Circuit Court for Baltimore City
Case No. 24-C-15-000776

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 698

September Term, 2017

BENJAMIN KIRSON, *et al.*

v.

BRIONNA HECKSTALL

Meredith,
Nazarian,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: January 15, 2019

Brionna Heckstall sued her former landlords, Benjamin L. Kirson and Karen L. Kirson (the "Landlords") in negligence, alleging that she had been poisoned by lead-based paint during the time she lived in two properties (collectively, the "Properties") owned by the Landlords and managed by Mr. Kirson. The Circuit Court for Baltimore City presided over a six-day jury trial, and denied all of the Landlords' motions for judgment. The jury returned a verdict in favor of Ms. Heckstall and awarded $2,692,250 in damages, which the court reduced to $1,959,250 after determining on the Landlords' motion that the non-economic damages should be capped at $515,000.

The Landlords moved for judgment notwithstanding the verdict and, in the alternative for a new trial, which the court denied. The Landlords appeal and we affirm.

I. BACKGROUND

Because this case went to trial and the primary issues on appeal relate to trial decisions and whether the circuit court should have granted a motion for judgment notwithstanding the verdict, we will tell the story as it came in before the jury.

Ms. Heckstall was born on February 17, 1994. She lived in the Properties for about eighteen months while the Landlords either owned or controlled the Properties; they overlapped at least four months and possibly as long as nine. Ms. Heckstall lived at 1121 E. 20th Street ("20th Street") from approximately May 1996 to January 1997, a total of about eight months. The Landlords sold 20th Street on September 3, 1996, so she lived there for approximately three months while the Landlords owned or controlled it or both (*i.e.*, from May 1996 to September 3, 1996), after which Mr. Kirson continued to manage the property

for a few months. She lived at 2311 Harford Road ("Harford Road") from approximately January 1997 to October 1997, a total of about ten months. The Landlords sold Harford Road on February 28, 1997, so she lived there for approximately two months while the Landlords owned or controlled that property or both (*i.e.*, from January 1997 to February 28, 1997). Mr. and Mrs. Kirson owned the Properties jointly. Mr. Kirson managed the Properties himself, and Mrs. Kirson did not participate in their operation or management.

Ms. Heckstall was first diagnosed with an elevated blood lead level on October 13, 1994, when she was approximately seven months old and before she moved into the Properties. Test results showed that Ms. Heckstall had elevated blood lead levels at least twenty times over a six-year period between October 13, 1994, and October 9, 2000. Her two highest results (*i.e.*, 26 µg/dL)[1] came while she lived at the Properties:[2]

Date Taken	Blood Lead Level
October 13, 1994	16 µg/dL
October 11, 1995	25 µg/dL
February 12, 1996	21 µg/dL
April 15, 1996	22 µg/dL
July 18, 1996	26 µg/dL
January 1, 1997	21 µg/dL
February 18, 1997	18 µg/dL
May 19, 1997	22 µg/dL
August 18, 1997	26 µg/dL
November 7, 1997	21 µg/dL

[1] Blood lead levels are measured in micrograms per deciliter (µg/dL) of blood. *See Standard Surveillance Definitions and Classifications*, Centers for Disease Control and Prevention, https://www.cdc.gov/nceh/lead/data/definitions.htm (last updated Nov. 18, 2016).

[2] The first time Ms. Heckstall's blood lead level result was 26 µg/dL was July 18, 1996, when she lived at 20th Street, and the second was on August 18, 1997, when she lived at Harford Road (although the Landlords did not own that property at that time).

November 11, 1997	21 µg/dL
December 8, 1997	22 µg/dL
January 26, 1998	18 µg/dL
April 28, 1998	20 µg/dL
July 7, 1998	19 µg/dL
July 27, 1998	21 µg/dL
November 30, 1997	17 µg/dL
February 22, 1999	12 µg/dL
September 2, 1999	15 µg/dL
October 9, 2000	14 µg/dL

Ms. Heckstall was referred to the Kennedy Krieger Institute ("KKI") and enrolled in KKI's Treatment for Lead-Exposed Children ("TLC") study in April 1996. The TLC Study was designed to determine whether treatment with a "succimer," a substance that can leach lead out of a child's blood, would reduce the injuries in lead-exposed children. Children were referred to the study by their pediatricians. To be accepted into the study, children had to meet certain criteria—most notably, they had to reside in a home where lead dust was present.

