Circuit Court for Baltimore City
Case No. 24-C-07-005633

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1252

September Term, 2016

MICHAEL STEVENS, JR.

v.

BANNER REALTY, INC., *ET AL.*

Woodward, C.J.,
Kehoe,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: March 14, 2018

Michael Stevens was born with a condition known as Pervasive Developmental Disorder ("PDD"), a disorder characterized by autism-like cognitive impairments. As an infant, and while he lived at a property owned by Banner Realty, Inc. and Rowhouses, Inc. (collectively, the "Landlords"), Mr. Stevens also was diagnosed with elevated blood-lead levels. He (through his mother) brought suit against the Landlords while he was still a child and lost, but the court entered judgment against him without prejudice, and expressly left open the possibility that he could try again as an adult, an unusual process that the Landlords haven't challenged.

This appeal arises from Mr. Stevens's second suit against the Landlords. The Circuit Court for Baltimore City granted the Landlords' Motion for Summary Judgment (the "Motion") on the grounds that Mr. Stevens failed to provide evidence that he was harmed by lead exposure above and beyond the effects of PDD, or that lead exposure exacerbated those harms. The circumstances of this case may make Mr. Stevens's burden trickier than usual to shoulder, but we believe that he has produced enough evidence to survive summary judgment. We reverse and remand for further proceedings.

I. BACKGROUND

Mr. Stevens was born on August 15, 1986, and was diagnosed as an infant with PDD. PDD is a general diagnostic category encompassing several autism spectrum disorders. Individuals with PDD typically show impairments in their intelligence, socialization, and communication skills, and Mr. Stevens suffers from all three.

From birth until March 1991, Mr. Stevens lived with his parents and maternal grandparents at 2504 East Chase Street in Baltimore City ("Chase Street"), a property then

owned by the Landlords. While Mr. Stevens lived at Chase Street, the Baltimore City Health Department ("Health Department") issued an Emergency Lead Paint Nuisance Violation Notice ("Notice") for the residence. The Notice indicated that forty-five areas of the house had been found to contain lead-based paint, and the Health Department served the Notice after an employee reported more than thirty areas of peeling and chipping lead-based paint inside the home.

During the time Mr. Stevens resided at Chase Street, his blood tests showed elevated lead levels on multiple occasions. The United States Centers for Disease Control and Prevention consider a blood-lead level of 5 µg/dL to be elevated to a "level of concern,"[1] but Mr. Stevens's blood-lead levels were between 26 and 39 µg/dL in tests conducted between August and December of 1990:

Date Taken	Blood Lead Level
August 16, 1990	37 µg/dL
August 17, 1990	39 µg/dL
September 24, 1990	39 µg/dL
December 04, 1990	26 µg/dL

Mr. Stevens alleges that the additional exposure to lead at Chase Street aggravated his PDD and diminished his quality of life and cognitive functioning. Mr. Stevens's medical causation expert, Dr. Howard Klein, reviewed multiple reports by Mr. Stevens's vocational

[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).

expert, Dr. Barry Hurwitz, and opined in an affidavit that lead exposure had aggravated Mr. Stevens's existing conditions and reduced his intelligence quotient:

> It is my opinion within a reasonable degree of medical probability that notwithstanding [Mr. Stevens's] pre-existing condition, his exposure to lead based paint aggravated his condition and reduced his cognition. My opinion, within a reasonable degree of medical probability, is that [Mr. Stevens] suffered a diminution in IQ of approximately 13-15 points. It is further my opinion, within a reasonable degree of medical degree of medical probability, that this loss of cognitive ability is an injury over and above, and caused additional loss in functioning, than that caused by [Mr. Stevens's] [PDD].

Mr. Stevens also alleges that the lead exposure at Chase Street contributed substantially to the extent of his cognitive deficits:

> [I]t is my opinion, within a reasonable degree of medical probability, that [Mr. Stevens] would have, at a minimum, been a little smarter and better able function on a day-to-day basis had he not been exposed to lead at the levels set forth above.

