Circuit Court for Baltimore City
Case No. 24-C-18-001928

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1248

September Term, 2020

DWANSHAYNE JOHNSON

v.

BALTIMORE SCHOOL ASSOCIATES, et al.

Friedman,
Beachley,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.
Concurring Opinion by Beachley, J.

Filed: July 8, 2022

This case arises out of a lead-paint poisoning action brought by Appellant, Dwanshayne Johnson, for injuries that she alleges she suffers as a result of exposure to lead paint while visiting and living at 511 South Bond Street, an apartment building that was owned and operated by Appellees, Baltimore School Associates (BSA).[1] On appeal, Johnson asks us to review the circuit court's exclusion of expert witness testimony and subsequent grant of summary judgment in favor of BSA. As we shall explain, we affirm the circuit court on both issues.

FACTUAL BACKGROUND

Johnson was born on August 27, 1997 in Baltimore, Maryland. During her first five years, Johnson lived with her mother and siblings in several residences throughout Baltimore City. The record of Johnson's residential history is inconsistent and does not identify with any precision where Johnson lived at any given time.[2] According to Mother,

[1] In her complaint, Johnson named several defendants involved in the ownership and management of the apartment building, including Baltimore School Associates; Crownshield Management Corporation; Philip S. Singleton; Mather, Inc.; the Crownshield Corporation; Crownshield Baltimore Schools, LLC; Jolly Company, Inc.; and the Estate of Mendel Friedman. Like the parties, we refer to the Appellees collectively as "Baltimore School Associates" or "BSA."

[2] The residential history Mother offered during her deposition and the residential history Johnson offered in her answer to interrogatories are both vague and inconsistent. In deposition testimony, Mother testified to the following timeline:

- From before Johnson's birth in August of 1997 and for "a few months" afterwards with her mother "off Cedonia [Avenue] …[in] the Maple Glen Apartments;"
- For the next three or four months with Johnson's father and his mother in a house "at 935 North Castle Street;"

two of the places she lived with Johnson, North Castle Street and North Port Street, were in "raggedy" condition with chipping paint throughout.

Between 1998 and 2001, Johnson also "spent significant time" visiting and living with her aunt and cousin in Apartment 202 at 511 South Bond Street, an apartment building that was owned and operated at the time by BSA. It was while at 511 South Bond that Johnson now claims that she was exposed to lead-based paint. As with Johnson's residency generally, the record is both incomplete and inconsistent with regard to how much time Johnson actually spent at 511 South Bond. Mother recalled the date of a few specific visits but also testified that she and her children would "always go back and stay" at Aunt's

---

- For the next five months in an apartment "off of Park Heights [Avenue] and Keyworth [Avenue];"
- For roughly one year in an apartment "on [West] Baltimore [Street] and Bentalou [Street];"
- For an undetermined amount of time with Mother's grandmother "at 1308 Kenwood [Avenue]," including when Johnson "was about two or three;"
- For two years in an apartment "at 6030 Albanene Place" including when Johnson was "about four" years old;
- For five or six months with Aunt "at 511 South Bond Street;" and
- For three years in a house "at 20 North Port Street," while Johnson was in first through fourth grades.

In her answers to interrogatories, Johnson represented her residential history as follows:

- 1997-2000: 935 North Castle Street
- 1997-2003: 511 South Bond Street
- 2000-2002: 5604 Albanene Place
- 2002-2002: 1308 Kenwood Avenue
- 2002-2003: Preston Street
- 2003-2008: 2105 East Federal Street

apartment "a lot of the nights," even when they primarily lived elsewhere. Mother further testified that she and her children stayed with Aunt for several longer stretches of time between moves, including for roughly one month in June of 2000 when Mother gave birth to her second daughter and for five or six months "after [they] moved from 6030 Albanene Place." Aunt also recalled that her sister and her children "briefly" stayed with her, although Aunt estimated the longest stay as much shorter than Mother had estimated, "for probably a month, if that, until her place came through." Aunt did not specify a timeframe for the stay either, but she testified that she received two letters from the landlord—dated November of 2000 and July of 2001—complaining that she had unauthorized people living with her, which Aunt thought referred to Johnson's family coming over.

