Circuit Court for Baltimore City
Case No. 24-C-13-001215

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1353

September Term, 2019

CITY HOMES, INC., et al.

v.

SAVON JOHNSON

Graeff,
Beachley,
Wells,

JJ.

Opinion by Beachley, J.

Filed: October 23, 2020

On February 22, 2019, a jury sitting in the Circuit Court for Baltimore City returned a $2.2 million verdict in favor of appellee Savon Johnson and against appellants City Homes, Inc. ("City Homes"), City Homes III, LP, and Barry Mankowitz.[1] The jury found that appellants were negligent in maintaining 903 North Duncan Street (the "Property"), and that their negligence caused appellee's exposure to lead paint and his subsequent injuries related to that exposure. Following an unsuccessful motion for new trial, and a successful motion to reduce appellee's non-economic damages, appellants timely noted their appeal. Appellants present the following six questions for our review:

1. Whether Appellee's experts had sufficient factual foundation and adequate methodologies to conclude that [the Property] substantially contributed to Appellee's lead ingestion and injury;

2. Whether Appellee met his burden to prove the nature and extent of the aggravation of his pre-existing injury;

3. Whether the trial court erred in refusing to instruct the jury on the apportionment of harm and damages;

4. Whether the trial court erred in allowing Mr. Lieberman to offer a "lay opinion" that Appellee is disabled and whether Appellee's economic damages, if any, should be reduced to the estimate not based on disability;

5. Whether the trial court erred in excluding both the Rey Complex Figure stimulus and Appellee's reproduction of it; and

6. Whether Appellants were unfairly prejudiced by the trial court's admission of evidence of Mr. Mankowitz's salary and the number of properties Appellants owned or managed.

[1] According to Mr. Mankowitz's testimony, City Homes, Inc. was the general partner, and it owned and controlled City Homes, III, LP. For clarity, we shall refer to City Homes, Inc. and City Homes, III, LP, collectively, as "City Homes."

Because we conclude that appellants were unfairly prejudiced by the trial court's erroneous admission of Mr. Mankowitz's salary, we must vacate the judgment and remand for a new trial. To the extent necessary, we shall provide guidance to the trial court on the remaining issues.

FACTUAL AND PROCEDURAL BACKGROUND

From his birth in April 1994 until January 3, 1996, appellee lived at 1127 Tenant Way in Baltimore, Maryland. On January 4, 1996, appellee and his mother moved to the Property owned by City Homes. On August 21, 1996, appellee and his mother were evicted from the Property and began living at 1115 Tenant Way.

During his childhood, appellee was tested three times for the presence of lead in his blood. First, on August 17, 1995, while living at 1127 Tenant Way, appellee's blood test indicated an elevated level of 10 micrograms per deciliter.[2] Second, on August 21, 1996, the day he and his mother were evicted from the Property, appellee's blood test revealed a level of 15 mcg/dL. Finally, on February 4, 1997, while living at 1115 Tenant Way, appellee's blood test indicated a level of 7 mcg/dL.

The following table depicts appellee's blood lead level test results:

Date of Test	Location	Blood Lead Level
8/17/1995	1127 Tenant Way	10 mcg/dL
8/21/1996	The Property	15 mcg/dL
2/4/1997	1115 Tenant Way	7 mcg/dL

[2] Micrograms per deciliter can be expressed as mcg/dL.

On March 1, 2013, appellee filed a complaint in the Circuit Court for Baltimore City against appellants jointly and severally, essentially alleging that their negligence in maintaining the Property caused his exposure to and subsequent injuries from lead paint. Following a jury trial, the jury returned a verdict in favor of appellee: $1,100,000 in economic damages, and $1,100,000 in noneconomic damages. Pursuant to Md. Code (1973, 2020 Repl. Vol.) § 11-108 of the Courts and Judicial Proceedings Article ("CJP"),[3] the court subsequently reduced the judgment regarding non-economic damages from $1,100,000 to $515,000. We shall provide additional facts as necessary.

DISCUSSION

I. EVIDENCE OF FINANCIAL CIRCUMSTANCES

Although appellants raised this issue last in their brief, we shall first address their argument that the trial court committed reversible error in allowing appellee to introduce evidence regarding Mr. Mankowitz's salary.[4] Prior to trial, appellants moved *in limine* to preclude references to either party's financial resources. In their motion, appellants asserted that, "Even under the fairly liberal standard set forth by the *Maryland Rules*, such evidence would be wholly irrelevant to the material facts of the instant case: Whether [appellee] was exposed to lead paint hazards and whether he suffered any injury as a

[3] We note that CJP § 11-108 has not been amended since 2005.

[4] In their brief, appellants also argue that the trial court erred in admitting evidence that appellants typically owned over 100 properties. Because we conclude that the trial court committed reversible error in admitting evidence of Mr. Mankowitz's salary, we need not reach this issue.

result." The record reveals that appellee stipulated to the relief requested in appellants' motion regarding financial circumstances, *i.e.*, appellee agreed to refrain from offering evidence of appellants' financial resources.