This is Mr. Stevens's second attempt to bring these claims. Initially, his mother, Paula Sumter, brought a claim on his behalf in 1995. That case resulted in summary judgment for the Landlords that we reversed in an unreported opinion. *Michael Stevens, Jr., A Minor, Etc. v. Rowhouses, Inc.*, No. 1095, Sept. Term 1997 (Md. App. Aug. 27, 1999) ("*Stevens I*"). In that opinion, we held that the trial court had incorrectly analyzed the sufficiency of the evidence using a "substantial contributing factor" test rather than the "but for" causation test. As a result of Mr. Stevens's "already abnormal brain" baseline, we said, he was required to offer something more than his original expert's opinion, that he must offer evidence of the harm caused by the lead exposure "over and above his baseline pre-existing condition" and that could "segregat[e] his injury from exposure to

lead-based paint from his pre-existing autism." On remand, the trial court again granted summary judgment to the Landlords after finding that Mr. Stevens had not established the extent to which lead exposure harmed him above his PDD. Then, in an unusual twist, the trial court dismissed *his* claims *without prejudice* so that Mr. Stevens could bring his claims anew as an adult. That decision was appealed as well, and we affirmed it. *Rowhouses, Inc. v. Stevens*, No. 2337, Sept. Term 2001 (Md. App. Feb. 6, 2003) ("*Stevens II*").

Fast-forward four-and-a-half years. Mr. Stevens filed this action in 2007, and again alleged that the Landlords' negligence and violations of the Maryland Consumer Protection Act caused lead exposure and cognitive injuries. The case was dismissed for failure of proper service, Mr. Stevens appealed, and we reversed and remanded the case to the circuit court.

After remand, both parties conducted discovery, and the Landlords filed a Motion for Summary Judgment. They relied primarily on the portion of *Stevens I* that directed Mr. Stevens to segregate the harm he had suffered as a result of PDD from the harm he suffered from lead exposure. Mr. Stevens opposed the motion and submitted a supporting memorandum that included, among other things, an affidavit from Dr. Klein explaining how lead exposure had harmed Mr. Stevens and reports by Mr. Stevens's vocational therapist, Dr. Barry Hurwitz. Dr. Hurwitz stated that he had met personally with and evaluated Mr. Stevens multiple times between 1994 and 2015. Dr. Hurwitz's evaluation of Mr. Stevens in May 2000 stated the opinion that "[Mr. Stevens's] history of elevated lead, a substance well known to destroy brain tissues, has, at least, contributed to his intellectual and social impairments."

The circuit court conducted a hearing and granted the Landlords' Motion. In reaching its decision, the circuit court found that:

> - [Mr. Stevens] fail[ed] to provide evidence necessary to establish an essential element of his claim;
> - [Mr. Stevens] fail[ed] to provide evidence that his exposure to lead caused a legally compensable injury as an essential element of his claim;
> - [Mr. Stevens] fail[ed] to provide evidence of harm from the lead paint exposure that is distinct from his pre-existing [PDD];
> - [Mr. Stevens] fail[ed] to provide evidence that his lead exposure exacerbated any harm already caused by this pre-existing [PDD];
> - [Mr. Stevens] has not proffered evidence to show that there is a genuine dispute of material fact.

This timely appeal followed.

II. DISCUSSION

Mr. Stevens raises a single issue on appeal: did the circuit court err in granting the Landlords' Motion for Summary Judgment?[2] He argues *first* that lead exposure *was* a substantial contributing factor to his cognitive impairment and, therefore, his claim should have survived the Motion. *Next*, he contends that even if the circuit court correctly analyzed his claims against the "but-for" causation test, he provided enough evidence to allow a jury to distinguish his lead exposure injuries from his PDD impairments. The Landlords respond

[2] In his brief, Mr. Stevens phrased the Question Presented as follows:

> I. WHETHER THE TRIAL COURT IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT REASONING THAT APPELLANT HAD NOT PROVED THAT HIS INJURIES FROM A DEVELOPMENTAL DISORDER WERE DISTINCT FROM AND/OR EXACERBATED BY HIS LEAD-RELATED INJURIES.

that the law of the case doctrine compelled the court to enter judgment based on the holding in *Stevens I*, which required Mr. Stevens to prove that lead paint exposure exacerbated his condition or caused a "legally compensable injury" "distinct from" his PDD.

We review a grant of summary judgment for legal correctness. *Goodwich v. Sinai Hosp. of Baltimore, Inc.*, 343 Md. 185, 204 (1996). "[W]e 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) (cleaned up). "We review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Rhoads v. Sommer*, 401 Md. 131, 148 (2007). We review the correctness of the trial court's legal conclusions *de novo*. *See Yourik v. Mallonee*, 174 Md. App. 415, 423 n.2 (2007).

