Circuit Court for Baltimore City
Case No. 24-C-09-008243

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 44 and 530

September Term, 2015

ON MOTION FOR RECONSIDERATION

ASHLEY PARTLOW

v.

KENNEDY KRIEGER INSTITUTE, *et al.*

Wright,
Berger,
Nazarian,

JJ.

Opinion by Nazarian, J.
Berger, J. concurs and dissents

Filed: October 23, 2017

* 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.

These consolidated appeals test the boundaries of the duty of care, first recognized in *Grimes v. Kennedy Krieger Institute Inc.*, 366 Md. 29 (2001), owed by Kennedy Krieger Institute ("KKI")[1] to individuals affected by a lead paint abatement study (the "R&M Study") in the 1990s. Unlike the plaintiffs in *Grimes*, Ashley Partlow ("Ashley")[2] was not herself a R&M Study participant. But her younger sister was, and the family's involvement in the R&M Study drove decisions her mother and her landlord made about how and to what extent to abate the lead paint that indisputably was present in their home.

[1] The Johns Hopkins Hospital, Johns Hopkins University, Johns Hopkins University School of Medicine, and Johns Hopkins University School of Public Health (together the "JHH Defendants") were defendants in the case in the trial court, and appellees in this Court through briefing and almost until oral argument. For reasons that neither side explains, but that don't matter for present purposes, Ashley dismissed the JHH Defendants on December 29, 2016, the Thursday before New Year's weekend. The Court was open that Friday, closed on Monday, January 2, and we heard oral argument on January 3, 2017; it's not clear when the dismissal was served (the version filed with the Court says it was served on December 29, but the version attached to the JHH Defendant's Motion for Reconsideration says it was served on January 3). And nobody mentioned the dismissal during oral argument. We acknowledge, though, that the dismissal was on file and that we overlooked it in the course of preparing the original panel opinion. By separate order, we grant the JHH Defendants' Motion for Reconsideration, withdraw the opinion issued on September 6, 2017, and replace it with this opinion. We have not been asked to vacate, and do not vacate, the circuit court judgment, and we express no views on the merits of what had been Ashley's claims against the JHH Defendants.

Where appropriate, we will refer to KKI and the JHH Defendants collectively as the "Researchers."

[2] For the sake of clarity, and meaning no disrespect, we refer to the different Partlows in this case by their first names.

Ashley sued the Researchers in the Circuit Court for Baltimore City alleging, among other things, negligence and violations of the Consumer Protection Act. The circuit court granted the Researchers' motion for summary judgment as to negligence after concluding that, as a matter of law, they did not owe a duty of care to Ashley. The circuit court found that Ashley had not alleged facts sufficient to bring the Researchers' conduct within the scope of the Consumer Protection Act. We reverse the summary judgment in favor of KKI on Ashley's negligence claim because the special relationship created by the R&M Study encompassed her as well as her sister. We affirm in all other respects.

I. BACKGROUND

A. The R&M Study

Affordable housing can be scarce, and is scarce in Baltimore. Landlords are, appropriately, required by law to maintain rental properties in a safe and habitable condition. Lead paint is poisonous and lead paint is dangerous, especially to children,[3] and it's common in older housing stock in Baltimore. Lead paint can be removed, but effective lead abatement is expensive. In neighborhoods where real estate values are lower and lead paint is present, the cost of abating lead from a dwelling can exceed the value of the property. If the cost of abating the lead makes renting safe dwellings cost-prohibitive,

[3] "Exposure to lead-bearing dust is particularly hazardous for children because hand-to-mouth activity is recognized as a major route of entry of lead into the body and because absorption of lead is inversely related to particule size." *Grimes v. Kennedy Krieger Institute Inc.*, 366 Md. 29, 37–38 (2001) (quoting Mark R. Farfel & J. Julian Chisolm, *Health and Environmental outcomes of Traditional and Modified Practices for Abatement of Residential Lead-Based Paint*, 80 American Journal of Public Health 1240, 1243 (1990)).

landlords can face difficult choices: abate and lose money; skimp on abatement and rent a potentially dangerous dwelling; or remove the unit from the market, making housing even more scarce. Each of these choices has different consequences, and none is altogether good.

The R&M Study, which was conducted by KKI, a research organization affiliated with The Johns Hopkins University, sought to address this dilemma by measuring the effectiveness of less-than-complete, and thus less costly, lead abatement measures. The R&M Study measured the blood-lead levels of infant and toddler-age children living in lead-laden houses before and after the measures were implemented:

> [KKI] created a nontherapeutic research program whereby it required certain classes of homes to have only partial lead paint abatement modifications performed, and in at least some instances . . . arranged for the landlords to receive public funding by way of grants or loans to aid in the modifications. [KKI] then encouraged, and in at least one of the cases at bar, required, the landlords to rent the premises to families with young children. In the event young children already resided in one of the study houses, it was contemplated that a child would remain in the premises, and the child was encouraged to remain, in order for his or her blood to be periodically analyzed. In other words, the continuing presence of the children that were the subjects of the study was required in order for the study to be complete. . . .
>
> The purpose of the research was to determine how effective varying degrees of lead paint abatement procedures were. Success was to be determined by periodically, over a two-year period of time, measuring the extent to which lead dust remained in, or returned to, the premises after the varying levels of abatement modifications, and, as most important to our decision, by measuring the extent to which the theretofore healthy children's blood became contaminated with lead, and comparing that contamination with levels of lead dust in the houses over the same period of time.

Grimes, 366 Md. at 36–37 (footnote omitted).

KKI funded the R&M Study through a $200,000 federal research contract entitled "Evaluation of Efficacy of Residential Lead Based Paint Repair and Maintenance Interventions." *Id*. at 48. At some point, either in the initial bid for the research contract or after the bid but before the R&M Study began, the Johns Hopkins University Joint Committee on Clinical Investigation—an Institutional Research Board ("IRB") with which KKI is affiliated and the oversight entity charged with "assess[ing] the protocols of the project to determine whether the project itself is appropriate, whether the consent procedures are adequate, whether the methods to be employed meet proper standards, whether reporting requirements are sufficient"—approved the R&M Study plan through its expedited review process. *Id.* at 38–39. The IRB found that the R&M Study satisfied its design, risk, and consent criteria:

> [T]he research design was sound; the risks to the participants were no more than minimal; . . . the research plan safe for the monitoring of the participants; the plan made for soliciting the assent and/or the permission of parent(s)/guardian(s) adequate and appropriate; [and] the R&M Study provided the prospect of direct benefit for the participants[.]