511 South Bond was originally built as a schoolhouse in 1891 and was converted by BSA into apartments for low-income tenants in 1978. It is undisputed that BSA did not maintain the apartments well, and in 2002, BSA elected to close the building rather than make required repairs. At the motions stage, there was conflicting evidence as to the conditions of 511 South Bond generally and Apartment 202 specifically. According to Aunt, when she moved into 511 South Bond in June of 1998, Apartment 202 was old but clean, and although "[n]othing was really updated," it looked like it had been newly painted. Sometime after April of 1999, however, Aunt testified that she began noticing "that the new paint that they had put on in certain places had started to peel and underneath … the old paint … was flaky, like, cracked off and chipped off," including on windowsills and window ledges inside her apartment and in common areas inside the building. An annual management inspection from 1999 also noted holes in the living room and dining

room walls of the apartment. Mother, on the other hand, did not recall seeing any peeling, chipping, or flaking paint while visiting or living at 511 South Bond.

Between 1999 and 2004, Johnson's blood lead level was tested four times, and each test revealed elevated levels of lead.[3] In deposition testimony, both Johnson and Mother testified that Johnson had issues with anger and "attitude" growing up, and that she has a history of cutting herself. Johnson also testified that she was diagnosed with Attention Deficit Hyperactivity Disorder, bipolar, and depression, and that she struggles with memory, concentration, and attention.

PROCEDURAL BACKGROUND

In April of 2018, Johnson filed an action in the Circuit Court for Baltimore City against BSA for negligence, violation of the Maryland Consumer Protection Act, and negligent misrepresentation arising out of her alleged exposure to lead-based paint at 511 South Bond. BSA filed an answer denying the allegations and asserting various affirmative defenses to Johnson's claims.

During the discovery phase, Johnson identified Dr. Sandra Hawkins-Heitt as an expert in the areas of clinical psychology and neuropsychology. Dr. Hawkins-Heitt evaluated Johnson and concluded that she suffered a range of cognitive impairments and

[3] Johnson's blood lead levels were measured as follows:

- February 11, 1999: 13 micrograms per deciliter (μg/dL)
- April 12, 2001: 6 μg/dL
- March 5, 2002: 5 μg/dL
- October 14, 2004: 4 μg/dL

deficiencies. Johnson also identified as an expert Dr. Steven Caplan, a board-certified pediatrician trained and experienced in medical issues related to childhood lead poisoning, to help establish a connection between her exposure to lead at 511 South Bond and Johnson's neuropsychological impairment. After reviewing the evidence, including Dr. Hawkins-Heitt's report, Dr. Caplan opined that it was "very likely 511 South Bond Street was a significant factor contributing to [Johnson's] lead intoxication," and to her resulting "behavioral, neurocognitive, and emotional difficulties," including, Dr. Caplan opined, "a cognitive deficit of about 5 to 8 IQ points."

Before trial, BSA moved to preclude the opinions and testimony of Dr. Caplan on the grounds that he lacked a sufficient factual basis for his opinions and that he employed an unreliable methodology in calculating Johnson's alleged IQ loss. BSA also filed a Motion for Summary Judgment, arguing that without Dr. Caplan's expert testimony, Johnson could not establish that 511 South Bond was a substantial factor in causing her elevated blood-lead-levels and resulting injuries. The circuit court held a hearing and granted both motions.[4]

Johnson filed a timely Motion to Alter or Amend the Court's Orders, arguing that BSA's motions and oral argument to the circuit court "contained an incorrect recitation of the facts and testimony … and completely disregarded the applicable case law regarding

[4] Johnson did not oppose BSA's Motion for Summary Judgment as to the Consumer Protection Act and Negligent Misrepresentation, nor does she raise any issues with these judgments on appeal. We are, therefore, concerned only with summary judgment as to her negligence claim.

the admissibility of expert testimony in a lead paint case." BSA opposed the motion, and the motions court denied it in a written order. Johnson subsequently noted a timely appeal.

DISCUSSION

On appeal, Johnson raises two issues: (1) whether the circuit court abused its discretion in excluding Dr. Caplan's expert testimony; and (2) whether the circuit court erred in granting summary judgment on the basis that Johnson could not establish causation in the absence of Dr. Caplan's expert testimony.[5] Because we conclude that the circuit court neither abused its discretion in excluding Dr. Caplan's testimony nor erred in granting summary judgment, we will affirm the circuit court.

