Circuit Court for Baltimore City
Case No. 24-C-17-002383

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1376

September Term, 2019

CITY HOMES, INC., et al.

v.

DILAN SUMPTER

Nazarian,
Beachley,
Zic,

JJ.

Opinion by Beachley, J.

Filed: December 21, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On June 4, 2019, a jury sitting in the Circuit Court for Baltimore City returned a $1.7 million verdict in favor of appellee Dilan Sumpter and against appellants City Homes, Inc. ("City Homes") and Barry Mankowitz. The jury found that appellants were negligent in maintaining 907 N. Wolfe Street (the "Property"), and that their negligence caused appellee's exposure to lead and his subsequent injuries related to that exposure. Following unsuccessful motions for judgment notwithstanding the verdict and/or for a new trial, and for remittitur, appellants timely noted their appeal. Appellants present the following three questions for our review:

1. Did the Trial Court abuse its discretion when it permitted Appellee to present evidence and testimony regarding Housing Code violations as to non-leaded leaking ceilings, and then instructing the jury that evidence of such Housing Code violations established a prima facie case of negligence against Appellants?

2. Did the Trial Court err or abuse its discretion in denying Appellants' Motion for Judgment and later Appellants' Motion for JNOV and/or New Trial, when Appellee and his experts failed to establish that any alleged exposure to lead-based paint at the Property proximately caused any injury to Appellee?

3. Did the Trial Court abuse its discretion in refusing to remit Appellee's economic loss award down to $0.00 given the speculative nature of the jury's economic loss award?

We answer appellants' questions in the negative and affirm.

<u>FACTUAL AND PROCEDURAL BACKGROUND</u>

From his birth in March 1993 until approximately 1994, appellee lived with his Mother, Grace Robinson, and siblings at a property on Linden Avenue. In August 1994,

appellee began living at 1610 St. Stephens Street.[1] On September 6, 1996, appellee moved to the Property, which appellants owned. Appellee left the Property in February 1998.

Notably, in April 1994, a lead paint inspection of the Property indicated that lead paint was present in nearly every room in the house. As a result, appellants performed a lead paint remediation in conjunction with the Baltimore City Health Department. Although many lead paint windows were completely replaced, other areas and surfaces were simply painted over with a stabilizing primer.

During his childhood, appellee was tested for the presence of lead in his blood on numerous occasions prior to moving to the Property. Relevant here, after living at the Property for approximately a year, appellee's September 11, 1997 blood lead test revealed a level of 12 micrograms per deciliter.[2] The following table depicts appellee's blood lead level test results:

[1] Citing to records from Kennedy Krieger Institute, appellants assert that appellee moved to St. Stephens Street in 1995. According to a Kennedy Krieger Institute document cited by appellee, however, appellee moved to St. Stephens Street in August 1994. Although irrelevant to the outcome of this appeal, we assume that appellee moved to St. Stephens Street in August 1994.

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

Date of Test	Location	Blood Lead Level
10/19/1994	1610 St. Stephens Street	14 mcg/dL
1/13/1995	1610 St. Stephens Street	15 mcg/dL
7/10/1995	1610 St. Stephens Street	20 mcg/dL
8/23/1995	1610 St. Stephens Street	22,24 mcg/dL
8/31/1995	1610 St. Stephens Street	18 mcg/dL
11/1/1995	1610 St. Stephens Street	26 mcg/dL
1/26/1996	1610 St. Stephens Street	10 mcg/dL
3/20/1996	1610 St. Stephens Street	12 mcg/dL
9/11/1997	The Property	12 mcg/dL
7/21/1999	Unknown	4 mcg/dL

On July 25, 2017, appellee filed his first amended complaint against appellants, alleging negligence, unfair and deceptive trade practices, and battery for injuries sustained from exposure to lead paint at the Property. Ultimately, the case proceeded solely on the negligence count, with the jury finding that appellants were negligent in their maintenance of the Property, and that appellee sustained injuries as a result of appellants' negligence. The jury awarded appellee $1,725,936.00 in economic damages, but declined to award any non-economic damages. Following the verdict, appellants unsuccessfully moved for JNOV and/or a new trial and for remittitur. We shall provide additional facts as necessary.

