Circuit Court for Baltimore City
Case No. 24-C-12-006885

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2374

September Term, 2019

RONALD FISHKIND

v.

DE'ANGELO ANTHONY

Arthur,
Shaw Geter,
Wells,
JJ.

Opinion by Wells, J.

Filed: February 2, 2021

After a seven-day trial, a jury in the Circuit Court for Baltimore City awarded appellee, De'Angelo Anthony damages resulting from his exposure to lead paint. The exposure occurred in the early 1990's when Mr. Anthony was an infant and then living in a property that appellant, Ronald Fishkind owned. Mr. Fishkind timely challenges the verdict, raising three allegations of error, each of which we have rephrased for clarity[1]:

1. Did the trial court err in permitting Mr. Anthony's vocational rehabilitation specialist to offer an opinion testimony about the grade level at which Mr. Anthony would likely function if he had no cognitive or behavioral deficits?
2. Did the trial court err in admitting into evidence photographs that showed the condition of the interior of the subject property while it was being reconstructed by a different owner in 2013-14?
3. Did the trial court err in allowing Mr. Anthony's neurological expert to testify using slides that helped explain his testimony?

[1] The questions appellant poses in his brief are:

1. Whether the Trial Court committed legal error and/or abused its discretion when it permitted Appellee's vocational expert, Mark Lieberman, to testify regarding academic and vocational losses when there was no nexus established between Appellee's lead ingestion and the predicted academic, vocational and/or alleged economic loses?

2. Whether the Trial Court committed legal error/and or abused its discretion when it permitted Appellee to introduce photographs of the subject property that were taken many years after the tenancy and were highly prejudicial to the Appellant?

3. Whether the Trial Court committed legal error and/or abused its discretion when it allowed Appellee's non-causation expert to discuss medical causation?

For the reasons explained below, we hold that the trial court did not err in admitting any of the evidence of which Mr. Fishkind complains. We, therefore, affirm.

I. SUMMARY OF TRIAL TESTIMONY

De'Angelo Anthony's parents, Leola Beaman and Larry Anthony, testified that in the fall of 1991 they decided to move to 912 North Luzerne Avenue (sometimes referred to here as "the subject property"), a house then owned by Ronald Fishkind. On November 25, 1991 they signed the lease. Each parent testified that shortly after they moved in, they noticed chipping paint throughout the residence. Coincidentally, their son, De'Angelo, was born on December 3, 1991, about one week after the move. The family made no complaints to Mr. Fishkind about the premises during their tenancy and vacated the property in March 1993.

Mr. Anthony began his testimony by telling the jurors that he was 28 years old and that he was serving a thirty-year sentence for first-degree murder, a crime which he insisted he did not commit. Mr. Anthony testified that during his childhood he struggled with maintaining attention while in school and that comprehending schoolwork was difficult for him. He admitted he frequently skipped classes. As a result, he was held back for some grades and was required to attend summer school. He believed he was promoted to higher grades because of "No Child Left Behind."[2] He also mentioned that he had disciplinary

[2] The No Child Left Behind Act of 2001 (NCLB) was in effect from 2002–2015. It was a version of the Elementary and Secondary Education Act. NCLB was replaced by the Every Student Succeeds Act in 2015. When NCLB was in place, it affected every public-school student in the United States. Its goal was "to level the playing field" for students who were disadvantaged because of race and financial circumstances, as well as

problems and gave as an example, fighting. Mr. Anthony said that prior to his incarceration he had only one job, in which he stocked shelves and bagged groceries.

Christopher White, the program manager for ARC Environmental, a firm that tests for the presence of lead in homes, testified that during the years 2013-14, he and a co-worker did an inspection of the house at 912 North Luzerne Avenue for the presence of lead-based paint. Mr. White, whom the court accepted as an expert in the field of lead-based paint detection, testified about testing the exterior and interior of the subject property. On January 23, 2013, their tests revealed the presence of lead paint on the exterior portion of a door molding and rear exterior wall. Mr. White opined that the lead paint had been present "from at least 1978." These findings were contained in a written report dated January 29, 2013. On May 14, 2014, Mr. White's testing revealed the presence of lead paint inside the house "on the first floor on the front and upper door casing…, a window casing…, and a baseboard." These findings were detailed in a report dated May 21, 2014.

The court accepted Dr. Robert K. Simon, a chemist and industrial hygienist, as an expert in the field of assessing the risk of lead exposure. One of the salient facts about which Dr. Simon testified were the levels of lead that were found in Mr. Anthony's blood, measured in micrograms per deciliter. These findings were the result of multiple tests performed on Mr. Anthony when he was a child. The following chart summarizes the findings. The same chart is also found in Mr. Anthony's brief. We reprint it here:

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special education and non-English speaking children. https://u.org/37mhHE3 (www.understood.org).

