Circuit Court for Baltimore City
Case No. 24-C-17-002357

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3493

September Term, 2018

RONALD FISHKIND

v.

LEA GARDNER

Graeff,
Beachley,
Gould,

JJ.

Opinion by Beachley, J.

Filed: February 24, 2020

In this lead paint poisoning case, a jury in the Circuit Court for Baltimore City found that appellant, Ronald Fishkind, committed negligence which injured appellee, Lea Gardner. The jury awarded Ms. Gardner $800,000 in non-economic damages, and $1,000,000 in economic damages. Mr. Fishkind timely appealed and presents the following three issues for our review:

1. Whether the [t]rial [c]ourt committed legal error and/or abused its discretion when it denied [a]ppellant's Motion for Judgment Notwithstanding the Verdict/New Trial when there was insufficient evidence that the subject property was a substantial factor regarding [a]ppellee's lead levels and alleged injuries?

2. Whether the [t]rial [c]ourt committed legal error and/or abused its discretion when it refused the reliance on or the evidentiary admission of the Community Lead Burden Survey Report?

3. Whether the [t]rial [c]ourt committed legal error and/or abused its discretion when it denied [a]ppellant's Motion for Judgment Notwithstanding the Verdict/New Trial when there was insufficient evidence of a nexus between [a]ppellee's lead ingestion and the predicted vocational and/or alleged economic losses?

We answer Mr. Fishkind's questions in the negative and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to the evidence adduced at trial, Mr. Fishkind was formerly in the business of purchasing and leasing rental properties in Baltimore City. In 1988, he purchased the home at 1654 Warwick Avenue (the "Property") in Baltimore City.[1] Six

[1] Although not relevant to the outcome of this case, Mr. Fishkind transferred title to the Property to 25th Street Properties, LLC, an entity Mr. Fishkind formed in which he was the president and resident agent. Mr. Fishkind continued to manage the Property with a business partner following the transfer.

years later, on June 16, 1994, Deborah Macklin submitted a rental application for the Property. In anticipation of Ms. Macklin moving in, Mr. Fishkind "totally renovated [the Property.]" Shortly thereafter, Ms. Macklin signed a rental lease and moved into the Property.

In January 1997, Ms. Macklin gave birth to Ms. Gardner. After ten days in the hospital, Ms. Macklin brought Ms. Gardner home to the Property. Ms. Gardner lived at the property with her mother until August 13, 1998, when they moved out. During their stay, Ms. Macklin observed paint chipping, peeling, and flaking in various places throughout the Property, including in her bedroom, on the mantle near the fireplace, on the floor of the living room, and near the only window in the living room. Ms. Gardner had access to all of those places, and was observed frequently pulling herself up onto the window to look outside. Approximately two months before they moved out of the Property, Ms. Gardner was tested for lead in her blood. Her June 18, 1998 test indicated an elevated level of 10 micrograms per deciliter of lead in her blood.

On April 28, 2017, Ms. Gardner filed a complaint in the Circuit Court for Baltimore City alleging that Mr. Fishkind negligently allowed her to be exposed to lead paint while living at the Property. As stated above, at the conclusion of the trial, the jury awarded Ms. Gardner $1,800,000 in damages.[2] We shall provide additional facts as necessary.

[2] The trial court reduced the judgment to $1,530,000 in response to Mr. Fishkind's motion to reduce the amount of non-economic damages.

DISCUSSION

I. CIRCUMSTANTIAL EVIDENCE THAT THE PROPERTY CONTAINED LEAD

Following the jury's verdict, Mr. Fishkind moved for judgment notwithstanding the verdict ("JNOV"), or for a new trial. In his motion, Mr. Fishkind argued, among other things, that there was no direct evidence of lead-based paint inside the Property. The trial court denied the motion.

From what we can glean from his brief, Mr. Fishkind argues on appeal that the court erred in denying his motion because Ms. Gardner failed to "provide any evidence that [the Property] contained lead-based paint." Specifically, Mr. Fishkind claims:

> [Ms. Gardner] did not present any lead-based paint testing for [the Property]. She did not present any evidence of lead dust within [the Property] when she was there. Finally, there was no evidence presented in any of the testimony or trial exhibits showing that any components within [the Property] contained lead. There was no evidence of lead in [the Property].

Mr. Fishkind also argues that Edward Barnett, Ms. Gardner's environmental expert, should not have been permitted to conclude that the Property contained lead paint because "[h]e lacked a factual basis supporting his conclusions and acknowledged that there were other potential sources of lead for Ms. Gardner." In other words, Mr. Fishkind argues that there was insufficient evidence that the Property contained lead paint, and that Mr. Barnett lacked a factual basis to conclude that the Property contained lead paint.

