sections 702 and 703 of the Baltimore City Housing Code, which were enacted to "protect children from lead paint poisoning by putting landlords on notice of conditions which could enhance the risk of such injuries." *Brooks*, 378 Md. at 81 (internal quotation marks and citation omitted). To be a violation of the City Housing Code, "all that must be shown is that there was flaking, loose[,] or peeling paint." *Kirson*, 439 Md. at 525 (internal quotation marks and citation omitted). Where a plaintiff has produced evidence of peeling, chipping, or flaking paint, "such a Code violation permits merely an inference of *prima facie* negligence on the part of the homeowner or landlord." *Id.* at 525-26. As the Court explained in *Kirson*, "[s]uch an inference, however, **does not eliminate the requirement** that the plaintiff prove that the landlord's negligence *caused proximately* the injury." *Id.* at 526 (italic emphasis in original) (bold emphasis added).

Here, the circuit court decided the motion on the issue of causation. In doing so, the court accepted the premise that appellant lived at West Rogers Avenue during the relevant time and that the property was afflicted with chipping, peeling, or flaking paint. With such

premise, appellant made out a *prima facie* case that appellees committed negligent acts in violation of the City Housing Code. We therefore address whether the court was correct in determining that the evidence adduced by appellant was insufficient to make out a *prima facie* showing of causation.

In order to prove proximate causation in a negligence case based on lead paint, the plaintiff must establish a series of links: "(1) the link between the defendant's property and the plaintiff's exposure to lead; (2) the link between specific exposure to lead and the elevated blood-lead levels, and (3) the link between those blood-lead levels and the injuries allegedly suffered by the plaintiff." *Ross v. Housing Authority of Baltimore City*, 430 Md. 648, 668 (2014). In other words, "[t]o be a substantial factor in causing [appellant's] alleged injuries, the [subject property] must have been a source of [appellant's] exposure to lead, that exposure must have contributed to the elevated blood lead levels, and the associated increase in blood lead levels must have been substantial enough to contribute to [his] injuries." *Id.* A plaintiff may prove the causation links "through circumstantial evidence, as well as direct evidence or a mixture of the two." *Kirson*, 439 Md. at 527.

In this case, we are concerned with the first link, "the link between the defendant's property and the plaintiff's exposure to lead." *Ross*, 430 Md. at 668. "To prove this link, circumstantial evidence may be used, so long as it creates a *reasonable likelihood or probability* rather than a possibility supporting a rational inference of causation, and is not wholly speculative." *Kirson*, 439 Md. at 529 (emphasis added) (internal quotation marks and citations omitted). There is a "reasonable probability" that a subject property is a source of a plaintiff's lead exposure "where there is a **fair likelihood** that the subject property

contained lead-based paint and was a source of [ ] lead exposure." *Rogers v. Home Equity USA, Inc.*, 453 Md. 251, 265 (2017) (emphasis in original) (internal quotation marks and citation omitted).

1. *Dow* and *Kirson* Theories of Causation

The Court of Appeals has recognized two ways in which a lead paint plaintiff can use circumstantial evidence to establish a subject property as a reasonably probable source of lead exposure: (1) a *Dow* theory of causation, and (2) a *Kirson* theory of causation. *See id.* at 265-66 ("Maryland appellate courts have recognized two ways in which a lead paint plaintiff can establish the subject property as a reasonably probable source of his lead exposure and resulting elevated blood lead levels.").

First, under a *Dow* theory of causation, "a plaintiff can defeat a motion for summary judgment by presenting evidence that the subject property is the *only possible source* of the plaintiff's lead exposure." *Id.* at 265 (emphasis added) (citing *Dow v. L & R Props. Inc.*, 144 Md. App. 67, 75-76 (2002)). In *Dow*, there was no direct evidence of lead-based paint at the subject property; however, the plaintiff argued that there was sufficient circumstantial evidence of lead-based paint to survive summary judgment. *Dow*, 144 Md. App. at 73-74. Specifically, the plaintiff produced evidence showing that

> (1) the child victim spent most of her time at the subject property where she lived and did not have contact with other possible sources of lead during the relevant period; (2) the child was observed ingesting regularly flaking or chipping paint at that property; (3) the child played frequently in the area of the flaking or chipping paint; and (4) the child had high blood lead levels during that time period, i.e., developed lead poisoning.

