UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0725

September Term, 2015

JASMINE GRIFFIN

v.

MARK JONTIFF, et al.

Wright,
Graeff,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: April 25, 2016

On July 5, 2012, Jasmine Griffin, appellant,[1] filed a complaint in the Circuit Court for Baltimore City against six defendants, including Mark Jontiff, appellee, alleging that she sustained personal injuries as a result of exposure to lead-based paint while residing in or frequenting various real properties. Relevant to this appeal, appellant alleged that appellee owned and/or controlled property known as 357 Fonthill Avenue, Baltimore City ("the Fonthill property") at the time appellant resided there with her mother. Appellant further alleged that the Fonthill property contained chipping and flaking lead-based paint to which she was exposed. Appellant pled theories of negligence and violation of the Consumer Protection Act, § 13-301 of the Commercial Law Article (CL), Maryland Code. Following discovery, appellee filed a motion for summary judgment, which the court granted. After the court entered a final judgment as to all parties, appellant noted this appeal, presenting one issue for our review:

> Whether the trial court erred when it granted appellee's motion for summary judgment[?]

For the reasons that follow, we affirm the judgment.

BACKGROUND

Appellee's motion and appellant's opposition to the motion were supported by exhibits, most notably the deposition of appellant's mother and the deposition of appellant's expert witness. The exhibits reveal the following.

[1]Appellant was formerly known as Shakira Iesha Meeks and is currently known as Jasmine Rushing.

Appellant was born on July 21, 1991. Following her birth, she resided at 600 Lyndhurst Street in Baltimore ("the Lyndhurst property") with her mother, Chiquita Meeks, formerly known as Chiquita Griffin ("Chiquita"), and other family members, including her grandmother, Pearline Meeks ("Pearline"). Chiquita testified that there was "chipping paint off the wall" in the Lyndhurst property. Appellant underwent two blood lead level tests while residing at the Lyndhurst property. A May 14, 1992 test indicated a blood lead level of 17 micrograms per deciliter, and an August 11, 1992 test indicated a blood lead level of 23 micrograms per deciliter, both of which are elevated levels.

On November 1, 1992, Pearline moved from the Lyndhurst property to the Fonthill property, where she resided until October 1994. In 1993 and 1994, Chiquita and appellant lived off and on with Pearline at that property. They did not live there full time because of a strained relationship between Chiquita and Pearline. Chiquita testified that she did not notice any chipping or flaking paint at the property the first year she was there. In the second year, however, she noticed chipping and flaking paint in various areas of the residence, including the front bedroom – where she and appellant slept – and the living room.

When Chiquita and appellant were not residing at the Fonthill property, they stayed with appellant's father, Antoine Rushing, formerly known as Antoine Griffin ("Antoine"), at 1405 Bank Street in Baltimore ("the Bank property"). Chiquita stated that in 1993, she and appellant were at the Bank property for "a couple months." Even when Chiquita and Pearline were getting along, Chiquita and appellant visited Antoine at the Bank property.

Chiquita recalled chipping paint at the Bank property in the living room and in the third floor bedroom where she stayed with appellant. She testified that after moving from the Bank property, Antoine and his family resided at 532 North Streeper Street in Baltimore ("the Streeper property"), but she did not recall the dates. Chiquita could not remember if there was any chipping paint at the Streeper property.

In August 1994, Chiquita and appellant moved out of the Fonthill property and resided at 29 Bledsoe Circle in Baltimore. Appellant continued to spend time at the Fonthill property with Pearline, until October 1994, when Pearline moved out.

Appellant continued to have elevated blood lead levels throughout this period. She had a blood lead level of 22 on November 10, 1992; 16 in February 1993; 16 in October 1993; and 17 in August 1994.

There were two lead paint violation notices relating to 313 and 321 Fonthill Avenue, dated January 1978 and February 1980, respectively.