DISCUSSION

I. EVIDENCE AND JURY INSTRUCTIONS REGARDING HOUSING VIOLATIONS: LEAKING CEILING AND KITCHEN FLOOR REPLACEMENT

Prior to trial, appellants filed two motions *in limine* to exclude evidence and testimony related to violations of the Baltimore City Housing Code.[3] The first motion sought to exclude documents relating to the Property's previous tenants. Specifically, appellants sought to exclude three work orders generated during the tenancy of Simone Miller (the "Miller tenancy"), who occupied the Property from August 1995 through August 1996, but whose tenancy did not overlap with appellee's. The second motion sought to exclude documents and testimony related to other alleged defects at the Property that were supposedly unrelated to appellee's lead exposure. The court granted in part and denied in part these two motions. Additionally, as part of the jury instructions provided, the trial court instructed the jury that it could consider whether appellants' violations of the Housing Code proximately caused appellee's lead exposure and resultant injury.

On appeal, appellants argue that the trial court erred in denying their motions *in limine* and allowing into evidence facts not related to appellee's alleged exposure to lead paint. They further argue that the court compounded its error by improperly instructing the jury that it could consider these violations in finding them negligent and liable for

[3] The Baltimore City Housing Code generally requires landlords to provide safe conditions for the use and occupancy of dwellings, including maintaining the roof and walls so as to prevent leaks, and to remove or repair any walls, ceilings, woodwork, or doors that contain flaking or peeling paint. Baltimore City, Md., Code of Ordinances Article 13 §§ 702-703.

appellee's lead paint exposure and injury. As we shall explain, the trial court did not err in its rulings on the motions *in limine*. Additionally, we perceive no error with the jury instructions provided.

A. Motions *in Limine*

Appellants challenge the trial court's partial denials of two motions *in limine*: a motion to exclude evidence involving prior non-party residents, and a motion to exclude evidence of other alleged defects at the Property during appellee's tenancy. In both instances, appellants argue that the evidence was not relevant and, even if relevant, the evidence was unduly prejudicial.

Maryland Rule 5-401 states 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, "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." We first review *de novo* whether evidence is legally relevant. *Wallace-Bey v. State*, 234 Md. App. 501, 548 (2017); *Wash. Metro. Area Transit Auth. v. Washington*, 210 Md. App. 439, 451 (2013). If the evidence is relevant, we review whether

the trial court abused its discretion in admitting such evidence because its probative value is outweighed by the danger of unfair prejudice. *Wash. Metro. Area Transit Auth.*, 210 Md. App. at 451.

1) Miller Tenancy Work Orders

We shall first address the motion *in limine* regarding the Miller tenancy. At the hearing on the motion, appellants clarified that they sought to exclude three work orders from the Miller tenancy: a February 23, 1996 work order stating “kitchen ceiling water and peeling only when rains [sic]”; a February 26, 1996 work order stating “rats in bathroom in hole, kitchen ceiling water and peeling only when it rains”; and a June 20, 1996 work order stating simply “kitchen ceiling and dining room ceiling.”

As relevant here, the court ruled that the two February work orders were relevant in that they were expected to corroborate Ms. Robinson’s trial testimony that the Property suffered the recurring problem of water leaking into the home and causing paint to peel. The court redacted references to the rat holes in the bathroom from the February 26, 1996 work order, and granted the motion as to the June 20, 1996 work order.[4] Put simply, the trial court denied the motion *in limine* as to two February 1996 work orders that indicated that the kitchen ceiling leaked when it rained, causing paint to peel in the kitchen.

[4] The trial court also redacted reference to the word “lead” as it appeared in the February 26, 1996 work order, finding that the word’s meaning, in the context of the order, was unclear.

This evidence was clearly relevant. At the time of the hearing, the parties expected Ms. Robinson to testify that during *appellee's* tenancy, the Property suffered from the same defects noted in the records—a leaking kitchen ceiling which caused paint to peel. That the ceiling suffered from a recurring defect made it more likely that these conditions persisted during appellee's tenancy. In this way, the Miller tenancy records served to bolster Ms. Robinson's credibility regarding her recollection of the Property's conditions. Furthermore, as appellants note in their brief, Ms. Robinson was expected to testify that the ceiling leak caused "paint to dislodge," which could have explained why appellee was exposed to lead at the Property even after the 1994 lead remediation. This evidence was clearly relevant to support appellee's theory of deteriorated conditions at the Property which caused lead exposure.

