UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No.1565

September Term, 2014

MARIE CARTER

v.

HOUSING AUTHORITY OF
BALTIMORE CITY

Eyler, Deborah S.,
Nazarian,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: September 8, 2016

In a previous Opinion, we reviewed the testimony of Dr. Howard Klein, a pediatrician, who testified that a property at Cherryland Road was the source of Marie Carter's lead exposure. We concluded that Dr. Klein's testimony was insufficient and we remanded the case for a new trial. Attempting to tailor his testimony to conform to our instructions, Dr. Klein prepared and filed a supplemental affidavit, again asserting that the property at Cherryland Road was the source of Carter's lead exposure. The trial court found the supplemental affidavit still to be insufficient and that without it Carter could not establish that the Cherryland Road property was the source of her lead exposure. As a result, the trial court granted summary judgment. We agree and affirm.

BACKGROUND

Marie Carter was born in October 1986 and briefly resided at 2714 Giles Road in Baltimore City. In March 1987, Carter moved to an HABC-owned property at 3223 Cherryland Road in Baltimore City (the "Cherryland Road house") and resided there until 1992. In July 1989, while living in the Cherryland Road house, Carter was found to have an elevated blood-lead level of 14 µg/dl.[1] In July 1990, she was tested again and had a blood-lead level of 6 µg/dl.

Carter filed a personal injury lawsuit in the Circuit Court for Baltimore City, alleging injuries related to lead-based paint exposure sustained while living at the

[1] Blood-lead levels are measured in micrograms per deciliter (µg/dL).

HABC-owned Cherryland Road house. At trial, Dr. Klein testified that the Cherryland Road house was the source of Carter's lead exposure. The jury found for Carter and awarded her damages in the amount of $20,824,409. Pursuant to the statutory cap on noneconomic damages, that verdict was then reduced to $1,174,109.

HABC appealed, raising two arguments. First, it argued that Dr. Klein's testimony should not have been admissible because Dr. Klein lacked a sufficient factual basis to opine that the Cherryland Road house was the source of Carter's lead exposure. Second, it argued that the report produced by Martel, Inc., an environmental consultant, which was excluded by the trial court, should have been admitted to show that there was lead-based paint on the exterior but not interior of the Cherryland Road house. We agreed with HABC as to the first issue, finding that "that the trial court erred in permitting [Carter's] expert witness, Dr. Klein, to express an expert opinion that Ms. Carter was exposed to lead in the [Cherryland Road house]." *Housing Authority of Baltimore City v. Marie Carter*, No. 2048, September Term 2010 (Unreported Opinion, May 1, 2013) (citing *Ross v. Housing Authority of Baltimore City*, 430 Md. 648 (2013)). Because we remanded for a new trial based on the inadmissibility of Dr. Klein's testimony, we declined to reach HABC's second question, concerning the admissibility of the Martel Report.

Rather than retaining a new expert witness to opine as to the source of her lead-paint exposure, Carter filed a supplemental affidavit from Dr. Klein, in which he attempted to rectify weaknesses in his prior affidavit. Despite the supplementation, however, HABC renewed its motion for summary judgment. The trial court granted HABC's renewed

motion for summary judgment finding, *first*, that Dr. Klein's supplemental affidavit didn't cure the defect, and *second*, that, without Dr. Klein, Carter had failed to set forth a *prima facie* case against HABC. Carter now challenges the trial court's grant of summary judgment.

DISCUSSION

Carter argues that the trial court erred when it granted HABC's Motion for Summary Judgment. *First*, Carter argues that the trial court erred in excluding Dr. Klein's testimony that the Cherryland Road house was the source of Carter's lead exposure. *Second*, Carter argues that the trial court erred in admitting the Martel Report. *Third*, Carter argues that even without Dr. Klein's testimony, that she has presented a *prima facie* case sufficient to withstand summary judgment. We disagree with all three assertions.