Date	Lead Level
7/9/92	9
1/7/93	15
4/8/93	12
6/17/93	12

Dr. Simon testified that the increase from level 9 to level 15 during the months from July 1992 to January 1993, when Mr. Anthony was between 7 and 13 months old, showed that he had "continuous blood lead level." And, Mr. Anthony demonstrated his highest blood lead level while living in the subject property.

Dr. Barry Hurwitz is a clinical psychologist and neuropsychologist and testified as an expert in those fields. He was tasked by Mr. Anthony's counsel with determining whether Mr. Anthony exhibited any signs of brain damage. Dr. Hurwitz conducted a battery of tests on Mr. Anthony and found that he had a full-scale IQ between 64 and 69. His verbal IQ, the ability to understand language and communicate, was 60. His ability to process information was in the rage of "borderline impairment." Other test scores showed that Mr. Anthony displayed a number of cognitive deficits. Dr. Hurwitz opined that these deficits were permanent.

Next, the plaintiffs called Dr. Paul Rogers, a neurodevelopmental pediatrician. As part of his training, Dr. Rogers oversaw "the lead inpatient unit" at Mount Washington Hospital. He testified as an expert in the fields of pediatric medicine, neurodevelopmental

pediatrics and childhood lead poisoning. Based on a half dozen hospital reports and forty reports from specific medical providers, in Dr. Rogers' opinion, Mr. Anthony suffered from lead exposure as a child, causing the elevated lead levels described. As a result of this exposure, Dr. Rodgers opined that that some of the deficits that Dr. Hurwitz discussed were related to lead exposure. These included Mr. Anthony's cognitive difficulties, problems with executive function, attention deficits, and disruptive behavior. On cross-examination, Dr. Rogers admitted that he could not tell what Mr. Anthony's intellectual and cognitive scores, or academic performance would be without exposure to lead; he could only opine that lead exposure resulted in some of Mr. Anthony's cognitive deficit and behavioral problems.

Mark Lieberman, a vocational rehabilitation consultant, works with people with cognitive, psychological, and physical disabilities. He offered testimony about how one's disabilities can impact one's ability to find and keep employment. Mr. Lieberman "assesse[d] the employment marketability of an individual" like Mr. Anthony using a standard methodology known by the acronym RAPEL.[3] Among the things Mr. Lieberman reviewed were Dr. Hurwitz's neuropsychological evaluation, Mr. Anthony's school records, Mr. Anthony's interrogatory answers, and other materials from the Maryland Department of the Environment, which showed Mr. Anthony's childhood blood-lead levels as depicted on the chart reprinted above. In Mr. Lieberman's opinion, Mr. Anthony's

[3] According to Mr. Lieberman, RAPEL takes its name from the first letter of the following factors: "Rehabilitation plan, Access to the labor market, Place-ability, Earning capacity, and Labor force participation."

cognitive problems would affect his ability to find and keep employment. At best, in Mr. Lieberman's opinion, Mr. Anthony will probably only be able to be employed in a low-skill, manual labor job, much like the one he had stocking shelves, because Mr. Anthony is functionally illiterate. One opinion that Mr. Lieberman offered was at what grade level Mr. Anthony would function if he had no cognitive deficits or behavioral problems. This opinion forms the basis of the first allegation of error and will be discussed below.

Mr. Anthony ended his case-in-chief with the testimony of Dr. Michael Conte. Dr. Conte, an economist, offered his opinions based on Mr. Lieberman's testimony about Mr. Anthony's employment prospects, or "vocational marketability." Dr. Conte assumed that without the deficits that Dr. Hurwitz identified, Mr. Anthony would likely not be imprisoned. Without the injuries allegedly caused by lead paint exposure and not being incarcerated, in Dr. Conte's opinion, the present value of Mr. Anthony's likely earnings over his estimated lifetime would be over $1.7 million. With the injuries caused by his exposure to lead and his incarceration, the present value of Mr. Anthony's likely earnings would be $739,005.00. Consequently, Dr. Conte calculated the loss to Mr. Anthony's earnings due to lead exposure to be approximately $1,027,054.00, or the difference between the two figures.

The defense's first two witnesses were Patrick Connor, "an environmental compliance specialist," and Terry Leslie, a vocational expert. Mr. Connor, whom the court accepted as an expert in the fields of assessing the risk of lead exposure and abatement of lead, testified that in his opinion 912 North Lucerne Avenue was not "a substantial contributing factor to [Mr. Anthony's] blood lead level." In fact, Mr. Connor 'did not find

any lead-based paint hazards associated with the property." According to Mr. Connor, the environment in and around where Mr. Anthony grew up had amounts of lead in the air and soil resulting from the construction of near-by buildings and the presence of coal-carrying trains through Baltimore City. Using information gleaned from the United States Environmental Protection Agency, Mr. Connor opined that with lead permeating the environment where Mr. Anthony lived as a child, no one could definitively say that the subject property was a significant contributing source of the lead in Mr. Anthony's body.