During opening statements, however, appellants' counsel told the jury that City Homes was "a charitable, tax-exempt organization under the Tax Code[,]" and that Mr. Mankowitz was merely an employee of City Homes with no ownership stake. Thereafter, when appellee called Mr. Mankowitz as a witness, appellee asked him to state his highest annual income while working as the president of City Homes. Over objection, Mr. Mankowitz stated that he made "A little less than $200,000."

On appeal, appellants argue that the trial court erred in admitting evidence of Mr. Mankowitz's salary. Appellants assert that the evidence was not relevant under Maryland Rule 5-401, and even if the evidence were relevant, it was still inadmissible because its probative value was outweighed by its unfair prejudice under Rule 5-403.

Maryland Rule 5-401 provides that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 5-402 provides that, "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible." Finally, Rule 5-403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Although trial judges have wide discretion 'in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence.'" *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 48 (2016) (quoting *State v. Simms*, 420 Md. 705, 724 (2011)).

The caselaw and commentators agree that, in Maryland, evidence of a party's financial status is generally not relevant under Rule 5-401. *See E. Contractors, Inc. v. State ex rel. Seifert*, 225 Md. 112, 126 (1961) ("The cases generally recognize that references to wealth or poverty in a civil case are improper."); *see also* Lynn McLain, *Maryland Evidence, State and Federal* § 401:2 (3d ed. 2019) ("Evidence of the parties' financial positions is usually irrelevant."); Joseph J. Murphy, Jr., *Maryland Evidence Handbook* § 508[E] at 239 (4th ed. 2010) ("A party's financial condition is generally irrelevant and therefore excluded under Md. Rules 5-401 and 5-402."); *cf. Farley v. Allstate Ins. Co.*, 355 Md. 34, 42-45 (1999) (stating that the amount of insurance coverage in an uninsured motorist policy is generally inadmissible as it "is not relevant to the jury's consideration of damages[,]" and "would be more prejudicial than probative" unless that amount were in issue). In *Maryland Evidence, State and Federal*, Professor McLain posits that the financial resources of a party are only relevant where: the suit requires proof of bankruptcy, where the plaintiff alleges that the defendant made a material misrepresentation as to his financial status, where a plaintiff seeks loss of earnings, or where a "a proper case for punitive damages is made[.]" § 401:2. Even in an action for punitive damages, "evidence

of the defendant's financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts." CJP § 10-913.

Appellee's negligence action clearly does not fall within one of these recognized exceptions.[5] In *Rogers v. Home Equity USA, Inc*., the Court of Appeals explained that there are three "links" a plaintiff must prove in a lead paint case sounding in negligence: "(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." 453 Md. 251, 265 (2017) (quoting *Ross v. Hous. Auth. of Balt. City*, 430 Md. 648, 668 (2013)). Mr. Mankowitz's annual salary clearly has no relation to the link between the Property and appellee's exposure to lead or to his resultant injury. This evidence was therefore irrelevant.

Not only was this evidence irrelevant, but it was also prejudicial in that it suggested that appellants had the financial means to pay appellee for his alleged injuries. Despite a dearth of Maryland caselaw discussing the prejudicial effect of mentioning or introducing evidence of a defendant's financial circumstances, our research has uncovered ample cases from other jurisdictions supporting the notion that a plaintiff's reference to a defendant's favorable financial situation will generally be "regarded as [an appeal] to the bias or

[5] Although appellee's complaint initially contained three counts—negligence, violation of the Consumer Protection Act, and negligent misrepresentation—the record reveals that appellee ultimately proceeded on only the negligence count.

prejudice of the jury, tending to improperly influence the decision either on the issue of liability or with regard to the amount of the verdict." W.E. Shipley, *Counsel's Appeal in Civil Case to Wealth or Poverty of Litigants as Ground for Mistrial, New Trial, or Reversal*, 32 A.L.R.2d 9 § 3 (2018); *see also United States ex. rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 896-898 (D.C. Cir. 2010) (holding that evidence of defendant corporations' wealth was irrelevant to their liability, that "[t]he only way the information could have affected the jury was to prejudice it[,]" and that it was not necessary for the evidence to be reinforced or reiterated "to be prejudicial enough to warrant a new trial"); *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970) (stating that evidence of defendant's financial circumstances was "totally irrelevant" and counsel's reference to defendant's wealth at closing argument was grounds for a new trial); *Liberty Nat. Life Ins. Co. v. Kendrick*, 210 So. 2d 701, 703 (Ala. 1968) (noting that there was no curative instruction to address statement "Liberty Mutual is a very wealthy company[,]" court held that "[i]t is highly prejudicial to a defendant for the jury to be improperly informed as to the wealth of the defendant or the poverty of the plaintiff and thus invite the jury to be liberal with someone else's money."); *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978) ("justice is not dependent upon the wealth or poverty of the parties and a jury should not be urged to predicate its verdict on a prejudice against bigness or wealth"); *Walsh v. Frankenthaler*, 186 A.D. 62, 64-65 (N.Y. App. Div. 1919) (noting error where plaintiff "dragged into the case the utterly irrelevant facts concerning defendant's large realty holdings"); *Griffith v. Am. Bridge Co. of N.Y.*, 163 A.D. 597, 599-600 (N.Y. App. Div.