Kirson, 439 Md. at 531 (summarizing *Dow*). This Court agreed with the plaintiff, holding that the circumstantial evidence was sufficient to defeat defendant's motion for summary judgment. *Dow*, 144 Md. App. at 74. We reasoned that the fact that the child did not spend time anywhere else and was not exposed to lead anywhere else, coupled with the undisputed fact that homes built before 1950 often contained lead-based paint, "could indeed support an inference that the paint in question contained lead." *Id.* at 76.

In *West v. Rochkind*, 212 Md. App. 164, *cert. denied*, 435 Md. 270 (2013), we elaborated on the causation theory established in *Dow* in an attempt to resolve any confusion. There, the plaintiff alleged that he had been exposed to lead-based paint while living at the subject property. *Id.* at 166. The plaintiff's negligence claim was based on circumstantial evidence because the subject property, since razed, had not been tested for lead. *Id.* The defendants filed a motion for summary judgment, which the circuit court granted, concluding that the plaintiff had failed to make out a *prima facie* negligence case because the plaintiff's mother stated during deposition that the plaintiff either resided or spent substantial amounts of time at other properties during the relevant time period. *Id.* Because the plaintiff's residential history was uncertain and there was no direct evidence of lead paint, the court reasoned that the plaintiff "could not point to [the subject property] as the source of his lead poisoning." *Id.*

On appeal, we agreed with the circuit court and affirmed. *Id.* We summarized a causation theory under *Dow* as follows:

> [W]here there [is] no direct evidence that [the subject property] even contained lead paint, [the plaintiff] may only rely on that critical fact, as a necessary part of his circumstantial evidence, if he can show by

> the process of elimination that [the subject property] was the only possible cause for the critical effect of lead poisoning. We may only infer the existence of lead paint at [a 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.

Id. at 175.

We distinguished the plaintiff's case in *West* from *Dow*, explaining that in *Dow* "the process of elimination showed ineluctably that [the subject property] had to have been (not could have been, but had to have been), a place containing lead paint." *Id.* at 172. In the plaintiff's case, however, there was "no such process of elimination at work." *Id.* We concluded that, because the plaintiff could show "[a]t best" "that he may have been exposed to lead at any or all of the three or four residences where he spent substantial time[,]" the plaintiff failed to establish the threshold premise that lead-based paint was even present in the paint at the defendant's property. *Id.* at 176-77.

The Court of Appeals affirmed the central holdings in *Dow* and *West* in *Kirson*, a consolidated appeal. 439 Md. at 536-37. In *Kirson*, the plaintiffs asked the Court to "permit a fact-finder to draw multiple inferences from a singular group of facts, even though [the plaintiffs] failed to exclude other potential sources of lead in these cases." *Id.* at 532. In denying the plaintiffs' request, the Court held that, where a plaintiff "does not produce evidence to support another theory of causation and, instead, relies on a causation theory similar to that espoused in *Dow*, the validity of the necessary inference is limited to those circumstances where the plaintiff is able also to exclude other reasonably probable sources of lead exposure." *Id.* at 538. The Court explained:

> Under a *Dow* theory of causation, a plaintiff 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. Where the plaintiff fails to rule out other reasonably probable sources, the necessary inferences for a *Dow* theory of causation cannot be drawn with sufficient validity to allow the claim to survive summary judgment.

Id. at 536-37. The Court concluded that, because the plaintiffs relied on a *Dow* theory, they were required to exclude other probable sources of lead exposure in order to establish causation. *See id.* at 543-44, 546.

The Court cautioned, however, that a *Dow* theory is not the only way to prove circumstantially that a subject property contained lead-based paint. *See id.* at 537 ("That certain facts are missing to establish a *Dow* theory of causation, however, does not mean that the lead-poisoned plaintiff has no way to prove circumstantially a *prima facie* negligence case."). The second way a plaintiff can make out a *prima facie* case using circumstantial evidence is "by presenting evidence related *solely* to the subject property." *Home Equity*, 453 Md. at 266 (emphasis added) (synthesizing *Kirson*). Under this second theory, called the *Kirson* theory, the plaintiff can "rule in" the subject property by presenting sufficient evidence "to show that the subject property was a reasonably probable source of [the plaintiff's] injury-causing exposure."[6] *See id.* In explaining this theory in *Kirson*, the Court posed a hypothetical situation in which direct testing of the subject property is impossible, but (1) the subject property is surrounded by four row houses, (2)