In their brief, appellants argue that the trial court erred in denying their motion *in limine* because "***Appellee's mother never testified that the ceiling or the walls in the rooms with leaks had deteriorated paint.***" In other words, although the court seemingly conditioned the admissibility of the Miller tenancy records on Ms. Robinson's expected testimony that the leaking ceiling caused paint to chip and flake at the Property, Ms. Robinson never so testified. Nevertheless, this does not mean that the trial court erred in denying the pre-trial motion *in limine*. We explain.

Maryland Rule 2-517(a) provides, in relevant part, that,

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final

> argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

Furthermore, Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 103, at 18 (4th ed. 2010) (quoting Rules 2-517(a), 3-517(a), and 4-323(a)) provides,

> A motion to strike is . . . the correct procedural tool when it becomes apparent that inadmissible evidence has previously been received, and when evidence has been admitted on condition that the necessary foundation would be supplied later. If the necessary foundation is not supplied by whatever evidence is later introduced, [the objecting party] must move to strike the conditionally admitted evidence "on the ground that the condition was not fulfilled."

Here, appellants did not move to strike the evidence of the leaking ceiling during the Miller tenancy on the basis that the condition for admissibility—Ms. Robinson's corroborating testimony—was never fulfilled. Thus, their argument that these records were irrelevant is unpreserved.

Finally, we hold that the records concerning the Miller tenancy were not unduly prejudicial. Rule 5-403 does not preclude the admission of evidence simply because it may be harmful to a party's case. *Burris v. State*, 435 Md. 370, 392 (2013) (citing *Odum v. State*, 412 Md. 593, 615 (2010)). Rather, evidence is unduly prejudicial when it "produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Newman v. State*, 236 Md. App. 533, 550 (2018) (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 506(b), at 181 (3d ed. 1999)). Evidence that the kitchen ceiling at the Property suffered from recurring leaks prior to appellee's own tenancy clearly does not produce an emotional response that logic cannot overcome.

Id. Accordingly, the trial court did not err in denying the motion *in limine* as to records related to the Miller tenancy.

2) Evidence of Other Alleged Defects

Turning to appellant's motion regarding other alleged defects at the Property during appellee's tenancy, appellants sought to exclude references to conditions at the Property that, although violations of the Housing Code, were not causally related to appellee's alleged exposure to lead. At the hearing, the court considered over a dozen repair requests, and excluded several of them, including: a complaint concerning a broken basement window, a complaint involving a missing window panel in the rear bedroom, a complaint that water was coming through a rear door and leaking onto the floor, a call log that water was coming through basement walls, and a complaint that the kitchen sink was leaking into the basement.

Nevertheless, the court denied the motion as to the following work orders and call logs:

- a defective rear bedroom window which, according to appellee, was inspected and found to contain lead, and which Ms. Robinson was expected to testify had chipping and flaking paint;

- a rear addition ceiling leak problem and bathroom and kitchen flooding, conditions which Dr. Zuckerberg, appellee's causation expert, relied upon in determining that water damage caused paint to peel at the Property;

- a second complaint regarding the rear addition ceiling leaking into the bathroom;

- a complaint regarding water on the bathroom walls and floor, the kitchen floor, and the kitchen and hallway ceilings;

- a second complaint regarding water coming through the ceiling; and
- work orders indicating the replacement of the kitchen floor, including the removal or replacement of the baseboards.

A complaint regarding a defective rear bedroom window, which was known to contain lead paint, and which Ms. Robinson was expected to testify had chipped paint, was clearly relevant to appellee's case. Evidence concerning the leaking ceiling and water on the walls and floors was similarly relevant to show that water had seeped into the home, causing deterioration. Indeed, throughout his *de bene esse* testimony, Dr. Zuckerberg relied on the principle that "water is the enemy of paint" and that painted surfaces "can be destabilized. . . . when they become wet" to support his conclusion that the Property contributed to appellee's overall lead burden. In fact, appellants' lead risk assessment expert, Patrick Connor, similarly testified on cross-examination that water damage can contribute to paint failure, even where there are multiple layers of paint involved. Finally, the work orders concerning the removal of the kitchen floor and removal/replacement of the baseboards were relevant to show appellee's exposure to lead paint where the evidence indicated that nearly every baseboard in the home was covered with lead paint.