1914) (finding reversible error where counsel alluded to a corporation's financial ability to pay).

The instant case is unique in that the record unequivocally demonstrates the effect of the improper evidence on at least one juror. During appellants' motion for a mistrial based upon the testimony of appellants' financial circumstances, the trial court acknowledged that when Mr. Mankowitz testified as to his salary, a juror audibly reacted:

> The -- there was from one juror -- I'd agree with you on this, [appellants' counsel]. On [sic] of the jurors, and I think it was one of the alternates, let out an audible kind of, gasp is the wrong word, but a sigh, or there was some reaction based on that; but, however, the -- I think the spirit of the stipulation is still intact.
>
> The fact that somebody is making $200,000 or somewhere in the neighborhood of $200,000 is -- is a fair reaction to the portrayal of the parties, defendants in this case, as being seen as just completely eleemosynary.

The juror's reaction, which presumably could be heard by other jurors, further bolsters our view that the admission of Mr. Mankowitz's salary evidence was highly prejudicial. Because the jury rendered its verdict against City Homes and Mr. Mankowitz as jointly and severally liable defendants, the prejudice resulting from the improper admission of Mr. Mankowitz's salary flowed to both parties. We conclude that the trial court committed reversible error in admitting evidence of Mr. Mankowitz's salary.

Appellee nevertheless argues that appellants "opened the door" regarding their financial circumstances when appellants' counsel told the jury in opening statements that City Homes was "a charitable, tax-exempt organization under the Tax Code[,]" and that

Mr. Mankowitz was merely an employee of City Homes with no ownership stake. Appellee asserts,

> In opening statements, [a]ppellants did, in fact, raise the issue of [a]ppellants' tax-exempt, charitable status but did not stop there. Appellants took another step and informed the jury that [a]ppellants['] business was defunct. This, again, was in stark contrast to any stipulation regarding either Party's financial resources cited by [a]ppellants.

Appellee is correct that the "opening the door" doctrine expands the scope of relevancy and renders admissible what would otherwise be inadmissible evidence. The Court of Appeals has explained the doctrine as follows

> The doctrine of "opening the door" to otherwise inadmissible evidence is based on principles of fairness. As we have stated: "'opening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'" It is a method by which we allow parties to "meet fire with fire," as they introduce otherwise inadmissible evidence in response to evidence put forth by the opposing side. In this regard, the "doctrine is really a rule of expanded relevancy." It "authorizes admitting evidence which otherwise would have been irrelevant in order to respond to . . . admissible evidence which generates an issue."

Little v. Schneider, 434 Md. 150, 157 (2013) (internal citations omitted). Moreover, the Court of Appeals has "held that the doctrine of 'opening the door' applies equally in opening statements, witness examination, and closing arguments." *Id*. at 161 (citing *Terry v. State*, 332 Md. 329, 337 (1993)).

We acknowledge that appellants' counsel arguably opened the door regarding *City Homes's* finances by describing it as a charitable but defunct organization. But we see no opening of the door as to *Mr. Mankowitz's* financial circumstances. Mr. Mankowitz testified that he was the president of City Homes from 1986 until at least 2010, but there

was no evidence that he owned City Homes or that City Homes's assets were effectively his own. Rather, the evidence simply indicated that Mr. Mankowitz was City Homes's employee. The admission of that irrelevant evidence clearly prejudiced Mr. Mankowitz. And given Mr. Mankowitz's relationship with City Homes and that City Homes paid his salary, we conclude that City Homes was likewise prejudiced by the improper salary evidence. Because the trial court committed reversible error in admitting evidence of Mr. Mankowitz's salary, we are compelled to vacate the judgments entered in this case.

II. CAUSATION

Were we to agree with appellants' next argument—that appellee failed to provide sufficient evidence of causation—appellants would be entitled to an outright reversal of the judgments without a remand for a new trial. We will explain, however, that appellee did produce sufficient evidence of causation.

As previously noted, to prove causation in a negligence case based on exposure to lead paint, a plaintiff must establish three 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." *Rogers*, 453 Md. at 265 (quoting *Ross*, 430 Md. at 668). For brevity, we refer to these links as "(1) source, (2) source causation, and

(3) medical causation." *Id*. Appellants assert that appellee's experts failed to establish source causation and medical causation.[6]

A) Source Causation

Appellants argue that because appellee's blood lead level was already 10 mcg/dL on August 17, 1995, appellee's experts could not establish that the Property contributed to his elevated level of 15 mcg/dL on August 21, 1996. In making their argument, appellants rely on the fact that appellee's experts could not verify whether appellee's blood lead level was higher or lower than 15 mcg/dL prior to him moving into the Property in January 1996. Appellants cite *Taylor v. Fishkind*, 207 Md. App. 121, 145-46 (2012), to argue that where a plaintiff's blood lead level is unknown prior to moving into a subject property, it is impossible to show that the subject property caused an increase in blood lead levels.