[6] In *Home Equity*, the Court of Appeals noted that the *Kirson* theory of causation can be satisfied by either direct or circumstantial evidence. 453 Md. at 266. The Court said: "The plaintiff can 'rule in' the subject property as a reasonably probable source through either direct or circumstantial evidence." *Id.*

the "four row houses were built at the same time in the 1920s" and were owned by the same entity, and (3) the houses on either side of the subject property tested positively for lead paint on the interior of the home. *Kirson*, 439 Md. at 538. According to the Court, this scenario would present sufficient "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.*

Returning to the instant case, it is undisputed that appellant has presented no direct evidence that West Rogers Avenue contained lead-based paint. Therefore, appellant must rely on circumstantial evidence to prove that West Rogers Avenue contained lead paint. Specifically, appellant produced the following circumstantial evidence in support of his contention: (1) appellant's elevated blood-lead level of 26 µg/dL, recorded on January 5, 1995; (2) appellant's answers to interrogatories stating that he lived at the West Rogers Avenue property from 1994-1995; (3) appellant's mother's testimony that there was chipping, peeling, and flaking paint at West Rogers Avenue when the family lived there; and (4) evidence that West Rogers Avenue was built before 1950. Appellant maintains that such evidence, coupled with the fact there were "no other contemporaneous sources identified[,]" is sufficient to establish the inference that West Rogers Avenue contained lead paint. We disagree.

The evidence adduced by appellant shows that appellant exhibited an elevated blood-lead level while residing at a pre-1950 property with chipping, peeling, and flaking paint. Appellant asserts that "[c]ertainly a jury could find that this set of facts established that it was more likely than not that lead was present in the subject property—and this is

the standard of proof explicitly required by [*Kirson*]." This Court and the Court of Appeals, however, have consistently held that such evidence is insufficient to establish a reasonable inference that a subject property contains lead-based paint. For example, in one of the consolidated cases in *Kirson*, the plaintiffs claimed they suffered lead-based paint poisoning while residing for consecutive periods at two dwellings but did not present any direct evidence of lead-based paint. 439 Md. at 507. The plaintiffs argued that they presented sufficient circumstantial evidence to establish that there was lead-based paint, based on evidence that: (1) they "lived in and/or visited the subject properties during the time period that they demonstrated elevated blood lead levels;" (2) "the residences had chipping, peeling, or flaking paint during the relevant time period;" (3) the residences were built before 1979; and (4) the plaintiffs exhibited elevated blood lead levels at the time they lived in the subject properties. *Id.* at 508 (footnote omitted).

The Court of Appeals held that the above circumstantial evidence was insufficient to establish "separate and reasonable inferences of the presence of lead at the subject property." *Id.* at 532. In affirming the circuit court's grant of summary judgment, the Court noted that the plaintiffs requested the Court to "permit a fact-finder to draw multiple inferences from a singular group of facts, even though [the plaintiffs] failed to exclude other potential sources of lead" in the case. *Id.* Because the plaintiffs did "not produce evidence to support another theory of causation and, instead, relie[d] on a causation theory similar to that espoused in *Dow*," the plaintiffs were required to "exclude other reasonably probable sources of lead exposure." *See id.* at 538, 543-44, 546.

Appellant contends, however, that he is not proceeding under a *Dow* theory of causation and thus, he was not required to exclude other reasonably probable sources of lead to establish causation. Appellant is in effect claiming that he is proceeding under a *Kirson* theory of causation, which, as we have stated, requires enough evidence, related solely to the subject property, "to establish that it is reasonably probable that the subject property contributed to his lead poisoning." *Home Equity*, 453 Md. at 266. Unfortunately for appellant, he did not adduce enough evidence to "rule in" West Rogers Avenue as a reasonably probable source of his lead exposure.