This evidence was relevant to show that the Property suffered conditions of disrepair, increasing the likelihood of appellee's exposure to lead paint, and was clearly not unduly prejudicial. Although these call logs and work orders undoubtedly portrayed appellants in a negative light by showing the deteriorated conditions at the Property, this evidence was highly probative to explain how the Property was a source of appellee's lead exposure. Furthermore, the evidence is not the type that would produce an emotional

response that overcomes logic. *Newman*, 236 Md. App. at 550. The trial court did not err in admitting this evidence.

B. Jury Instructions

Appellants also argue that the trial court erred in providing jury instructions concerning the Housing Code because it allowed the jury to find them liable for appellee's lead paint injuries based merely on leaking ceiling conditions, rather than requiring them to determine whether appellee was actually exposed to lead at the Property. The instructions stated, in relevant part:

> In a case such as this, a plaintiff may otherwise prove negligence by showing that defendants violated a statute or ordinance designed to protect a specific class of persons which includes the plaintiff and that the violation proximately caused the injury complained of.
>
> I instruct you that pertinent sections of the Baltimore City Housing Code, which we'll read in a moment, were or are designed to protect children from harm that might be caused by ingesting lead-based paint. If you find that . . . the Plaintiff has produced evidence that the Defendants violated these pertinent sections *and that the violations proximately caused the injuries complained of, he has established what we call a prima facie case of negligence*. . . .
>
> Now the Baltimore City Housing Code places a continuous duty on landlords to maintain rental property. Among other things, it states as follows, Section 103 of the Housing Code: The purpose of this code is to prevent all conditions in and about dwellings which are now or may in the future become so unsafe, dangerous, unhygienic or unsanitary as to constitute a menace to public health and safety of the people.
>
> Section 702, every building and parts thereof used or occupied as a dwelling shall, while in use, be kept in good repair, in safe condition and fit for human habitation. The roof and walls of such buildings shall be maintained so as not to leak, and all means of draining water therefrom shall be maintained so as to prevent dampness in the walls, ceilings or basements.
>
> Section 703, good repair and safe conditions shall include, but is not limited to, the following standards: All walls, ceilings, woodwork, doors and windows shall be kept clean and free of any flaking, loose or peeling paint or paper.

> Section 706, all interior loose or peeling wallcovering or pain[t] shall be removed and the exposed surfaces shall be placed in a smooth, sanitary condition. No paint shall be used for interior painting of any dwelling unless the paint is free from any lead pigment. . . .
>
> The Baltimore City Housing Code does not prohibit the offering for rent of a dwelling that contains lead-based paint nor does it require a landlord to remove intact lead-based paint. . . .
>
> Causation -- *for a person to recover damages, the plaintiff's injuries must result from and be reasonably -- be a reasonably foreseeable consequence of the defendant's negligence. There may be more than one cause of an injury, that is several negligent acts may work together to cause an injury. Each person whose negligent act is a substantial fact in causing an injury is responsible*.
>
> Now you have heard evidence that the Plaintiff may have been exposed to lead at locations other than [the Property]. Plaintiff must establish by a preponderance of the evidence that his exposure to lead at [the Property] was a substantial contributing factor in causing his elevated blood lead levels, and the elevated blood lead levels caused by the lead exposure at [the Property] was a substantial contributing factor in causing the injuries that the Plaintiff has allegedly suffered.

(Emphasis added).