I. EXCLUSION OF DR. CAPLAN'S TESTIMONY

In Maryland, the admission of expert testimony is governed by Rule 5-702, which states that "[e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." MD. R. 5-702. In making that determination, the circuit court evaluates "(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." *Id.* As the Court of Appeals has explained, this third factor really includes two sub-factors: (a) whether the expert had an adequate supply of data; and

[5] Johnson also raises a third issue on appeal: whether the trial court abused its discretion in refusing to grant her motion to alter or amend the judgment. Because our resolution of the first two questions disposes of the third, we do not reach it.

(b) whether the expert used a reliable methodology. *Rochkind v. Stevenson*, 471 Md. 1, 22 (2020) ("*Rochkind II*"). Absent either sub-factor, the expert's opinion is "mere speculation or conjecture," and, therefore, is inadmissible. *Id.*

Here, there is no dispute as to (1) whether Dr. Caplan is qualified as an expert by knowledge, skill, experience, training, or education; or (2) the appropriateness of Dr. Caplan's testimony on the subject. Rather, the circuit court excluded Dr. Caplan's testimony on the third requirement of Rule 5-702: because the circuit court found that Dr. Caplan both lacked an adequate supply of data and employed an unreliable methodology. Because "decisions to admit or exclude expert testimony fall squarely within the discretion of the trial court," *Levitas v. Christian*, 454 Md. 233, 243 (2017), we review the circuit court's decision to exclude Dr. Caplan deferentially.[6] We will not reverse the circuit court simply because we would not have made the same ruling. Rather, to warrant reversal, the circuit court's decision "must be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *State v. Matthews*, ____ Md. ____, No. 15, Sept. Term 2021, Slip Op. at 25 (June 22, 2022). As the Court of Appeals recently reiterated, "it is the rare case in which a Maryland trial court's exercise of discretion to admit or deny expert testimony will be

[6] Because BSA filed separate motions first to exclude Dr. Caplan and then for summary judgment, we are not required to use the non-deferential standard of review that applies to both decisions when the two motions are conjoined. *Hamilton v. Kirson*, 439 Md. 501, 521 n.11 (2014). Instead, applying the principles enunciated in *Rochkind II*, *Matthews*, and *Levitas*, we apply the abuse of discretion standard of review to the decision to exclude Dr. Caplan, only.

overturned." *Id.* at 3.[7] This is not that rare case. Based on the evidence presented at the hearing on the motion to exclude Dr. Caplan's testimony, the circuit court was well within the bounds of its discretion in finding that he lacked an adequate supply of data and used an unreliable methodology. We, therefore, affirm the circuit court's exclusion of Dr. Caplan's testimony. We explain.

[7] At the time of the motions hearing, the parties briefed and argued, and the circuit court applied, the then-prevailing *Frye-Reed* test. After the motions hearing, but before this appeal was noted, the Court of Appeals decided *Rochkind II*, modifying the standard for admissibility of experts by officially adopting the interpretation of Rule 5-702 set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). 471 Md. 1 (2020). Because this was "a new interpretation of Rule 5-702," the Court held that the decision would "appl[y] to this case and any other cases that are pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellate review." *Rochkind II*, 471 Md. at 38 (citing *Kazadi v. State*, 467 Md. 1, 47 (2020)). The Court explained that "[i]n this context, the 'relevant question' is whether a trial court erred in admitting or excluding expert testimony under Maryland Rule 5-702 or *Frye-Reed*." *Id.* at 39.

At the time of oral argument, there was some question of whether Johnson's case qualified as a case "pending on direct appeal" because it had been decided at the trial level but not yet appealed at the time *Rochkind II* was decided. Interpreting the same language in a different context, however, the Court of Appeals has since clarified that "any other cases that are pending on direct appeal when this opinion is filed" includes "cases in which there had not yet been a final disposition, regardless of whether a notice of appeal had been filed at the time the opinion … was issued, and in which the issue had been preserved for appellate review." *Kumar v. State*, 477 Md. 45, 55 (2021) (applying transitional rules from *Kazadi*). Thus, although Johnson had not yet filed an appeal when *Rochkind II* was decided, *Rochkind II* applies because there was not yet a final disposition in the case and Johnson's objection to Dr. Caplan's testimony under Rule 5-702 and *Frye-Reed* preserved the issue for appellate review. *See also Matthews*, Slip Op. at 33, n.21 (finding that because Matthews objected to the admission of expert testimony under Rule 5-702 and *Frye-Reed*, *Rochkind II* applied).