On July 11, 1996, approximately two months after Ms. Heckstall moved into 20th Street, an assessor from KKI's TLC study visited the home. The assessor documented several areas of deteriorating paint in the house and described the lead exposure level as "moderate." A few days later, a KKI technician collected dust wipe samples. A laboratory found that the samples contained dust lead levels above the Maryland threshold for those surfaces. And a KKI TLC "internal loan assessment form" rated 20th Street with a cleanup level of "5"—the highest level.

On January 28, 1997, a KKI TLC assessor visited Harford Road. The assessor documented several areas of deteriorating paint in the house, indicated the lead exposure

level as "high," and also rated Harford Road as a cleanup level of "5." KKI also collected dust wipe samples, but unlike the samples from 20th Street, the results were not located in discovery.

Ms. Heckstall's lead risk assessment expert, E. Rush Barnett, opined that lead-based paint hazards existed at both 20th Street and Harford Road while Ms. Heckstall resided at them. He opined as well that Ms. Heckstall's exposure to those hazards substantially contributed to her elevated blood lead levels. He based his opinion on the evidence described with respect to each Property, the fact that the Properties were built before 1950, and Ms. Heckstall's high elevated blood levels while she lived at each Property.

Ms. Heckstall's neuropsychological expert, Robert Kraft, M.D., conducted psychometric testing on her and found impairments in the areas of attention, language function, and visual-motor skills. The Landlords' neuropsychological expert, Tracy Vannorsdall, Ph.D., diagnosed Ms. Heckstall with Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder ("ODD").

Ms. Heckstall's medical expert, pediatrician Paul Rogers, M.D., testified that lead interferes with brain development in young children and that Ms. Heckstall's ADHD, executive function problems, learning disability in math, and language deficits were caused by her exposure to lead. He opined that Ms. Heckstall lost eight IQ points due to her lead exposure, that the continued elevated blood lead levels after she moved in to the Properties "continued to cause some ongoing impairment or damage to her developing brain," and

that those levels were "very important." Dr. Rogers relied on medical and scientific studies in forming his opinions, and the Landlords did not object.

Ms. Heckstall's vocational expert, Mark Lieberman, opined, based in part on the neuropsychological testing results of Drs. Kraft and Vannorsdall, that Ms. Heckstall will at best be able to maintain employment consistent with a person having a high school diploma. Mr. Lieberman opined that "her ability to fully utilize her average IQ and average academic abilities" was limited due to her cognitive defects, and that without those defects, Ms. Heckstall would have been able to "achieve at the level of an Associate's degree."

Additional facts will be supplied as necessary below.

II. DISCUSSION

The Landlords raise five questions in their brief.[3] Their fourth question asks us to overturn well-established Maryland law, but beyond acknowledging that they made and,

[3] The Landlords stated the questions presented in their brief as follows:

> I. Whether the trial court erred in denying Appellants' Motion for Judgment Notwithstanding the Verdict/New Trial?
>
> II. Whether the trial court erred in ruling on the applicable cap on non-economic damages?
>
> III. Whether the trial court erred in refusing to amend the Verdict Sheet to ask separate questions for Benjamin Kirson and Karen Kirson?
>
> IV. Whether the trial court erred in reading certain jury instructions with respect to the Baltimore City Housing Code and the definition of Negligence?
>
> V. Whether the trial court erred in allowing certain Kennedy Krieger Institute records into evidence?

we suppose, preserved this argument, we need not address it further.[4] The remaining questions ask us to find that the circuit court erred in (1) denying the Landlords' motion for judgment notwithstanding the verdict or a new trial, (2) setting the non-economic damages cap at $515,000 as opposed to $500,000, (3) denying the Landlords' request to have separate questions on the verdict sheet for Mr. Kirson and Mrs. Kirson, (4) admitting certain evidence.