Terry Leslie was the defense's vocational rehabilitation expert. Mr. Leslie focused on records showing Mr. Anthony's parents' progress (or lack thereof) academically, was a predictor of Mr. Anthony's academic achievement. His theory was "that children tend to mimic the educational attainments of their parents." In Mr. Leslie's opinion, there was nothing in Mr. Anthony's medical or academic records that showed that he could not have attained at least a high school diploma if he had exerted himself academically. In Mr. Leslie's opinion, Mr. Anthony did not suffer from a loss of earning capacity. And Mr. Leslie opined, there was little foundation for Mr. Lieberman's opinion, because according to Mr. Leslie, there was nothing in Mr. Anthony's medical history that would "impact Mr. Anthony's ability to sustain gainful employment but for his incarceration."

The defense called Dr. Joseph Scheller, a pediatric neurologist, to testify as an expert in that field. The focus of his testimony was on causation. After reviewing Mr. Anthony's medical records and meeting with him, Dr. Scheller was of the opinion "[w]ith blood levels like he (Mr. Anthony's) had there's no way to say that you can measure any kind of damage or injury or difficulty that those are responsible for." Aside from being

unable to ascertain the effect of lead exposure on Mr. Anthony from more than a quarter century ago, Dr. Scheller testified that many factors go into one's development. He could not say what among "100 reasons" could be the cause of Mr. Anthony's cognitive deficits and lack of academic achievement. Dr. Scheler pointed to declining lead levels historically as being the third factor as to why, in his opinion, Mr. Anthony's exposure to lead as a child could not have impacted his development.

Finally, the defense called Dr. Aaron Noonberg to counter the testimony of Dr. Hurwitz. Dr. Noonberg testified as an expert in the fields of clinical psychology and neuropsychology. He stated that he did a neuropsychological evaluation of Mr. Anthony and reviewed Mr. Anthony's academic record as well as his medical records, among other things. Dr. Noonberg rated Mr. Anthony within the "borderline to low average" range, which was consistent with the tests Dr. Noonberg administered. One area that Dr. Noonberg focused on was Mr. Anthony's history of substance abuse. In Dr. Noonberg's opinion, Mr. Anthony did not exhibit evidence of brain damage. Mr. Anthony's low achievement in school could be attributed to a lack of effort.

A jury returned a verdict in Mr. Anthony's favor, finding that Mr. Fishkind was negligent in failing to remove lead-based paint from the house at 912 North Lucerne Avenue and the failure to do so was a substantial contributing factor in causing injury to Mr. Anthony. The jury awarded Mr. Anthony $459,841.00 in future noneconomic damages and $425,000.00 for past damages. The total award was $884,881.00.

Mr. Fishkind filed this timely appeal. Additional facts may be discussed, if necessary.

DISCUSSION

I. The Court Did Not Err in Allowing Mr. Lieberman to Offer Expert Opinion Testimony Concerning the Grade Level at Which Mr. Anthony Would Function Absent Any Deficits

A. Parties' Contentions

Mr. Fishkind argues that the trial court erred in allowing Mr. Lieberman, plaintiff's vocational expert, to testify about Mr. Anthony's potential future employability, and by extension, economic losses "when there was no nexus established between Mr. Anthony's lead ingestion and the predicted…losses." More specifically, Mr. Fishkind claims that the court improperly allowed Mr. Lieberman to "quantify the injuries" from lead exposure. "[Mr. Lieberman's] testimony was not admissible under Md. Rule 5-702 because it lacked reliable supporting evidence demonstrating a causal link between [Mr. Anthony's] lead exposure and his predicted vocational losses."

Mr. Anthony counters that Mr. Fishkind misconstrues what Mr. Lieberman was asked to testify about, namely, the employment opportunities that would be available to a person without the cognitive deficits like those that Mr. Anthony possessed. Further, Mr. Lieberman's testimony was supported by a sufficient factual basis found in the record that satisfies Rule 5-702. Finally, Mr. Anthony argues that Mr. Lieberman's opinion about Mr. Anthony's likely academic level absent injury was consistent with this Court's decision in *Lewin Realty III, Inc., v. Brooks*, 138 Md. App. 244 (2001), *aff'd, Brooks v. Lewin Realty III, Inc*., 378 Md. 70 (2003), *abrogated on other grounds by Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594 (2011).

B. Expert Testimony

As Mr. Fishkind is challenging the relevancy of Mr. Lieberman's testimony, we review that legal determination without deference to the trial court. *State v. Robertson*, 463 Md. 342, 353 (2019) (citing *Perry v. Asphalt & Concrete Services, Inc.*, 447 Md. 31, 48 (2016)).And, in determining whether expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue," Rule 5-702 requires a trial court to evaluate "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education[;] (2) the appropriateness of the expert testimony on the particular subject[;] and (3) whether a sufficient factual basis exists to support the expert testimony." The proponent of the expert testimony is required to demonstrate that these requirements have been met. *Bomas v. State*, 412 Md. 392, 417–18 (2010).