In our view, *Taylor* is distinguishable. In *Taylor*, the plaintiff lived in three separate properties. *Id*. at 125. From her birth in June 1990 until February 1993, she lived at 2320 Riggs Avenue; from February 1993 until March 1994, she lived at 1025 North Carrollton Avenue—the subject property; and from March 1994 until 2005, she lived at 828 Clintwood Court. *Id*. During this fifteen-year span, Taylor's blood was tested ten separate times for the presence of lead. *Id*. The results were as follows:

[6] In a footnote, appellants claim that, although they do not concede the point, they have omitted any argument regarding the first link ("source") from their brief "in the interest of brevity." In accordance with our practice, we shall not consider any argument not made. *Thompson v. State*, 229 Md. App. 385, 400 (2016) ("[a]rguments not presented in a brief or not presented with particularity will not be considered on appeal." (quoting *Wallace v. State*, 142 Md. App. 673, 684 n.5 (2002))).

Date of Test	Location	Blood Lead Level
4/22/1991	2320 Riggs Ave.	5 mcg/dL
10/31/1991	2320 Riggs Ave.	10 mcg/dL
4/15/1993	1025 North Carrollton Ave.	17 mcg/dL
5/28/1993	1025 North Carrollton Ave.	13 mcg/dL
1/27/1994	1025 North Carrollton Ave.	7 mcg/dL
8/3/1994	828 Clintwood Court	6 mcg/dL
7/19/1995	828 Clintwood Court	6 mcg/dL
9/20/1995	828 Clintwood Court	3 mcg/dL
5/6/1996	828 Clintwood Court	6 mcg/dL
11/21/1996	828 Clintwood Court	4 mcg/dL

Id.

Environmental testing of numerous exterior surfaces of 1025 North Carrollton revealed that "the only surface that tested positive for the presence of lead-based paint was an exterior window apron on the front of the house, and the paint on the window apron was intact. All other tested surfaces were negative for the presence of lead-based paint." *Id*. at 129.

Taylor's causation expert, Dr. Henri Frances Merrick, M.D., a pediatrician, authored a causation report asserting that Taylor was exposed to lead paint at both 2320 Riggs Avenue and 1025 North Carrollton Avenue. *Id*. at 126, 130. During Dr. Merrick's deposition, however, she conceded that she did not know Taylor's blood lead levels prior to moving to 1025 North Carrollton Avenue, and the mere fact that Taylor had a blood lead level of 17 mcg/dL in April 1993 did not prove that Taylor was exposed to lead at 1025 North Carrollton Avenue. *Id*. at 131-33.

In holding that Taylor presented legally insufficient evidence to connect 1025 North Carrollton Avenue to her elevated blood lead levels, we stated:

> Dr. Merrick's opinion that 1025 N. Carrollton Avenue contained lead-based paint is only supported by the age of the house and the presence of lead on one component of the exterior of the house. Moreover, the only evidence that [Taylor] was exposed to lead at 1025 N. Carrollton Avenue was her elevated blood lead level while living at that property. However, by Dr. Merrick's own admission, she could not conclude that [Taylor's] blood lead level rose while living at 1025 N. Carrollton Avenue nor could she rule out the possibility that [Taylor's] elevated blood lead level was caused by an exposure to lead that occurred prior to her moving to 1025 N. Carrollton Avenue. In light of Dr. Merrick's inability to rule out other sources of lead, such as 2320 Riggs Avenue, and the scant evidence presented that areas of 1025 N. Carrollton Avenue that were accessible to [Taylor] contained lead-based paint, we hold that the circuit court acted reasonably in concluding that the circumstantial evidence supporting Dr. Merrick's opinion amounted to no more than a possibility that [Taylor] was exposed to lead-based paint at 1025 N. Carrollton Avenue.

Id. at 142. Because the evidence was "inconclusive as to the source of [Taylor's] lead exposure[,]" we affirmed the court's granting of summary judgment. *Id*. at 146.

Taylor is distinguishable on several points. Although both cases involve uncertainty as to blood lead levels prior to moving into a new property, there are other facts present here that establish a connection between the presence of lead at the Property and appellee's elevated blood lead levels.

Dr. Sweeney, who was admitted at trial as an "expert in the fields of neurology, epidemiology, biostatistics and pediatric lead poisoning[,]" concluded that appellee suffered lead poisoning at the Property. In reaching her conclusion, Dr. Sweeney considered all available and relevant records in this case, including deposition transcripts, medical records, and property records. Dr. Sweeney noted that Ms. Pitman, appellee's mother, testified at a deposition that the Property contained chipping, peeling, and flaking paint in multiple locations. Additionally, Dr. Sweeney noted that the Property had been

previously tested and found to contain lead paint in multiple locations throughout its interior. Although Dr. Sweeney declined to testify regarding the half-life[7] of lead in the human body, she did explain that, following an elevated level, a lower blood lead level generally signifies that a person is no longer being exposed to lead. Dr. Sweeney was also able to rule out other sources of lead exposure based on appellee's parents' occupations or hobbies. In reaching her conclusion, Dr. Sweeney recognized that appellee had "an elevated blood lead level drawn while he was living [at the Property]."