On July 5, 2012, appellant filed a complaint against Allysons World, Inc., Robin Neil Snyder, Jerry Johnson, Quinita Johnson, Malcolm J. Barrow, and appellee, alleging that they permitted peeling and flaking lead-based paint at the Lyndhurst, Fonthill, and Bank properties. The thrust of appellee's motion for summary judgment was that appellant could not establish that the Fonthill property was a source of lead exposure. Following a hearing, by order dated May 13, 2015, the court granted appellee's motion. After appellant resolved

her claims against the owners of the Bank property and dismissed the remaining parties, she noted this appeal, challenging the grant of summary judgment in favor of appellee**.**

STANDARD OF REVIEW

"The standard of review applied in reviewing a grant of a motion for summary judgment is well-established in Maryland. 'Summary judgment is appropriate where there is no genuine dispute as to any material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law.'" *Injured Workers' Ins. Fund v. Orient Express Delivery Serv., Inc.*, 190 Md. App. 438, 450 (2010) (quoting *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294 (2007)). *See also* Rule 2-501(f). We review the circuit court decision for legal correctness, and our review is *de novo*. *Collins v. Li*, 176 Md. App. 502, 590 (2007), *aff'd sub nom. Pittway Corp. v. Collins*, 409 Md. 218 (2009).

Moreover, "[a]ny factual dispute is resolved in favor of the non-moving party." *Dashiell v. Meeks*, 396 Md. 149, 163 (2006). Accordingly, we first determine if there is a dispute of material fact, which is a fact that "'will alter the outcome of the case, depending on how the fact-finder resolves the dispute.'" *Injured Workers*, 190 Md. App. at 451 (quoting *Berringer v. Steele*, 133 Md. App. 442, 471 (2000)). If there are no disputes of material fact, then we consider whether the moving party is entitled to judgment as a matter of law. *Id.* at 450-51.

DISCUSSION

Appellant contends that the court erred in granting summary judgment because she had presented sufficient circumstantial evidence of the presence of lead paint at the Fonthill property. Specifically, appellant argues that a fact finder could reasonably infer that the Fonthill property contained lead-based paint because, after moving from the Lyndhurst property, her blood lead levels did not decline at the expected rate, absent further exposure to lead.

Both parties rely heavily on the testimony of appellant's medical expert, Dr. Howard Klein. Appellant relies on his opinion that exposure to lead in the Fonthill property was a substantial contributing factor to appellant's blood lead levels. Appellee argues that there was no factual predicate for Dr. Klein's opinion. According to appellee, Dr. Klein failed to rule out other properties as a source of lead exposure and, in fact, testified that the Bank property was "an extra factor" that "more likely than not" contributed to appellant's blood lead levels in the period from 1993-1994. Accordingly, appellee argues that appellant failed to establish that the Fonthill property was a probable contributing source of lead exposure.

This Court has noted that a plaintiff, in a suit alleging exposure to lead-based paint, must show: "'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 the duty.'" *Barr v. Rochkind*, 225 Md. App. 336, 345 (2015) (quoting *Taylor v. Fishkind*, 207 Md. App. 121,

148 (2012)). To prove the causation element of negligence in a lead paint case, the plaintiff must introduce evidence to show "(1) that the property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the [plaintiff's] exposure to lead." *Hamilton v. Kirson*, 439 Md. 501, 530 (2014)).

A plaintiff may prove causation through circumstantial evidence, as well as direct evidence or a mixture of the two. *Id.* at 527. Establishing causation in a lead paint case through circumstantial evidence requires the plaintiff to build a series of inferences:

> "The theory of causation presented in this case can be conceived of as a series of links: (1) the link between the defendant's property and the plaintiff's exposure to lead; (2) the link between specific exposure to lead and the elevated blood lead levels, and (3) the link between those blood lead levels and the injuries allegedly suffered by the plaintiff. To be a substantial factor in causing [the plaintiff's] alleged injuries, [the property] must have been a source of [the plaintiff's] exposure to lead, that exposure must have contributed to the elevated blood lead levels, and the associated increase in blood lead levels must have been substantial enough to contribute to her injuries."

Id. at 529 (emphasis omitted) (quoting *Ross v. Housing Auth. of Balt. City*., 430 Md. 648, 668 (2013)). Circumstantial evidence is sufficient "'so long as it creates a **reasonable likelihood or probability rather than a possibility** supporting a rational inference of causation, and is not wholly speculative.'" *Id.* (emphasis added) (quoting *West v. Rochkind*, 212 Md. App. 164, 170-71 (2013)).