Nevertheless, appellant argues that he was not required to exclude other probable sources of lead exposure because none were identified. Such argument is both factually and legally flawed. First, evidence put forth by appellant did identify other probable sources of lead exposure. In her deposition, appellant's mother stated that while living at West Rogers Avenue, appellant spent time visiting his paternal grandmother's house at 4309 Ridgewood Avenue and his maternal great-grandmother's house at 4719 Old York Road. Appellant proffered no evidence to exclude these properties as reasonably probable sources of lead exposure. Because appellant is asking us to make an inference similar to that espoused in *Dow*, "the validity of the necessary inference is limited to those circumstances where the plaintiff is able also to exclude other reasonably probable sources of lead exposure." *Home Equity*, 452 Md. at 280 (internal quotation marks and citation omitted). By failing to exclude these other sources, appellant's evidence was insufficient to survive summary judgment.

Second, even assuming *arguendo*, that there were no other sources of lead exposure identified in the record, appellant's argument is legally flawed. In *Dow*, the plaintiff presented similar evidence, including, evidence of elevated blood levels, deterioration at the property, and age of the property. 144 Md. App. at 70-71. Moreover, the subject property was the only source identified by the plaintiff. *Id.* at 76. On this evidence alone, the plaintiff would not have survived summary judgment. *See id.* The plaintiff, however, also presented testimony from her mother stating that the plaintiff spent substantially all of her time at the subject property, did not visit any other properties, and was not exposed to any other sources of lead. *Id.* This Court explained that the mother's testimony coupled with the rest of the evidence could establish an inference that the subject property contained lead, because there was no other possible source. *Id.* at 76. The evidence from the plaintiff's mother in *Dow* was the connecting link between the plaintiff's elevated blood-lead levels and the subject property. *See id.* ("That, coupled with the undisputed fact that homes built before 1950 often contain lead-based paint, could indeed support an inference that the paint in question contained lead."). In the instant case, appellant did not produce similar evidence that appellant spent substantially all of his time at West Rogers Avenue and was not exposed to any other sources of lead. Simply put, appellant needed to produce something more to link his elevated blood-lead levels to the condition of the property.

In sum, despite his contention to the contrary, appellant proceeded on a *Dow* theory of causation. Appellant's evidence was insufficient to withstand summary judgment, because such evidence did not exclude other reasonably probable sources of appellant's lead exposure.

2. Expert Opinion of Dr. Klein

Appellant attempts to bridge the evidentiary gap in his circumstantial proof by pointing to Dr. Klein's affidavit and expert report. Specifically, Dr. Klein opined that West Rogers Avenue was a source of appellant's lead exposure. He based his opinion on (1) appellant's elevated blood-lead levels while residing or visiting West Rogers Avenue, (2) the age of the house, and (3) the deteriorated condition of the house. Dr. Klein also stated that "[i]n rendering this opinion . . . I have taken into account that there may have been other residential sources of exposure[,]" but did not specifically address the other properties appellant visited while living at West Rogers Avenue.

We had an opportunity to review a similar situation in *Hamilton v. Dackman*, 213 Md. App. 589 (2013), *cert. denied*, 439 Md. 329 (2014). In that case, the plaintiff claimed that he was exposed to lead-based paint at his father's home on Appleton Street, where the plaintiff visited and stayed sometimes overnight. *Id.* at 592. During discovery, the plaintiff identified three other properties where he lived when he exhibited elevated blood-lead levels: (1) the Gilmor Street Property from 1992 to 1993; (2) the Harlem Avenue Property from 1993 to 1995; and (3) the Fulton Avenue Property from 1995 to 1999. *Id.* The plaintiff's medical expert, Dr. Jacalyn Blackwell-White, "opined that the Appleton Street, Harlem Avenue, and Fulton Avenue properties all were sources of lead-based paint and that [the plaintiff]'s injuries were caused by exposure at the sites[.]" *Id.* at 597. Dr. Blackwell-White explained that both the Appleton Street and Harlem Avenue properties were old and "in the absence of physical lead assessment information, *are presumed to have contained lead based paint*." *Id.* (emphasis added). Dr. Blackwell-White

"confidently called the Appleton Street property a 'smoking gun' [source of lead exposure,] while saying the same of the Harlem Avenue property." *Id.* at 615. The circuit court granted the defendant's motion for summary judgment, holding that the plaintiff "had not produced evidence sufficient to establish a *prima facie* case of lead exposure at the one property at issue here, [Appleton Street,] and the court declined to allow [the plaintiff's expert] to fill the causal gaps." *Id.* at 591-92.

