The Top Ten Decisions From 2013 Affecting Lead Poisoning Litigation in Maryland

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In 2013, the Maryland Court of Appeals and Court of Special Appeals issued several opinions which have had a direct and immediate impact upon litigating lead poisoning in this State. These appellate decisions address requirements for expert opinion testimony, the use of circumstantial evidence to prove the existence of lead-based paint in a particular property, which parties can be potentially liable under the Baltimore City Housing Code, as well as various discovery-related issues. Maryland law impacting lead litigation continues to rapidly evolve and is expected to continue in the years to come. Below is a compilation of the most noteworthy Maryland appellate decisions of 2013.

1. Necessity of Expert Testimony as to the "Source" of One's Lead Exposure: *Ross v. Hous. Auth. of Baltimore City*, 430 Md. 648, 63 A.3d 1 (2013).

The Maryland Court of Appeals held that, while the Plaintiff's medical expert, Dr. Jacalyn Blackwell-White, was properly excluded as an expert as to the "source" of the Plaintiff's lead exposure, the exclusion of that testimony did not preclude the Plaintiff from establishing the causal link by circumstantial evidence at trial.

To prove that the Defendant's subject premises was a "substantial factor," and therefore caused the Plaintiff's injuries resulting from lead exposure, the premises (1) must have been a source of the Plaintiff's exposure to lead, (2) the exposure must have contributed to the elevated blood lead levels, and (3) the associated increase in blood lead levels must have been substantial enough to contribute to the Plaintiff's injuries. The Court held that an expert is not necessary in order to establish prong (1), but that expert testimony might be essential in proving prongs (2) and (3).

The Court remanded the case back to the circuit court on the basis that the fact-finder could infer from the evidence that lead exposure at the subject premises was a substantial contributing factor to the Plaintiff's blood lead levels without the testimony of a causation expert.

2. Expert Lacks Factual Basis for "Substantial Factor" Causation: *City Homes, Inc. v. Hazelwood*, 210 Md. App. 615, 63 A.3d 713 (2013), *cert. denied*, 432 Md. 468, 69 A.3d 476 (2013).

Experts must have expertise and supporting facts to testify. In *Hazelwood*, the Court of Special Appeals outlined the lack of qualifications and insufficient factual basis of an expert who was to offer opinions regarding alleged injury from childhood lead poisoning as well as the source of the lead ingestion. The trial court did not abuse its discretion in excluding Eric Sundel, M.D.'s testimony because the doctor had never evaluated, diagnosed or monitored the progress of children diagnosed with elevated lead levels, had never been involved in any environmental tests dealing with the presence of lead, was not a Maryland certified Lead Risk Assessor, had never published any articles related to lead nor delivered any lectures on lead ingestion, did not examine Plaintiff nor performed a medical or nutritional history of Plaintiff, could not recall performing a differential diagnosis on a pediatric patient in which he had determined that the symptoms were due to lead ingestion, and could not cite a single instance in which he identified "source." The Court of Special Appeals held that Dr. Sundel's exclusion was not an abuse of discretion.

The Court also said, in *dicta*, that an environmental expert must have knowledge as to how the XRF lead-testing machine was actually operated at a subject property if he was

to testify regarding that testing. The Court warned that general knowledge of how an XRF machine is typically used would be insufficient to support testimony regarding specific testing.

3. *Frye/Reed* Does Not Apply to Generally Accepted Opinions or Methodologies: *Dixon v. Ford Motor Co.*, 433 Md. 137, 70 A.3d 328 (2013).

The Maryland Court of Appeals overturned the Court of Special Appeals' exclusion of medical expert testimony regarding causation of mesothelioma due to second-hand asbestos exposure. The Court of Appeals asserted that a *Frye/Reed* analysis of the admissibility of an expert's opinion based upon its general acceptance in the relevant scientific community is only necessary if that opinion involves a novel scientific method.

The Court concluded that the expert's opinion that regular and frequent asbestos exposure causes mesothelioma is not a novel scientific method or opinion and is generally accepted in the scientific community. Thus, the exclusion of the expert's opinion was improperly based upon a *Frye/Reed* analysis. The Court of Appeals held that the Court of Special Appeals' further assertion that the Plaintiff needed to demonstrate the quantity of exposure and provide a probabilistic analysis of causation was incorrect and contrary to prior case law. The Court of Appeals went on to conclude that any probabilistic analysis would not be of merit where the expert in question relied on facts that the decedent was regularly exposed to high levels of asbestos for thirteen years.