At the outset, we note that Mr. Fishkind never filed a pre-trial motion to exclude Mr. Barnett's testimony, nor did he object to the admissibility of Mr. Barnett's testimony at trial. Accordingly, to the extent Mr. Fishkind argues that the trial court erred in admitting

Mr. Barnett's testimony, that argument is not preserved.[3] Md. Rule 8-131(a). Nevertheless, as we shall explain, although Ms. Gardner did not provide *direct* evidence that the Property contained lead paint, she provided sufficient *circumstantial* evidence to allow the fact-finder to make such a finding.[4]

We review a trial court's decision to deny a motion for judgment notwithstanding the verdict to determine whether it was legally correct. *Wallace & Gale Asbestos Settlement Tr. v. Busch*, 464 Md. 474, 486 (2019) (quoting *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503 (2011)). In doing so, we review the trial court's decision,

> viewing the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party[.] The denial of a [motion for judgment notwithstanding the verdict] will be upheld if there is "any evidence adduced, however slight . . . from which reasonable jurors, applying the appropriate standard of proof, could find in favor of the plaintiff on the claims presented."

[3] In his brief, Mr. Fishkind states: "Mr. Barnett . . . was improperly permitted to presume that lead was present based on his qualifications and a hunch." At no point during trial did Mr. Fishkind object to the admissibility of Mr. Barnett's conclusion that the Property contained lead paint. Accordingly, Mr. Fishkind waived this argument. *See Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 624 (2006) (stating that "whatever battle is to be fought out over the adequacy of the factual basis for an expert opinion is to be fought out when the evidence is offered and when the judge rules on its admissibility. The opponent of the expert opinion does not get a second opportunity to challenge the factual basis for the expert opinion under the guise of litigating something else, such as a motion for judgment under Rule 2-519.").

[4] Unfortunately, Mr. Fishkind's first argument is challenging to follow. He argues that Ms. Gardner failed to provide evidence that the Property contained lead paint, but immediately cites to case law concerning whether an expert's opinion is sufficiently supported by facts.

Id. (internal citations omitted). "The standard of review of the denial of a motion for new trial is abuse of discretion." *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012) (citing *Miller v. State*, 380 Md. 1, 92 (2004)).

In his brief, Mr. Fishkind compares his case to *Taylor v. Fishkind*, 207 Md. App. 121 (2012) to show that Ms. Gardner failed to prove the presence of lead paint at the Property. *Taylor*, however, is distinguishable. In *Taylor*, Jazminn Taylor alleged that she sustained injuries related to lead paint consumption while living at a property Mr. Fishkind[5] owned. *Id*. at 124. There, this Court was tasked with determining whether the circuit court erred in granting summary judgment in favor of Mr. Fishkind because Ms. Taylor's expert lacked a sufficient factual basis to conclude that the property at issue actually contained lead paint. *Id*.

From her birth until the age of fifteen, Ms. Taylor lived in three separate places. *Id*. at 125. From June 1990 until February 1993, she lived at 2320 Riggs Avenue; from February 1993 until March 1994, she lived at 1025 North Carrollton Avenue; and from March 1994 until 2005, she lived at 828 Clintwood Court. *Id*. During this fifteen-year span, Ms. Taylor's blood was tested ten separate times for the presence of lead. *Id*. The results were as follows:

[5] Mr. Fishkind was also presumably the defendant in *Taylor*.

Date of Test	Location	Blood Lead Level[6]
4/22/1991	2320 Riggs Ave.	5 mcg/dL
10/31/1991	2320 Riggs Ave.	10 mcg/dL
4/15/1993	1025 North Carrollton Ave.	17 mcg/dL
5/28/1993	1025 North Carrollton Ave.	13 mcg/dL
1/27/1994	1025 North Carrollton Ave.	7 mcg/dL
8/3/1994	828 Clintwood Court	6 mcg/dL
7/19/1995	828 Clintwood Court	6 mcg/dL
9/20/1995	828 Clintwood Court	3 mcg/dL
5/6/1996	828 Clintwood Court	6 mcg/dL
11/21/1996	828 Clintwood Court	4 mcg/dL

Ms. Taylor's complaint identified Mr. Fishkind as the owner of 1025 North Carrollton Avenue. *Id*. at 124.

During discovery, Ms. Taylor hired Arc Environmental, Inc. to test 1025 North Carrollton Avenue for lead paint. *Id*. at 127. Arc Environmental tested the property on June 3, 2009, and determined that "the only surface that tested positive for the presence of lead-based paint was an exterior window apron on the front of the house, and the paint on the window apron was intact. All other tested surfaces were negative for the presence of lead-based paint." *Id*. at 129. Ms. Taylor's mother stated in a discovery deposition that she observed Ms. Taylor with paint chips in her mouth while living at 1025 North Carrollton Avenue. *Id*. Ms. Taylor's mother also submitted an affidavit verifying that she observed chipping and flaking paint at 1025 North Carrollton Avenue, and that she saw her daughter with paint chips and dust on her hands while they lived there. *Id*.