The Court of Appeals has interpreted the third prong of the analysis, whether there is a sufficient factual basis for the expert's opinion, "to include two subfactors: an adequate supply of data and a reliable methodology." *Roy v. Dackman*, 445 Md. 23, 42–43 (2015). To constitute "more than mere speculation or conjecture," the expert's opinion must be based on facts sufficient to "indicate the use of reliable principles and methodology in support of the expert's conclusions." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 478 (2013). To demonstrate a sufficient factual basis, an expert must establish that their testimony is supported by both subfactors. *Id*.

On the first sub-prong, the data supporting the expert's opinion, the Court has held that data may come from a variety of sources, such as firsthand knowledge, the testimony of others, and the use of hypothetical questions. *Sippio v. State*, 350 Md. 633, 653 (1998)

On the second sub-prong, the methodology the expert uses must be reliable. *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 418-19 (2013). To satisfy this prong, "an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data and must have an adequate theory or rational explanation of how the factual data led to the expert's conclusion." *Ford*, 433 Md. 426, 478(2013)). Finally, the expert may not simply make conclusory statements of opinion. "[T]he expert must be able to articulate a reliable methodology for how she reached her conclusion." *Id*. at 481-82.

C. Proceedings in the Circuit Court

Prior to trial, Mr. Fishkind's counsel filed a motion in limine to exclude Dr. Roger's and Mr. Lieberman's testimony. At that hearing, Mr. Fishkind's counsel argued that because Dr. Rodgers could not say the degree to which lead caused Mr. Anthony's deficits, then Dr. Rogers should not be allowed to offer any testimony on causation.

> [MR. FISHKIND'S COUNSEL]: So the issue is – it's sort of like this, Your Honor. This is the brain, and this is the injury that it has caused (sic). The problem is you can't see it. So how do we know if it's substantial or not? If you can't see what the injury is, if you can't quantify that injury, how can you sit in that chair and tell the ladies and gentlemen of the jury that it is a substantial factor to any injury?
>
> That's my problem with Dr. Rogers' testimony…, with all the medical experts, and ultimately Mark Lieberman's opinion.
>
> If you can't – if you cannot quantify an injury how can you say it's substantial?
>
> …
>
> So that leads me to Mr. Lieberman's opinions. Mr. Lieberman, in this case, is using a ga[u]ge of below ninth grade. That's where he believes that De'Angelo Anthony is currently functioning. He says without the deficits he would be functioning between the ninth and twelfth grade. But no one – no

> one is connecting those dots[.] [No one is saying] that without the lead he would be between the ninth and twelfth grade. No one is doing that. They're not able to say that without the lead we believe to a reasonable degree of probability that he would substantially, we believe it, he would be in that range.

Mr. Anthony's counsel responded as follows:

> [MR. ANTHONY'S COUNSEL]: The fact that – the argument that he can't – that Dr. Rogers can't quantify the injuries. No doctor can. Defendant cites no Rule, no case law whatsoever as to that. In fact, it's been the same kind of testimony in all the appellate decisions concerning medical experts on lead paint cases is that lead causes brain, permanent brain damage and the deficits are the manifestation of the permanent brain damage. And the manifestations would have been be it executive function issues, attention deficit issues, impulsivity, hyperactivity or whatever. The testimony is consistently and would be from Dr. Rogers that they would be worse off. They are worse off because of the lead. And that's all you can really say.

After noting that it was well-accepted within the scientific community that the only loss caused by lead exposure that Dr. Rogers could quantify was a decline in intelligence, counsel explained,

> [MR. ANTHONY'S COUNSEL]: But what we are saying is that Mr. De'Angelo Anthony wouldn't be a rocket scientist absent the lead. He wouldn't be, you know, he's currently less than ninth grade. He would have been, you know, a Ph. D absent the lead, no. He would have been a little bit better and that means, you know, a twelfth-grade education.
>
> …
>
> Mr. Lieberman's testifying as to the records he reviewed, the method he applied, the RAPEL method which has all been accepted by the Court of Special Appeals and the Court of Appeals in various cases….

After hearing rebuttal argument from Mr. Fishkind's counsel, the trial court denied both motions. The court ruled that Dr. Rogers could testify that lead exposure caused Mr.

Anthony's deficits. As far as Dr. Rogers being unable to quantify the degree of injury the court noted that

> This is the type of injury that it would be impossible to put a percentage how damaged is the brain? (sic). Is there a ten percent damage to the brain? It just can't be done. The Court's going to deny the motion.
>
> Similarly, the Court finds that the proposed testimony of Mr. Lieberman is supported by both the medical testimony that he's relying on and the facts that he's reviewed and provide a substantial or significant factual basis for those opinions.

Later, at trial, after Mr. Lieberman was tendered as an expert, Mr. Fishkind's counsel renewed his motion to exclude Mr. Lieberman's testimony in its entirety. The court, again, denied the motion.