In *Dow v. L & R Properties, Inc.*, 144 Md. App. 67 (2002), this Court concluded that Dow had met the threshold requirement of demonstrating the presence of lead paint at the subject property. In responding to L & R Properties, Inc.'s motion for summary judgment, Dow asserted: 1) that the subject property was built in 1935;[2] 2) that Dow had been diagnosed with lead poisoning; 3) that Dow lived at the subject property at the time she was diagnosed with lead poisoning; 4) that Dow spent virtually all of her time at the residence and could not have been exposed to lead anywhere else; and 5) that Dow consumed paint chips from chipping and flaking paint at the residence. *Id.* at 75-76. We concluded that "[i]f believed, the evidence offered by [Dow] in opposition to the motion for summary judgment could establish that the chipping and peeling paint inside [the property] was the only possible source of Dow's lead poisoning." *Id.* at 76. *See also Ross*, 430 Md. at 670 (permitting inference that house was source of child's lead exposure).

In contrast, *West*, *supra*, presents an example of insufficient circumstantial evidence to establish the causation link. In that case, the subject property had been razed, and no lead tests had been conducted. 212 Md. App. at 166. West's mother indicated that West resided at or visited several properties in the first six years of his life. *Id.* at 166-67 (describing

[2]In this case, Dr. Klein stated that "a recent paper talks about that approaching 80 percent of the properties built before 1940 have lead in them." In Maryland, for purposes of accreditation and training for lead abatement services, there is a presumption that a building constructed prior to 1950 contains lead. *See* COMAR 26.16.01.03.

West's residential history as "peripatetic"). This Court concluded that West had failed to demonstrate that the subject property had lead paint:

> The distinction that [West] fails to grasp is a subtle one; it is nonetheless a critical one. In [West]'s forensic syllogism, his conclusion of ultimate liability does not, to be sure, depend on the exclusivity of [the subject property] as a source of his lead poisoning. [The subject property] could readily share liability with two or three other places of exposure. That, however, is not the point. Before even getting to a syllogism's conclusion, one must first establish the premises out of which the conclusion arises. A necessary premise in this case is that there was, indeed, lead paint at [the subject property]. It is with respect to that antecedent premise, not with respect to the ultimate conclusion, that the lack of exclusivity is [West]'s Waterloo. It is the teaching of *Dow* that, even in the absence of direct proof, the presence of lead paint at a particular site can be inferred by the process of elimination, but only if we have 1) the effect of lead poisoning in the plaintiff and 2) the fact that the site in question was the exclusive possible source of the plaintiff's lead paint exposure. It was the truth of that premise that [West] failed to establish in this case, not the validity of the conclusion preceding from the premises. Exclusivity was not required at B. It was required at A, before one even gets to B.

Id. at 175-76. We concluded that "[a]t best, [West] can show that he may have been exposed to lead at any or all of the three or four residences where he spent substantial time as a child." *Id.* at 176.

In *Hamilton*, *supra*, the Court of Appeals stated that, under the *Dow* and *West* analysis, a plaintiff must rule out other reasonably probable sources of lead exposure in order to prove it is probable that the subject property contained lead-based paint. 439 Md. at 536-537. The *Dow* analysis is not exclusive, however. "In sum, *Dow* does not define the only

set of circumstantial facts that may satisfy a plaintiff's burden to establish a *prima facie* negligence case for lead paint poisoning." *Id.* at 542. "The pertinent question to be asked," rather, "is whether the particular circumstantial evidence permits an inference or inferences of the desired ultimate fact or facts as a 'reasonable likelihood or probability,' and not a mere 'possibility.'" *Id.* The Court recognized that there is more than one way to establish the causation link with circumstantial evidence in a lead paint case: "To the extent that the [] opinions discussed in this opinion suggest that the only way to prove a *prima facie* negligence case circumstantially is to eliminate every other reasonable possibility as an alternative source, we do not agree with the exclusivity of such a conclusion." *Id.* Stated another way, a plaintiff is "not required to establish that the only place responsible for [a plaintiff's] lead poisoning was the [subject property], but [was required] to show that the [subject property] contained lead." *Id.* at 544 (internal quotation marks and citation omitted).