This opinion appears to limit the avenues by which lead paint Defendants could attack the admissibility of a Plaintiff's expert. However, the Court of Appeals' later decision in *Chesson* indicates that it is willing to weigh studies that challenge the validity and acceptance of theories previously deemed admissible.

4. Admissibility of Novel Expert Opinion Hinges on "General Acceptance" in Scientific Community: *Montgomery Mut. Ins. Co. v. Chesson*, 434 Md. 346, 75 A.3d 932 (2013).

The Maryland Court of Appeals held that an expert's novel opinion as to causation due to toxic exposure must be generally accepted in the relevant scientific community before it can be deemed admissible. General acceptance requires that the relevant scientific community be in consensus regarding the causal link between the exposure and the alleged injury or injuries. This decision relied on and expanded upon the Court of Appeals' decision in *Blackwell v. Wyeth*, 408 Md. 575, 971 A.2d 235 (2009).

The court utilized a *Frye/Reed* examination and stated that such an examination is limited to novel or new scientific theories. The novel theory in this matter, and the subject of the *Frye/Reed* test, was whether exposure to mold from water-damaged buildings can lead to the medical conditions complained of by the plaintiffs. There was no consensus as to acceptance in the scientific community, to the extent that some publications concluded that additional research was necessary before any conclusion could be reached. Thus, the opinion was excluded.

This opinion acknowledges that scientific methodologies can reach a level of acceptance in the relevant community to obtain judicial notice of their reliability and acceptance. This would appear to take them out of the *Frye/Reed* sphere. However, the court acknowledged that a methodology once deemed to be generally accepted may be excluded when later studies call into question the methodology's reliability and acceptance, thereby indicating a divergence in the relevant scientific community. This may have future implications in lead paint cases if studies emerge that call into question the methodologies of causation or damage experts that have previously been admitted in Maryland courts.

5. Using Circumstantial Evidence to Prove that a Subject Property Contained Lead-Based Paint: *West v. Rochkind*, 212 Md. App. 164, 66 A.3d 1145 (2013), *cert. denied*, 435 Md. 270, 77 A.3d 1086 (2013).

The Maryland Court of Special Appeals held that a Plaintiff may prove the presence of lead paint at a property via circumstantial evidence without XRF spectrometry or laboratory paint chip or dust testing. A Plaintiff must eliminate all other potential sources of lead exposure to circumstantially prove the presence of the toxin at the subject property.

The Court distinguished proof of the presence of lead from proof of causation. First, a Plaintiff must prove there was lead at the property. Then, he or she must prove that the property was a source of lead exposure that was a substantial factor that caused Plaintiff's injury. A Plaintiff may prove that multiple sources of lead caused the injury once there is proof of lead in each of the multiple properties. However, the Plaintiff must use a process of elimination to prove the factual predicate of lead absent positive testing at a particular property. The practical implication going forward is that it will be difficult to prove the presence of lead absent testing if a Plaintiff resided at or spent substantial time at another property or properties during the same time period. This decision affirmed and elucidated on the decision in *Dow v. L & R Props., Inc.*, 144 Md. App. 67, 796 A.2d 139 (2002), and certiorari was denied

by the Maryland Court of Appeals.

6. "Substantial Factor" Causation Expert Lacks Factual Basis: *Taylor v. Fishkind*, 207 Md. App. 121, 51 A.3d 743 (2012), *cert. denied*, 431 Md. 221, 64 A.3d 497 (2013).

The Maryland Court of Special Appeals held that Dr. Henri Merrick, the Plaintiff's medical causation expert, lacked a sufficient factual basis to opine within a reasonable degree of medical certainty that 1025 N. Carrolton Avenue was a substantial contributing source of the Plaintiff's lead exposure. The only evidence linking 1025 N. Carrolton to the Plaintiff's lead exposure was the age of the property, one elevated blood lead level, and a positive test for the presence of lead on the exterior of the house.