Dr. Henri Frances Merrick, M.D., a pediatrician, and one of Ms. Taylor's expert

[6] Micrograms per deciliter can be expressed as mcg/dL.

witnesses, then authored a causation report, asserting that Ms. Taylor was exposed to lead paint at both 2320 Riggs Avenue and 1025 North Carrollton Avenue. *Id*. at 126, 130. The report also noted that, based on the dates of construction, both properties "most probably contained lead based paint." *Id*. at 130. During Dr. Merrick's deposition, however, she conceded that she did not know Ms. Taylor's blood lead levels prior to moving to 1025 North Carrollton Avenue, and the mere fact that Ms. Taylor had a blood lead level of 17 mcg/dL in April 1993 did not prove that Ms. Taylor was exposed to lead at 1025 North Carrollton Avenue. *Id*. at 131-133.

Mr. Fishkind moved for summary judgment, arguing "that Dr. Merrick's testimony was inadmissible because she lacked a sufficient factual basis to support her opinion that [Ms. Taylor] was exposed to lead-based paint at 1025 North Carrollton Avenue." *Id*. at 133. Mr. Fishkind argued that because Dr. Merrick did not know Ms. Taylor's blood lead levels when she moved to 1025 North Carrollton Avenue, her elevated blood levels while living at that location did not prove that she was exposed there. *Id*. at 133-34. Instead, the blood test results also supported the possibility that Ms. Taylor had already suffered lead exposure prior to moving to 1025 North Carrollton Avenue. *Id*. Ultimately, the circuit court agreed that Dr. Merrick lacked a factual basis to conclude that Ms. Taylor was exposed to lead paint at 1025 North Carrollton Avenue, and because Dr. Merrick was the only expert establishing causation, the court granted Mr. Fishkind's motion for summary judgment. *Id*. at 136.

In affirming the circuit court's grant of summary judgment, we held that Dr. Merrick's opinion concerning causation was legally insufficient. *Id*. at 141-42. We stated:

> Dr. Merrick's opinion that 1025 N. Carrollton Avenue contained lead-based paint is only supported by the age of the house and the presence of lead on one component of the exterior of the house. Moreover, the only evidence that [Ms. Taylor] was exposed to lead at 1025 N. Carrollton Avenue was her elevated blood lead level while living at that property. However, by Dr. Merrick's own admission, she could not conclude that [Ms. Taylor's] blood lead level rose while living at 1025 N. Carrollton Avenue nor could she rule out the possibility that [Ms. Taylor's] elevated blood lead level was caused by an exposure to lead that occurred prior to her moving to 1025 N. Carrollton Avenue. In light of Dr. Merrick's inability to rule out other sources of lead, such as 2320 Riggs Avenue, and the scant evidence presented that areas of 1025 N. Carrollton Avenue that were accessible to [Ms. Taylor] contained lead-based paint, we hold that the circuit court acted reasonably in concluding that the circumstantial evidence supporting Dr. Merrick's opinion amounted to no more than a possibility that [Ms. Taylor] was exposed to lead-based paint at 1025 N. Carrollton Avenue.

Id. at 142. We therefore concluded that "the evidence is inconclusive as to the source of [Ms. Taylor's] lead exposure." *Id*. at 146.

In his brief in the instant case, Mr. Fishkind simply states, "The Court of Special Appeals' reasoning in [*Taylor*] is applicable here."[7] We disagree. Unlike the "scant evidence" in *Taylor*, here the evidence was sufficient for Mr. Barnett, Ms. Gardner's environmental expert, to reasonably conclude that the Property contained lead paint.

At trial, the court recognized Mr. Barnett as an expert in industrial hygiene and lead risk assessment. Mr. Barnett testified that when he is hired to prepare an assessment in

[7] This single sentence encompasses the entirety of Mr. Fishkind's analysis in comparing the *Taylor* case to the instant case.

lead paint litigation, he obtains documents concerning the plaintiff's residential history, the plaintiff's medical records, and any soil or lead hazards, including where the person played or any locations the person may have visited regularly. In this instance, the Property had been demolished by the time Mr. Barnett was hired to assess Ms. Gardner's source of lead contamination.