Additionally, Dr. Robinson-Josey, an expert in the field of pediatric medicine and childhood lead poisoning, concluded that appellee suffered lead exposure at the Property. Like Dr. Sweeney, Dr. Robinson-Josey reviewed all available and relevant records including appellee's medical and school records, as well as property records and deposition testimony. In reaching her conclusion, Dr. Robinson-Josey ruled out some of the properties that appellee visited during his tenancy at the Property. Specifically, Dr. Robinson-Josey ruled out 1821 East 30th Street and 1724 North Wolfe Street because appellee's mother testified at deposition that they visited those locations infrequently and they were in good condition.[8] Dr. Robinson-Josey considered 1127 Tenant Way to be the likely cause of appellee's elevated blood lead level in August 1995 because it was appellee's primary

[7] Dr. Sweeney testified that a substance's half-life "is the time it takes for half of the substance to leave . . . the body."

[8] Dr. Robinson-Josey considered 1821 East 30th Street as a potential source when appellee lived at 1127 Tenant Way, but ultimately attributed appellee's first elevated lead level to 1127 Tenant Way.

residence at the time, and "there was no significant visitation" to other properties. Nevertheless, Dr. Robinson-Josey concluded that the Property also contributed to appellee's elevated blood lead levels because: the property had been previously tested and those tests confirmed the presence of lead, repair records revealed that numerous parts of the property were in disrepair, there was no history of a gut rehabilitation nor a record of a removal of the original components of the property, and the other properties appellee visited "would not seem to be a contributing source of his exposure."

Whereas in *Taylor* only a single *exterior* location of the property tested positive for lead, here, both experts testified that numerous *interior* sites throughout the Property tested positive for lead, that other locations were not a likely source of lead exposure, and that appellee's blood lead level was elevated on the last day of his tenancy at the Property. Moreover, in *Taylor*, testing performed during the plaintiff's occupancy of the dwelling showed a *decrease* in lead levels during the course of her tenancy. *Id*. at 145. No such evidence exists in the case at bar. Indeed, appellee had an elevated blood lead level after residing in the Property for nearly eight months.

The facts in the instant case are more analogous to *Rogers*, 453 Md. 251. There, Rogers's blood lead levels were already elevated before he moved into the defendant's property. *Id*. at 256-57. After residing at the defendant's property for nearly three months, however, Rogers's blood lead level remained elevated. *Id*. at 257. The facts also revealed that "[t]he property tested positive for lead-based paint throughout its interior in 1976—20 years before Rogers lived there." *Id*. at 256. In fact, the testing showed that "lead-based

paint was on 'basically everything inside the house[.]'" *Id*. at 269. Additionally, "the building permits issued between 1976 and 1996 suggest that [the property] was never fully rehabilitated." *Id*. at 272. Relying on these facts, the Court of Appeals held that there was sufficient evidence to establish that the defendant's property was a reasonably probable source of Rogers's lead exposure. *Id*. at 272-73.

As in *Rogers*, the interior of the Property tested positive for lead in various locations, there was no evidence of a gut rehabilitation, and the testimony revealed that portions of the Property were chipped or flaking. And, like Rogers, appellee's blood lead level was elevated prior to moving into the Property and remained elevated at the end of appellee's eight-month tenancy. We therefore conclude that there was sufficient evidence to establish that the Property, appellee's residence for nearly eight months after which his blood lead levels tested at 15 mcg/dL, was a reasonably probable contributing source of appellee's lead poisoning.

B) Medical Causation

Appellants also argue that appellee failed to provide sufficient evidence that any blood lead level increase from the Property contributed to his injury. According to appellants: 1) appellee's experts failed to "discern a specific injury attributable to [the Property]" because appellee already suffered a permanent injury when he was exposed to lead as early as August 17, 1995—the date of his first test; and 2) appellee's experts failed to take into account other challenges appellee faced when determining the extent of appellee's injuries. We reject these arguments in turn.

Appellants claim that appellee's "experts did not discern a specific injury attributable to [the Property]." Appellee's experts were not required to do so, however, because they unequivocally testified that the injury in this case is indivisible.

In *Carter v. Wallace & Gale Asbestos Settlement Tr.*, the Court of Appeals held that "apportionment of damages is appropriate only where the injury is reasonably divisible and where there are two or more causes of the injury." 439 Md. 333, 348 (2014). There, in a consolidated asbestos case, a plaintiff named Hewitt was exposed to asbestos, but was also a "long-time smoker, smoking half a pack to a full pack of cigarettes every day for 65 years."[9] *Id*. at 336-39. At trial, Hewitt's expert, Dr. Zimmet, testified that both the asbestos and the cigarette smoking were substantial contributing factors to Hewitt's lung cancer. *Id*. at 340-41, 356. Dr. Zimmet explained "that he could not differentiate between the two causes because the two exposures are 'not just additive, they are synergistic which means they multiply exposures.'" *Id*. at 340-41 (footnote omitted). Accordingly, when the asbestos settlement trust requested apportionment of Hewitt's damages, Hewitt responded that apportionment was impossible due to the indivisible nature of his injury. *Id*. at 341. The trial court agreed with Hewitt; it excluded evidence from the trust's expert regarding apportionment, and also declined to instruct the jury on apportionment of damages. *Id*. at 341-42.