The R&M Study divided participants into five groups of up to twenty-five houses each. *Id.* at 50–51, 55. Three of the R&M Study's groups of homes received different packages of less-than-complete abatement measures, with total costs capped at $1,650, $3,500, and $6,000–$7,000. *Id.* at 52–53. The other two groups were controls—one group

had once had lead paint in them and had undergone complete abatement, and the other (newer, post-lead paint era houses) had never had lead paint. *Id.* at 51.

Homes had to meet various eligibility criteria to participate in the R&M Study. One key criterion was the presence of lead in the house. In deposition testimony, Dr. Farfel, the director of KKI's Lead Abatement Department and its research efforts, explained the heightened lead level criteria required of R&M Study houses:

> [T]he house either had to be built prior to 1941 or had documented lead based paint in the unit based on [x-ray fluorescence] testing.
>
> The house also had to have what we called elevated levels of lead in dust in at least two sites in the house to qualify for the study. And our definition of elevated was two sites with lead loadings, we called them lead dust loadings, greater than the clearance criteria in Maryland.

Another essential criterion was the extended presence of one or more young, healthy children in the R&M Study home:

> For the family participant side, we were looking for families that obviously were willing to cooperate with the study by signing informed consent statements. We were looking for families that had at least one child under the age of 48 months and older than five months at the start of the study. These children were not to be mentally retarded or severely handicapped in any way . . . .
>
> . . . .
>
> We asked the families if they had any immediate plans to move. If they did, then they weren't eligible because we were interested in following the family over a period of years.

Lawrence Polakoff, owner of the 1906 East Federal Street house in which Ashley resided (and later the principal of the company to which he transferred ownership of the

house), filed an affidavit with the circuit court explaining that "KKI urged landowners to accept as tenants children it referred who were under its review as a result of being previously diagnosed with elevated blood-lead levels" and that "KKI advised [Mr. Polakoff's company] that KKI would refer parents with young children to the [p]roperty."

KKI encouraged homeowners to participate in the R&M Study by offering access to funds from the Maryland Department of Housing and Community Development ("DHCD") to pay for the approved repairs. Owners could receive funding only after the home had been deemed structurally sound. After KKI had recruited a landlord to participate (and alongside KKI's evaluation of the house against its other criteria), KKI inspected the house against DHCD's criteria. Once the landlord received DHCD funds, contractors were paid to do the approved work under KKI's direction and supervision, consistent with the cost cap on that house and other specifications of the R&M Study. The net result for landlords was funded partial lead abatement of their houses:

> Q[uestion:] You were not to pay -- it wasn't going to cost you anything for the work to be done; is that correct?
>
> [Mr. Polakoff:] No, the only cost to me -- there was a lot of different programs going on but the only cost to me on any of the programs that I participate with [KKI] of this nature would be some filing of some documents, city or state documents.

After the work was done, landlords could rent participating units to tenants. KKI then paid visits to residents in the three groups of partially abated homes to obtain consent from the parents to measure lead levels inside and outside the house, in the drinking water,

and in the blood of the young children. The consent forms described the purpose of the R&M Study and the families' obligations:

> PURPOSE OF STUDY:
> As you may know, lead poisoning in children is a problem in Baltimore City and other communities across the country. Lead in paint, house dust and outside soil are major sources of lead exposure for children. Children can also be exposed to lead in drinking water and other sources. We understand that your house is going to have special repairs done in order to reduce exposure to lead in paint and dust. On a random basis, homes will receive one of two levels of repair. We are interested in finding out how well the two levels of repair work. The repairs are not intended, or expected, to completely remove exposure to lead.
>
> We are now doing a study to learn about how well different practices work for reducing exposure to lead in paint and dust. We are asking you and over one hundred other families to allow us to test for lead in and around your homes up to 8 times over the next two years provided that your house qualifies for the full two years of study. Final eligibility will be determined after the initial testing of your home. We are also doing free blood lead testing of children aged 6 months to 7 years, up to 8 times over the next two years. We would also like you to respond to a short questionnaire every 6 months. This study is intended to monitor the effects of the repairs and is not intended to replace the regular medical care your family obtains.
>
> . . . .
>
> BENEFITS:
> To compensate you for your time answering questions and allowing us to sketch your home we will mail you a check in the amount of $5.00. In the future we would mail you a check in the amount of $15 each time the full questionnaire is completed. The dust, soil, water, and blood samples would be tested for lead at [KKI] at no charge to you. We would provide you with specific blood-lead results. We would contact you to

> discuss a summary of house test results and steps that you could take to reduce any risks of exposure. **[E2. 1339-1340]**

KKI then measured lead levels at periodic intervals, both in the dwelling and the children:

> Measurements of lead in the blood of the children and vacuum dust samples from the houses were to be obtained at the following times: pre-intervention, immediately post intervention, and one, three, six, twelve, eighteen, and twenty-four months post intervention. Measurements of lead in the exterior soil were to be obtained at pre-intervention, immediately post intervention, and twelve and twenty-four months post intervention. Measurements of lead in drinking water were to be obtained at pre-intervention, and twelve, and twenty-four months post intervention. Additionally, the parents of the child subjects of the study were to fill out a questionnaire at enrollment and at six-month intervals.

Grimes, 366 Md. at 53–54.