In the most recent appellate opinion on the subject, the Court of Appeals stated that, for summary judgment purposes, showing that the subject property was a reasonably probable source of lead exposure means that, if the evidence is believed, there is a fair likelihood that it was the reasonably probable source and rules out other reasonably probable sources. *Rowhouses, Inc. v. Smith*, __ Md. __, No. 60, Sept. Term 2015, slip op. 45 (Mar. 25, 2016).

With these principles in mind, we turn to the evidence presented by appellant. She concedes that there is no direct evidence of the presence of lead-based paint in the interior

of the Fonthill property.[3] She posits that there is sufficient circumstantial evidence, however, relying on evidence that she lived at the property from November 1992 until October 1994, that there was no evidence of any significant environmental or other source of exposure to lead at this time, that the property contained flaking and chipping paint, and that her blood lead levels failed to decline at the expected rate, absent further exposure to lead.

As noted, appellant relies heavily on the deposition testimony of Dr. Klein, which we quote at length:

> [COUNSEL FOR JONTIFF]: So the property card, are they ledgers showing these references?
>
> DR. KLEIN: They come – they actually come in two types. The ledger-type ones that you're talking about were the property cards that I received, oh, I don't know, starting five, six years ago and continued like that for a while, and I still receive those.
>
> Some properties what are called property cards in the cover letter and what I state as – I sometimes more accurately will put on the – on the report property information because sometimes I get like SDAT [State Department of Assessments and Taxation] records which note the age of the property.
>
> In this particular case – while I'm talking I can open it up and tell you exactly what type they are.
>
> Q: All right.

[3] There is evidence that testing of the exterior of the building indicated the presence of lead. Lead on the exterior of a building, however, does not establish the presence of lead in the *interior* of the building. *See Taylor*, 207 Md. App. at 141-42.

A: They happen to be for Lyndhurst. It's an SDAT record, and it lists the primary structure built 1920. I also have the property card, the ledger card for Lyndhurst, which also talks about not specifically '20; it says 1922. But that was the first registration of the property, and so that's saying – and there's also a – I'm trying to figure out what this is. It's a description of the property for, I guess, either tax or notary purposes.

For Fonthill, it's also an SDAT record, and it lists the date of the property as 1910. I also have a ledger-type card. And for the final – there's also a – excuse me. There's also a description of the property. I don't know if it's an indication that the property was sold or something like that, but it's a deed – some kind of deed.

And then for Bank Street I also have an SDAT form and a ledger form and a – and a deed.

And that's it.

Q: What was the date of Bank Street? You gave us Fonthill and Lyndhurst.

What was the date that SDAT reports as construction of Bank?

A: Okay. I'll give it to you in a minute. 1880.

Q: All right. And you didn't physically evaluate Jasmine Griffin; right?

A: I did not.

* * *

Q: Okay. So let's start by talking about the three properties that are mentioned in your list of records: 600 Lyndhurst, 357 Fonthill and 1405 Bank Street.

A: Okay.

Q: Let's start there. Do you have an opinion to a reasonable degree of probability as to which one or whether any of these properties were substantial factors in Jasmine Griffin's elevated blood lead levels?

* * *

A: I do have opinions about each of the properties given individually.

Q: Okay. Well, why don't we start with 600 Lyndhurst Street. What are your opinions to a reasonable degree of probability as to that property?

A: I try to – to be very direct in the – in the writing, so I think it's going to sound almost superficially simple. The problem – the property is an old property. It dates back to 1920. There were violation notices from the Department of Housing and Community Development which talks about at least the condition – the general condition of the property. And she had elevated blood levels at that property.

Q: Okay. Do you have an opinion to a reasonable degree of probability as to whether 600 Lyndhurst was a substantial factor in her elevated blood lead levels?

A: I think that it was a substantial factor during her – she was born, as you know, July 21st 1991, and she lived there for at least the second part of that year plus going into '92, so for at least a year that she was in residence. I think that it accounts for the early elevations in her blood lead, which I – blood – of her blood lead level which I listed at the very end of that sentence, which are the 17 on 5/14/92 and the 23 on 8/11/92.

Q: Do you have an opinion to a reasonable degree of probability as to whether – substantial factor in the lead levels that followed that time period?

A: What? Whether Lyndhurst contributed to later?

Q: Whether Lyndhurst was a substantial factor in, let's say, for example, the November 10th, 1992 lead level of 22.