A. The Circuit Court Did Not Err In Denying The Landlords' Motion For Judgment Notwithstanding The Verdict Or For A New Trial.

When reviewing the denial of a motion for judgment notwithstanding the verdict or for a new trial, we conduct the same analysis as the trial court did when it considered the motion. *Washington Metro. Area Transit Auth. v. Djan*, 187 Md. App. 487, 491 (2009). That is, "we ask whether on the evidence adduced, viewed in the light most favorable to

[4] Specifically, the Landlords challenge the Court of Appeals's decision in *Polakoff v. Turner*, 385 Md. 467 (2005), and argue that "[t]he retroactive application of *Brooks v. Lewin Realty II, Inc.*, 378 Md. 70 (2003), violates Article 5 of the Maryland Declaration of Rights, and Appellant is entitled to a new trial, wherein the 'notice' requirement is reinstated, and the jury is instructed of same." In *Brooks*, the Court of Appeals overruled *Richwind Joint Venture 4 v. Brunson,* 335 Md. 661, 673 (1994), which had held that "a landlord is not liable for a defective condition on the property unless the landlord knows or has reason to know of the condition and had a reasonable opportunity to correct it." In *Brooks*, the Court of Appeals disagreed with *Richwind*'s notice requirement and held that it is not necessary to establish that a landlord knew or had reason to know of the defective condition in order to establish a *prima facie* case of negligence. 378 Md. at 79. In *Polakoff*, the Court of Appeals held that *Brooks* applied retroactively, *i.e.*, the landlord's actual notice of a defective condition is not necessary to prove negligence in claims arising prior to the 2003 *Brooks* decision. *Polakoff*, 385 Md. at 488–89. The Landlords ask us to hold that *Brooks* should not retroactively apply to this case. Of course, we cannot overrule the Court of Appeals's explicit determination that its decision did not violate the constitutional provision.

the non-moving party, any reasonable trier of fact could find the elements of the tort by a preponderance of the evidence." *Id.* (*quoting Waldt v. Univ. of Md. Med. Sys. Corp.*, 181 Md. App. 217, 270 (2008)). "If there is even a slight amount of evidence that would support a finding by the trier of fact in favor of the plaintiff," denial of the motion was proper. *Id.* at 492.

1. Ms. Heckstall presented sufficient evidence of causation.

A plaintiff in a negligence case "has the burden of proving all the facts essential to constitute the cause of action." *Hamilton v. Kirson*, 439 Md. 501, 527 (2014) (*quoting Peterson v. Underwood*, 258 Md. 9, 15 (1970)). One element of a negligence claim is proximate causation, *id.*, and in a lead paint case, causation requires the plaintiff to connect three links:

> The theory of causation can be conceived as 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.

Sugarman v. Liles, 460 Md. 396, 416 (2018) (*quoting Ross v. Housing Auth. of Balt. City*, 430 Md. 468, 668 (2013)) (cleaned up). The Landlords argue that Ms. Heckstall failed to establish any of the three. We disagree.

The Landlords challenge the *first* link by arguing that "[t]here is no direct lead paint testing for either property, and the circumstantial evidence presented was insufficient to support the verdict." They challenge the *second* link by arguing that "there is no direct evidence and insufficient circumstantial evidence to establish that a specific exposure to

lead occurred from the Kirson houses." Plaintiffs in lead paint cases can establish the first two links by way of two theories of causation. *Rogers v. Home Equity USA, Inc.*, 453 Md. 251, 265 (2017) ("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."). Under the first theory, articulated in *Dow v. L&R Properties, Inc.*, 144 Md. App. 67, 75–76 (2002), a plaintiff can present evidence that a subject property is the only possible source of the plaintiff's lead exposure through the process of elimination. *Rogers*, 453 Md. at 265–66. Under the second theory, a plaintiff can "'rule in' the subject property as a reasonably probable source through either direct or circumstantial evidence." *Id.* at 266. Under that theory, "the plaintiff is not required to eliminate all other possible sources of lead exposure." *Id.*; *accord Levitas v. Christian*, 454 Md. 233, 250 (2017) ("The substantial factor test does not require experts to exclude other properties as possible contributing sources or the plaintiff to show that one cause had a greater impact than any other substantial factor causing the harm.").