Following the Court of Appeals' decision in *Ross v. Housing Authority of Baltimore City*, 430 Md. 648 (2013), this Court affirmed the exclusion of Dr. Blackwell-White's source causation testimony on appeal. We explained that, "although an expert *can* helpfully connect the casual dots between lead in a building and a plaintiff's injuries . . . an expert cannot transform thin evidence or assumptions into viable causal connections simply by labeling them an expert opinion." *Hamilton*, 213 Md. App. at 608 (emphasis in original). Moreover, "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 house." *Id.* at 612. Because Dr. Blackwell-White based her conclusion on an assumption that residences built before 1950 contain lead, rather than evidence, this Court held that Dr. Blackwell-White did not have an adequate factual basis to opine as to the plaintiff's source of lead exposure. *Id.*

Here, we similarly conclude that Dr. Klein lacked an adequate factual basis to opine as to the source of appellant's lead exposure. Dr. Klein opined that "even without direct evidence of lead," West Rogers Avenue was the source of appellant's lead exposure because of "the age of the property, the time [appellant] lived and/or visited there,

[appellant's] blood-lead levels and the condition of the painted surfaces[.]" Although Dr. Klein stated that he did "not presume that an older property had lead," the entirety of his opinion was largely premised on the fact that West Rogers Avenue was an old property.[7] As the circuit court aptly noted in reviewing Dr. Klein's affidavit, "almost the entirety of Dr. Klein's opinion amounts to, 'This is an old property. And I therefore assume or believe that the deteriorated paint which is testified to in the property was lead paint and was a source of exposure for this [appellant] and was a substantial cause.'" *Cf. Levitas v. Christian*, 454 Md. 233, 248-49 (2017) (upholding Dr. Klein's source causation expert testimony where he concluded "with a reasonable degree of medical certainty" that the subject property was a reasonably probable source of the plaintiff's lead exposure based on an Arc Report detecting lead in the interior of the subject property, the age of the house, Department of Housing and Community Development records, a Maryland Department of the Environment certificate indicating the subject property was not lead free, the plaintiff's elevated blood-lead levels, and family members' testimonies).

In *Kirson*, the Court stated that "a presumption that houses built during a certain time period contain typically lead-based paint . . . is insufficient for an expert to reach the conclusion that the interior of a specific property contained lead-based paint during the relevant time period." 439 Md. at 544. Moreover, as we explained in *Dackman*, "an expert cannot transform thin evidence or assumptions into viable causal connections simply by

[7] At the time that Dr. Klein rendered his opinion, he did not have the Arc Environmental, Inc., ("Arc") report, discussed *infra*, that showed the presence of lead paint at West Rogers Avenue. Dr. Klein signed his affidavit on December 9, 2014. The Arc report stated that West Rogers Avenue was tested on February 10, 2015.

labeling them an expert opinion." 213 Md. App. at 608. Because Dr. Klein's affidavit was based on "thin evidence or assumptions," we conclude that Dr. Klein did not have a sufficient factual basis to opine that West Rogers Avenue was the source of appellant's lead exposure.[8]

For the reasons stated above, the circuit court did not err in concluding that appellees were entitled to judgment as a matter of law in their favor. The evidence that appellant adduced to establish causation required an inference of the existence of lead at West Rogers Avenue based on appellant's elevated blood-lead level and the property's age and condition. Under the *Dow* theory of causation, plaintiffs seeking to avail themselves of such inference must exclude other reasonably probable sources of lead exposure. Because appellant did not do so, he failed to make out a *prima facie* case of negligence. Moreover, appellant's expert, Dr. Klein, could not bridge the evidentiary gap to establish causation because his opinion was based on the same insufficient factual basis. Without an evidentiary link tying together appellant's elevated blood-lead level and the age and condition of West Rogers Avenue, appellant presented only a mere *possibility* that West

[8] Because we conclude that Dr. Klein lacked a sufficient factual basis to opine that West Rogers Avenue was a source of appellant's lead exposure, we express no opinion as to Dr. Klein's qualifications to offer expert testimony as to medical causation. *See Roy v. Dackman*, 445 Md. 23, 53 (2015). Here, unlike in *Roy*, there was no other evidence or testimony to establish West Rogers Avenue as a source of appellant's lead exposure, and accordingly, no independent basis for Dr. Klein to opine as to medical causation. *See id.* (upholding Dr. Sundel's medical causation testimony where Dr. Simon, an industrial hygienist and toxicologist, independently testified as to the source of plaintiff's lead exposure). Consequently, we need not reach the question of Dr. Klein's qualifications to testify as to medical causation.