[9] Unfortunately, Hewitt passed away two years after he and his wife filed their asbestos complaint. *Carter*, 439 Md. at 339. Although Hewitt's estate proceeded with that action, for simplicity, we shall refer to the plaintiff in that case as "Hewitt."

On appeal, the Court of Appeals upheld the trial court's rulings regarding the indivisible nature of Hewitt's injury. *Id*. at 351. The Court noted that, where multiple sources contribute to cause an injury, "The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes." *Id*. (quoting W. Page Keeton et al., *Prosser and Keeton on Torts* § 52, at 345 (5th ed. 1984)). Based upon its review of caselaw and its application of the Restatement (Second) of Torts, the Court concluded that "apportionment of damages is appropriate only where the injury in question is reasonably divisible among multiple causes." *Id*.

The Court explained that the concept of joint and several liability justified "why a defendant should be held liable for the entirety of an injury, even when there may be multiple contributing causes." *Id*. at 352. The Court noted,

> [T]he predicate for concurrent tortfeasors' joint and several liability is the indivisibility of the injury. We have long recognized that when tortfeasors act independently and their acts combine to cause a single harm, the tortfeasors are jointly and severally liable. . . . Under the 'single indivisible injury rule' or 'single injury rule,' the necessary condition for concurrent tortfeasors to be held jointly and severally liable is that they caused a single injury incapable of apportionment.

Id. at 352-53 (quoting *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 178-79 (2005)).

In holding that Hewitt's injury was indivisible, the Court relied on Dr. Zimmet's testimony regarding the "synergistic" effect of a smoker who is then exposed to asbestos. *Id*. at 356. According to Dr. Zimmet, exposure to both could multiplicatively increase the risk of cancer: "if you are a smoking asbestos worker, the risk factors are not really additive.

They are synergistic and they are multiple. And the risk factors can go up, some published reports, 50 to 90 times if you both smoke and have asbestos exposure." *Id*. at 356. The Court also recognized a 1996 resource stating that smoke and asbestos exposure create a multiplicative effect on the development of cancer. *Id*. at 356 (citing George A. Peters & Barbara J. Peters, *Asbestos Pathogenesis and Litigation, Vol. 13 of the Sourcebook on Asbestos Diseases: Medical, Legal, and Technical Aspects* 149 (1996)). Because of its "multiplicative effect," the Court held that Hewitt's injury was indivisible, and that apportionment was therefore not appropriate. *Id*. at 356-57. Moreover, the Court concluded that Hewitt's ultimate injury—his death—"is an indivisible injury incapable of apportionment." *Id*. at 357.

As in *Carter*, the evidence on this record demonstrates that appellee's injury was indivisible and incapable of apportionment. On direct-examination, Dr. Robinson-Josey explained that multiple exposures to lead caused an indivisible injury. She testified that in analyzing appellee's injury from lead exposure, she looked beyond each independent blood lead level test result. She testified

> every exposure contributes to the deficits and contributes to that lead burden. *So it's not possible to isolate a lead level and say this caused this injury* except in a case where you have an [encephalopathy] which means you have a very high level that causes a neurological deficit in terms of the child would present with brain swelling, seizures, vomiting. If you have a level of that level, then definitely you can -- you can point that this level caused that injury. But in terms of lower levels, you're looking at the chronicity of exposure.

(Emphasis added).

Dr. Sweeney's testimony further persuades us that appellee's injury is indivisible. Dr. Sweeney noted that when appellee's initial blood test revealed elevated lead levels, he was too young to undergo psychological and IQ testing. In August 1995, when appellee first tested positive for elevated lead levels, he was only one year old. In January 1996, appellee, then only two years old, similarly did not undergo any psychological or IQ testing prior to moving into the Property. Dr. Sweeney further testified that there are no studies examining the harm to children who have been affected by multiple distinct exposures to lead because such a study "would likely be unethical." Because appellee was never psychologically evaluated nor was his IQ measured when his blood tests indicated lead exposure, it would be impossible to apportion his injury among the properties that exposed him to lead. In short, appellee suffered an indivisible brain injury incapable of apportionment, and "any tortfeasor joined in the litigation whose conduct was a substantial factor in causing the plaintiff's injury would be legally responsible for the entirety of the plaintiff's damages."[10] *Id*. at 354.

We next turn to appellants' argument that appellee's experts "failed to account for the impact of other known impediments to [a]ppellee's psychological and academic development, including migraines, suspected sleep apnea, and poor school attendance." According to appellants, Drs. Sweeney and Robinson-Josey failed to distinguish these contributing factors to appellee's injuries from appellee's lead exposure. The record belies

[10] We note that appellants presented no evidence to support their apportionment of damages theory.

appellants' assertion. At the outset, we note that both Drs. Sweeney and Robinson-Josey concluded that appellee suffered injury due to his lead exposure, and that his exposure resulted in a lower IQ, academic problems, and attention and behavioral issues.