A: To the extent – there are several articles, the most notable one – I can give you the exact reference, but for now let's call it the Robert's study, which talks about what decline of lead is in the body in a child who's living at – let's say after exposure property X, we can call Lyndhurst if you want at this point, that when it starts falling off.

So from the minute she moved out of Lyndhurst, the effect of Lyndhurst is declining. So soon thereafter she moves to another property, and unfortunately we have a sequence of older properties with varying degrees of disrepair and other problems including lead.

So the effect of Lyndhurst falls off, and the other properties take over.

So for some time period, at least several months, Lyndhurst can be an additional contributing factor superimposed on the place that she's living at the time.

Q: So, then, you do believe that 600 Lyndhurst Street was a substantial factor in that [blood lead level of] 22 taken in November?

A: It's more likely than not that there was some contribution.

Q: Can you quantify that contribution?

A: No.

* * *

Q: All right. Okay. So let's move – and what's the basis of concluding 600 Lyndhurst Street was a substantial factor in the elevated lead levels that you've talked about?

A: You mean the original two that we talked about, the 17 and the 23?

Q: The original two and then part of that 22 but we don't know how much.

A: The basis is that virtually every document and every article written about sources of lead talks about the source – the major source of lead in a child's environment being the property in which they live.

There are various articles talking about factors like the age of the property, the percentage of – of properties built before certain ages, what percentage of the properties had lead. Just to give you an example, the EPA [Environmental Protection Agency] says that – in a recent paper talks about that approaching 80 percent of the properties built before 1940 have lead in them.

The – there are various and sundry papers, including all the CDC [Centers for Disease Control] reports, which talk about the condition of the property; it talks about the access of children, particularly toddlers, to the – to the lead in the property and how its imbibed or ingested or inhaled.

So that's the significance of the way we set up the fact that an old property in poor repair, especially when there's testimony to that effect, is the – is a major source of the lead to a child.

Q: Okay. There are other sources of lead aside from property or housing; right?

* * *

[A]: There are.

Q: Did you do anything to consider, rule in, rule out, any of the other (inaudible) sources.

* * *

[A]: I just note particularly we're still at Lyndhurst, and the answer would be that I believe that the overwhelming evidence is that the child's major source for the lead is the property in which they're living.

I have no evidence that Lyndhurst is in any neighborhood worse than any other place in downtown Baltimore. There is, in my knowledge, no unusual hobbies, which are varied, been attested to. We don't have any evidence of battery grave yards or old gas stations around there.

We also have the testimony of the mother that she didn't take the child out much before she was a couple of years of age, and so we're talking at Lyndhurst, that the child being less than two years of age.

Those – those are some of the – some of my thought processes in answering that question.

* * *

Q: Okay. All right. So let's move to the next property. And, as I understand it, Jasmine moved from 600 Lyndhurst Street into 357 Fonthill Avenue; is that your understanding?

A: Yes.

Q: All right. So let's talk about Fonthill Avenue next. To a reasonable degree of probability in your field, Doctor, do you have any opinion as to whether 357 Fonthill Avenue was a substantial factor in Jasmine Griffin's elevated lead levels?

A: I do.

Q: What is that opinion, Doctor?

A: That it was.

Q: Specifically, what lead levels do you attribute to 357 Fonthill Avenue?

* * *

A: To the best of my knowledge, based on the evidence, including the fact that Fonthill was an old property, the testimony of the mother as to the condition of specific places in the property, I believe that we can attribute the blood lead level of 22 on 11/10/92, the 16s – there are two 16s; one on 2/93 and one on 10/7/93 – and the 17 on 8/23/94. And I think those are attributable to her – that range of lead is attributable to her residence at 357 Fonthill.

Q: Okay. And the – you kind of answered the next question, but I just want to make sure I understand it.

And the basis of that opinion is what?

* * *

[A]: The basis of – I'm answering. Okay. The basis for the opinion is the age of the property. I – I sort of gave you a – just to set the stage, I guess, to frame what I'm going to say, that Fonthill itself is an old property. I believe that the STA report – the SDAT report that we talked about before dates the property for 1910. I mentioned at least the EPA, but I could have mentioned other studies to talk about the fact that properties built before 1940 had 80 percent or better chance of having lead in them.