B. Ashley

The facts underlying this case are undisputed or were assumed to be true, in the light most favorable to Ashley, for purposes of summary judgment by the circuit court in its memorandum opinion:

> Plaintiff's mother, Jacqueline Martin, rented 1906 East Federal Street with a friend, Catina Higgins, in May 1994. She and Ms. Higgins both had children. Plaintiff Ashley [] was then five years old. Her sister Anquenette was two years old. Plaintiff was tested and found to have an elevated blood lead level of 17 µg/dl before she moved into the house. Several months after moving into the house, her blood lead level was recorded as 21 µg/dl. Shortly after she moved out of the house, her blood lead level was recorded as 13 µg/dl.
>
> The house at 1906 East Federal Street was owned by Defendant CFOD-2 Limited Partnership and managed by Defendant Chase Management, Inc. Defendant Lawrence M. Polakoff is or was a principal in these entities. Ms. Martin dealt

> with Chase Management in renting the property. It is undisputed that she did not meet any representative of Defendant [KKI] and did not know anything about the R&M Study before signing the lease. Although Ms. Martin's memory of the events is minimal, she met with [KKI] representatives shortly after she and her children moved into the property. Exactly what she was told is disputed, but she agreed to enroll Anquenette in the R&M Study, and Ms. Martin went through the informed consent process with respect to Anquenette. It is undisputed that Plaintiff Ashley [] was then too old to participate in the Study; but that Defendant [KKI] was aware that Plaintiff was living in the property.
>
> For purposes of this motion, the Court assumes that the owners and managers of the property coordinated with Defendant [KKI] in making the house available for individuals participating in the R&M Study. The coordination included agreeing that a prescribed degree of lead abatement repairs would be performed in the property before it was rented, and the owners and managers of the property agreed to perform only those initial repairs related to lead abatement. Of the three levels of repairs performed as part of the Study, this property received the intermediate level of repairs limited to approximately $3,500. Defendant [KKI] participated in defining the initial repair work to be performed and in inspecting the property once the work was completed and before Ms. Martin and her children moved in. The Court further assumes that the owners and managers of the property agreed to do subsequent repairs only with the knowledge of Defendant [KKI]. The Court also assumes that Defendant [KKI]'s agents were regularly in the house while Plaintiff Ashley [] lived there and that they had opportunities to inspect the condition of the property.

(Footnotes omitted.)

In her January 20, 2012 deposition, Ms. Martin testified that her landlord conditioned their rental agreement on participation in the R&M Study:

> I asked if we didn't -- if the doctors didn't -- if they didn't [permit KKI to measure Anquenette's] lead levels, what would be -- would we still be able to rent the house. They said no.
>
> Q[uestion:] Okay. And who said that?
>
> [Ms. Martin:] The representative at the rental office.
>
> Q[uestion:] Okay. That was when they asked -- when they said we need to get your children's lead levels?
>
> [Ms. Martin:] Yes.
>
> Q[uestion:] And you said if I don't let you get them, can I rent and --
>
> [Ms. Martin:] If they didn't receive the kids' lead levels, we wouldn't be able to move in.

Ms. Martin also testified that the rental office had told her that the house was lead-free before she moved in, but that Mr. Polakoff himself told her that the basement had lead paint in it:

> [Mr. Polakoff] asked me was -- did the kids play in the basement. I said yes. I told him I had my kids' toys in the basement and during the winter months that's where they played. And he said: "Oh, there's lead paint in the basement" to which I had no knowledge that there was lead paint in the basement if the house is supposed to be lead-free.
>
> Why would there be lead paint left in the basement if the whole house was supposed to be done?
>
> Q[uestion:] Who told you the whole house was done?
>
> [Ms. Martin:] Lead-free would be lead-free, right?
>
> Q[uestion:] Who [told] you that the whole house was done?
>
> [Ms. Martin:] The rental office.

> Q[uestion:] Okay. And who told you the house was lead-free?
>
> [Ms. Martin:] The rental office.
>
> Q[uestion:] Okay. What was Mr. Polakoff's response to your call?
>
> * * *
>
> [Ms. Martin:] When -- oh, they didn't know that the kids was going to be playing in the basement.

Finally, Ms. Martin said that she understood that KKI was testing her children to ensure that their blood levels were safe, and claimed not to know they were participating in research:

> [W]hen [KKI] came to the house, they -- when they asked me did I want my kids to go to [KKI] to get their lead levels taken, which I thought would be a good gesture, a good thing to make sure my kids didn't -- did not have lead, that's how I took it. I didn't know -- she never mentioned to me by word of mouth that it was a study.
>
> Q[uestion:] Okay.
>
> [Ms. Martin:] So I -- I'm feeling as a parent that, okay, I live in a lead-free house. Now, here is [KKI] telling me, okay, we're going to monitor your kids to -- we're going -- we're taking them to [KKI]. We're drawing their blood. We're getting their lead levels to show you they have safe lead levels. That was my end take on it. I wasn't told that it was -- they were -- they were being part of a study[.]

Ashley's complaint alleged claims for negligence and violation of the Maryland Consumer Protection Act against the Researchers. She contended that the Researchers were responsible for her exposure to lead paint at 1906 East Federal Street based on

Anquenette's enrollment in the R&M Study. The parties engaged in nearly four years of discovery, and the Researchers filed motions for summary judgment in December 2014.

On February 19, 2015, the circuit court granted the Researchers' motion for summary judgment and found, as a matter of law, that they did not have a duty of care to Ashley at common law or under the Baltimore City Housing Code, and that Ashley had not alleged facts sufficient to bring their conduct within the scope of the Consumer Protection Act. The court found this case indistinguishable from cases that had declined to extend tort duties to plainly foreseeable victims, such as the family members of patients injured by medical malpractice or employees injured by workplace hazards. The court also found that the Researchers' duty to subjects recognized in *Grimes* arose from the Researchers' request for parents' consent for children to participate in the R&M Study and the monitoring of subjects during the R&M Study, and that Ashley fit neither of these descriptions.

This timely appeal followed. Both KKI and the JHH Defendants filed briefs on appeal, but Ashley dismissed the latter at the eleventh hour, *see* n.1 above, leaving KKI as the sole appellee.

II. DISCUSSION

Ashley asks us on appeal to resolve one multi-layered question that we have separated into three.[4] We must *first* determine whether the trial court erred when it found

[4]Ashley phrases questions for this appeal in her brief as follows:

as a matter of law that KKI owed no duty of care to Ashley, and thus entered summary judgment on her negligence claim. Ashley contends *second* that the trial court erred when it found, as a matter of law, that KKI did not owe her a duty of care stemming from the requirements of the Baltimore City Housing Code. *Finally*, Ashley asserts that the trial court erred when it found that, as a matter of law, KKI did not violate the Consumer Protection Act.