The Landlords rely exclusively on *Dow* and make much of Ms. Heckstall's exposure to lead before she lived at either of the Properties, particularly her exposure at 1505 E. Federal Street. But as counsel acknowledged at oral argument (if not in the brief), the second theory of causation is the theory that applies here. In this case, Ms. Heckstall needed to "rule in" one of the Properties—via direct or circumstantial evidence or both—as a reasonably probable source of her lead exposure and of her elevated blood lead levels. *Rogers*, 453 Md. at 268.

And as the circuit court found, she succeeded. As to the first link—*i.e.*, the presence of a lead hazard at the Properties while Ms. Heckstall was a resident—sufficient evidence existed for both Properties. While Ms. Heckstall lived at 20th Street, KKI's records documented several areas of deteriorating paint and dust wipe samples tested positive for lead, at levels that Mr. Barnett testified were above the Maryland threshold for those surfaces. Other KKI records indicated the lead exposure level at 20th Street was "moderate" and rated a cleanup level of "5," the worst rating. And based on both that evidence and on 20th Street having been built before 1950, Mr. Barnett opined that lead-based paint hazards existed at the property.

Mr. Barnett reached the same conclusion about the Harford Road property, *i.e.*, that lead-based paint hazards existed there as well. Although the dust wipe sample results for that property were never located, Ms. Heckstall offered other evidence to support a finding that the house contained lead-based paint hazards and that evidence was sufficient to support the jury's finding: KKI records documented several areas of deteriorating paint, KKI records indicated that the lead exposure level at the property was "high" and had a cleanup level of "5," and the building was built before 1950.

Second, Ms. Heckstall offered sufficient evidence to link her exposure to lead at the Properties and her elevated blood lead levels. As Mr. Barnett explained, her medical records revealed that her blood lead levels were elevated and remained elevated while she lived at both Properties, and that was enough to make the connection, *Rogers*, 453 Md. at 276, and to rule in the Properties as reasonably probable sources, notwithstanding her

earlier exposure at the Federal Street house.[5] *See Levitas*, 454 Md. at 250 ("It would be illogical for us to require an expert to narrow the plaintiff's lead exposure down to a single source when the substantial factor test, by its very definition, permits more than one cause of injury."). And even if the absence of lab results for Harford Road precluded a finding of causation—which it doesn't—evidence sufficient to prove causation as to one of the Properties is enough to connect her lead levels to these Landlords.

Third, Ms. Heckstall linked her elevated blood lead levels to her injuries. "The third link encompasses both general and specific causation—whether lead can generally cause certain injuries, and whether that exposure did cause [the plaintiff's] injuries." *Sugarman v. Liles*, 460 Md. 396, 416 (2018). The Landlords purport to challenge only the latter, *i.e.*, specific causation, but the substance of their argument actually relates more to the second link than to the third. They don't challenge the factual basis of Dr. Rogers's opinion that Ms. Heckstall suffered an eight-point IQ loss as the result of her lead exposure. *Cf. id.* at 434–35 (property owner challenged specific causation of plaintiff's injury by lead exposure on ground that expert's opinions were based on assumptions not supported by the data).

Instead, they cite excerpts of Dr. Rogers's testimony on cross-examination to the effect that Ms. Heckstall's injuries occurred *before* she lived in the Properties. That's true as far as it goes, but doesn't change the analysis here. Of course, Dr. Rogers did not testify

[5] The Landlords' reliance on *Taylor v. Fishkind*, 207 Md. App. 121 (2012), also does not help because the facts of that case are distinguishable. The evidence of the presence of lead at the relevant residence in that case was far less than the evidence here; in *Taylor*, it consisted only of the building's age and one positive test on the *exterior* of the residence.

that Ms. Heckstall's injuries occurred before she lived at the Properties—he testified that Ms. Heckstall's exposure to lead both before and after she lived in the Properties contributed to her injuries. That difference matters, especially as he went on to opine that Ms. Heckstall continued to suffer brain injury during the period she lived at the Properties (beginning roughly in May 1996), and that research supported that opinion:

> Q. Do you see these four blood lead levels listed on this piece of paper?
>
> A. Yes.
>
> Q. Okay. There's a blood lead level of 16 from October 13th of 1994. . . . Were there additional blood lead levels that you found in the records after April 15th, 1996?
>
> A. Yes.
>
> Q. Okay. Do you have an opinion to [a] reasonable degree of medical probability as to whether the additional blood lead levels subsequent to April 15th, 1996 substantially contributed to the injuries that you stated?
>
> A. Yes.
>
> Q. And what is that opinion?
>
> A. My opinion is that the additional elevated blood levels continued to cause some ongoing impairment or damage to her developing brain.
>
> Q. And are there any research articles or studies that you are relying on to form the basis of that opinion?
>
> A. Yes.
>
> Q. And what forms the basis of that opinion?
>
> A. I'm sorry. My opinion is based on those articles.
>
> Q. Okay. And what do the articles state regarding continued elevated blood lead levels and a lifetime of average blood lead level?
>
> A. They state that there's ongoing loss and impairment due to the chronic blood lead levels looking at the average as well as concurrent blood levels.

> Q. Can you explain to the ladies and gentlemen of the jury what concurrent blood lead level is and what it would be concurrent to?
>
> A. Yes. All these studies have looked at blood levels from several perspective[s]. One perspective was elevated blood lead level at the age of two. They also looked at what happened with an average blood level over the lifetime of the child actually, up to the age -- mostly, age six or seven was the last time they do levels. And then they looked [at] what's called the concurrent blood lead level. The blood lead level at the time testing was done was determined to be the concurrent blood lead level. And so what they tried to decide and find out was which lead level caused or could be related most directly to the I.Q. loss. And they found that the later the testing was done the more likely that was to be related to the I.Q. loss.
>
> Q. So if you have the blood lead levels for Ms. Heckstall in your report, if there were continued blood lead levels for Ms. Heckstall as you've noted in your report would on April 15th, 1996 blood lead level be a concurrent blood lead level?
>
> A. No.
>
> Q. And if we only look at the top four blood lead levels for Ms. Heckstall would those be the only blood lead levels we would determine to represent her lifetime average?
>
> A. If we looked at -- if we only had four values, that is, those are the only four levels those are the ones we would use to determine lifetime average.
>
> Q. But she sustained additional blood lead levels throughout her lifetime; is that correct?
>
> A. Yeah, she had I think 16 altogether. So yeah, she had a lot of additional testing done, yes.
>
> Q. So would it be appropriate for you to ignore the remaining blood lead levels?
>
> A. No, they were very important.

His testimony held up on cross-examination: Dr. Rogers acknowledged the contribution of the earlier lead exposure, but did not disavow his opinion about the causal contribution to her injuries of her lead exposure at the Properties:

> Q. So these four blood lead levels [drawn before Ms. Heckstall lived at either of the Properties], if we're just looking at them, you would still say that those blood lead levels were a substantial factor in all of the problems that Ms. Heckstall has according to what you've reviewed; is that correct?
>
> A. Yes.

In short, there was sufficient evidence for the jury to find causation.

2. The trial court did not abuse its discretion in admitting the testimony of Ms. Heckstall's vocational expert.

The Landlords argue *next* that the circuit court erred in admitting the expert opinion of Ms. Heckstall's vocational expert, Mr. Lieberman, and specifically his opinion that Ms. Heckstall's cognitive impairments would negatively affect her vocational placement. They also assert (in a footnote) that "[i]f Mr. Lieberman's opinions are found to be unsupported by the evidence, then Appellee's economist, Dr. Conte's opinions regarding Appellee's economic losses are also unsupported." We review the circuit court's decision to admit or exclude expert testimony under Maryland Rule 5-702 for abuse of discretion. *Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199, 252 (2002). The trial court's "action will seldom constitute a ground for reversal." *Id.* (*quoting Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 76 (1996)). For expert testimony to be admissible, (1) an expert must have the requisite qualifications to give an expert opinion and (2) the expert's opinion must be supported by an adequate factual basis. *Hamilton v. Dackman*, 213 Md. App. 589, 614 (2013) (*citing Ross*, 430 Md. at 662–63).