D. Analysis

Preliminarily, we think that the issue presented here is one that should be resolved by examination of Rule 5-702 and relevant appellate precedent. Contrary to what Mr. Fishkind alludes in his reply brief and at oral argument, we do not think the Court of Appeals' recent ruling in *Rochkind v. Stevenson*, ___ Md. ___ (2020) (decided: August 28, 2020) is implicated. The question here is not about the use of a scientific technique or methodology. Instead, the allegation has consistently been that the trial court erred in allowing Mr. Lieberman's opinion because there was no factual basis for it. Indeed, Mr. Fishkind concedes that Mr. Lieberman meets the first two prongs of Rule 5-702, namely, in that he does not take issue with Mr. Lieberman's credentials or the RAPEL methodology used. Mr. Fishkind's stated concern is that there is "an analytical gap" between Mr. Lieberman's opinion and a scientific opinion to support it. *See* Reply Brief at 1-2.

Although Mr. Fishkind cites *Rochkind* in his reply brief and attaches a copy of the Court of Appeals' opinion for our convenience, he maintains that the basis for his claimed error is the lack of a factual foundation for Mr. Lieberman's opinion, not a challenge to a scientific theory. *See* Reply Brief at 3. This alleged error implicates the third prong of Rule 5-702, namely, whether Mr. Lieberman had a sufficient factual basis for his opinion and whether that factual basis was supported by data. *Roy*, 445 Md. at 42–43; *Ford*, 433 Md. at 478; *Sippio*, 350 Md. at 653.

We start with Dr. Rogers' testimony, which laid the foundation for Mr. Lieberman's opinions. Dr. Rogers' opinion, unchallenged on appeal, is that when he was an infant, Mr. Anthony was exposed to lead, which caused him to develop several difficulties, including cognitive deficits, problems with executive function and memory, attention deficit, and eruptions of violent, disruptive behavior. Dr. Rogers could not say the degree to which the exposure to lead caused Mr. Anthony's deficits, only that such exposure caused them. Additionally, Dr. Hurwitz, Mr. Anthony's neurological expert, opined that Mr. Anthony's cognitive deficits and intelligence range in the mid-60s, indicating that "borderline impairment," was permanent. As a result, Mr. Anthony's verbal functioning was at "about a first or second grade level." And his numeracy skills were at "about second to third grade level."

As a result of these findings, Mr. Lieberman opined that Mr. Anthony's deficits would "negatively affect his vocational placement," because of,

> Again, the low I.Q., the reading and math scores, essentially in the illiterate range, cognitive deficits with attention, concentration, focus, impulse control, language and memory, history of not obtaining a high school

> diploma, a history of multiple grade failures, being incarcerated. All those factors are going to combine for somebody who is going to have an extremely difficult time obtaining and maintaining any type of employment.

As a result, in Mr. Lieberman's opinion, Mr. Anthony would be suited for "the most unskilled [employment] level." "The bottom of the unskilled level."

With this testimony as the backdrop, Mr. Anthony's counsel then asked Mr. Lieberman:

> [MR. ANTHONY'S COUNSEL]: Now, Mr. Lieberman, do you have an opinion with a reasonable degree of vocational probability as to what Mr. Anthony's vocational abilities would have been absent the deficits that you have discussed?
>
> [MR. LIEBERMAN]: Sure. Well, in general, the average individual is a high school graduate. In Baltimore City, although the statistics are low, the average individual is still a high school graduate. Nationally, that means the individual is actually a high school grad with some college.
>
> So, we know the average range is at least high school grad. We know the mom has a GED, dad didn't graduate from high school, but has a long work history. So we would look at those factors, absent the issues with IQ, absent the issues with attention concentration and focusing, I would expect he would function up to a maximum of high school grad.
>
> [MR. ANTHONY'S COUNSEL]: And how do you go about coming up to that opinion?
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> [MR. LIEBERMAN]: Well, again, if you look at the statistics. Statistics again, tell us the average person is a high school grad, so most people fall within the average range. That average range being anywhere from a high school grad to some college.

As we see it, Mr. Lieberman's opinion on this topic had several factual bases. Most obviously, the opinion was based on statistical data about the average educational attainment of the City's adult population. Mr. Lieberman applied that statistical average to Mr. Anthony, assuming he fell within that range. Further, the opinion was grounded in

what Mr. Lieberman knew about Mr. Anthony's parents' educational backgrounds and Mr. Anthony's own lack of significant educational attainment. More importantly, Mr. Lieberman relied on Dr. Rogers' testimony concerning Mr. Anthony's limited intelligence and other cognitive deficits. As we understand Mr. Lieberman's testimony, he opined that, at best, Mr. Anthony might have advanced a few grades, from the ninth to the twelfth grade, if he had no significant cognitive difficulties. Mr. Lieberman did not opine that absent any deficits, Mr. Anthony would have attained an advanced academic degree. In this sense, Mr. Lieberman's opinion was quite limited.