I. WHETHER THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEES' MOTIONS FOR SUMMARY JUDGMENT.

A. Whether the Trial Court Erred and/or Abused Its Discretion When It Ruled that Appellees Did Not Owe Appellant a Duty of Care Under Common Law Negligence.

B. Whether the Trial Court Erred and/or Abused Its Discretion When it Ruled that Appellees Did Not Owe Appellant a Duty of Care in Negligence Under the Baltimore City Housing Code.

1. Whether the Trial Court Improperly Invaded the Province of the Jury When it Determined, As a Matter of Law, that Appellees Were Not "Operators" of the Study Home Under the Baltimore City Housing Code's Expansive Definition of "Operator."

C. Whether the Trial Court Erred and/or Abused its Discretion When It Ruled that Appellees Did Not Owe Appellant a Duty of Care Under the Consumer Protection Act.

"'In reviewing a grant of a summary judgment, we are first concerned with whether a genuine dispute of material fact exists' and then whether the movant is entitled to summary judgment as a matter of law." *Grimes*, 366 Md. at 71 (citations omitted). "The standard of review for a grant of summary judgment is whether the trial court was legally correct." *Goodwich v. Sinai Hosp. of Balt., Inc.*, 343 Md. 185, 204 (1996) (citations omitted). We review the legal correctness of the trial court's legal conclusions *de novo*. *See Yourik v. Mallonee*, 174 Md. App. 415, 423 n. 2 (2007).

A. KKI Owed Ashley A Duty Of Care Under The Common Law.

Ashley contends *first* that the trial court erred when it found that KKI owed her no common law duty of care. The presence of a duty is the first of the four elements of negligence:

> (1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of duty.

Valentine v. On Target, Inc., 353 Md. 544, 549 (1999) (citation omitted). Breach, harm, and causation are generally questions for the finder of fact, but "the existence of a legal duty is a question of law to be decided by the court." *Corinaldi v. Columbia Courtyard, Inc.*, 162 Md. App. 207, 218 (2005) (citing *Todd v. Mass Transit Admin.*, 373 Md. 149, 155 (2003)).

As a general rule, "there is no duty to protect a victim . . . in the absence of a statute, contract, or other relationship between the party in question and the [harmful agent], which

imposes a duty to control the [harm], or between the party in question and the victim, which imposes a duty to protect the victim." *Id.* at 219 (citations omitted); *see also Lamb v. Hopkins*, 303 Md. 236, 242–45 (1985). And we agree with the circuit court that the mere foreseeability of potential or derivative harm to third parties doesn't give rise to a duty. *See Doe v. Pharmacia & Upjohn Co*., 388 Md. 407, 417 (2005); *Dehn v. Edgecombe*, 384 Md. 606 (2005). But a duty may arise when a "special relationship" exists between the party in question and a third person. *Doe*, 388 Md. at 490. The term "special relationship" comes from § 315 of the Restatement (Second) of Torts (1965) (the "Restatement") (which Maryland adopted in *Lamb*, 303 Md. at 245), and means (perhaps tautologically), "a relationship that gives rise to a duty to exercise reasonable care." *Corinaldi*, 162 Md. App. at 219–220.

Maryland law recognizes a limited number of "special relationships," and defines carefully the roles that give rise to them, the universe of people covered, and the scope of the duty. Among these, a landlord has duties to his tenant that include the duty to maintain common areas under the landlord's control. *See Shields v. Wagman*, 350 Md. 666, 673–674 (1998) ("When the [landlord] has parted with his control, *i.e.*, has leased the premises to a tenant, we have held that the tenant has the burden of the proper keeping of the premises. Where the owner maintains control, however, the owner may be liable for injuries." (internal quotations and citations omitted)); *Landay v. Cohn*, 220 Md. 24, 27–28 (1959) ("The [landlord's] duty stems from the responsibility engendered in the landlord by his having extended an invitation, express or implied, to use the portions of the property

retained by him." (citations omitted)). This duty extends to people invited to the property by the tenant because the right to occupy the leasehold encompasses a right to invite visitors—the tenant, by virtue of the lease, is authorized to invite visitors just as the owner can. *See Landay*, 220 Md. at 27 ("Such an invitation extended to a tenant includes the members of his family, his guests, his invitees, and others on the land in the right of the tenant.") (internal citation omitted). But a landlord does not have a duty to those who enter the common areas without permission from the landlord or the tenant. *Id.* at 28 ("There is an important qualification to the rule as to the duty of the landlord. His responsibility for the reasonably safe condition of premises retained under his control is limited to the confines of his invitation, express or implied. It does not extend to the use of such premises for an unintended purpose." (citations omitted)). Strangers in common areas without the consent of the tenant (or the landlord) lack the connection to the source of the special relationship that would bring them within the scope of the landlord's heightened responsibility. *See id*.

Grimes applied these principles to the R&M Study. In that case, Ericka Grimes and Myron Higgins, both minors, participated in the R&M Study, *Grimes*, 366 Md. at 47; Ashley and her younger sister, Anquenette, lived in the same house as Myron Higgins. As here, KKI argued that it did not have any duty of care to the minors who lived in the house. *Id.* But the Court of Appeals recognized, for the first time, a special relationship between KKI and R&M Study participants. *Id*. at 87–88. The Court grounded the potential duty in

two factual characteristics of the relationship: the nontherapeutic[5] nature of the R&M Study and the likely risk of serious harm to the children as a result of exposure to the conditions the R&M Study created:

> the creation of study conditions or protocols or participation in the recruitment of otherwise healthy subjects to interact with already existing, or potentially existing, hazardous conditions, or both, for the purpose of creating statistics from which scientific hypotheses can be supported, would normally warrant or create such special relationships as a matter of law.