The Landlords do not challenge Mr. Lieberman's qualifications—they argue that his opinion is not supported by an adequate factual basis. But the Landlords do not

challenge Mr. Lieberman's opinion that Ms. Heckstall's earning capacity indeed had been impaired as the result of her deficits. Instead, they challenge that opinion indirectly by conflating it with their arguments about the sufficiency of the *causation* evidence. They argue that Ms. Heckstall had to produce evidence that, *but for* her lead exposure—and in particular, her lead exposure at the Properties—she would not have experienced *any* of the deficits identified by the neuropsychological and medical experts who testified in this case. For the reasons we explained above, though, there was sufficient evidence of causation, and beyond that, we don't read the Landlords to offer any other challenge to the admissibility of Mr. Lieberman's opinions.

B. The Circuit Court Did Not Err In Setting The Non-Economic Damages Cap At $515,000.

The Landlords argue *next* that the circuit court erred in capping Ms. Heckstall's non-economic damages at $515,000. Section 11-108(b)(2)(i) of the Courts and Judicial Proceedings Article of the Maryland Code ("CJ") sets the initial cap on non-economic damages at $500,000 for personal injury causes of action arising on or after October 1, 1994, and the cap increases by $15,000 annually.[6] CJ § 11-108(b)(2)(ii). The Landlords

[6] Sections 11-108(b)(2)(i–ii) provide:

> (2)(i) Except as provided in paragraph (3)(ii) of this subsection [not applicable here], in any action for damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for noneconomic damages may not exceed $500,000.
>
> (ii) The limitation on noneconomic damages provided under subparagraph (i) of this paragraph shall increase by $15,000 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising

argue that Ms. Heckstall's cause of action against them accrued on October 13, 1994, the date of her first elevated blood lead level, rather than at the time she lived in the Properties.

But the issue isn't when Ms. Heckstall was first injured by *anybody's* lead—the issue is when her lead injury claims against *the Landlords* accrued. Ms. Heckstall did not move into the first of the Properties until about May 1996, at which time, pursuant to CJ § 11-108(b)(2)(i–ii), the non-economic damages cap was $515,000. A negligence action accrues "when facts exist to support each element of the action." *Green v. N.B.S., Inc.*, 409 Md. 528, 546 (2009) (*quoting Green v. N. Arundel Hosp. Ass'n*, 366 Md. 597, 607 (2001)). And the elements of a negligence start with a duty by *the defendant*:

> (1) a legally cognizable duty on the part of the defendant owing to the plaintiff, (2) a breach of that duty by the defendant, (3) actual injury or loss suffered by the plaintiff, and (4) that such injury or loss resulted from the defendant's breach of the duty.

Id. (*citing Brown v. Dermer*, 357 Md. 344 (2000)).

The Landlords didn't, and couldn't, owe Ms. Heckstall any duty until she moved in to the first of the Properties, and the cap on non-economic damages at that time was $515,000. Any breaches of that duty, damages, and causation occurred after that point, and the circuit court used the correct non-economic damages cap.

C. The Circuit Court Did Not Err In Declining To Amend The Verdict Sheet To Have Separate Questions for Mr. Kirson and Mrs. Kirson.

The parties do not dispute the following: Mr. Kirson and Mrs. Kirson co-owned the

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> between October 1 of that year and September 30 of the following year, inclusive.

Properties, Mr. Kirson managed the Properties, and Mrs. Kirson had no role in the managing or operating them. From these facts, the Landlords argue that the circuit court erred in declining to include separate questions on the special verdict form asking the jury to decide Mr. Kirson's and Mrs. Kirson's respective individual liability for negligence. The court decided that the liability questions as to each Property would read instead: "Do you find that the Defendants were negligent as to [the Property]?"