For our present purposes, this change makes little difference. As the Court of Appeals recently explained in *Matthews*, whether before or after *Rochkind II*, it was and remains rare that we will overturn a trial court's exercise of discretion to admit or deny expert testimony. *Matthews*, Slip Op. at 3.

A. Adequate Supply of Data

The circuit court found that Dr. Caplan did not have an adequate supply of data because there were "issues" with some of the facts on which Dr. Caplan relied, and that "some of what he relied on was just incorrect." The court did not specify—nor did it need to—which of the facts relied upon by Dr. Caplan had issues. BSA raised several questions of factual accuracy, and there was sufficient ambiguity for the court to reasonably find Dr. Caplan's supply of data lacking.[8] By way of example, we assess two such areas of ambiguity here.

First, the court could have found that the data about Johnson's visiting and living in Apartment 202 was inadequate to form the basis of Dr. Caplan's opinion that her exposure to lead paint at 511 South Bond was a cause of her elevated blood lead levels. Dr. Caplan's deposition testimony was that he didn't know and that there were "discrepancies" in the dates during which Johnson was alleged to have visited and lived at 511 South Bond and that, as a result, that he "c[ould]n't trust them as being accurate." BSA argued at the motions hearing that Dr. Caplan relied on "incorrect" information in Johnson's answers to interrogatories to conclude that she lived at 511 South Bond from 1997-2003. As BSA points out, Aunt did not even move into the building until June of 1998, and after that,

[8] In addition to the two examples that follow, BSA also complained that Dr. Caplan lacked an adequate supply of data regarding the condition of the paint in Aunt's apartment; the condition of the paint in the other properties Johnson lived in at around the same time; whether Johnson ever ingested paint chips or dust at 511 South Bond; and any other possible causes of her injuries. Johnson, of course, had answers for each of BSA's complaints, but based on the evidence before it, the circuit court was entitled to believe that any, all, or none of these supplies of data were adequate.

Johnson spent most of her time living elsewhere, other than with Aunt. Whether or not the circuit court believed that Dr. Caplan relied solely on Johnson's answers to interrogatories to establish the amount of time she spent at 511 South Bond, the court could have looked at the imprecise and contradictory information available about Johnson's residency, and reasonably concluded that there was an inadequate supply of data to form an opinion about the relationship between 511 South Bond and Johnson's elevated blood lead levels. Given the state of the data available to Dr. Caplan, we cannot say that the circuit court abused its discretion in finding it inadequate.

Second, the circuit court could also have found the data establishing that there was lead-based paint at 511 South Bond inadequate to support Dr. Caplan's opinion that the building was a "significant factor contributing to [Johnson's] lead intoxication." In Dr. Caplan's deposition and report, he stated that 511 South Bond was "built" before 1950, "when paint containing lead was used." BSA disputed this, pointing out that 511 South Bond was "built" in 1891 but converted into apartments in 1979, well after the use of lead paint was prohibited. A convoluted semantic debate about the meaning of the word "built" ensued. But irrespective of whether the 1979 conversion to apartments meant that the building was "built" in 1979, the evidence was not at all clear about how much work was done in 1979 and, critically, how much pre-1950 lead-based paint would have remained after the 1979 conversion. If the circuit court believed that Dr. Caplan did not know about the conversion and simply based his opinion on the building being "built" before 1950, this could have given rise to the conclusion that he lacked adequate data.

Moreover, even if Dr. Caplan did not rely *solely* on the age of the building to opine that it likely contained lead-based paint, the circuit court was within its broad discretion to find Johnson's other evidence inadequate. To establish the presence of lead in Aunt's apartment, Johnson relies in large part upon two inspections conducted in 2018, which detected the presence of lead-based paint on exterior and interior surfaces in the common areas of 511 South Bond. Neither test, however established the presence of lead-based paint inside Apartment 202, where Johnson presumably spent most of her time. Johnson also relies upon Dr. Caplan's knowledge that other former residents of the building, including Johnson's cousin, had been diagnosed as suffering lead intoxication. This, too, is thin circumstantial evidence, and it was not unreasonable for the circuit court to view this as inadequate to support Dr. Caplan's opinion. Given these factual uncertainties, and the arguments presented at the pretrial hearing, the circuit court was well within its broad discretion to find that Dr. Caplan lacked an adequate supply of data on which to base his opinion that 511 South Bond was a "significant factor contributing to [Johnson's] lead intoxication."