We reject appellants' argument that the inclusion of these instructions "allowed the jury to speculate that the leak somehow caused a lead paint hazard, despite the fact that there was no evidence presented that a lead-hazard was ever created." To be sure, appellants correctly note that, in order to establish a *prima facie* case of negligence in this context, a plaintiff must show "(a) the violation of a statute or ordinance designed to protect a specific class of persons which includes the plaintiff, and (b) that the violation proximately caused the injury complained of." *Brooks v. Lewin Realty III, Inc*., 378 Md. 70, 79 (2003), *abrogated on other grounds by Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594 (2011). But the jury instructions here do not run afoul of this principle; the instructions did not allow the jury to find that appellants caused appellee's lead exposure

based solely on Housing Code violations. Rather, the instructions required the jury to link any such violations to appellee's lead exposure: "If you find that . . . the Plaintiff has produced evidence that the Defendants violated these pertinent sections *and that the violations proximately caused the injuries complained of*, he has established what we call a prima facie case of negligence." (Emphasis added). Additionally, the court properly instructed the jury regarding causation, requiring the jurors to link appellee's lead injuries to defendant's negligence. Accordingly, we reject appellants' assertion that the jury instructions here were improper.

II. CAUSATION

Appellants next argue that the trial court erred in denying their motions for judgment and for judgment notwithstanding the verdict ("JNOV") because appellee failed to provide sufficient evidence of causation through his expert, Dr. Zuckerberg.

> The standard of review of a court's denial of a motion for JNOV is the same as the standard of review of a court's denial of a motion for judgment at the close of the evidence, *i.e.*, whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence.

Univ. of Md. Med. Sys. Corp. v. Gholston, 203 Md. App. 321, 329 (2012) (citing *Wash. Metro. Area Transit Auth. v. Djan*, 187 Md. App. 487, 491-92 (2009)). We conclude that appellee presented sufficient evidence to permit a reasonable fact-finder to find the elements of negligence by a preponderance of the evidence.

At the outset, we note that 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 v. Home Equity USA, Inc*., 453 Md. 251, 265 (2017) (quoting *Ross v. Hous. Auth. of Balt. City*, 430 Md. 648, 668 (2013)). For brevity, we refer to these links as "(1) source, (2) source causation, and (3) medical causation." *Id*. In their brief, appellants argue that Dr. Zuckerberg "lacked a sufficient factual basis to offer testimony that the Property was a source of [a]ppellee's lead exposure and ingestion," and that he "failed to link [appellee's] alleged exposure at the Property to any identifiable injury." In other words, appellants argue that Dr. Zuckerberg failed to establish source causation and medical causation. We shall address each causation argument in turn.

A. Source Causation

At trial, Dr. Zuckerberg testified to a reasonable degree of medical probability that the Property was a "substantial, impactful, and significant contributor" to appellee's total lead burden and injury. Appellants challenge that conclusion in two ways. First, appellants argue that pursuant to *Taylor v. Fishkind*, 207 Md. App. 121 (2012), Dr. Zuckerberg improperly concluded that the Property contributed to appellee's lead exposure because his blood lead tests indicated elevated levels prior to him moving into the property. Second, appellants argue that Dr. Zuckerberg's explanation for appellee's expected decrease in blood lead levels over time does not comport with the studies he relied upon. We shall distinguish *Taylor*, and hold that Dr. Zuckerberg had a sufficient factual basis for his conclusions regarding source causation.

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.* Between April 1991 and November 1996, Taylor's blood was tested ten separate times for the presence of lead. *Id.* The results were as follows:

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. Although both *Taylor* and the case at bar involve lead exposure prior to moving into the subject property, Dr. Zuckerberg testified to other relevant facts that establish a connection between the presence of lead at the Property and appellee's elevated blood lead levels.

At trial, the court accepted Dr. Zuckerberg as an expert in medicine generally, pediatrics, lead poisoning, and its sources and medical harms. In order to determine whether appellee suffered significant lead exposure at the Property, Dr. Zuckerberg reviewed numerous documents, including records "from all the institutions [appellee] got his health care from." This included records from Kennedy Krieger Institute, Total Health Care, and the Department of Health and Mental Hygiene. Additionally, Dr. Zuckerberg reviewed appellee's educational records, his housing history, and the call log and repair records from his housing history. Dr. Zuckerberg also considered deposition testimony from both appellee and Ms. Robinson.[5]