We have found at least two appellate opinions in which Mr. Lieberman has offered similar, if not identical testimony in other lead exposure cases that has been accepted by the Court of Appeals and this Court. For example, in *Lewin Realty III*, where a minor, Sean Brooks, sued for damages as a result of exposure to lead paint, Mr. Lieberman gave opinion testimony about Mr. Brooks' employment prospects, over the objections of Lewin Realty. 138 Md. App. at 275. We affirmed the trial court's determination that Mr. Lieberman could testify as an expert and opine about Mr. Brooks' lost earning capacity as a child exposed to lead. *Id*. at 285. In reaching this conclusion we noted that, just as here, Mr. Lieberman relied on neurological reports and school records to form his opinions.

> **[Mr. Liberman] concluded that, without the mental disabilities from lead exposure, it was probable that Sean would have in the future attained an education level of between 9th and 12th grade**, and would have been employable in jobs requiring organizational and oversight skills. He further concluded that given Sean's lead impairments, it was more likely than not that he would drop out of school at the age of 16 and would not complete a 9th grade education, and that he only would be employable for "very basic manual labor." **Finally, relying on statistics from the**

> **Department of Commerce, Mr. Lieberman opined that Sean's earning capacity was less than what it would have been had he not been injured.**

Id. (emphasis supplied). And in *Sugarman v. Liles*, 46 Md. 396 (2018), another lead paint case, the Court of Appeals rejected Mr. Sugarman's claim that Mr. Lieberman's opinions were "baseless." *Id*. at 443. Just as in this case, the Court of Appeals, citing *Lewin Realty*, noted that,

> Mr. Lieberman's opinion was based on substantial material. He interviewed Liles, conducted additional vocational testing, and reviewed his educational and medical records. He also reviewed and relied upon the neuropsychological evaluation and conclusions of Dr. Kraft. Additionally, Lieberman relied on his years of experience as a vocational rehabilitation counselor during which he has helped thousands of students attend college. After reviewing this data, he concluded that Liles was not likely to receive a college degree due to the attention problems Dr. Kraft identified. **He further proffered that, in his expert opinion, Liles would have been able to earn a college degree without his disabilities**.

Id. at 445 (emphasis supplied).

Mr. Fishkind asserts that the specific issue he raises here was not presented in the cases cited or was simply not addressed by those courts. We disagree. We conclude that the Court of Appeals and this Court have both recognized Mr. Lieberman's ability to render an opinion on a person's likely educational attainment if the person was among the average population. On similar, if not identical evidence presented in other lead paint exposure cases, both of Maryland's appellate courts have held that Mr. Lieberman's opinions are not speculative but can aid the jury in assessing damages. *Id*.; *Lewin Realty*, 138 Md. App. at 285. To be clear, we perform an independent assessment of the evidence in this case and reach a conclusion similar to the appellate cited decisions.

Finally, we note that the trial judge was correct when he stated that in challenging Mr. Lieberman's testimony, Mr. Fishkind's counsel was actually asserting a "straw man" argument. We explain.

At trial, Mr. Anthony called Dr. Rogers to testify on the issue of causation. In that capacity, Dr. Rogers was only required to opine whether Mr. Anthony's childhood lead ingestion caused the intellectual deficits that Dr. Hurwitz opined Mr. Anthony possesses. Dr. Rogers was not required to offer an opinion about what Mr. Anthony's physical and mental abilities would have been like without injury. Dr. Rogers acknowledged that no one in the medical field could answer that question. The only thing that medical professionals could say is that lead exposure caused the injuries which Mr. Anthony has. The degree to which lead exposure has caused an injury is, for now, beyond the ken of science, the sole exception being a person's intelligence quotient.

For Mr. Fishkind to argue that because no scientist can opine the degree to which lead exposure has caused a person's injuries seems to us different from Mr. Lieberman answering a hypothetical question about Mr. Anthony's likely educational achievement if, based on readily available statistics and the testimony of witnesses at trial, Mr. Anthony did not have cognitive deficits caused by led exposure.[4] To us, Mr. Fishkind's concern

[4] Counsel's quoted question asked Mr. Lieberman for an opinion based on a hypothetical scenario, which is permissible in Maryland. "A factual basis for expert testimony may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions." *Sippio*, 350 Md. at 653 (citing 6 Lynn McLain, Maryland Evidence, § 703.1, at 236–37 (1987). Although the question may have appeared to be inquiring as to the degree to which lead exposure caused Anthony's injuries, Mr. Lieberman's response illustrates that he understood the question as a mere hypothetical

about Mr. Lieberman attempting to "quantify" Mr. Anthony's loss seems misplaced. Mr. Lieberman was not offering an opinion about how much, or the degree to which lead exposure affected Mr. Anthony. Instead, Mr. Lieberman testified that presuming Mr. Anthony was without cognitive impairments, at best he likely would possess a high school diploma.