Although he could not test the Property for lead, Mr. Barnett was able to investigate the history of the Property. Based on his training and review of relevant documents, Mr. Barnett concluded within a reasonable degree of probability, and without objection from Mr. Fishkind, that the Property was constructed "around 1920." Mr. Barnett further testified that organizations including the Environmental Protection Agency ("EPA") and the Department of Housing and Urban Development ("HUD") had performed studies regarding the likelihood of a home containing lead paint based on the year of construction. According to Mr. Barnett, "One EPA study showed that pre-1940 homes had 87 percent probability of lead-based paint being in the property." Additionally, "The Maryland Department of Environment had a 2011 lead summer study that showed that pre-1950 homes in Baltimore City had 95 percent probability of containing lead-base paint." In his professional experience, 100 percent of the homes Mr. Barnett had tested in his career that were built pre-1950 and had not been "gut rehabilitated"[8] contained lead-based paint. At

[8] Mr. Barnett explained that the term "gut rehabilitation" indicates that everything in the home "wall to wall" "has been replaced" including windows, baseboards, walls, stairs, and mantel pieces.

trial, Mr. Fishkind testified that he never "gut rehabilitated" the Property prior to Ms. Macklin's move-in.

In expressing his expert opinion, Mr. Barnett also relied on answers to interrogatories and deposition testimony. He noted that the paint was in poor condition while Ms. Gardner lived at the Property, that Ms. Gardner used a pacifier, and that Ms. Gardner was not exposed to lead from "drinking water, gunpowder, battery casings, folk medicines, painted metal toys, metal figurines, cosmetics, foreign glazed pottery, naval paint or construction industry family members or visitors." Additionally, Ms. Gardner was never taken to other relatives' homes for visitation, nor was she taken to local playgrounds or parks for the first year and a half of her life. Because Ms. Gardner tested positive for an elevated blood lead level while living at the Property, and because she could not have been exposed by other sources, Mr. Barnett concluded, within a reasonable degree of probability in his field of expertise, that the Property contained lead paint.

Although Mr. Barnett could not provide direct evidence that the Property contained lead paint, applicable case law supports our conclusion that the circumstantial evidence he relied upon was legally sufficient. In *Hamilton v. Kirson*, 439 Md. 501, 519-20 (2014), the Court of Appeals considered "under what circumstances, if any, will circumstantial evidence alone of the possible presence of lead-based paint inside a residential property be sufficient to survive a defense motion for summary judgment challenging the sufficiency of proof of the causation element of a negligence claim against the landlord." In other words, the Court considered whether the plaintiffs in *Hamilton* produced sufficient

circumstantial evidence to make out a *prima facie* case regarding the causation element of their negligence claims to survive a motion for summary judgment. *Id*.[9]

To decide whether the two petitioners in *Hamilton* had alleged sufficient facts to prove causation in their respective lead paint claims, the Court recognized that "circumstantial evidence may be used, 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*. at 529 (internal quotation marks omitted) (quoting *West v. Rockhind*, 212 Md. App. 164, 170-71 (2013)). Specifically, the circumstantial evidence must "establish two separate inferences: (1) that the property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the victim's exposure to lead." *Id*. at 530.

The *Hamilton* Court then looked to *Dow v. L & R Props., Inc*., 144 Md. App. 67 (2002) for guidance. The *Hamilton* Court summarized *Dow* as follows:

> In sum, the facts in *Dow* showed that (1) the child victim spent most of her time at the subject property where she lived and did not have contact

[9] We note that *Hamilton* involved two cases in which circuit courts granted summary judgment, whereas here, Mr. Fishkind argues that the trial court erred in denying his motion for JNOV. Nevertheless, appellate courts review the two issues under strikingly similar lenses. When reviewing a grant of a motion for summary judgment, the appellate court reviews whether the circuit court's decision was legally correct, and in doing so, must determine whether the parties generated a genuine dispute of material fact, viewing the record in the light most favorable to the non-moving party. *Hamilton*, 439 Md. at 522. Similarly, in reviewing the denial of a grant for JNOV, an appellate court reviews the trial record in a light most favorable to the non-moving party, to determine if there is any evidence, however slight, from which reasonable jurors could find in favor of the plaintiff under the appropriate standard of proof. *Wallace & Gale Asbestos Settlement Tr*., 464 Md. at 486.

> with other possible sources of lead during the relevant period; (2) the child was observed ingesting regularly flaking or chipping paint at that property; (3) the child played frequently in the area of the flaking or chipping paint; and (4) the child had high blood lead levels during that time period, i.e., developed lead poisoning. The court concluded that, under those circumstances, there was more than a mere possibility that the house where the child resided *and spent most of her time* was the *only* possible source of the lead exposure. As such, because the child spent almost all of her time at the house, the court concluded additionally that it was more than a mere possibility that the house contained lead-based paint. Even though there was no direct evidence of lead at that property, i.e., no scientific testing, it was reasonable to infer that there had to be lead at that property because the child would not have suffered otherwise from lead poisoning. In that sense, the plaintiff eliminated all other possible sources of lead poisoning in order to make reasonable and probable those conclusions. Thus, the court drew two necessary, separate inferences on the basis of the same set of facts.