Unlike in *Taylor*, where only a single exterior surface tested positive for lead paint, there was ample undisputed evidence here that the Property contained lead paint during appellee's tenancy. Dr. Zuckerberg noted that testing of the Property in 1994 revealed the presence of lead paint throughout its interior. Lead paint was pervasive at the property as nearly every baseboard in the home tested positive for the presence of lead, as did many of the door structures and window structures. In fact, the only room in the Property that did not test positive for the presence of any lead was the pantry. Although the Property underwent a "Lead Hazard Reduction" following the 1994 lead testing, Dr. Zuckerberg noted that City Homes did not perform an "abatement" or "complete removal of lead-based

[5] Because Dr. Zuckerberg provided his *de bene esse* testimony on May 22, 2019—a week before trial began—he could only rely upon deposition testimony rather than trial testimony. Appellants do not argue that it was improper for him to do so.

paint from the [P]roperty." Instead, they completed a "hazard reduction," which involved completely replacing some components such as windows, but simply stabilizing other components, such as the baseboards, by applying a primer and painting on top of them. Dr. Zuckerberg indicated that simply applying primer and paint would not prevent exposure to lead because the paint could flake or chip and create a hazard, and that dust from the friction of certain components could also create a lead hazard.

After noting the undisputed presence of lead at the Property, Dr. Zuckerberg then considered whether appellee could have been exposed to lead there. Dr. Zuckerberg opined that the condition of the Property led him to conclude that appellee suffered significant lead exposure. He learned from Ms. Robinson's statements that the baseboards chipped and flaked during appellee's tenancy, and that the Property had a history of water leaking into the home during appellee's tenancy. Dr. Zuckerberg asserted that "water is the enemy of paint[,]" and that it would cause paint to deteriorate. Of particular significance, Dr. Zuckerberg noted that between June and October 1997, repair orders indicated that there were serious problems with the Property's rear addition ceiling, and that water was leaking into the kitchen ceiling. According to Dr. Zuckerberg, home renovations can cause lead exposure to children when proper safety practices are not implemented.

Dr. Zuckerberg also considered appellee's blood lead test results in reaching his conclusion that the Property significantly contributed to his overall lead burden. Dr. Zuckerberg noted that appellee's blood indicated a lead level of 12 mcg/dL on March 12, 1996, six months before he moved to the Property on September 6, 1996. Next, Dr.

Zuckerberg noted that appellee's level was still 12 mcg/dL on September 11, 1997, a year and a half later, and after having lived at the Property for a year. This was significant to Dr. Zuckerberg because, if there were no ongoing exposure, Dr. Zuckerberg expected that appellee's blood lead level would decline as he grew bigger and older. That appellee's level did not decline, but instead remained the same a year after moving into the Property, indicated ongoing exposure.[6]

Whereas in *Taylor* only a single exterior location tested positive for lead, here the evidence showed that numerous interior sites throughout the Property tested positive. Moreover, in *Taylor* the plaintiff's test results showed a decrease in lead levels while living at the subject property. Here, however, appellee's level remained elevated a year after moving into the Property despite Dr. Zuckerberg's expectation that his level would decrease in the absence of ongoing lead exposure. Unlike in *Taylor*, there was a sufficient factual basis to support Dr. Zuckerberg's conclusion that lead at the Property was a significant contributor to appellee's overall lead burden.

In our view, this case is on all fours with *Rogers*, 453 Md. 251. There, Rogers's blood lead levels were already elevated before he moved into the defendant's property. *Id.*

[6] Dr. Zuckerberg recognized that, prior to moving to the Property, appellee likely suffered significant lead exposure at his previous residence, 1610 St. Stephens Street, and also at his father's home at 825 N. Chauncey Street. Both of these properties tested positive for the presence of lead and both were reported to have chipping paint. Nevertheless, Dr. Zuckerberg testified that the Property was a substantial contributing factor in appellee's overall lead burden based on the conditions at the Property, and appellee's elevated level after living there for a year.

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[ed] 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 the Property was in significant states of disrepair throughout appellee's tenancy. And, similar to Rogers, appellee's blood lead level was elevated prior to moving into the Property, but remained elevated a year after moving in. We therefore conclude that Dr. Zuckerberg possessed a sufficient factual basis to conclude that the Property contributed to appellee's overall lead burden.