Causation in Lead Paint Cases

In *Rodgers v. Home Equity USA, Inc*., this Court summarized the state of the law with respect to causation in lead-paint litigation:

> The Court of Appeals has explained the evidence necessary to establish causation in a lead-based paint case, as follows:
>
> > To connect the dots between a defendant's property and a plaintiff's exposure to lead, the plaintiff must tender facts admissible in evidence that, if believed, establish two separate inferences: (1) that the property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the victim's exposure to lead. At times, these separate inferences may be drawn

> from the same set of facts, but parties would do well to remember that these inferences are separate and often will require different evidentiary support.
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> *Hamilton v. Kirson*, 439 Md. 501, 529-30 (2014).
>
> A plaintiff may show causation through either direct or circumstantial evidence. *Id.* at 527. Circumstantial evidence may satisfy the plaintiff's burden of proof if it demonstrates that the property is a reasonable probable source of lead exposure. *Rowhouses*[*Inc. v. Smith*], 446 Md. [611] at 654-57 [(2016)]. … In other words, the plaintiff must show that "there is a fair likelihood that the subject property contained lead-based paint and was a source of the lead exposure." *Rowhouses*, 446 Md. at 657-59.

Rodgers v. Home Equity USA, Inc. ---- Md. App. ----, slip op. at 21-22 (2016).

Because of problems of proof caused by the passage of time, perhaps the most common species of circumstantial case of lead-paint causation is the "*Dow* theory," so named for our Opinion in *Dow v. L & R Properties*, 144 Md. App. 67 (2002). A *Dow* theory case requires proof of three elements: (1) that the plaintiff lived in a house constructed before 1950; (2) that the plaintiff tested positive for blood lead while at that house; and (3) exclusivity, that the house was the only possible source of the lead. *Id*. This third element requires a plaintiff to produce sufficient circumstantial evidence to "rule in" the subject property as a reasonably probable source of the lead exposure and to "rule out" other reasonably probable sources. *Rowhouses Inc. v. Smith*, 446 Md. 611, 660 (2016). Carter attempted to show causation through this *Dow* theory.

With these elements in mind, we turn to Carter's specific allegations of error.

1. Dr. Klein's Causation Testimony

For the first trial, Dr. Howard Klein provided an affidavit in which he gave his expert opinion that the Cherryland Road house was the source of Carter's lead exposure. Dr. Klein was explicit in identifying the bases for this opinion: (1) the age of the Cherryland Road house; and (2) that Carter had elevated lead levels while living at Cherryland Road.

On appeal, this Court held that it was error for the trial court to admit Dr. Klein's testimony, holding that a pediatrician—without more—is not qualified by virtue of his or her medical training to render an expert opinion as to the source of an individual's lead exposure.[2] It is important to understand, however, that instead of couching our rejection as

[2] The operative language from our prior Opinion is:

> [J]ust because Dr. Klein was properly qualified to testify as a *medical* expert, that does not mean that he is qualified to render an expert opinion to a reasonable degree of medical probability as to the *source* of the lead. The Court of Appeals touched on this principle in *In re Yve* S., 373 Md. 551, 613 (2003):
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> > [T]he mere fact that a witness has been accepted to testify as an expert in a given field is not a license to testify at will. Such a witness only will be allowed to testify as an expert in areas where he or she has been qualified and accepted. Where a witness who is qualified as an expert in one area strays beyond the bounds of those qualifications into areas reserved for other types of expertise, issues may arise as to the proper admissibility of that testimony.

See also Johnson v. State, 408 Md. 204, 225 (2009) (reversing the decision of the circuit court that admitted a police officer's testimony as an expert and stating: "[A]lthough the State established that Officer Tucker is 'an expert in the area of canine police work,' the State did not establish that he is qualified to express an opinion about the percentage of cash that is contaminated with drug residue."); *Yve S., supra,* 373 Md. at 615-18 (holding that an expert in social work not qualified to testify about a matter reserved to a psychiatrist or psychologist expert witness); *United R. & E. Co. v. Corbin,* 109 Md. 442, 450 (1909) ("A physician may be a very intelligent man, and may be very well versed in his profession, but that does not make him competent to speak as an expert of things he is not specially acquainted with."); *Naughton v. Bankier,* 114 Md. App, 641, 655 (1997) (holding that ophthalmologist expert witness not qualified to testify about adequacy of warning label on or design of product because he was not an engineer).