B. Reliable Methodology[9]

Even if Dr. Caplan had an adequate supply of data on which to base his opinion, the circuit court also found that his testimony was inadmissible because he failed to use a reliable methodology to estimate Johnson's alleged IQ loss. As the Court of Appeals has explained:

> 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. We have explained that for an opinion to assist a trier of fact, the trier of fact must be able to evaluate the reasoning underlying that opinion. Thus, conclusory statements of opinion are not sufficient—the expert must be able to articulate a reliable methodology for how she reached her conclusion.

Rochkind v. Stevenson 454 Md. 277, 287 (2020) ("*Rochkind I"*) (cleaned up).

Here, Dr. Caplan relied on two studies to calculate that Johnson suffered a loss of between five and eight IQ points as a result of her elevated blood lead levels: the Canfield

[9] Because this case was argued and decided at the circuit court level when *Frye-Reed* was still applicable, the parties argued in terms of both whether Dr. Caplan's opinion was "reliable" under Rule 5-702 and whether it was shown to be "generally accepted" within his field. *Reed v. State,* 283 Md. 374, 381 (1978). Although, "[g]eneral acceptance remains an important consideration in the reliability analysis," it is no longer "the *sole* consideration." *Rochkind II*, 471 Md. at 30 (emphasis in original). Thus, we focus our analysis on the question of reliability, and not explicitly on the language of general acceptance. *See Matthews*, Slip Op. at 33 (assessing the trial court's reliability determination).

study[10] and the Lanphear study.[11] These studies have been frequently relied upon in previous lead paint cases, and Maryland courts have repeatedly held "that a properly qualified expert witness can rely on the Lanphear Study methodology, as well as other accepted scientific research, as a factual basis for an opinion that a plaintiff's elevated [blood lead levels] caused the loss of a specific number of IQ points." *Sugarman v. Liles*, 460 Md. 396, 434 (2018); *see also Roy v. Dackman*, 445 Md. 23, 51 n.16 (2015) (accepting expert testimony based, in part, on Lanphear study); *Levitas*, 454 Md. at 254-55 (same). As the circuit court explained, its quarrel with Dr. Caplan's methodology was not that he relied on these studies, however, but that he used them in a way that was "directly and expressly contradictory to that which he … identifies as generally accepted," and that he "offere[d] no explanation" for his methodology. The circuit court did not specify what part of Dr. Caplan's application of Canfield and Lanphear it took issue with, but BSA presented several methodological problems that the circuit court could have believed. *First*, BSA argued that Dr. Caplan incorrectly calculated Johnson's average blood lead level by simply adding up each test result and dividing by the number of tests. This was an improper methodology, BSA argued, because the calculation must also consider the age span of the tests. Canfield, *supra* note 9, at 1518. *Second*, BSA argued that Dr. Caplan improperly drew causal inferences between Johnson's elevated blood lead levels and her IQ loss, even

[10] Richard L. Canfield, et al., *Intellectual Impairment in Children with Blood Lead Concentrations Below 10 μg per Deciliter*, NEW ENG. J. MED., 348(16) (Apr. 2003).

[11] Bruce P. Lanphear, et al., *Low-Level Environmental Lead Exposure and Children's Intellectual Function: An Intermediate Pooled Analysis*, CHILDREN'S HEALTH 113(7) (July 2005).