We have – we know that the child was of toddler age when she moved into the property. Numerous studies have

talked about the peaks of lead in a child who's living in a leaded environment happening right at the age that she moved – right or about the age that she moved into Fonthill. It's the time when they're crawling on the floor. It's the time when there's a lot of hand-to-mouth activity.

And then we have the testimony of the mother, which from pages 136 about – to about 139, or better, talk about which areas in the property were – were chipping and flaking. She talks about the bedroom; she talks about the living room; she talks about the front bedroom, the second floor bath, and the different windows.

So between the age of the property, the age of the child, I – I – my opinion, with a reasonable degree of medical probability, is that those four blood levels that we're talking about, that sequence of lead are attributable to Fonthill, 357 Fonthill.

* * *

Q: Okay. All right. So you would agree, Doctor – and I believe you testified in the past that a visitation property could also be a substantial factor in elevated lead level; right?

A: Yes.

Q: So let's move to – let's talk about 1405 Bank Street.

Do you have an opinion to a reasonable degree of probability as to whether 1405 Bank Street was a substantial factor in Jasmine Griffin's elevated lead levels?

* * *

A: I have a – I have an opinion, but it's – I would think it was incomplete. And I will tell you why. I know that there's testimony that after the mother and grandmother had a falling out, there's testimony that the mother went to with

child – the mother went with Jasmine to live at the father's address, which was 1405 Bank Street.

We – the time frame is about two months. We know that Bank Street was an old property; we've already discussed that. We have no idea what the condition of the property was.

So the answer is that there is a suggestion that Bank Street could have been a contributor, but we don't know to what extent and how much.

Q: Okay. So as I understand it, Bank Street has the qualification of being the old property; right?

A: Yes.

Q: And I believe, if I'm understanding you correctly – and you can correct me if I'm wrong – Jasmine lived there for approximately a couple of weeks; right?

A: Yes.

* * *

Q: Right. So I go back to my original question, which is, do you have an opinion to a reasonable degree of probability as to whether 1405 Bank Street was a substantial factor in Jasmine Griffin's elevated blood lead levels?

* * *

A: My opinion would be that it's more likely than not that Banks was a – 1405 was a contributor. But there are two issues. First of all, she was there for a relatively short period of time. The second is that the – we don't have any – any – anything pointing to Bank Street. We don't have a blood level that specifically says this was incurred at Bank Street.

In other words, she didn't go in and – and have that – have – have Bank Street even – even – even mentioned.

During the time period she was at Bank Street, her primary residence was really at Fonthill, so I wasn't joking or being facetious when I said you – do you want me to take the four – one of the four blood lead levels out of the Fonthill column and put it in Bank Street.

The four lead levels – Fonthill, in my opinion, accounts for the – the sequence of – the continuous sequence of lead levels which we've already discussed. If you want to ask me to opine as to whether in addition to the continuing exposure at Fonthill, Bank Street may or may not have contributed, I think that in some way it may be an extra factor.

As far as saying whether or not it was substantial or not, I don't know; I – I'm not. But if you're asking me was Bank Street an additional contributor, it's more likely than not.

Q: It's more likely than not what? That it is or is not?

A: That it is an additional area that she could have been exposed.

* * *

Q: So can you rule in or out Streeper Street as a substantial factor for Jasmine Griffin's elevated lead levels while she's living at Fonthill?

* * *

[A]: So, in other words, after Bank Street, there are other leads as of 1995 which are from a model cake conglomeration of Bledsoe, Akin, Denwood, and possibly Streeper. So there –

there – whatever the continuing exposure was after '95, Streeper would be in the running.

But he [Antoine] can't live at Bank Street and Streeper at the same time.

* * *

[COUNSEL FOR APPELLANT]: All right. And let me ask you, then, another hypothetical question, Doctor, about the – the sequence – well, first let me say it – lay a foundation for that.

If after moving from what you believe was the leaded house at Lyndhurst Street and the child moved then into Fonthill Avenue, and Fonthill Avenue was a lead-free house, that the paint in the Fonthill address was not lead paint, what would happen to the child's lead levels?

[DR. KLEIN]: We would expect that within a year of her living there at Fonthill, if it was lead free, that the lead level (inaudible).