Appellants further challenge Dr. Zuckerberg's factual basis for concluding that the Property significantly contributed to appellee's overall lead burden, arguing that he misconstrued two studies he relied upon to determine the time needed for an elevated blood lead level to fall below 10 mcg/dL. According to appellants, the studies Dr. Zuckerberg relied upon "present clear evidence that [appellee] carried with him lead from prior

exposures when he moved into [the Property] and that his sole blood lead level of 12 would be reflective of his past exposure rather than new exposure."

Although we acknowledge that appellant's extensive cross-examination of Dr. Zuckerberg cast some doubt on whether Dr. Zuckerberg accurately construed the two studies he relied upon, that does not compel us to conclude that Dr. Zuckerberg lacked a sufficient factual basis for determining that the Property significantly contributed to appellee's overall lead burden. As noted above, there was ample evidence that numerous components in the Property contained lead paint, and that the Property was in disrepair. That appellee's blood lead level did not decrease while living at the Property for a year, coupled with the evidence of disrepair and the presence of lead paint, was sufficient for Dr. Zuckerberg to conclude that the Property substantially contributed to his overall lead burden. In the end, the evidence was sufficient for the jury to find all of the elements of appellee's negligence action by a preponderance of the evidence.[7]

[7] On October 22, 2020, appellants filed a Motion to Remand, arguing that the case should be remanded to the circuit court pursuant to the Court of Appeals's recent decision in *Rochkind v. Stevenson*, 471 Md. 1 (2020). There, a closely divided Court of Appeals rejected the long-standing *Frye-Reed* test in favor of *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993) as the standard for evaluating the admissibility of expert testimony. *Rochkind*, 471 Md. at 5. In other words, instead of requiring a party to show that the scientific opinion to be received is generally accepted within the relevant scientific community (*Frye-Reed*), *Rochkind* "eliminates the duplicative analysis [of *Frye-Reed* and Rule 5-702] and permits the trial courts to evaluate *all* expert testimony—scientific or otherwise—under Rule 5-702." *Id*. at 35. By adopting *Daubert*, a court may consider a variety of factors, including but not limited to: whether the theory can be or has been tested; whether the theory has been subjected to peer review and publication; whether a technique has a known or potential rate of error; and the existence and maintenance of standards and controls. *Id*. at 4, 35-36. This change is designed to require courts to review the reliability

of the methodology used to reach a particular result, rather than focus on the methodology's mere acceptance in the scientific community. *Id*. at 31. This new interpretation

> applies to [*Rochkind*] and any other cases that are pending on direct appeal when [*Rochkind*] is filed, where the relevant question has been preserved for appellate review. In this context, the 'relevant question' is *whether a trial court erred in admitting or excluding expert testimony under Maryland Rule 5-702 or* Frye-Reed.

Id. at 38-39 (emphasis added) (quoting *Kazadi v. State*, 467 Md. 1, 47 (2020)).

We initially denied appellants' Motion to Remand without prejudice, permitting them to raise the issue at oral argument. We once again deny the motion. *Rochkind* makes clear that the "relevant question" must be whether the trial court erred in admitting or excluding expert testimony under Rule 5-702 or the *Frye-Reed* standard that previously applied. *Id*. Appellants do not cite to any instance in the record, nor have we found any, where appellants, prior to trial, sought to exclude Dr. Zuckerberg's testimony on the basis that his methodologies and conclusions were not generally accepted in the scientific community under *Frye-Reed* or Rule 5-702.

In their Motion to Remand, appellants rely on the arguments they raised in their motion for judgment at the close of appellee's case to argue that they have sufficiently preserved the "relevant question." In their Motion to Remand, appellants state that

> Dr. Zuckerberg did not provide a sufficient factual basis for his opinion that [a]ppellee was exposed to, and ingested, lead at the Property, or that the Property was a substantial contributing factor to [a]ppellee's injuries, given that most, if not all, of [a]ppellee's injuries occurred prior to his tenancy at the Property.