Id. at 93.[6] The Court held that the circuit court had erred in granting summary judgment as to negligence because the two minors *were* otherwise healthy subjects recruited to interact with already existing or potentially existing hazardous conditions for the benefit of research that had no direct benefit to them. *Id*. Two months later, the Court of Appeals

[5] The Court defined "nontherapeutic" studies as those that "generally utilize[] subjects who are not known to have the condition the objectives of the research are designed to address . . . "and[] [are] not designed to directly benefit the subject utilized in the research, but, rather, . . . the public at large." *Id*. at 36 n.2. Later, in denying the motion for reconsideration, the court stated that "the determination of whether the study in question offered some benefit, and therefore could be regarded as therapeutic in nature, or involved more than that minimal risk is open for further factual development on remand." *Id.* at 120.

[6] The dissent, at 8-9 and n.3, is correct that no reported Maryland case has cited the duty-as-a-function-of-foreseeability formula posited in *United States v. Carroll Towing Co*., 159 F. 2d 169 (2d Cir. 1947). But although there is a (perhaps) interesting law review article one could write about whether the *Carroll Towing* formula lies at the heart of the duty the Court of Appeals recognized in *Grimes*, that's a wheel we don't need to (re)invent here. Even as limited on reconsideration (and as characterized in *White v. Kennedy Krieger Inst., Inc.*, 221 Md. App. 601 (2015), *Grimes* found a special relationship, and thus a duty, to otherwise healthy Study participants who were placed by the Study's parameters into a potentially hazardous environment. 366 Md. at 93. All we find here, as we discuss in the text, is that this same duty covers Ashley because the terms of the Study put Ashley, through her sister's and her landlord's participation in it, into the same potentially hazardous environment, and thus exposed her directly to the same dangers.

denied a motion for reconsideration, but noted that "the only conclusion that we reached as a matter of law was that, on the record currently before us, summary judgment was improperly granted." *Id*. at 119.

This case involves the same study, and even one of the same properties, but our plaintiff is a sibling who was not enrolled in the R&M Study herself. Although her sister Anquenette was a subject and thus fell within the special relationship recognized in *Grimes*, Ashley was not—she was too old at the time the family moved into 1906 East Federal Street. Ashley argues nevertheless that the same circumstances that gave rise to the special relationship in *Grimes* include her as well. And we agree that under these circumstances they do, because the terms of the R&M Study determined the condition of the home for all who lived there during the period of the operative lease, whether they participated directly in the R&M Study or not. It is not Ashley's mere status as a sibling that brings her within the *Grimes* duty—it is the fact that the terms of the Study, as they bound her mother and sister and landlord, drove the presence of lead in her environment and exposed her to the same lead to which it exposed Anquanette.

Stripped to its essence, the R&M Study sought to determine whether less-than-total abatement of lead from a child's home environment could make that environment safe in a cost-effective way. This required two things: young children and environments that controlled, or attempted to control, the lead to which those children were exposed. But the R&M Study environments weren't restricted to R&M Study participants. Everyone who lived in those homes during the relevant time period, including other children, was exposed

to the lead that was there. Unlike the spouses in *Dehn* and *Doe*, whose secondary exposure fell outside the special relationship between the alleged tortfeasor and their husbands, or third party victims like the spouse in *Gourdine v. Crews*, 405 Md. 722, 750-51 (2008), Ashley alleges that she was exposed to lead directly, through the same modality as her Study-participant sister, in the same environment that the Study controlled. To make *Doe* analogous, imagine instead that the employer required the employee spouse to conduct HIV research in his home, thus exposing his spouse directly, rather than at the company lab—a far-fetched scenario, perhaps, but that hypothetical research protocol better mimics the manner in which the Study brought non-participating children within the Study environment. And the parameters of the Study restricted the landlord's ability to respond to the presence of lead in the house. Although participation in the R&M Study gave landlords access to funds and made certain improvements easier to afford, lead remained present, by design if not intent, in the homes inhabited by three groups of R&M Study participants and, importantly for present purposes, the people with whom they lived.

It's true that Ashley was not a participant in the R&M Study. But we find it incongruous, and ultimately untenable, to say that, on the one hand, KKI owed a duty of care to Ashley's sister because it controlled the environment in which she was exposed to lead but, on the other hand, that it owed no duty to another child who lived in the same dwelling pursuant to the same lease and who was exposed to the same lead environment defined—and this is the key— by the terms of the same Study. Put another way, the structure and terms of the Study brought Ashley within the Study environment (defined

and bounded by the lease agreement her mother entered with the participating landlord) and exposed her to the same hazards on the same terms as her Study-participant sister. Were it not for the R&M Study, the duty to maintain a safe and habitable environment for tenants would lie solely with the landlord. In this setting, though, and as *Grimes* recognized, the intervention of research motivations and protocols influenced the environment in which Anquanette *and Ashley* lived, and that may have resulted in toxic exposure to lead.

We need not, and do not, decide that this particular environment was dangerous. We hold only that KKI owed to Ashley the same duty of care it owed to R&M Study participants who lived in the same dwelling pursuant to the same lease agreement. For that reason, KKI was not entitled to summary judgment as to Ashley's negligence claim for lack of duty, and we reverse the judgment in that regard and remand for further proceedings.

B. The Baltimore City Housing Code Does Not Give Rise To A Duty Of Care By KKI.

Second, Ashley contends that the Baltimore City Housing Code gave rise to a duty of care from KKI to Ashley as well. She argues that because the R&M Study's lead-abatement protocols were "decisions regarding maintenance of the property," KKI was an "operator" or "agent" of the house covered by the Housing Code. From this premise, she argues that violations of the Code by KKI is evidence of negligence that gives rise to a duty of care. We need not reach the second step of Ashley's argument, though, because it fails at the first.

Ashley points to *Allen v. Dackman*, 413 Md. 132 (2010), but that case is easily distinguishable. *Allen* addressed whether, as a matter of law, an individual who is also a principal of an LLC is precluded from being characterized as an "owner" of a leased residential property when the LLC is the owner of record of the property but the principal "controls" it. *Id*. at 145–46. In no way, though, can KKI be considered an "owner" of 1906 East Federal Street. It had no "ability to change or affect the title to the property," *id*. at 145, and *Allen* explicitly declined to address the meaning of "operator" under the code, *id*. at 144 n.10.