439 Md. at 531. Significantly, the Court approved *Dow* as an example of a case "with sufficient circumstantial evidence." *Id*. at 532. The *Hamilton* Court recognized, however, that *Dow* did not provide the only way to satisfy causation with circumstantial evidence. *Id*. at 542. Instead, "[t]he pertinent question to be asked is whether the particular circumstantial evidence permits an inference or inferences of the desired ultimate fact or facts as a 'reasonable likelihood or probability,' not a mere 'possibility.'" *Id*.

We hold that, under *Hamilton* and *Dow*, Ms. Gardner produced sufficient evidence indicating "a reasonable likelihood or probability" that the Property contained lead paint, which was a "substantial contributor" to Ms. Gardner's elevated blood lead levels. Indeed, factually, this case is on all fours with *Dow*. As in *Dow*, Ms. Gardner presented evidence that she resided at the Property and did not have contact with other possible sources of lead paint, that she often played in or moved around in areas with flaking and chipping paint, and that she had high blood lead levels while living at the Property. Additionally, the

evidence showed that Ms. Gardner's exposure occurred when she was an infant, that she had elevated blood lead levels at eighteen months old, and that she resided exclusively at the Property when her blood lead levels were elevated. In the words of *Hamilton*, "Even though there was no direct evidence of lead at that property . . . it was reasonable to infer that there had to be lead at that property because [Ms. Gardner] would not have suffered otherwise from lead poisoning." 439 Md. at 531. Accordingly, we hold that the trial court did not err in denying Mr. Fishkind's motion for JNOV, nor did it abuse its discretion in denying his motion for a new trial.

II. EXCLUSION OF THE COMMUNITY LEAD BURDEN REPORT[10]

Mr. Fishkind's second argument on appeal is that the trial court erred in excluding a report that he sought to introduce into evidence, allegedly showing other sources of lead exposure in the community. Although Mr. Fishkind does not specifically mention so in his brief, we assume he is referring to the fact that, prior to trial, Ms. Gardner filed a motion *in limine* to exclude the Community Lead Burden Report ("CLBR") that Patrick Connor, one of Mr. Fishkind's experts, prepared.

[10] We note that Mr. Fishkind's second and third arguments on appeal span a mere two pages. Neither argument section contains a single citation to a legal authority, and only the third argument section even provides a citation to the six-volume record extract. The Court of Appeals has stated that it is not an appellate court's task to "rummage in a dark cellar for coal that isn't there" nor is it an appellate court's task to "fashion coherent legal theories to support appellant's sweeping claims." *HNS Dev., LLC v. People's Counsel for Balt. Cnty.*, 425 Md. 436, 459 (2012) (quoting *Konover Prop. Trust, Inc. v. WHE Assocs.*, 142 Md. App. 476, 494 (2002)). Nevertheless, we shall do our best to address Mr. Fishkind's arguments.

The CLBR consists of dust and soil testings done in various locations near the Property from the years 2011 through 2016. In her motion to exclude the CLBR, Ms. Gardner argued that the test results were, at the earliest, based on data collected twelve years after she moved out of the Property, and that there was no evidence showing that she or any of her family members came into contact with the sites tested in the CLBR. Accordingly, Ms. Gardner argued that Mr. Connor could, at most, simply speculate that environmental lead exposure was a substantial factor in causing her injuries.

In his opposition, Mr. Fishkind argued that the CLBR was relevant despite the fact that the measurements were taken more than twelve years after Ms. Gardner left the Property because Mr. Connor would testify "that the lead content found in the [CLBR] is equal to or lower than what it would have been during the time [Ms. Gardner] lived at [the Property]." Mr. Fishkind further argued that "[t]he data in the [CLBR] is not offered as proof of the specific level of lead in the community at the time of [Ms. Gardner's] residency, but, rather, as evidence of the presence of lead in the general community." Following a hearing on the motion, the trial court ruled that the CLBR was irrelevant because the CLBR's data was based on samples taken at least twelve years after Ms. Gardner left the Property.

Maryland Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 5-402 provides, "Except as otherwise provided by constitutions, statutes, or these rules, or by

decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible."

We agree with the trial court's ultimate conclusion that the CLBR was not relevant. First, Mr. Connor's own prior testimony regarding ambient lead levels contradicted Mr. Fishkind's assertion that such levels always decrease. Attached to Ms. Gardner's motion to exclude the CLBR were numerous transcripts of testimony from Mr. Connor. Notably, at a March 1, 2016 deposition, Mr. Connor testified that ambient community lead levels are generally affected by the weather:

> Q: Okay. And the dust levels that are found are out in the environment are affected by weather, correct?
> A: Yes.
> Q: Such as rain, it could wash it away and it could be a lower level one day versus the next, correct?
> A: Correct. In the area where it washed away, it could be lower, and then the area where it washed to could become higher.