Rogers Avenue was the source of his lead exposure, instead of the required *probability*. Consequently, we affirm the circuit court's order granting appellees summary judgment.

II. Motion and Supplemental Motion for Reconsideration

After the circuit court granted summary judgment in favor of appellees, appellant filed a motion and supplemental motion for reconsideration. The court denied both motions without a hearing in an Order Denying Reconsideration, dated March 25, 2015. In the order, the court set forth its reasons for denying appellant's motions:

> [Appellant] initially moved for reconsideration of the summary judgment decision on February 4, 2015. [Appellant] argued basically that the decision was erroneous as a matter of law. Then, **on February 24, 2015, [appellant] filed a supplement to the motion stating that "through continued investigation" he had obtained environmental testing of the property at issue, 4131 West Rogers Avenue.** That inspection was performed on February 10, 2015. According to the report, the property is currently occupied**. The report states that lead paint is present on three areas – two interior and one exterior.**
>
> **[Appellant] does not offer any explanation why the property was not tested earlier.** This action was filed on June 13, 2013. Discovery ended on November 16, 2014. The case then went through the orderly summary judgment process with no suggestion that contemporary testing for the presence of lead paint was in process or even possible. The trial date was March 18, 2015. **The scheduling order exists to allow actions to be resolved in an orderly and efficient manner. [Appellant] is essentially now asking that that orderly process be rolled back and that discovery be reopened for some period of time leading to a postponed trial date. This extraordinary request comes with no explanation why environmental testing was not accomplished at an earlier date, either before this action was filed or within the eighteen months allotted for discovery.** The Court will not reopen the case for that purpose.

> The Court has carefully considered [appellant's] arguments for why the summary judgment decision was erroneous, and the Court declines to reconsider its ruling.

(Emphasis added).

On appeal, appellant contends that the circuit court abused its discretion in denying his motion and supplemental motion for two reasons. *First*, appellant contends that the court abused its discretion, because in granting appellees' motion for summary judgment, the court relied on an incorrect statement of law that appellant had to exclude other sources of lead exposure. *Second*, appellant argues that the court abused its discretion when it refused to consider appellant's environmental report that detected lead-based paint at West Rogers Avenue, on the ground that the report was obtained after discovery had closed. For the reasons stated below, we conclude that the trial court did not abuse its discretion in denying appellant's motions.

Under Rule 2-534, on motion of either party made within

> ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment or may enter a new judgment.

We review a denial of a motion for reconsideration under an abuse of discretion standard. *See Miller v. Mathias*, 428 Md. 419, 438 (2012). The Court of Appeals has stated that, "when reviewing a trial judge's discretionary rulings," appellate courts have "recognized that trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." *Id.* (internal quotation marks and citation omitted). An abuse of discretion occurs "where no reasonable

person would take the view adopted by the [trial] court," or where the court acts "without reference to any guiding rules or principles." *Powell v. Breslin*, 430 Md. 52, 62 (2013) (alteration in original) (internal quotation marks and citation omitted). An appellate court will find an abuse of discretion when a ruling is "clearly against the logic and effect of facts and interferences before the court[,]" or when the decision is "clearly untenable, unfairly depriving a litigant a substantial right and denying a just result[.]" *Id.* (some alterations in original) (internal quotation marks and citation omitted).

1. Denial of Motion for Reconsideration

Appellant contends that the circuit court abused its discretion by denying his motion for reconsideration, because the court misstated the law as to appellant's requirement to exclude other sources of lead. Thus, according to appellant, the court abused its discretion for the same reason that it erred in granting summary judgment. Rochkind responds that the court correctly granted summary judgment; therefore, the denial of the motion for reconsideration was not an abuse of discretion.

As explained above, the circuit court applied the correct standard in determining that appellant had not made out a *prima facie* case of negligence, and properly granted summary judgment in favor of appellees. Accordingly, the court did not abuse its discretion in denying appellant's motion for reconsideration.