A. The Law Of The Case Doctrine Does Not Drive This Appeal.

The Landlords contend that that earlier decisions in Mr. Stevens's cases, and particularly the earlier decisions of this Court, compel us to affirm summary judgment in their favor because those decisions state the law of the case. Mr. Stevens's brief (filed before theirs, of course) doesn't even address this argument, and we suspect why: this isn't actually the same case. His first case was dismissed without prejudice, and that decision was affirmed; this case was filed four years later, and has an altogether different case number. So on a purely superficial level, the prior decisions on Mr. Stevens's dismissed claims aren't really the law of this case. *See Reier v. State Dept. of Assessments and Tax'n*, 397 Md. 2, 24 (2007) (The law of the case did not apply "because no legal conclusions

were reached" by the Court in an earlier case.); *see also Ralkey v. Minnesota Min. & Mfg. Co.*, 63 Md. App. 515, 520 (1985) ("The law of the case doctrine generally provides that a 'legal rule of decision between the same parties in the same case' controls in subsequent proceedings between them.").

Beyond that formalistic answer, though, it's hard to understand how the law of the case doctrine is meant to apply to this particular set of proceedings. The Landlords argue that "the evidence presented by Mr. Stevens in this case is virtually identical to the evidence presented" at his first trial. But the evidence wasn't *actually* identical—Mr. Stevens substituted the opinion of a new expert, Dr. Klein, for the expert opinion that didn't get him past the Landlords' motion for judgment at his first trial. We'll address next whether the evidence is substantially different or not, but we need to decide that question for ourselves. *See Barret v. Lohmuller Bldg. Co. of Baltimore City*, 151 Md. 133, 139 (1926) (quoting 4 Corpus Juris § 3088, p. 1106) ("As a general rule the doctrine of the 'law of the case' . . . is rarely, and in a very limited class of cases, applied to matters of evidence as distinguished from rulings of law, and a decision on appeal on a question of fact does not generally become the law of the case, nor estop the parties on a second trial from showing the true state of the facts."). Similarly, the parties disagree about what standards of causation and damages apply to this case, but the law of the case doctrine doesn't bind us on a purely legal question if there is some doubt about the state of the law. *Turner v. Housing Authority of Baltimore City*, 364 Md. 24, 34 (2001) ("It is well settled that the law of the case doctrine does not apply when one of three exceptional circumstances exists: the evidence on a subsequent trial was substantially different, ***controlling authority***

has since made a contrary decision on the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.") (emphasis added) (cleaned up).

Instead, the Landlords seem to be asking us to affirm the new summary judgment ruling because *Stevens I* and *II* weren't clearly erroneous and didn't work a manifest injustice. Putting aside that those decisions are not before us, affirming on that basis would defeat the holding of *Stevens II*. Unconventional as the resulting posture might be, we specifically affirmed in *Stevens II* the circuit court's decision to dismiss Mr. Stevens's individual claims without prejudice, and to afford him an opportunity to attempt anew to prove his claims once he reached adulthood. So if anything, the law of *this* case contemplates that Mr. Stevens would have one more opportunity on the merits. For us to decline now to review the merits of the case he presented to the circuit court in response would flout our earlier decision, a step we are not inclined to take.

B. Mr. Stevens Created A Genuine Issue Of Material Fact As To Damages.

Mr. Stevens's claims sound in negligence. To state a claim for negligence a plaintiff must prove "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." *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 76 (1994). Neither of the first two elements is at issue here, nor is there any dispute that Mr. Stevens tested positive for elevated blood levels as a result of the conditions of the home on Chase Street. Nor is there any dispute that the cognitive deficits from which Mr. Stevens suffers are the same sort of cognitive

deficits that can be caused by childhood exposure to lead. But since those cognitive deficits are also caused by PDD, this case boils down to whether Mr. Stevens offered evidence that could "permit a jury to differentiate between loss caused by [Mr. Stevens's] pre-existing PDD and loss caused by [Mr. Stevens's] lead exposure."

When we addressed this question in *Stevens I*, we held that the "but-for" causation test was the appropriate test. We distinguished the situation here—where different causes, PDD and lead, independently could have contributed to his harms—from situations involving multiple potential sources of the same cause, such as different lead-laden properties. Because Mr. Stevens's PDD is not "alleged to have concurred with his lead-based paint exposure to produce an injury," we said, he may only "recover damages for the aggravation of the injury but not for the condition that pre-existed it" and therefore must segregate his injuries.

Mr. Stevens asks us this time around to apply the "substantial factor" test to evaluate the evidence he produced at summary judgment, not the "but-for" test we applied in *Stevens I*. "[T]he 'but for' test applies when the injury would not have occurred in the absence of the defendant's negligent act." *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124, 138 (1996). Substantial factor causation, on the other hand, is typically used "where independent causes produce an injury that would have occurred as a result of each cause alone." *Mayer v. North Arundel Hosp. Ass'n Inc.*, 145 Md. App. 235, 246 (2002). Under that approach, a defendant's negligence is a cause-in-fact of the plaintiff's injuries when it is "a substantial factor in bringing about the harm." RESTATEMENT (SECOND) OF TORTS § 431. And that test eliminates the need to "rule out"

or "exclude" other possible sources of the harm or "show that one cause had a greater impact than any other substantial factor causing the harm." *Levitas v. Christian*, 454 Md. 233, 250 (2017), *reconsideration denied*.