(The Reporter asks for clarification.)

[A]: That the lead level would be significantly diminished.

* * *

Q: All right. And again, Doctor, if Fonthill was lead free, would there be any explanation for the sequence that follows, a 16, a 16, and then a 17 over a two-year period?

* * *

[A]: The – there would be explanations of all kinds, but the most likely explanation would be continuing exposure.

* * *

> Q: Do you have any doubt, Doctor, that the sequence of lead levels that happened from November '92 through August of '94 in Jasmine Griffin were caused by her exposure to lead at Fonthill Avenue at least in part?
>
> * * *
>
> [A]: I do not have any doubt of that.

(Emphasis added).

As the Court of Appeals has observed: "[I]t is not enough for an expert to conclude that a certain property is the source of the child's exposure to lead when other probable sources have not been eliminated." *Roy v. Dackman*, 445 Md. 23, 47 (2015). At the time that appellant resided at the Fonthill property, she was visiting and/or residing at the Bank property, and possibly the Streeper property.[4] Dr. Klein did not exclude the Bank property as a probable source of lead exposure, and, in fact, he explicitly included it, calling it an "extra factor" and "an additional contributor." Additionally, an expert may not conclude that a residence contained lead-based paint based on its age. *Hamilton*, 439 Md. at 544. *See Smith v. Rowhouses, Inc.*, 223 Md. App. 658, 666 (2015) ("The presence of lead-based paint inside a property may not be proven based upon the age of the property alone."), *aff'd*, No. 60, Sept. Term 2015 (Mar. 25, 2016). Similar to *West* and *Barr*, appellant has failed to rule out other

[4] It is unclear what dates appellant visited the Streeper property or other properties. Regardless, the fact that the Bank property was not excluded as a possible source of appellant's alleged lead exposure during the period 1992-1994 is sufficient to affirm the circuit court's grant of appellee's motion for summary judgment.

reasonably probable sources of lead during the time that she resided in the Fonthill property, a predicate necessary to establish causation under *Dow* and its progeny. *See Hamilton,* 439 Md. at 537.

The presumption found in COMAR 26.16.01.03, assuming the Fonthill property was built before 1950, is insufficient to support a conclusion that the Fonthill property contained lead. In *Hamilton v. Dackman*, 213 Md. App. 589, 603-04 (2013), *cert. denied*, 439 Md. 329 (2014), this Court concluded that COMAR 26.16.01.03 does not provide an evidentiary presumption upon which experts could rely in Maryland courts. "'Obviously, the mere fact that most old houses in Baltimore have lead-based paint does not mean that a particular old Baltimore house has a similar deficiency.'" *Dackman*, 213 Md. App. at 604 (citation omitted). *See also* COMAR 26.16.01.01 (noting that the scope of the presumption applies to the "accreditation of contractors, supervisors, inspectors, project designers, and trainers providing lead abatement services for residential, public, or commercial buildings, bridges, or other structures or superstructures").

In *Hamilton*, the Court of Appeals noted that "there may be other ways that an injured plaintiff may establish that it was probable that the interior of a subject house contained lead." 439 Md. at 544. Indeed, the Court hypothesized that an injured plaintiff may be able to demonstrate that other houses in the same block contained lead paint, and the houses were constructed at the same time. *See id.* at 537-38. But, as here, when a plaintiff relies on expert testimony and a chain of inferences under *Dow* and that line of cases, the plaintiff must

eliminate other reasonably probable sources of lead to establish that a particular property contained lead before showing that the property was a substantial contributor to the plaintiff's lead exposure.

With respect to the "other ways" to prove causation referred to in *Hamilton*, the evidence is legally insufficient. The only evidence is that there were lead paint notices in 1978 and 1980 relating to two properties on Fonthill Avenue. It is apparent from their addresses that they are not contiguous to the Fonthill property in question, and there is no indication that they are in the same block. The evidence is much less than that in *Rowhouses*, slip op. 55-56, which did not stand alone but "bolstered" other evidence.

In summary, the evidence was insufficient to support Dr. Klein's opinion as to causation, and the circumstantial evidence was insufficient to survive the summary judgment standard as to causation.

We, therefore, affirm the judgment of the circuit court.

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