When asked about appellee's sleep issues and whether they contributed to his academic challenges, Dr. Sweeney testified that appellee was never diagnosed with a sleep disorder, and opined to a reasonable degree of medical certainty that any sleep disorder or related issues did not cause appellee's academic deficits or impairments. Regarding migraines, Dr. Sweeney testified that upon taking medicines like Advil and Motrin, appellee's headaches would generally dissipate. Dr. Sweeney rejected the notion that appellee's migraines hampered his academic performance, testifying, "I don't look at migraines as a diagnosis that would prevent someone from learning or cause impaired school performance." Indeed, appellee's academic record indicates that he struggled with attention and concentration prior to him reporting his sleeping issues. Finally, regarding appellee's school absences, Dr. Sweeney acknowledged appellee's generally poor attendance, but noted that in sixth grade—one of appellee's best attendance years—his grades did not improve. Rather, he averaged a "D."

Dr. Robinson-Josey also testified at length about whether lead exposure or appellee's other health issues and school attendance impacted his development. Dr. Robinson-Josey noted that appellee's "academic struggles started before the headaches and the sleepiness kicked in." Dr. Robinson-Josey acknowledged that, even with elevated lead levels, had appellee slept adequately, attended school regularly, and was motivated, there

was a possibility he would have performed better. Nevertheless, Dr. Robinson-Josey noted that appellee suffered deficits in specific areas—reading comprehension and math—and that even with improvements in attendance, sleep, and motivation, appellee's deficits would persist.

The record clearly reveals that, in formulating their medical opinions, both Drs. Sweeney and Robinson-Josey contemplated what role appellee's health issues and school attendance played in hampering his development. Accordingly, the trial court did not err in rejecting appellants' request to strike the testimony of Drs. Sweeney and Robinson-Josey for failing to establish source causation and medical causation.

III. AGGRAVATION AND APPORTIONMENT

The second issue raised in appellants' brief is whether the trial court erred in denying their Motion for Judgment Notwithstanding the Verdict because appellee failed to establish his pre-existing injury such that he could attribute his subsequent injury to appellants. Appellants' third issue in his brief is closely related: whether the trial court erred when it refused to instruct the jury on apportionment.

As we explained above, "apportionment of damages is appropriate only where the injury is reasonably divisible and where there are two or more causes of the injury." *Carter*, 439 Md. at 348. Because appellee's injury is indivisible, apportionment is not appropriate. "To be sure, if an injury is indivisible, any tortfeasor joined in the litigation whose conduct was a substantial factor in causing the plaintiff's injury would be legally responsible for the entirety of the plaintiff's damages." *Id*. at 354. Appellee established that appellants

substantially contributed to his injury. Accordingly, appellants may be held legally responsible for the entirety of his damages.

IV. LAY OPINION TESTIMONY

Appellants next argue that the trial court erred when it allowed Mark Lieberman, appellee's vocational expert, to testify as a lay witness that appellee is cognitively disabled. To provide context for this issue, we note that the United States Census Bureau administers an "American Community Survey" ("ACS"), and that question 18-A on the ACS asks: "Due to a physical, mental or emotional condition does the person have serious difficulty concentrating, remembering, or making decisions?" The question is part of the overall ACS, which is distributed to residents as part of the census.[11]

Appellee successfully introduced Mr. Lieberman as an expert in vocational rehabilitation. As part of his work in evaluating appellee's vocational opportunities, Mr. Lieberman testified that he relies on information contained in the ACS. Although Mr. Lieberman did not specifically ask appellee question 18-A as part of his vocational analysis (presumably because he only relies on mass data accumulated by ACS), at trial appellee sought to have Mr. Lieberman testify that, in accordance with question 18-A, appellee suffered from a cognitive disability. After appellants' objection, the trial court allowed Mr.

[11] The ACS is sent to specific addresses, rather than to specific people, and each address in the United States "has about a 1-in-480 chance of being selected." American Community Survey Information Guide, How ACS Data Are Collected https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS_Information_Guide.pdf page 6 (last visited Oct. 19, 2020).

Lieberman to answer question 18-A, but only in the capacity of a lay witness. Appellants allege that this was not lay witness testimony. We agree.

Maryland Rules 5-701 and 5-702 govern opinion testimony by lay and expert witnesses. Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

In *Ragland v. State*, the Court of Appeals held that the trial court erred in admitting the "lay opinion" testimony of two police officers because that evidence could have only been admitted as expert testimony. 385 Md. 706, 709 (2005). There, police officers observed a man named Paul Herring make two phone calls from separate pay phones, and then participate in a hand-to-hand transaction with another individual later identified as Ragland. *Id*. at 709-10. At trial, the State called Officer Bledsoe and Detective Halter as lay witnesses to testify that Ragland's exchange with Herring was a drug transaction. *Id*. at 710-14. On appeal, Ragland argued that both officers' testimony constituted expert testimony, and should not have been admitted as mere lay opinion. *Id*. at 715-16.