We review the circuit court's decisions concerning the form of special verdict forms for abuse of discretion, and questions of law *de novo*. *Electrical Gen. Corp. v. Labonte*, 229 Md. App. 187, 206 (2016); *Elvaton Towne Condo. Regime II, Inc. v. Rose*, 453 Md. 684, 701 (2017) (citing *Schisler v. State*, 394 Md. 519, 535 (2006)). Mrs. Kirson asserts that she should have been "given the opportunity to ask the jury whether her actions were reasonable," and cite *Polakoff v. Turner*, 385 Md. 467 (2005). *Polakoff* recognized that a landlord's ultimate liability for negligence "will depend upon the fact-finder's determination regarding whether the landlord acted reasonably under all the circumstances," 385 Md. at 480, and the Landlords argue that the circuit court should have separated the questions so that the jury would have been able to consider and decide this second part of the analysis individually, at least with respect to Mrs. Kirson. (They make no such argument with respect to Mr. Kirson.)

Again, this question arises in the context of a negligence claim. The first element—the duty—arises in the context of a statute designed to protect people in the same class as this plaintiff. *See Brooks*, 378 Md. at 79–80. The second element, breach, arises from a

landlord's violation of that statute, but the violation alone doesn't establish a breach of duty. *Polakoff*, 385 Md. at 480. The fact-finder must also evaluate whether the landlord acted reasonably under the circumstances. *Id.*

In this context, we don't see how Mrs. Kirson could avoid liability if Mr. Kirson is liable. From an ownership perspective, she doesn't attempt to distinguish her actions from his,[7] and as an owner, she (and he) delegated the management and operations functions to him. Ms. Heckstall asserts that Mr. Kirson, as manager, "was acting as an agent of his wife, Karen Kirson, the co-owner of [the Properties]," and that therefore, any negligence by Mr. Kirson in the management of the Properties is imputed to Mrs. Kirson. For their part, the Landlords don't dispute this, at least explicitly. And the only cases the Landlords cite don't address whether an *individual* co-owner who does not manage the property can escape liability for lead paint injuries sustained on the property. Instead, they address the altogether separate question of whether a corporate officer or member of a limited liability company can be liable individually for lead paint injuries. *See Shipley v. Perlberg*, 140 Md. App. 257, 278–79 (2001) (corporate officer and director not individually liable for

[7] The Landlords do not dispute that Mrs. Kirson was an "owner" of the Properties as defined by the Housing Code, or that the Housing Code imposed obligations and requirements on Mrs. Kirson in her role as an "owner." Balt. City Code (1976, 1983 Repl. Vol.) § 105 of Article 13 (defining "owner" as "any person . . . who, alone or jointly or severally with others, owns, holds, or controls the whole, or any part, of the freehold or leasehold title to any dwelling or dwelling unit . . ."); (1995 Supp.) § 310(a). Those obligations included, for example, keeping the Properties "in good repair, in safe condition, and fit for human habitation" (*id.* § 702) and keeping "[a]ll walls, ceilings, woodwork, doors and windows . . . clean and free of any flaking, loose or peeling paint and paper." *Id.* § 703(2)(c).

plaintiff's lead paint injuries); *Allen v. Dackman*, 413 Md. 132, 159–60 (2010) (limited liability company member individually liable for plaintiff's lead paint injuries); *Toliver v. Waicker*, 210 Md. App. 52, 70 (2013) (corporate officer not individually liable for lead paint injuries). Because the Kirsons' liability rises and falls together under the circumstances of this case, we discern no abuse of discretion by the circuit court in formulating the special verdict form not to distinguish them.[8]

D. The Circuit Court Did Not Err In Admitting Certain KKI Records Into Evidence.

Finally, the Landlords argue that the circuit court erred in admitting "the Kennedy Krieger Institute records regarding 2311 Harford Road and 1211 E. 20th Street and the corresponding results of the dust sampling conducted at 1121. E. 20th Street." They make three arguments, each of which lacks merit.