Nor can it be shoehorned into the Code's definition of the term "operator." An "operator" is one who "has charge, care or control of a building or part thereof." Balt. City Code (2000, 2002 Supp.), § 105 of Article 13 ("Art. 13"). By its plain language, the Code distinguishes between entities that *generally* manage or repair, and may therefore "care" or "control," a property, and specialized contractors that don't. *See id.*; *Toliver v. Waicker*, 210 Md. App. 52, 66 (2013) (interpreting the code's plain language to characterize one who had some input on repairs but no "day-to-day" or other regular involvement with a building physically as not an "operator"). KKI's role in the maintenance of these dwellings, although influential, was limited in time and scope, and thus too narrow to bring them within the definition of "operator." And "when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we end our inquiry there also." *Dyer v. Otis Warren Real Estate*, 371 Md. 576, 581 (2002) (citations omitted).

Lastly, Ashley argues that KKI was an "agent" of the landlords and owners of 1906 East Federal Street, Mr. Polakoff and Chase Management. But she simply says this without alleging facts that could support a finding that such an agency relationship existed. *See* Balt. City Code, Art. 13 § 105 (defining an agent as a person who "[i]n any way represents the owner of the property"); *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 247 (2007) ("An agency relationship is one that arises from the manifestation of the principal to the agent that the agent will act on the principal's behalf."). The court did not err, then, in granting summary judgment on this basis.

C. The Circuit Court Properly Granted Summary Judgment On The Consumer Protection Act Claim.

Finally, Ashley argues that the court erred in granting summary judgment for KKI on her claim under the Maryland Consumer Protection Act. She argues that because the Act protects lessees, and that KKI induced Ms. Martin to agree to the lease using false or misleading representations, she alleged enough of a connection between these acts and KKI to defeat summary judgment. *See White v. Kennedy Krieger Inst., Inc.,* 221 Md. App. 601, 653 (2015) ("The CPA squarely applies to leases and is designed in part 'to protect consumers from unfair or deceptive trade practices that induce prospective tenants to enter into a lease.'" (citation omitted)). But KKI didn't lease the apartment: Chase Management leased the house to Ms. Martin, and Chase Management (allegedly) induced Ms. Martin into signing the lease by using false or misleading representations about the state of the house; the Researchers did neither. Although it is true that the Consumer Protection Act is meant to be construed liberally, *see Wash. Home Remodelers, Inc. v. State of Md., Office*

of the Attorney Gen., Consumer Prot. Div., 426 Md. 613, 630 (2012) ("The CPA. . . constitutes remedial legislation that is intended to be construed liberally . . . ."), it doesn't reach entities that were not parties to the consumer transaction at issue.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EVENLY.

Circuit Court for Baltimore City
Case No. 24-C-09-008243

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 44 and 530

September Term, 2015

ASHLEY PARTLOW

v.

KENNEDY KRIEGER INSTITUTE, INC., ET AL.

Wright,
Berger,
Nazarian,

JJ.

Concurring & Dissenting Opinion by Berger, J.

Filed: October 23, 2017

* 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.

I agree with the portion of the Majority's opinion that affirms the circuit court's grant of summary judgment on the appellant's Consumer Protection Act claim. I further agree with the Majority that the circuit court properly determined that the appellee bore the appellant no duty stemming from the requirements of the Baltimore City Housing Code. Where I part ways with the Majority, however, is with respect to the appellant's claim that the appellee owed her a duty of care under the common law. In my view, the appellee did not, under the common law, owe a legal duty to the appellant. For that reason, I, respectfully, dissent.

The legal duty recognized by the Court of Appeals in *Grimes v. Kennedy Krieger Institute, Inc.*, 336 Md. 29 (2001), was based upon the unique special relationship between researchers and participants in a particular research study. Indeed, in response to a motion for reconsideration, the Court of Appeals specifically limited its holding, explaining that "[a]lthough we discussed the various issues and arguments in considerable detail, the only conclusion that we reached as a matter of law was that, on the record currently before us, summary judgment was improperly granted—that sufficient evidence was presented in both cases which, if taken in a light most favorable to the plaintiffs and believed by a jury, would suffice to justify verdicts in favor of the plaintiffs." *Id.* at 119. *See also White v. Kennedy Krieger Institute, Inc.*, 221 Md. App. 601, 622 (2015) ("In light of the Court of Appeals's pointed effort to specifically limit its holding [in *Grimes*, *supra*], we are

constrained to hold fast to the narrow parameters set out by the Court of Appeals in its denial of the motion for reconsideration.").[7]

In *White*, *supra*, we emphasized that, "at most, pre-reconsideration *Grimes* stood for the proposition that in certain circumstances, a duty may exist between the researcher and research subject." *Id.* at 625. In this case, the appellant asks us to further extend the Court of Appeals's narrow holding in *Grimes* to a circumstance involving an individual who was not a participant in the research study on the basis that the appellant's injuries were foreseeable to the sibling of the subject of the research study. I am unpersuaded that such an extension of *Grimes* is grounded in the law.

The Majority holds that, because the appellant is a sibling of a study participant, she had a special relationship with the appellee giving rise to a duty under the common law. The Majority emphasizes that this is so "because the terms of the R&M Study determined the condition of the home for all who lived there during the period of the operative lease, whether they participated directly in the R&M Study or not." The Majority reads *Grimes* as holding that the duty to the research subject in that case was based specifically upon the researchers' control of the subject's environment. In my view, *Grimes* and the cases

[7] Pre-reconsideration *Grimes* characterized the R&M Study as nontherapeutic, but, on reconsideration, the determination of whether the study was therapeutic or nontherapeutic was left to the fact-finder. *Grimes*, *supra*, 366 Md. at 120 "[T]he determination of whether the study in question offered some benefit, and therefore could be regarded as therapeutic in nature, or involved more than that minimal risk is open for further factual development on remand."). In the present case, a jury would similarly need to determine whether the R&M Study was, in fact, nontherapeutic.

decided since *Grimes* do not provide support for such a broad reading of *Grimes*. Nor do they provide support for the Majority's imposition of a duty in this case.