To be sure, our Court and the Court of Appeals have cited the substantial factor test frequently in lead paint cases. *See Hamilton v. Kirson*, 439 Md. 501 (2014); *Rogers v. Home Equity USA, Inc.*, 453 Md. 251, 268 (2017); *Levitas v. Christian*, 454 Md. 233, 250 (2017). But unlike this case, those cases all involved multiple potential sources of the same harm, *i.e.*, lead from different properties. Rather than requiring a plaintiff to rule out all other potential sources of lead, those cases hold that a plaintiff need only "rule in" a reasonably probable source of exposure (and thus harm) in order to proceed against that source. *See Rogers*, 453 Md. at 266–67 (quoting *Hamilton v. Dackman*, 213 Md. App. 589, 616–17 (2013)). Here, on the other hand, our plaintiff has suffered cognitive harms separately, and independently, by two different sources—PDD and, he alleges, lead. Both are at least alleged to be "substantial factors" in determining Mr. Stevens's cognitive status, and both operated altogether separately.

The doctrinal choice the parties are asking us to make, though, is ultimately a false one. The challenge lies instead in determining the extent of Mr. Stevens's impairments that are attributable to the different causes, which is less a dispute about doctrine than the quantum of evidence Mr. Stevens needed to produce in order to survive the Landlords' summary judgment motion. There is no doubt here that PDD has caused certain cognitive and developmental deficits in Mr. Stevens, nor any doubt about the basic proposition that children who ingest lead can suffer from similar cognitive and developmental harms. The

question is whether Mr. Stevens produced evidence in response to the Landlords' motion for summary judgment that generated a genuine dispute of material fact as to the extent to which lead either aggravated or augmented the harms he suffered from PDD. It is not at all unusual for landlords to argue that factors other than lead caused or contributed to a plaintiff's condition, and for the court or jury to have to sift through the relative impact of these alternatives. *See Richwind Joint Venture 4 v. Brunson*, 96 Md. App. 330, 338 (1993) ("Dr. Chisolm testified that [plaintiffs] ingested lead into their blood in quantities sufficient to cause brain damage … Further, Dr. Chisolm fully considered the effect of other factors, such as the mother's alcoholism and the children's home environment, on the children's IQ loss"), *rev'd on other grounds*, 335 Md. 661 (1994). And on this record, we find that Mr. Stevens met his burden.

The circuit court found that Mr. Stevens had failed to provide evidence that lead exposure caused a legally compensable injury distinct from his PDD diagnosis. But he did. Dr. Klein's affidavit considered Mr. Stevens's pre-existing condition and opined that he suffered intelligence and cognitive losses as a result of lead exposure (emphasis added):

> ***[N]otwithstanding [Mr. Stevens's] [PDD],*** his exposure to lead-based paint aggravated his condition and reduced his cognition.… [Mr. Stevens] ***suffered a diminution in IQ of approximately 13-15 points***… [T]his loss of cognitive ability is ***an injury over and above,*** and caused additional loss in functioning, than ***that caused by [Mr. Stevens's] [PDD].***

To be sure, the relative impact of these two causes will be difficult to pin down with precision, and the Landlords will be free not only to challenge the testimony at trial, but to argue as well that he didn't suffer any harm from lead exposure. Even so, the expert

testimony Mr. Stevens has offered here is sufficient to raise a triable issue on that question. Indeed, in *Levitas*—a decision that, to be fair, had not been issued at the time of the circuit court's summary judgment ruling—the Court of Appeals held that this same expert, Dr. Klein, had "ample knowledge, training, and experience" to offer expert testimony on IQ loss from lead exposure, and that his reliance on the same vocational expert's (Dr. Hurwitz) neuropsychiatric report in that case, along with other materials, formed a sufficient factual basis for his opinion to be admissible. 454 Md. at 253–55. There, as here, the Landlords' disagreement with his conclusions "is the grist for cross-examination and dueling experts and for resolution by the relative weight assigned by the factfinder,'" not for categorical rejection at summary judgment. *Id*. at 255 (*quoting Roy v. Dackman*, 445 Md. 23, 52 (2015), *reconsideration granted*).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.