We conclude that Mr. Lieberman's opinion was not unfounded but supported by statistical data that was not challenged on cross-examination. Mr. Lieberman was able to use the opinions of other experts, in this case Drs. Hurwitz and Rogers, in forming his opinion. He could also use his knowledge and reliable data to form his opinions and did so here. Of course, the jury was free to believe all, part, or none of Mr. Lieberman's or any of the experts' testimony. *Edsall v. Huffaker*, 159 Md. App. 337, 342 (2004) ("A jury is not required to accept the testimony of an expert witness."); *Walker v. Grow*, 170 Md. App. 255, 275 (2006) ("Even if a witness is qualified as an expert, the fact finder need not accept the expert's opinion."). On this basis the trial court did not abuse its discretion in allowing the Mr. Lieberman's testimony.

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as to what Mr. Anthony's intellectual abilities could have been absent the effects of lead exposure. We conclude that the question posed was a permissible hypothetical question posed to an expert witness. There was a factual basis for Mr. Lieberman's opinion that was supported by his knowledge of Mr. Anthony and statistical data. The opinion provided "a…rational explanation of how the factual data led to the expert's conclusion." *Ford*, 433 Md. 426, 478.

II. The Court Did Not Err in Admitting Photographs of the Subject Property During Renovation by a Subsequent Owner

Mr. Fishkind next asserts that the trial court abused its discretion in admitting photographs of the subject property taken by ARC Environmental's representatives during the rehabilitation of 912 North Luzerne Avenue by a subsequent owner. Mr. Fishkind maintains that the photographs, showing the interior of the gutted house, were so prejudicial they outweighed any probative value. Mr. Anthony argues that the jury was not confused about what the photographs showed. The jury understood the photographs did not depict how the subject property looked when Mr. Anthony and his family lived there twenty years earlier.

Generally, under Maryland law, in both civil and criminal cases that arise from occurrences at specific places, photographs of these places, such as the site of an accident or a crime scene, is normally considered to have some relevance. *Mason v. Lynch*, 388 Md. 37, 48 (2005). It is ordinarily within the discretion of the trial court to weigh the degree of relevance against any unfair prejudice which might arise from the admission of the photographs. *See* Maryland Rule 5–403.[5] The trial court's ruling on admissibility will not be overturned on appeal absent a clear abuse of discretion. The Court of Appeals has consistently reiterated that "whether or not a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge.... A court's

[5] "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." Md. Rule 5-403.

determination in this area will not be disturbed unless plainly arbitrary." *Id*. at 49 (quoting *Johnson v. State*, 303 Md. 487, 502 (1985), *cert. denied*, 474 U.S. 1093 (1986)).

While trial judges have "wide discretion when weighing the relevancy of evidence[,]" judges do not have the discretion to admit irrelevant evidence. *State v. Simms*, 420 Md. 705, 724 (2011). With regards to the issues of relevancy, therefore, "[t]he determination of evidentiary relevance is a legal question that is reviewed *de novo*. *Robertson*, 463 Md. at 353 (2019). Because the trial judge's ruling here was on relevancy, we review the trial court's ruling without deference.

Mr. White, the program manager for Arc Environmental testified about tests that he performed for the presence of lead paint at 912 North Luzerne Avenue during the years 2013 and 2014. As it happened, during that time period, the owner of the home, who was not Mr. Fishkind, had stripped the house to its studs. To show where Mr. White tested and found lead paint, Mr. White's associate, Rodney Barkley, took photographs of the locations in the house where lead paint was found. Photographs of the exterior of the house are reproduced at pages 1300-02 of the Record Extract and those of the interior at pages 1310-13.

We conclude that the trial court did not abuse its discretion in admitting these photographs because there was minimal, if any, prejudice to Mr. Fishkind. *First*, Mr. Anthony's counsel made clear in his opening statement that by 2013, when ARC performed its tests, Mr. Fishkind had sold the house and that a new owner was performing a rehabilitation of the dwelling. Mr. White had to gain access to the house while the rehab work was on-going to determine whether there were traces of lead paint from the 1990s.

Second, work permits for the rehabilitation work, as well as documents from the Maryland Department of Assessments and Taxation, introduced without objection, showed that not Mr. Fishkind did not own the property when ARC performed its tests. *Third*, during closing argument, Mr. Anthony's counsel told the jury that the condition of the property in 2013-14 was not how the house looked almost twenty-five years earlier when Mr. Fishkind owned it. *Finally*, in his closing argument, Mr. Fishkind's counsel acknowledged that Mr. Anthony's counsel showed the jury the way the house looked during its reconstruction, not how it looked in the early 1990's.

> [MR. FISHKIND'S COUNSEL]: So, [Mr. Anthony's counsel] showed you a bunch of pictures and [Mr. Anthony's counsel], thankfully, **[he] did the right thing and told you that these photos don't show the conditions of the property when [Mr. Anthony] was there but he's rather showing you that the property was being abated or being rehabbed when the family was there, I'm sorry, when ARC was testing the property**. I apologize.