though both studies say that "it is not possible to draw causal inferences from these findings." Canfield, *supra* note 9, at 1523; *see also* Lanphear, *supra* note 10, at 898 ("The observational design of this study limits our ability to draw causal inferences."). And *third*, BSA argued that Dr. Caplan improperly extrapolated a *linear* relationship between Johnson's blood lead level and IQ loss despite that the Canfield study explicitly states that "the relation between children's IQ score and their blood concentration is *nonlinear*." Canfield, *supra* note 9, at 1521-22 (emphasis added). Johnson countered by arguing that Dr. Caplan's methodology for calculating IQ loss was the same as that employed by experts, and approved by the Court of Appeals, in previous cases like *Levitas v. Christian*, 454 Md. 233 (2017); and that any dispute about his precise calculations goes to the weight, rather than the admissibility of his testimony, and as such were more properly the "grist for cross-examination." After a close review of the Canfield and Lanphear studies and the case law approving them, we cannot say whether we, in the first instance, would find Dr. Caplan's methodology consistent or inconsistent with the studies' directives or other previously sanctioned expert testimony.[12] Given our deferential standard of review based on *Rochkind II* and *Matthews*, however, we can say that the circuit court was within the bounds of its discretion in finding Dr. Caplan's methodology—that is, his application of

[12] By way of example, we note that while the Canfield study appears to have taken time into consideration when calculating average blood lead level (a methodology referred to in the study as computing the "area under the curve"), Lanphear appears to have simply used "mean blood lead rather than area under the curve." At best, the record is ambiguous, and a different judge could have viewed this methodology and reasonably come to the opposite conclusion.

Johnson's facts to the Canfield and Lanphear studies—unreliable. We, therefore, affirm the circuit court's decision to exclude Dr. Caplan's testimony on this ground, too.[13]

II. SUMMARY JUDGMENT

Having first determined that Dr. Caplan's expert testimony was inadmissible, the circuit court then found that Johnson could not make out a *prima facie* case for negligence. Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. MD. R. 2-501(f). One way to survive summary judgment in a lead paint negligence action is to show that (1) the defendant violated a statute or ordinance designed to protect a specific class of persons which includes the plaintiff, and (2) the violation proximately caused the injury complained of. *Hamilton v. Kirson*, 439 Md. 501, 524 (2014) (citing *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 79 (2003)). We review the circuit court's grant of summary judgment without deference. *Mayor and City Council of Balt. v. Whalen*, 395 Md. 154, 161-62 (2006). Like the circuit court, we view the record in the light most favorable to the non-moving party and "construe any reasonable inferences that may be drawn from the facts against the

[13] We note here that the arguments regarding Dr. Caplan's methodology were confined to his calculation of Johnson's IQ loss. After the circuit court issued its ruling excluding Dr. Caplan's testimony, Johnson sought to clarify whether Dr. Caplan would still be allowed to opine that 511 South Bond was a substantial contributing factor to bringing about her elevated blood lead levels. The circuit court explained that "because of the factual issues in … the [case]," Dr. Caplan was precluded from giving *any* opinion testimony based on the information gathered in these two cases." (Emphasis added). That is, the circuit ruled that because Dr. Caplan was excluded both because of his inadequate supply of data and because of his methodology, it was excluding his testimony entirely. We cannot say that this ruling was error.

moving party." *Brooks ex rel. Wright v. Housing Auth. of Balt. City*, 411 Md. 603, 615 n.6 (2009) (cleaned up). Viewing the record in the light most favorable to Johnson, we conclude that Johnson presented sufficient evidence to raise a dispute of material fact as to the violation of an ordinance designed to protect persons like her, but that she failed to present sufficient evidence to raise a dispute of material fact as to causation. We will, therefore, affirm the circuit court's grant of summary judgment. We explain.

A. Statutory Violation

Johnson alleged that BSA violated provisions of the Baltimore City Code, which require that lead-paint hazards be abated and that residences be kept free of peeling, chipping, or flaking paint.[14] As the Court of Appeals has explained, these provisions "were clearly enacted to prevent lead poisoning in children. Therefore, [a plaintiff alleging exposure to lead-based paint] ... is in the class of people intended to be protected by the Housing Code, and [that person's] injury, lead poisoning, is the kind of injury intended to be prevented by the Code." *Kirson*, 439 Md. at 524 (quoting *Brooks*, 378 Md. at 89). Thus, to make out a *prima facie* case, Johnson must simply show that there was peeling, chipping, or flaking paint at 511 South Bond. *Kirson*, 439 Md. at 525.[15] As described above, there was conflicting testimony about the conditions of the paint in the building at the time

[14] Johnson's complaint relied upon HOUSING CODE, BALTIMORE CITY CODE (1976), Art. 13, § 702, 703, & 706; as well as the Maryland Reduction of Lead Risk in Housing Act, MD. CODE, ENVIRONMENT ("EN") §§ 6-815 & 6-817.