Although appellants baldly assert, "These are the same arguments presented and preserved on appeal – the admissibility of expert testimony under Md. Rule 5-702 and/or *Frye-Reed*," they failed to preserve any *Daubert* challenge because, even under appellants' theory, they did not raise the issue until their motion for judgment. In this regard, we have stated that,

> once an expert opinion has been received in evidence, one may not seek to avoid its impact by making an untimely Rule 5-702 admissibility challenge under the guise of a Rule 2-519 motion for judgment based on the legal insufficiency of the plaintiff's case. The right to challenge the sufficiency or adequacy of the plaintiff's case in macrocosm does not embrace the entitlement to rechallenge the sufficiency or adequacy of the basis for the

B. Medical Causation

Appellants also challenge Dr. Zuckerberg's conclusion that appellee's lead exposure at the Property was a substantial contributing factor to his injuries, including his loss of approximately 9 to 15 IQ points. Appellants principally rely on the fact that Dr. Zuckerberg arrived at this IQ decrement based on appellee's peak blood lead level, which occurred in November 1995, ten months before appellee moved to the Property. According to appellants, because appellee suffered permanent and irreversible damage before moving to the Property, Dr. Zuckerberg lacked a sufficient factual basis to conclude that the Property contributed to his lead-related injuries. We disagree. Under settled Maryland law, appellants could be found liable for all of appellee's injuries, even if he suffered permanent and reversible damage before moving to the Property.

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

> expert's opinion in microcosm. There are different kinds of sufficiency, and there are different times and places and ways for measuring sufficiency for different purposes.

Terumo Med. Corp. v. Greenway, 171 Md. App. 617, 630 (2006). Because appellants cannot point to a single instance in the record where they timely sought to exclude Dr. Zuckerberg's testimony on the basis of Rule 5-702 or *Frye-Reed*, the "relevant question," in *Rochkind*'s parlance, has not been preserved for appellate review. *Rochkind*, 471 Md. at 38-39.

a "long-time smoker, smoking half a pack to a full pack of cigarettes every day for 65 years."[8] *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.

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

[8] 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."

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*, Dr. Zuckerberg essentially testified that appellee's lead injuries were indivisible. Although Dr. Zuckerberg calculated appellee's IQ loss based on his peak blood lead level, Dr. Zuckerberg clarified that when quantifying an injury based on lead exposure, most studies consider the frequency of the levels over time assuming consistent and regular testing. Because appellee was not tested in a consistent and regular manner, Dr. Zuckerberg was forced to employ "a conservative method of estimating IQ loss [by looking] at the peak blood lead level, acknowledging that it doesn't capture how long that exposure was." On cross-examination, however, Dr. Zuckerberg clarified that, although he relied on the peak level to calculate IQ loss, the "chronicity" of exposure also factored into the extent of appellee's injury. Dr. Zuckerberg acknowledged that appellee suffered serious injury before entering the Property, but testified, "that damage only intensified as the duration of his exposure increased." When appellants' trial counsel suggested that Dr. Zuckerberg was "trying to sort of stretch out the time frame" which contributed to appellee's injury, Dr. Zuckerberg responded, "I'm not trying to stretch out anything. I'm looking at the data. The data is very clear. He was exposed for a prolonged period of time."

Because appellee's injury—essentially a brain injury—is indivisible, Dr. Zuckerberg attributed appellee's injury to both his peak blood lead level and the chronicity

of his exposure, including his exposure at the Property. Indeed, appellants presented no evidence at trial that appellee's injury was divisible. Because the evidence showed that appellee's 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. Applying that principle to the instant case, appellants are "legally responsible for the entirety of [appellee's] damages." *Id*.

III. REMITTITUR OF ECONOMIC DAMAGES

Finally, appellants argue that the trial court erred in denying their motion to remit the economic damage portion of the verdict due to the speculative nature of the award. According to appellants, despite relying on the chronicity of the exposure, "Dr. Zuckerberg offered no basis from which the jury could have determined what, if any, injury occurred as the result of [a]ppellee's residency at the Property."

This argument stems from appellants' misunderstanding of *Carter*. Under *Carter*, appellants could be found liable for the entirety of appellee's injury provided that the evidence showed that the Property was a substantial contributing factor to appellee's overall lead burden, and that this exposure contributed to his injuries. *Id*. By testifying that appellee suffered significant lead exposure at the Property, and that the chronicity of his exposure over time factored into appellee's overall injury, Dr. Zuckerberg satisfied these requirements. Accordingly, the trial court did not err in denying the motion to remit economic damages.

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