In *Ross* [*v. Housing Authority of Baltimore City*, 430 Md. 648 (2013)], the Court of Appeals considered whether a medical expert could testify as to the source of a plaintiff's elevated blood[-]lead levels. The plaintiff in *Ross* alleged that she was injured by lead-based paint she ingested at two properties, one of which had been managed by the HABC. *Id.* at [651]. At trial, the plaintiff intended to call a pediatrician to testify that the plaintiff had been exposed to toxic lead levels and to describe the extent of plaintiff's harm. *Id*. at [656]. This expert also stated that it was her opinion that the HABC-managed property was the source of the plaintiff's elevated blood[-]lead levels. *Id*. at [659]. The HABC moved to exclude this proffered testimony because the pediatrician lacked the necessary qualifications to testify as to the source of lead poisoning; the circuit court granted the HABC's motion. *Id*. at 660-62 & n.12. The Court of Appeals affirmed, citing the reasoning of this Court:

> "[Plaintiff's expert] is not an epidemiologist and not a toxicologist. As per her testimony, she has no technical knowledge regarding lead or lead

> testing. Rather, [the expert]'s training and experience is to determine blood[-]lead level, to treat patients with elevated blood[-]lead levels, and to counsel patients to avoid lead exposure. She is not trained or experienced in quantifying lead exposure, identifying lead hazards, abating lead hazards, or in determining causality with respect to relative exposures, as distinguished from the general causality that lead exposure can cause an elevated blood[-]lead level. In effect, [the expert] implicitly opined that any exposure, no matter how slight, contributes to an elevated blood[-]lead level. That being the case, she had no basis on which to differentiate a specific exposure from other known exposures, environmental or otherwise."

Id. at [663] n.15 (quoting *Ross v, HABC*, No, 1831, Sept. Term 2010, at slip op. 51 (Md. Ct. Spec. App. Jan. 5, 2012)).

Here, the circuit court accepted Dr. Klein as an "expert in the area of pediatrics, behavior and child development, and childhood lead poisoning." Similar to the situation in *Ross*, *supra*, [430 Md.] at [663], Dr. Klein's opinion as to the source of the lead went a step beyond his expertise as a medical expert. Dr. Klein appears to have been qualified to discuss the effects of lead on the development of a child, and the HABC admits as much.

But, because there was no direct evidence to support the existence of lead inside Ms. Carter's home, Dr. Klein was not qualified to opine to a reasonable degree of *medical probability* that the home was the source of her exposure to lead. We conclude that the circuit court abused its discretion in allowing such expert opinion testimony, the prejudicial impact of which clearly outweighed the *de minimus* probative value, *see [i]d.* at [665] (noting that label of opinion as expert influences jury), and for that reason, we vacate the judgment of the circuit court and remand the case for a new trial.

a matter of the appropriate expertise, we might just as easily have held that Carter failed to state a *prima facie* case that the Cherryland Road house was the source of her lead exposure. That is because *Dow* and its progeny (including and as modified by *Rowhouses*) have held that it is insufficient for a plaintiff to prove source with evidence of (1) the age of the house; and (2) the child's elevated blood-lead levels without some additional evidence of (3) exclusivity. Dr. Klein's original affidavit didn't say anything about exclusivity.

On remand, Dr. Klein provided a supplemental affidavit. The supplemental affidavit is longer, more detailed, and more explanatory. Things that were stated in one sentence in the original affidavit were transformed into a whole paragraph (or more) in the supplemental affidavit. Dr. Klein also used the supplemental affidavit to make the case that he knows more than an average pediatrician and more than the pediatrician whose testimony was considered and rejected in *Ross*.

But at its core, Dr. Klein's supplemental affidavit demonstrates that he still knows only two facts about the source of Carter's lead exposure: (1) the age of the Cherryland Road house; and (2) that Carter had elevated lead levels while living at the house. Under the *Dow* theory, this is insufficient. *Dow* requires, in addition to this, evidence that the subject property was the plaintiff's exclusive source of lead exposure. *Id.* at 75. While Dr. Klein had sufficient facts to establish factors (1) and (2), there must also be evidence

Housing Authority of Baltimore City v. Marie Carter, No. 2048, September Term 2010, slip op. at 7-10 (Unreported Opinion, May 1, 2013).

about (3) exclusivity. Without that third ingredient—exclusivity—Dr. Klein's supplemental affidavit can't make a *prima facie* case that the Cherryland Road house is the source of Carter's exposure.