Since *Grimes* was decided in 2001, the Court of Appeals has addressed issues relating to duty in the cases of *Gourdine v. Crews*, 405 Md. 722 (2008); *Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407 (2005); and *Dehn v. Edgecome*, 384 Md. 606 (2005). In *Dehn*, *supra*, the Court of Appeals considered whether a primary care physician bore a duty to the wife of the physician's patient after the wife became pregnant following her husband's vasectomy. The primary care physician did not perform the patient's vasectomy, but the wife alleged that the physician negligently advised her husband that he did not require a semen analysis following the vasectomy and that there was "no risk" of the husband impregnating his wife. 384 Md. at 614. After the wife became pregnant, she sued the primary care physician, alleging negligence.[8]

The "threshold question in" *Dehn*, *supra*, was "whether there existed a duty flowing from [the physician] to [the wife], because if there was no duty, her negligence action [would] not lie." *Id.* at 622. The Court rejected the wife's assertion that a duty should be imposed on the basis of foreseeability, emphasizing that "mere foreseeability of harm or injury is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm." *Id.* at 624. The wife argued that a duty should be imposed based upon a special relationship, but the Court rejected her argument, explaining that "[t]he

[8] With respect to the husband's claim, the jury found that the primary care physician was negligent, but further found that the husband had been contributorily negligent. *Id.* at 611.

imposition of a common law duty upon [the physician] to the wife under these circumstances could expand traditional tort concepts beyond manageable bounds." *Id.* at 627.

A few months after issuing its opinion in *Dehn*, the Court of Appeals again declined to impose a new duty in *Doe v. Pharmacia*, *supra*, 388 Md. 407. In *Pharmacia*, an employee became infected with the Human Immunodeficiency Virus (HIV) after being exposed to the vaccine while working with the virus as a laboratory technician. The employee's wife subsequently became infected with HIV as well, and the wife sued the employer, alleging that the employer failed to test its employees for HIV frequently enough and failed to properly inform the employees about the significance of negative test results.[9]

The wife argued that the employer "owed her a duty of care as the spouse of an employee who had a foreseeable risk of contracting HIV from her husband." *Id.* at 413. The Court commented that it "should have been foreseeable" to the employer that the wife would contract HIV, but again emphasized that foreseeability alone did not determine the existence of a duty. *Id.* at 416-17. ("That the injury to Ms. Doe may have been foreseeable does not end our inquiry."). The Court, relying in substantial part upon its recent decision in *Dehn*, *supra*, declined to impose a duty flowing from the employer to the spouse of an employee, explaining:

[9] The employer tested its employees every six months. The husband at one point tested positive on one test, but a subsequent test was negative, so the employer characterized it as a "false positive." In fact, the employee had been infected with HIV-2, which was the cause of the positive result.

Doe's proposed duty of care to her would create an expansive new duty to an indeterminate class of people. This Court has resisted the establishment of duties of care to indeterminate classes of people. *See Dehn*, 384 Md. at 627, 865 A.2d at 615 (stating that "[t]he imposition of a common law duty upon Dr. Edgecombe to the wife under these circumstances could expand traditional tort concepts beyond manageable bounds"); *Walpert v. Katz*, 361 Md. 645, 671, 762 A.2d 582, 596 (2000) (concluding that the rationale for the privity requirement in negligence cases involving economic harm is to avoid liability to an indeterminate class); *Valentine* [*v. On Target*], 353 Md. [544] at 553, 727 A.2d [947] at 951 [(1999)] (stating that "[t]he class of persons to whom a duty would be owed under these bare facts would encompass an indeterminate class of people, known and unknown"); *Village of Cross Keys v. U.S. Gypsum*, 315 Md. 741, 744-45, 556 A.2d 1126, 1127 (1989) (stating that the claim of a tort duty "generates the specter of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class,' a liability that concerned Justice Cardozo in *Ultramares Corporation v. Touche*, 255 N.Y. 170, 174 N.E. 441, 444 (1931), and continues to concern courts today").

The concern with recognizing a duty that would encompass an indeterminate class of people is that a person ordinarily cannot foresee liability to a boundless category of people. *See Walpert*, 361 Md. at 671, 762 A.2d at 596 (explaining the limitation of duty as aimed at "limit[ing] the defendant's risk exposure to an actually foreseeable extent, thus permitting a defendant to control the risk to which the defendant is exposed"). Additionally, we have noted that the imposition of a duty to an indeterminate class would make tort law unmanageable. *See Dehn*, 384 Md. at 627, 865 A.2d at 615.

The imposition of a duty of care in this case would create an indeterminate class of potential plaintiffs. Doe portrays her proposed duty as limited to spouses. She claims that it was foreseeable that she would contract HIV while engaging in unprotected sex with her husband because it is foreseeable that a husband and wife will engage in sexual relations. Doe does not offer any legitimate reason to support a distinction between married plaintiffs and other plaintiffs.

> The rationale for imposing a duty of care to Ms. Doe could apply to all sexual partners of employees. *See id.* (declining to impose a duty of care based on the foreseeability that spouses would engage in sexual relations because "[t]he rationale for extending the duty would apply to all potential sexual partners and expand the universe of potential plaintiffs"). The potential class to whom Pharmacia would owe a duty under Doe's theory is even greater than all sexual partners of its employees. It includes any person who could have contracted HIV-2 from the employee by any means. The law does not countenance the imposition of such a broad and indeterminate duty of care.

Pharmacia, *supra*, 388 Md. at 420-21.