(emphasis supplied).

We do not think the jury was confused or misled about what the photographs depicted. The photographs were probative to show how difficult it was for the ARC investigators to find traces of lead paint from the 1990's when Mr. Anthony's family lived there. Both trial counsel told the jury that the photographs showed the house as it looked when testing for lead paint was performed many years after Mr. Anthony's family moved out and after Mr. Fishkind owned the property. The introduction of the photographs did not prejudice Mr. Fishkind. Reversal is not required. *Mason,* 388 Md. at 49.

III. The Trial Court Did Not Err in Allowing Dr. Hurwitz's Testimony

In his final allegation of error, Mr. Fishkind asserts that the trial court abused its discretion in allowing Dr. Hurwitz, a neuropsychologist, to testify that in his expert opinion Mr. Anthony displayed symptoms of brain damage. Mr. Fishkind's specific objection is that while he was testifying, Dr. Hurwitz used slides to explain to the jury how the brain works. One slide explained how brain damage can be manifest itself. Mr. Fishkind argues that Dr. Hurwitz's testimony in relation to this slide amounts to causation testimony, which Mr. Fishkind maintains, Dr. Hurwitz was not qualified to give.

Mr. Anthony argues that Dr. Hurwitz confined his testimony and opinions to explanations of how the brain works. Dr. Hurwitz testified that he found indications that Mr. Anthony's brain was damaged. Mr. Anthony contends that Dr. Hurwitz did not discuss causation whatsoever.

Since the trial judge's ruling concerns relevancy, we review that ruling under a *de novo* standard of review. *Perry*, 447 Md. at 48. And, because Dr. Hurwitz testified as an expert, we look to Rule 5–702 to determine whether Dr. Hurwitz's testimony assisted the jury in understanding the evidence by evaluating "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education[;] (2) the appropriateness of the expert testimony on the particular subject[;] and (3) whether a sufficient factual basis exists to support the expert testimony." *Bomas v. State*, 412 Md. 392, 417–18 (2010).

In his case-in-chief, Mr. Anthony's attorney called Dr. Hurwitz to testify about his findings and opinions that resulted from a battery of neurological tests performed on Mr. Anthony. As part of his presentation, Dr. Hurwitz prepared several PowerPoint slides. Dr.

Hurwitz explained that he assembled one set of slides to help educate the jury "… to understand how the brain works, and what happens when the brain is damaged." Another set of slides helped explain the results of the tests that he preformed on Mr. Anthony. It is the first set of slides that concern us.

In that group, the first slide defines the term "neuropsychology," Dr. Hurwitz's field of practice. Another part of the same slide defines "behavior" as "[t]he way the brain expresses itself," and another part of the slide defines the term "neuropsychological evaluation."

The next slide purports to explain how the brain works, using several graphic representations of neurons[6] and how "the brain communicates" using electrical impulses running through the body's neurons. At the top of the slide, the phrase, "brain damage" is defined as: "The alteration of the structural, electrical, or chemical integrity of the brain that results in symptomatic behavior: depression, por attention, learning and memory." Mr. Fishkind objects to this slide and Dr. Hurwitz's testimony about how electrical impulses from the neurons get "altered." Dr Hurwitz testified that altered neurons change "the structural, electrical, or chemical integrity of the brain that results in symptomatic behavior, like depression, poor attention, poor memory, that sort of thing." Before this Court, Mr.

[6] A neuron, also called a nerve cell, is the basic cell of the nervous system in vertebrates and most invertebrates from the level of the cnidarians (e.g., corals, jellyfish) upward. A typical neuron has a cell body containing a nucleus and two or more long fibers. Impulses are carried along one or more of these fibers, called dendrites, to the cell body; in higher nervous systems, only one fiber, the axon, carries the impulse away from the cell body. The Encyclopedia Britannica. https://bit.ly/38qBRvD.

Fishkind describes this testimony as medical causation and outside of Dr. Hurwitz's expertise.

As we read the transcript of the testimony and the challenged slide, we do not see how Dr. Hurwitz can be said to have testified that *lead paint exposure* caused Mr. Anthony's brain injury. As Mr. Anthony points out in brief, and we agree, Dr. Hurwitz does not mention the word "lead" within the slides, nor does he mention the word "lead" in over one-hundred pages of transcript testimony. The only thing that Dr. Hurwitz explained with the slide was how damage to the electrical impulses of the neurons can cause brain injury, not how lead paint caused Mr. Anthony's brain injury. Mr. Fishkind argues that Dr. Hurwitz was not qualified to offer this testimony. We disagree. This testimony is well-within Dr. Hurwitz's field of expertise as a neuropsychologist. *See* Rule 5–702. The trial court committed no error in admitting either the challenged slide or Dr. Hurwitz's accompanying testimony.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY THE COSTS.