Not only does this testimony cast doubt on the notion that ambient lead levels always decrease, but the CLBR itself is inconsistent with that assertion. For example, in a table in the CLBR labeled "Summary by Year and Type," the average amount of lead in soil in 2011 was 163 mcg per square foot. In 2012, however, the amount of lead in soil was 3,212.18 mcg per square foot. The lead measurements in dust similarly fluctuated. In 2011, there was an average of 213.2 mcg per square foot of lead in the dust. In 2012, the measurement went to 8,078.61 mcg per square foot. Clearly, these measurements increased despite Mr. Fishkind's assertions that lead levels only decrease over time. Equally important, Mr. Connor never connected any of the tested sites from the CLBR to

Ms. Gardner. In other words, Mr. Conner did not proffer that Ms. Gardner's elevated blood lead levels were causally related to the ambient lead sources in the community that were listed in the CLBR. Instead, Mr. Connor simply mentioned at trial that, based on Ms. Gardner's mother's deposition, the family dog could have brought in dirt from outside, and that the dirt could have contained lead. For these reasons, we cannot discern any error in the trial court's exclusion of the CLBR evidence.

III. PROOF OF VOCATIONAL AND ECONOMIC LOSSES

Mr. Fishkind's final argument on appeal is that the trial court erred in allowing Mark Lieberman, Ms. Gardner's vocational expert, to testify to Ms. Gardner's "predicted losses." He asserts that "Mr. Lieberman rendered his opinion absent any findings from a medical causation expert, namely Dr. Paul Rogers." Additionally, Mr. Fishkind argues that Mr. Lieberman's testimony did not contemplate whether Ms. Gardner's deficiencies were related to her exposure to lead. Accordingly, Mr. Fishkind concludes that the trial court "abused its discretion by permitting this testimony and evidence on the alleged vocational and economic losses." As we shall explain, the trial court did not err in admitting Mr. Lieberman's testimony.

The Court of Appeals has stated that "the decision to admit or exclude expert testimony fall[s] squarely within the discretion of the trial court." *Dackman v. Robinson*, 464 Md. 189, 215 (2019) (quoting *Levitas v. Christian*, 454 Md. 233, 243 (2017)). In *Dackman*, a case directly on point, the Court of Appeals examined whether the trial court

abused its discretion in admitting the expert testimony from the plaintiff's vocational expert. *Id*. at 193. There,

> [t]he vocational rehabilitation expert opined that, with the cognitive deficits caused by exposure to lead, the plaintiff would not have the academic and intellectual competency of a high school graduate, would work in unskilled or low-level semi-skilled jobs, and would have the earning capacity of someone with less than a twelfth-grade education. The vocational rehabilitation expert also opined that, absent cognitive deficits caused by exposure to lead, the plaintiff would have been able to graduate high school and attend a vocational technical school or a community college "where he would learn some type of . . . hands-on work."

Id. The Court of Appeals was tasked with determining "whether there was a sufficient factual basis to support the vocational expert's opinion as to the plaintiff's vocational and educational attainment absent impairment." *Id*.

There, the plaintiff, Mr. Robinson, identified Estelle Davis, Ph.D., as one of his vocational rehabilitation experts. *Id*. at 196-97. Dr. Davis evaluated Mr. Robinson's "employability and earning capacity given his impairments and absent his impairments." *Id*. at 197. Relying on various records, including a neuropsychological evaluation, Dr. Davis concluded that, given Mr. Robinson's impairments, he would graduate from high school, but that absent his impairments, Mr. Robinson "would finish two year[s] of college or the equivalent in a technical school, and have earnings comparable to someone with that level of education." *Id*. at 197-99 (alteration in original).

Prior to trial, Mr. Dackman moved *in limine* to exclude Dr. Davis's reports and testimony, arguing that she was not qualified to make such assumptions and lacked an adequate factual basis to do so. *Id*. at 200. Mr. Dackman argued that Dr. Davis was

effectively rendering a medical opinion about Mr. Robinson's pre-injury cognitive ability and earning capacity. *Id*. at 200-201. The circuit court denied Mr. Dackman's motion, *id.* at 202, and Dr. Davis testified at trial to a reasonable degree of vocational probability that Mr. Robinson "would not have the academic and intellectual competency of a high school graduate[,]" *id.* at 204.