Moreover, we don't think that a pediatrician (at least by virtue of his or her medical training) can ever have the kind of factual information necessary to demonstrate exclusivity. That's why in the prior case we held that a pediatrician, by virtue of his or her medical training, can't provide source testimony. *See supra* slip op. at 5 n.2 (quoting *HABC v. Carter*, No. 2048, slip op. at 7-10). Of course, like any expert witness, a pediatrician, who is given all of the ingredients, can render an opinion as to causation. Md. Rule 5-702; 5-704. Thus, had Carter, for example, in giving her medical history to Dr. Klein, told him facts from which he could determine exclusivity, he could opine as to causation. But without all three ingredients, there is no alchemy that a pediatrician can perform to fulfill the plaintiff's burden to make a *prima facie* case that the defendant's property was the source of plaintiff's lead exposure.

2. The Martel Report's Admissibility

Carter's second argument concerns the admissibility of the Martel Report. As described above, before the Cherryland Road house was demolished, Martel, Inc., an environmental contractor hired by HABC, tested the Cherryland Road house for the presence of lead-based paint. The results showed the presence of lead-based paint on the exterior of the home, but not on any interior surfaces. Carter argues that the device used by Martel to test the paint was not properly calibrated. As a result, Carter argues, *first*, that the

Martel Report itself was inadmissible, and *second*, that HABC's environmental expert, Patrick Connor, should have been barred from considering the Martel Report in preparing his expert opinion.

As to the first issue, we hold that the trial court did not abuse its discretion in admitting the Martel Report. Connor testified that he did not personally calibrate the device, which Carter took to mean that the device was not calibrated, and therefore not reliable. But the transmittal letter which covered the Martel Report says that the lead paint testing was performed in a manner consistent with guidelines propounded by the federal Department of Housing and Community Development and those guidelines specifically include a requirement that the device be calibrated. The trial court heard argument from both parties regarding the meaning of Connor's deposition testimony. The trial court made a reasonable determination that Connor's testimony did not generate any genuine dispute of material fact. We will not overturn this determination on appeal.

As to the second point, the standard is even more forgiving. Maryland Rule 5-703(a) explains that "[the facts or data] reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, … need not be admissible in evidence." Here, Connor testified that the Martel Report was "of a type reasonably relied upon by experts in the environmental field in connection with lead in paint and lead[-]based paint hazard determination in forming by experts in the environmental field in connection with lead in paint and lead[-]based paint hazard determination in forming opinions or inferences." That is sufficient.

Thus, we hold that the Martel Report was properly admitted and that it was an acceptable basis for Connor's opinion.

3. Proof of Causation Without Dr. Klein

Finally, as a fallback position, Carter asserts that even without Dr. Klein's expert testimony, she still adduced sufficient evidence of causation to survive summary judgment. Our review of the record convinces us to the contrary. Again, as before, the problem remains exclusivity. And, as ever, even in this corner of tort law, the plaintiff bears a burden of proving a *prima facie* case of negligence. *Rowhouses*, 446 Md. at 631. Here, Carter failed to produce evidence to generate a genuine dispute of material fact to "rule in" the Cherryland Road house.

The only admissible evidence on this point at summary judgment was the Martel Report, *see supra* slip op. at 10, which found lead-based paint only on the exterior but not the interior surfaces of the Cherryland Road house. We have held that the existence of exterior paint is an insufficient basis from which to infer that the interior paint also contained lead. *Hamilton v. Dackman*, 213 Md. App. 589, 617 (2013) (holding that a positive test for lead paint on the exterior of a house is insufficient to show that the interior of a defendant's house also contained lead-based paint). Therefore, because Carter failed

to "rule in" Cherryland Road house her causation argument fails as a matter of law and we have no choice but to affirm.[3]

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

[3] Because Carter failed to "rule in" the Cherryland Road house, her *Dow* theory claim fails and we need not consider whether her very thin case to "rule out" other reasonably probable sources was sufficient.