In reversing Ragland's conviction, the Court of Appeals endorsed a narrow interpretation of permissible opinion testimony. *Id*. at 725. Specifically, the Court held that "lay opinion" testimony may not be "based upon specialized knowledge, skill, experience, training or education." *Id*. Accordingly, the Court concluded that Officer Bledsoe and Detective Halter's testimony constituted expert testimony because their opinions "were based on those witnesses' specialized knowledge, experience, and training." *Id*. The Court noted that

> At the beginning of Officer Bledsoe's testimony, the prosecutor asked him to describe his training in the investigation of drug crimes. Bledsoe reported having attended "several drug recognition courses and training at the police academy, and several seminars," as well as a "drug school." The prosecutor asked Officer Bledsoe whether "based on [his] training and experience" the activity on Northwest Drive was "of significance" to him, and then asked "what did you believe had occurred?" Although he denied that he was seeking an expert opinion, the prosecutor explained that Officer Bledsoe "brings to this like a mechanic who works on Mercedes, brings special knowledge about Mercedes. He brings special knowledge about drug deals and what these things bring."
>
> Officer Bledsoe testified that "[i]n my opinion what occurred was the drug transaction." Asked what that opinion was based on, Bledsoe replied, "[b]ased on two temporary assignments in a narcotics unit; two and a half years with this unit; involved in well over 200 drug arrests." Detective Halter similarly testified to an extensive history of training and experience in the investigation of drug cases, and gave his opinion that the events on Northwest Drive constituted a drug transaction.

Id. at 725-26. Because the officer and detective testified that Ragland participated in a drug transaction based on their knowledge and experience, rather than simply their observations, the Court of Appeals held that "This testimony cannot be described as lay opinion." *Id*. at 726. Indeed, the Court noted, "These witnesses had devoted considerable

time to the study of the drug trade. They offered their opinions that, among the numerous possible explanations for the events . . . the correct one was that a drug transaction had taken place." *Id*.

As in *Ragland*, Mr. Lieberman's testimony that appellee suffers from a cognitive disability based on the standard enumerated in question 18-A of the ACS cannot constitute lay opinion. Not only did Mr. Lieberman testify to something beyond his rational observations, *see* Md. Rule 5-701, but the testimony itself reveals that he relied on his training, knowledge, and experience:

> Okay. Again, that definition, "Due to a physical, mental or emotional condition, does the person have serious difficulty, concentrating, remembering and making decisions?" Now, remember. I said earlier, I didn't ask him the question. I don't work for the Census Bureau. It's not like I interview 20 people, ask them, find out the results and run back to the Census Bureau and say hey, include this in your survey. They'll say did you ask him the question and I'll say no. They'll say well, no, thank you. We don't want it in the survey. That's not the purpose of it for me.
>
> For me, I'm looking at Savon as a unique individual and saying *everything I know in the field of vocational rehabilitation, my education, training and experience*. Does he have significant cognitive issues that are going to slow him down from achieving what his maximum potential would have been? And to me, the answer is yes. Did I ask Savon the question? No. Because again, I'm not reporting it back to the Census Bureau.
>
> But do I believe based on all the records and reports that I reviewed he has significant cognitive issues, yes. By the way, is that consistent with what I know from government data again, that Census Bureau survey, yes. So I feel very comfortable that Savon is going to experience the same type of issues as individuals in that category.

(Emphasis added).

This was quintessentially expert opinion. Because Mr. Lieberman's testimony illustrated reliance on his specialized knowledge, training, and experience rather than his observations, "[t]his testimony cannot be described as lay opinion." *Id.* at 726. *Ragland* therefore compels us to conclude that the trial court erred in permitting this testimony under the guise of "lay opinion."[12]

V. REY COMPLEX FIGURE

Finally, we address appellants' argument regarding the Rey Complex Figure. The Rey Complex Figure is a "complicated figure" that Barry Hurwitz Ph.D, appellee's psychology expert, had appellee attempt to copy in order to evaluate appellee's brain damage. Dr. Hurwitz testified that the American Psychological Association admonishes the publication and dissemination of the figure. Accordingly, on cross-examination, Dr. Hurwitz declined to positively identify the figure when appellants' counsel produced his own copy of the Rey Complex Figure. The trial court relied on Dr. Hurwitz's reference to professional ethics in allowing him to avoid answering appellants' counsel's question.

The record reveals that appellants intended to challenge Dr. Hurwitz's testimony with their own expert, Dr. Marote. Unfortunately, Dr. Marote was unavailable for trial. Because we are vacating the judgments and remanding for a new trial, and because we

[12] On remand, should appellee attempt to offer this testimony through Mr. Lieberman in his capacity as an expert, we caution the trial court that, "[S]imply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion which does not otherwise comport with Maryland Rule 5-702." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 478 (2013) (quoting *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182-83 (2003)).

believe it unlikely that this issue will arise on re-trial, we simply note that a trial judge has the discretion to seal an exhibit, and protect its publication from the public. *See generally Balt. Sun v. Thanos*, 92 Md. App. 227 (1992).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED FOR NEW TRIAL. COSTS TO BE PAID BY APPELLEE.