The Court of Appeals reexamined *Dehn* and *Pharmacia* in *Gourdine v. Crews*, *supra*, 405 Md. 722, a products liability case. In *Crews*, Mr. Gourdine was fatally injured in an automobile accident. A driver, Ms. Crews, suffered a debilitating episode that Mr. Gourdine alleged was caused by medications the driver took for diabetes. The episode caused Ms. Crews to crash her vehicle into the vehicle operated by Mr. Gourdine. Mr. Gourdine's surviving spouse sought to recover from Eli Lilly and Company ("Lilly"), the manufacturer of the medication that allegedly caused Ms. Crews's episode. The Court again declined to impose a new duty, expressing concerns about duties that flow to an indeterminate class of people:

> In the case *sub judice*, there was no direct connection between Lilly's warnings, or the alleged lack thereof, and Mr. Gourdine's injury. In fact, there was no contact between Lilly and Mr. Gourdine whatsoever. To impose the requested duty from Lilly to Mr. Gourdine would expand traditional tort concepts beyond manageable bounds, because such duty could apply to all individuals who could have been affected by Ms. Crews after her ingestion of the drugs. Essentially, Lilly would owe a duty to the world, an indeterminate class of people, for which we have "resisted the establishment of duties of care." *Pharmacia & Upjohn*, 388 Md. at 407, 879 A.2d at 1088. *See*

> *also Dehn*, 384 Md. at 627, 865 A.2d at 615 ("The imposition of a common law duty upon Dr. Edgecombe to the wife under these circumstances could expand traditional tort concepts beyond manageable bounds."); *Valentine*, 353 Md. at 553, 727 A.2d at 951 ("One cannot be expected to owe a duty to the world at large to protect it against the actions of third parties, which is why the common law distinguishes different types of relationships when determining if a duty exists. The class of persons to whom a duty would be owed under these bare facts would encompass an indeterminate class of people, known and unknown."); *Village of Cross Keys*, 315 Md. at 744-45, 556 A.2d at 1127 (stating that the claimed duty "generates the specter of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class,' a liability that . . . continues to concern courts today").

Gourdine, *supra*, 405 Md. at 750-51.

In my view, this case is indistinguishable from *Gourdine, Dehn,* and *Pharmacia* and presents similar concerns with respect to duties to indeterminate classes of people. The appellant seeks to distinguish this case from *Gourdine, Dehn,* and *Pharmacia*, arguing that *Gourdine, Dehn,* and *Pharmacia* involved sequential events, but, in this case, the appellant was exposed to lead paint hazards at the same time as her sister Anquenette. I acknowledge that, factually, *Gourdine, Dehn,* and *Pharmacia* involved sequential events. In *Dehn*, the doctor negligently advised the patient that his wife could not become pregnant, and, subsequently, the wife became pregnant. In *Pharmacia*, the employer provided negligent HIV testing to its employees, and, subsequently, the employee's wife contracted HIV. In *Gourdine*, the drug manufacturer produced the drug and the driver subsequently experienced the episode that caused the collision. Critically, the Court's holdings in these two cases were not based upon the sequential nature of the acts causing the plaintiffs' injuries. I agree with the circuit court that this distinction is not determinative. The critical

similarity between the case *sub judice*, *Gourdine, Dehn,* and *Pharmacia* is the relationship between the injured party and the allegedly negligent party. The duties recognized by the Court of Appeals in *Grimes* were based upon the specific relationship between a researcher and a researcher's subject in a nontherapeutic research study.

Gourdine, Dehn, and *Pharmacia* instruct that *Grimes* should be construed narrowly. The Majority portrays the imposed duty as narrow, in that it would apply to the appellant only because she resided in the same home as the study participant. There are, however, critical differences between a participant in a research study and a third party who is harmed as a result of a research study. The appellee bore specific responsibilities to the participants in their research study, including the duty to obtain informed consent. No informed consent was obtained, nor was it necessary, for the appellant because she was not a participant in the research study. Furthermore, the appellee did not monitor the appellant in the same manner as they monitored study participants. In my view, an indeterminate number of people could conceivably be harmed by actions undertaken by researchers during a research study, and the rationale supporting the imposition of the duty could arguably apply to a far wider range of individuals. I, therefore, share the concerns expressed by the Court of Appeals in *Gourdine*, *Pharmacia*, and *Dehn*. In my view, the Majority's imposition of a duty in this case expands traditional tort concepts beyond manageable bounds.

The Majority attempts to cast its holding as narrow based upon the appellant's status as a resident of the same home as her study participant sister. My concern is that the

Majority's holding could be used to expand duties further. Indeed, there are myriad ways in which third parties can be harmed as a result of research studies. *See* Resnik, D. B., & Sharp, R. R. *Protecting Third Parties in Human Subjects Research*. IRB, Jul.-Aug. 2006, at 1-7 (describing various hypothetical ways in which third parties can be harmed by research). For example, "vaccine research in which subjects are exposed to a biological agent . . . may pose a health hazard to others who come in contact with research subjects," and "[s]tudies that involve research interventions in settings occupied by multiple individuals, such as a home, a school, or a community center" could cause harm to a wide range of third-parties. *Id.*[10] In short, I simply do not believe the Majority's opinion

[10] The target audience for this article included investigators and Institutional Review Boards. In addition to discussing hypothetical harm to third parties in research, the authors propose imposing a duty of care based upon the risk of harm to a third party, i.e., the foreseeability of harm -- an approach rejected by Maryland courts. *See*, *e.g.*, *Dehn*, *supra*, 384 Md. at 624 ("[M]ere foreseeability of harm or injury is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm."). When there is no risk to third parties, the authors posit there is no duty owed to third parties. When there is minimal risk to third parties, the authors advocate that researchers' duty should be to inform subjects about risks to third parties. When there is more than minimal risk to third parties, the authors advocate that researchers' duty should be to take reasonable measures to protect third parties, such as informing third parties about risks and obtaining permission if necessary. When there is serious risk to third parties, the authors posit that researchers' duty is to not conduct the research or redesign the research to minimize risks to third parties.

The authors base their duty analysis on Judge Learned Hand's formula, wherein the degree of care owed is a function of the probability that the harm will occur to the person multiplied by the magnitude of the harm, divided by the burden of the sacrifice one must make to avoid the harm. *See United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). The authors' discussion of duty is interesting on a theoretical level, but is not based upon Maryland law. Indeed, Judge Learned Hand's *Carroll Towing* opinion has never been cited in a reported Maryland case.

presents any principled basis to determine when a duty exists under the common law to third parties harmed by research studies.

Accordingly, I would hold that the appellee did not owe the requisite duty to the appellant under Maryland common law to sustain a negligence claim.[11] I, therefore, would affirm the trial court's order granting summary judgment to the appellee in its entirety.

[11] I would further reject the appellant's assertion that 45 C.F.R. § 46.102 provides a basis for recognizing a legal duty in this case. The appellant was not a "human subject" because she is not an individual "about whom an investigator . . . conducting research obtain[ed] . . . [d]ata" during the study.