The Court of Appeals began its analysis of the sufficiency of the factual basis for Dr. Davis's testimony by discussing two relevant cases: *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244 (2001), and *Sugarman v. Liles*, 460 Md. 396 (2018). *Dackman*, 464 Md. at 217-18. In *Lewin Realty*, the plaintiffs designated Mr. Lieberman[11] as a vocational rehabilitation expert. *Dackman*, 464 Md. at 217-18. "[Mr.] Lieberman conducted an individualized assessment of the minor plaintiff in forming his opinion, considering a neuropsychological evaluation from Dr. Hurwitz, a medical report, the plaintiff's school and health records, and information provided by the plaintiff's mother and grandmother." *Id*. at 218 (citing *Lewin Realty*, 138 Md. App. at 284). Mr. Lieberman also considered the plaintiff's achievements and "developmental milestones" as well as "his mother's work and educational background." *Id*. (citing *Lewin Realty*, 138 Md. App. at 284). "[U]tilizing this information and his expertise, [Mr.] Lieberman formed opinions as to the plaintiff's education and vocational future, with and without deficits." *Id*. (citing *Lewin Realty*, 138 Md. App. at 284-85). Ultimately, "[Mr.] Lieberman opined 'that, without the mental

[11] The "Mr. Lieberman" in *Lewin Realty* is presumably the same "Mr. Lieberman" in the instant case.

disabilities from lead exposure, it was probable that [the plaintiff] 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.'" *Id*. (quoting *Lewin Realty*, 138 Md. App. at 284-85). Mr. Lieberman further opined that, "with deficits, it was more likely than not that [the plaintiff] 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.'" *Id*. (alteration in original) (some internal quotation marks omitted) (quoting *Lewin Realty*, 138 Md. App. at 285).

The *Dackman* Court then considered *Sugarman*, another lead-based paint case involving whether the vocational expert's opinion was supported by an adequate factual basis. 464 Md. at 219. In *Sugarman*, "[Mr.] Lieberman[12] conducted an assessment of the plaintiff by meeting with him and reviewing a neuropsychology report of the plaintiff, as well as his medical and educational records." *Id*. (citing *Sugarman*, 460 Md. at 406). In addition to meeting with Mr. Liles and reviewing a neuropsychological report, Mr. Lieberman

> applied the RAPEL methodology to evaluate [Mr. Liles's] employment capacity. [Mr.] Lieberman explained that each letter in "RAPEL" stands for a separate stage of the vocational rehabilitation analysis . . .
>
> > • R = **R**ehabilitation plan. This assesses the responsibilities of the rehabilitation counselor, the client time frames, and the expenses of rehabilitation.
> > • A = **A**ccess to labor market. What type of job can the client acquire?

[12] Again, the "[Mr.] Lieberman" in *Sugarman* is presumably the same "Mr. Lieberman" in the instant case.

> • P = **P**laceability. Who will hire the client and why?
> • E = **E**arning capacity. How much can the client earn in his current condition and how much could they have earned prior to the disability?
> • L = **L**abor force participation. What is known about persons with the specific type of limitations that the client presents?

Sugarman, 460 Md. at 406-07 (footnote omitted). Mr. Lieberman also relied on the report from Dr. Robert Kraft, a neuropsychologist who examined Mr. Liles and administered numerous tests. *Id*. at 403, 407. Relying on Dr. Kraft's report, Mr. Lieberman concluded that Mr. Liles "suffered from major cognitive problems[.]" *Id*. at 407.

In holding that Mr. Lieberman's opinion was appropriately admitted to support Mr. Liles's damages claim, the *Sugarman* Court stated,

> 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 444.

Relying on the standards for a sufficient factual basis enumerated in *Lewin Realty* and *Sugarman*, the *Dackman* Court turned to Dr. Davis's testimony. 464 Md. at 222. In concluding that "there was a sufficient factual basis to support Dr. Davis's opinions[,]" the *Dackman* Court noted that Dr. Davis testified extensively about her professional background and "how a vocational rehabilitation counselor conducts a vocational

evaluation." *Id*. at 223. In addition to the fact that Dr. Davis had a Ph.D. in rehabilitation counseling and had been working in the field since the late 1970s, Dr. Davis explained that a vocational evaluation involves assessing numerous factors, including:

> an individual's educational background and whether the individual is interested in, and capable of, pursuing further education; the individual's medical records, and "the nature and extent of any impairments"; and the individual's work history or background, or, where employment history does not exist, the likely educational attainment of the individual; and, where there is no work history, the individual's "family issues[,] social issues[,] maturity[,] school records," any testing that had been completed, and psychological reports.

Id.

"Dr. Davis testified in detail about her vocational assessment of [Mr. Robinson]." *Id*. She explained that she met with Mr. Robinson and his mother, that she reviewed various documents and reports, including discovery materials such as Mr. Robinson's answers to interrogatories, a neuropsychological report, hospital records, and school records. She also personally observed Mr. Robinson's deficits with executive functioning, attention, and focus. *Id*. at 223-24. Relying on her extensive experience and reliance on data and records specific to Mr. Robinson, "Dr. Davis offered opinions to a reasonable degree of vocational probability as to [Mr. Robinson's] academic and intellectual capacity and his vocational and educational attainment both with and absent cognitive deficits." *Id*. at 224.