2. Arc Environmental Report

Appellant's supplemental motion for reconsideration included an Arc Environmental, Inc. ("Arc") lead-based paint survey of West Rogers Avenue, which detected lead-based paint in the interior and exterior of the property. As set forth above,

the circuit court stated in its order denying reconsideration that appellant did not produce the Arc report until three and one-half months after discovery had closed. On appeal, appellant argues that the court abused its discretion, "because it failed to recognize the difference between discovery obtained under the Maryland Rules and/or pursuant to a scheduling order, in contrast to independent investigative results obtained by a party using self-help outside the discovery process." According to appellant, the court applied the incorrect standard when it stated that considering the Arc report would be an extraordinary reopening of the discovery process, because appellant did not request that discovery be reopened, nor did he invoke the discovery power of the court to obtain the test. Appellant thus concludes that the court was obliged to consider the Arc report when it ruled on the supplemental motion for reconsideration. Rochkind counters that appellant did not offer any explanation for why the property was not tested during the discovery period, nor did appellant offer any reason why such an "extraordinary request to reset the litigation clock" should be granted.

We conclude that the circuit court acted within its discretion in refusing to consider the Arc report because appellant violated the scheduling order by failing to adhere to the discovery deadlines as set forth therein.

"The principal function of a scheduling order is to move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to occur." *Dorsey v. Nold*, 362 Md. 241, 255 (2001). As noted by the circuit court, this action was commenced on June 13, 2013. The scheduling order was issued on August 15,

2013. The scheduling order provided, among other things, deadlines for discovery. Those deadlines included the following:

> 2. (a) **All discovery shall be completed no later than 11/16/14.**
>
> (b) **Expert designations shall include all information specified in Rule 2-402([g])(1)(A) and (B).**
>
> (c) **Plaintiff(s) shall respond to all interrogatory requests concerning the findings and opinions of experts**, and shall have psychometric testing performed on the minor Plaintiff(s) and serve such testing results no later than 02/13/14.
>
> (d) Defendant(s) shall respond to all interrogatory requests concerning the findings and opinions of experts, and shall have psychometric testing performed on the minor Plaintiff(s) and serve such testing results no later than 09/15/14.
>
> (e) **Defendants who still own a subject property shall allow the Plaintiffs to perform a non-destructive lead test upon the premises within 60 days of a written request provided that the request is made no later than four months prior to the discovery deadline in 2(a). The defendants shall be permitted to attend the lead test accompanied by a consultant(s) or experts(s).**
>
> (f) All depositions of expert witnesses shall be completed no later than 11/16/14.

(Emphasis added).

Pursuant to the scheduling order in this case, discovery closed on November 16, 2014. Rochkind filed his motion for summary judgment the next day. The hearing on the

motion for summary judgment was held on January 26, 2015, with the court granting summary judgment at the hearing. Appellant filed his motion for reconsideration on February 4, 2015. The Arc report detecting lead-based paint at West Rogers Avenue was not introduced into this case until the supplemental motion for reconsideration, filed on February 24, 2015. The report was introduced more than three months after the discovery deadline, and nearly a month after summary judgment had been granted. As noted by both the circuit court and Rochkind, appellant never provided any explanation for why West Rogers Avenue was not tested earlier. Moreover, during the discovery period appellees repeatedly requested expert reports and depositions, to which appellant failed to respond.

The introduction of the Arc report into the instant case would have changed the nature of the case from a purely circumstantial evidence case to a direct evidence case. Had the circuit court considered the new report, it would have been required to reopen discovery to give appellees the opportunity to challenge this new evidence. At a minimum, appellees would have had the right to depose the expert behind the Arc report and to conduct their own investigation of the property. Appellant's contention that the Arc report should be considered as evidence because it was obtained through independent investigation, as opposed to through discovery, completely ignores appellees' right to discover the evidence supporting appellant's claims against them. The court properly recognized that in submitting the Arc report in opposition to appellees' motion for summary judgment, appellant was "essentially now asking that that orderly process be rolled back and that discovery be reopened for some period of time leading to a postponed trial date." Appellant's failure to comply with the scheduling order and lack of explanation

for that failure were sufficient reasons supporting the court's exercise of discretion to deny the supplemental motion for reconsideration.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.