First, they argue that language identifying Mr. Kirson as the landlord on KKI forms[9] is hearsay within hearsay, and should have been excluded, because it does not fall within

[8] The Landlords also complain in their reply brief that the circuit court erred by amending the judgment to include Mrs. Kirson, who had been omitted from the original judgment. The Landlords do not argue that Mrs. Kirson should not have been added to the judgment; rather, they argue that Ms. Heckstall's alleged delay in filing a motion to amend caused post-judgment interest to accumulate over a longer period of time. But at oral argument, the Landlords' counsel acknowledged that it was an error to leave Mrs. Kirson off the judgment and that the error had since been corrected. And even if the Landlords were to continue to maintain their position, we would not consider it because this argument was raised for the first time in their reply brief. *See Gazunis v. Foster*, 400 Md. 541, 554 (2007).

[9] The Landlords identify the forms as: (1) "the TLC Trial Home Assessment Log relating to 1121 E. 20th Street" and (2) "the TLC Trial Home Assessment Log relating to 2311 Harford Road." They challenge the portion of the form saying that "If permission is needed from landlord, please provide the following information," where Mr. Kirson's name, phone number and address is listed.

any exception to the hearsay rule. The Landlords challenge the identification of Mr. Kirson on the forms to the extent that that identification was used to support Ms. Heckstall's counsel's assertion in his opening statement that "Mr. Kirson was a willful participant in [the KKI TLC] study" and that "Ms. Heckstall was their lab rat."

To the extent the Landlords preserved this argument, it fails,[10] primarily because the "statement" isn't hearsay. "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). The Landlords' position seems to be that the "matter asserted" was that Mr. Kirson willfully participated in the KKI TLC study and that Ms. Heckstall was the KKI's and Mr. Kirson's "lab rat." But the "statement" in question and the "matter asserted" don't match up—at most, the identification of Mr. Kirson as the landlord on the KKI forms is an implied assertion that Mr. Kirson is the owner of the Properties, a fact he does not dispute. Moreover, the Landlords admit that the forms were correctly admitted under the business records exception to the hearsay rule. The identification of Mr. Kirson is not a statement, and is not hearsay, and the circuit court did not err in admitting these forms.

Second, the Landlords argue that the circuit court erred in admitting "the Kennedy Krieger Institute records" because their prejudicial effect outweighed their probative value under Maryland Rule 5-403. The Landlords failed to brief this issue adequately and we

[10] The Landlords fail to identify either the place in the record where they objected to the admission of the forms on this ground or the place where the court ruled on this issue.

decline to consider it. They did not identify the particular documents they assert should have been excluded, nor did they identify the place in the record where the court made its ruling on this issue. *See Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003). But even if we were to consider the merits of their argument, it would fail. The test results here are nothing like the consent order that was held to be both irrelevant and prejudicial in the only case upon which they rely, *Rochkind v. Finch*, 196 Md. App. 195 (2010). Everything from KKI admitted at trial related directly to the Properties at issue.

Third, the Landlords challenge the admission of the lab results from the dust wipe samples for 20th Street, arguing that Ms. Heckstall "failed to provide any type of clearance levels when [she] presented the lead dust levels to the jury," something they claim is required in order to evaluate the results of "vacuum dust sampling." Put another way, the Landlords argue that "a property can contain lead dust, but still be deemed 'lead free' or 'lead safe' if the dust levels are within certain clearance levels established by the [Maryland Department of the Environment]," and that because the Department has purportedly established no such clearance, or threshold, limits for vacuum dust sampling, there was "no way for the jury to determine if the figures associated with the vacuum dust sampling of [20th Street] are actually lead-contaminated dust . . . ."

But the Landlords fail to point to any part of the record supporting that vacuum sampling was the method used. As Ms. Heckstall points out in her brief, the Landlords' own expert in lead risk assessment testified that he did not know which sampling method was used; the records themselves were labeled "Baltimore TLC/LIS **Wipe Dust** Collection

Form" (emphasis added); and Ms. Heckstall's lead risk assessment expert, Mr. Barnett, testified that he saw no reference to vacuum sampling in the documents he reviewed. The Landlords do not dispute Ms. Heckstall's characterization of the evidence in their reply, and they were free to cross-examine her expert at trial. We see no error in the circuit court's decision to admit the lab results from the dust wipe samples for 20th Street.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.