[15] In Maryland, there is no requirement that the landlord must have had notice of the violation. The violation itself is evidence enough to establish a *prima facie* case for negligence. *Brooks*, 378 Md. at 72.

Johnson was visiting and residing there. Aunt testified that there was "flaky" and "chipped" paint in the common areas of the building and in Apartment 202 itself, while Mother did not recall seeing any peeling, chipping, or flaking paint.[16] Viewing the evidence in the light most favorable to Johnson, as the non-moving party, *Brooks ex rel. Wright*, 411 Md. at 615 n.6, we assume the truth of Aunt's description of the conditions. We, therefore, conclude that Johnson presented sufficient evidence to make a *prima facie* case for violation of a statute designed to protect a class of persons that included her.

B. Causation

Having established a statutory violation, Johnson must next show that the violation was a proximate cause of her injuries. *Kirson*, 439 Md. at 526. The Court of Appeals has described the causation element as requiring a plaintiff to establish three links in a chain: (1) that the property contained lead-based paint that was a source of the plaintiff's exposure ("source"); (2) that the lead-based paint at the property was a reasonably probable source of plaintiff's elevated blood lead levels ("source causation"); and (3) that the elevated blood lead levels are a cause of the plaintiff's injuries ("medical causation"). *Ross v. Housing Auth. of Balt. City*, 430 Md. 648, 668 (2013). The circuit court found that Johnson could not establish causation, but did not specify whether this was based on failure to establish one, two, or all three links in the chain. Because we conclude that without Dr. Caplan's

[16] BSA argues that we should not rely on Aunt's deposition testimony from a prior case because Johnson never identified her as a witness she intended to call at trial. Johnson contends that Aunt was identified in her Answers to Interrogatories as a tenant of the property and, thus, a potential witness. Because BSA never moved below to exclude Aunt's testimony, and the circuit court did not address the issue, we decline to reach it here.

testimony, Johnson cannot establish the third link, medical causation, we need not reach the questions of whether Johnson can establish the first and second links.[17]

The third link, medical causation, "encompasses both general and specific causation—whether lead can generally cause certain injuries, and whether that exposure did cause [the plaintiff's] injuries." *Liles*, 460 Md. at 416. Expert testimony, though not required to establish the first two links in the chain of causation, may well be necessary to establish this third link. *Ross*, 430 Md. at 668 ("Expert opinion testimony could be helpful

[17] We note, however, that it is doubtful whether Johnson could establish the first or second links (source or source causation), with or without Dr. Caplan's testimony. Johnson did not present direct evidence that there was lead inside Apartment 202. The only direct evidence of lead at all comes from testing done on the exterior of the building and interior common areas at the time litigation began. No testing was done while Johnson was visiting or living there, and no testing was ever done inside Apartment 202, where Johnson presumably spent most of her time. Instead, Johnson relied on circumstantial evidence to establish causation. *Ross*, 430 Md. at 669-70 (explaining that both direct and circumstantial evidence can be used to establish causation). She could, therefore, make her case by either ruling *out* other possible sources of lead poisoning, *Dow v. L&R Properties, Inc.*, 144 Md. App. 67, 76 (2002), or by ruling *in* the subject property as a reasonably probable source of lead poisoning. *Kirson*, 439 Md. at 527-28; *Rogers v. Home Equity USA, Inc.*, 453 Md. 251, 266-67 (2017). Johnson did not allege that she was living exclusively at 511 South Bond at the time of her elevated blood lead levels, nor did she present evidence that the other properties she lived in at the time were free of peeling, chipping, or flaking paint. In fact, Mother specifically testified that there was chipping paint "everywhere" at North Castle Street, where Johnson was primarily residing at the time of her first and highest blood lead level, and throughout "the majority of [the house]" at North Port Street, where Johnson was primarily residing at the time of her fourth elevated blood lead level. Because she did not, and could not, rule out these other possible sources of her lead exposure, Johnson was required to present sufficient evidence to "rule in" 511 South Bond as a source of lead exposure and a substantial contributing cause of her elevated blood lead levels. Although Johnson's circumstantial evidence may have arguably supported a *possibility* that she was exposed to lead there and that the exposure caused her elevated blood lead levels, it was likely insufficient to support the required "reasonable probability." *Rowhouses, Inc. v. Smith*, 446 Md. 611, 655 (2016). Because of our analysis of the third link, however, we need not decide this.