In holding that Dr. Davis had a sufficient factual basis to reach such a conclusion, the Court of Appeals compared the basis of her testimony to Mr. Lieberman's in *Sugarman* and *Lewin Realty*. *Id*. at 226-228. The *Dackman* Court, referring specifically to Mr.

Lieberman's testimony in *Sugarman*, stated that, "[l]ike Lieberman, Dr. Davis conducted a detailed, individualized assessment of [Mr. Robinson], reviewing various reports and records, and relied on that assessment and her expertise and experience as a vocational counselor in forming opinions regarding [Mr. Robinson's] educational and vocational attainment with and without deficits." *Id*. at 228. Because "Dr. Davis's vocational assessment of [Mr. Robinson] largely mirror[ed] that conducted by Lieberman in *Sugarman*," and because the *Sugarman* Court held that Mr. Lieberman's testimony was supported by a sufficient factual basis, the *Dackman* Court concluded that Dr. Davis's opinion regarding Mr. Robinson's vocational and educational potential both with and without the deficits from lead exposure was supported by a sufficient factual basis. *Id*. at 229-30.

Based on the Court of Appeals's analysis in *Dackman* and *Sugarman*, and our *dicta* in *Lewin Realty*, we conclude that Mr. Lieberman's testimony here was supported by a sufficient factual basis,[13] and therefore he did not need to specifically rely upon the opinion of the causation expert. As in *Sugarman*, Mr. Lieberman's "opinion was based on substantial material. He interviewed [Ms. Gardner], conducted additional vocational testing, and reviewed [her] educational and medical records. He also reviewed and relied

[13] To the extent Mr. Fishkind argues that Mr. Lieberman's testimony was deficient because he did not specifically rely on a medical causation expert, we note that the jury heard expert testimony connecting Ms. Gardner's lead-related injury to her cognitive deficits. Mr. Lieberman's testimony concerning Ms. Gardner's vocational and educational potential with and without deficits did not require a causation predicate.

upon the neuropsychological evaluation and conclusions of Dr. Kraft[14]." 460 Md. at 444.

Mr. Lieberman noted that, starting in the second grade, Ms. Gardner demonstrated problems with learning, organizing, reading comprehension, and math. He noted that, based on Dr. Kraft's testing, Ms. Gardner had the reading comprehension level of a ninth grader, and the math score of a fifth grader. Mr. Lieberman also independently interviewed Ms. Gardner, and asked about her family history and family educational background. He then performed aptitude testing in order to prepare his report. Mr. Lieberman testified that Ms. Gardner required individualized education plans ("IEPs") starting in either first or second grade and continuing through twelfth grade.

Finally, Mr. Lieberman identified Ms. Gardner's "Handicaps to Success." Mr. Lieberman explained that these are the "issues that would affect a person's ability to achieve to the maximum capability they may have had in the absence of any issues." In other words, Mr. Lieberman's "Handicaps to Success" identified the deficits that prevented Ms. Gardner from achieving a higher level of education and a higher vocational potential. Mr. Lieberman testified that he observed the following handicaps for Ms. Gardner:

> Well, first of all, the borderline to low average verbal IQ. The neuropsychological impairments identified by Dr. Kraft and Dr. Vannorsdall[15] in the area of general intelligence, visual memory, attention, executive functioning, language, and perceptual motor skills. Thirdly, Ms. Gardner herself identified difficulties that she had in the area of organization, focus, reading comprehension, and math. That's consistent with what the

[14] Dr. Kraft is presumably the same neuropsychologist who examined Mr. Liles in *Sugarman*. 460 Md. at 403.

[15] Dr. Vannorsdall, Mr. Fishkind's expert psychologist, performed neuropsychological testing for this case.

> testing has shown. Fourth, she has a long-term history of needing an IEP. Now the IEP is a program that's put together by the school system when they recognize an individual has limitations that are going to hold them back. The goal of the IEP is to bring the person's skills up. But keep in mind, when the fact that you actually have an IEP means the school recognized that you had significant problems. And lastly, academic skills below age and grade level expectations. Her math skills are at a fifth grade level. Her reading comprehension abilities are at about the ninth grade level.

Relying on the deficits identified by the neuropsychological experts, Mr. Lieberman concluded, within a reasonable degree of vocational probability, that Ms. Gardner's vocational abilities will be "up to the high school graduate level at best[,]" but that, without the deficits identified by the neuropsychological experts, she "would have been capable of achieving at least up to the level of an associate's degree." Just as they were in *Lewin Realty* and *Sugarman*, Mr. Lieberman's conclusions were clearly supported by a sufficient factual basis. Accordingly, the trial court did not abuse its discretion in admitting his expert opinion regarding Ms. Gardner's abilities due to her deficits from lead exposure.[16]

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

[16] We note that Mr. Lieberman did not testify to Ms. Gardner's economic damages. Instead, Dr. Colin Linsley, an expert in the field of economics and economic loss, provided that testimony.