in establishing any of the links and might sometimes be essential in proving the second and third links."). It is, in fact, difficult to imagine how this third link could be established without the aid of expert testimony. The connection between an elevated blood lead level and cognitive or neuropsychological injury is not "within the understanding of the average layperson," and without expert testimony, "the trier of fact would not … be able to reach a rational conclusion" from the evidence. *See State v. Galicia*, ____ Md. ____, No. 5, Sept. Term 2021, Slip Op. at 53-54 (June 27, 2022). *See also* MD. R. 5-702 ("Expert testimony may be admitted … if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue."). Here, Dr. Caplan was Johnson's sole witness as to medical causation. Without his testimony, there is no evidence linking Johnson's elevated blood lead levels to any of her alleged injuries. Even viewing the record in the light most favorable to Johnson and construing any reasonable inferences that may be drawn from the facts against BSA, *Brooks ex rel. Wright*, 411 Md. at 615 n.6, Johnson cannot connect her exposure to lead at 511 South Bond to her alleged cognitive impairments. Having excluded Dr. Caplan, the circuit court, therefore, did not err in granting summary judgment for BSA.

CONCLUSION

We hold that the circuit court did not abuse its discretion in excluding Dr. Caplan's expert testimony on the grounds that he lacked a sufficient factual basis for his opinions. Once Dr. Caplan's testimony was excluded, Johnson was unable to establish medical causation. As a result, Johnson failed to make a *prima facie* case for negligence sufficient

to survive summary judgment. We, therefore, affirm the circuit court's grant of summary judgment for BSA.

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

Circuit Court for Baltimore City
Case No. 24-C-18-001928

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1248

September Term, 2020

DWANSHANYE JOHNSON

v.

BALTIMORE SCHOOL ASSOCIATES, *et al.*

Friedman,
Beachley,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Concurring Opinion by Beachley, J.

Filed: July 8, 2022

I concur in the Majority opinion's view that summary judgment was properly granted because Dr. Caplan had insufficient evidence to conclude that 511 South Bond Street was a cause of Johnson's elevated blood lead levels. I write separately only because, in my view, the Majority has applied the wrong standard of review in affirming the circuit court's decision to preclude Dr. Caplan as an expert.

In *Hamilton v. Kirson*, the Court of Appeals affirmed our Court's decision, but noted that we incorrectly applied two different standards of review in the context of a grant of summary judgment based on an insufficient basis for the expert's testimony. 439 Md. 501, 521 n.11 (2014). The *Hamilton* Court further stated

> Accordingly, where a circuit court grants a summary judgment motion on the grounds that the plaintiff's expert lacks a sufficient factual basis of admissible facts and the admissible evidence (if any) is insufficient independently to prove causation, the circuit court is making a decision on the admissibility of the expert's testimony as part of its summary judgment decision and, thus, is making a legal decision. Such a decision is reviewed on appeal without deference, as the grant of all summary judgment motions are.

Id. The Court of Appeals reaffirmed that principle in *Roy v. Dackman*, 445 Md. 23, 39-40 (2015). Here, in footnote 6 of the opinion, the Majority concludes that "[b]ecause BSA filed separate motions first to exclude Dr. Caplan and then for summary judgment, we are not required to use the non-deferential standard of review that applies to both decisions when the two motions are conjoined." Maj. Op., p. 8 n.6. I note that, according to the certificates of service, BSA's motion for summary judgment and motion to preclude Dr. Caplan were submitted contemporaneously for filing on March 9, 2020, and both appear in the docket entries as having been filed on March 11, 2020. I further note that the

circuit court heard the two motions at the same hearing and promptly issued rulings on the motions at the conclusion of the hearing. I fail to see how the instant case is different from *Hamilton* and *Roy*, nor do I see any indication in the recently-issued *Matthews* opinion that the standard of review principles enunciated in *Hamilton* and *Roy* are no longer viable.

The correction notice(s) for this opinion(s) can be found here:

http://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1248s20cn.pdf