The Court concluded that a reasonable person could find that the Plaintiff's injuries were caused by exposure to lead-based paint at 2320 Riggs Avenue—the house where the Plaintiff lived prior to moving to Carrolton Avenue—rather than 1025 N. Carrolton Avenue. The Court found that Dr. Merrick was unable to rule out 2320 Riggs Avenue and, therefore, her expert opinion amounted to no more than a possibility that the Plaintiff was exposed to lead at 1025 N. Carrolton Avenue.

The Court of Appeals declined to issue a writ of certiorari even though, in *Ross*, the Court held that a causation expert is not necessary as to "source." This is likely due to the fact that the *Taylor* trial court "didn't disregard Dr. Merrick's testimony but, in fact, relied on her statements as to what she could and could not determine from the facts before her."

7. Subject Property Must be a "Probable" Source, Not Just a "Possible" Source of Lead Exposure: *Hamilton v. Dackman*, 213 Md. App. 589, 75 A.3d 327, *petition for cert. filed*, Petition Docket No. 450, Sept. Term, 2013.

The Court of Special Appeals held that in order to make a *prima facie* lead-paint case, a Plaintiff must show that the subject property was probably (that is, more likely than not, not just possibly) a source of exposure. The trial court did not err in finding that the following facts did not add up to a "probable" exposure from the Defendant's property: a single, positive reading of lead-based paint on an exterior component (that was not in a defective condition and was inaccessible to Plaintiff), defective paint at the property during the time the Plaintiff regularly visited the property and sustained elevated blood lead levels, testimony that the structure was built in 1920, and testimony that another property also was a source of the Plaintiff's lead levels. The Court acknowledged that a Plaintiff may be able to show multiple sources of exposure via a combination of direct and circumstantial evidence, but a Plaintiff still must show that a particular property was probably a source to survive summary judgment.

The Court followed *Ross v. Hous. Auth. of Baltimore City*, 430 Md. 648, 63 A.3d 1 (2013), in holding that Dr. Jacalyn Blackwell-White, the Plaintiff's medical expert, lacked sufficient qualifications and both she and Dr. Robert Simon, the Plaintiff's environmental expert, lacked an adequate factual basis to opine that Defendant's property was a source of the Plaintiff's lead ingestion. The Court opined that Dr. Blackwell-White's assumptions regarding source of exposure, rather than evidence, was likely to confuse and not assist a jury. Further, the Court found that Dr. Simon was improperly insulated from information dealing with another property, which is not a permissible means of allowing him to rule out other sources. The Plaintiff, Raymond Hamilton, has filed a Petition for Writ of Certiorari with the Court of Appeals. This Petition is pending.

8. Management Company President Not Personally Liable as "Operator" Under Housing Code: *Toliver v. Waicker*, 210 Md. App. 52, 62 A.3d 200 (2013), *cert. denied*, 432 Md. 213, 68 A.3d 287 (2013).

Toliver is the next step in evolving case law regarding who can be held liable in lead-paint cases. In *Allen v. Dackman*, 413 Md. 132, 991 A.2d 1216 (2010), the Court of Appeals held that principals of LLCs and corporate shareholders are at risk of personal liability as "owners" for lead-based paint poisoning under the Housing Code, Art. 13, Sec. 310(a). In *Allen*, the Court held that a person who "ran the day-to-day affairs" of the titled owner, had the ability to control title, sign deeds and failed to show that anyone else could perform these tasks, was personally liable as an "owner" under the Housing Code, Art. 13, Sec. 310(a). In *Toliver*, the Court of Special Appeals narrowed the scope of "operators" as set forth in the Housing Code, Art. 13, Sec. 310(a). The Court held that a president of a property management company, who did not have any day-to-day operational or decision-making duties regarding the subject property that is managed by the company, could not be held personally liable as an "operator."[1] An "operator" is one who has "charge, care or control" of the subject property under the Housing Code, Art. 13, Sec. 310(a).

[1]The Court pointed to *Shipley v. Perlberg*, 140 Md. App. 257, 780 A.2d 396 (2001), *cert. denied*, 367 Md. 90, 785 A.2d 1293 (2001), in concluding that a person must have involvement in the decision-making regarding the condition of property in order to be in "charge, care or control" of the property.

Finally, the Court held that a corporate officer could not be held liable as an "operator" under Housing Code, Art. 13, Sec. 310(b) unless he personally committed, inspired or participated in the alleged tort.

9. Improper Exclusion of Evidence Based Upon Alleged Scheduling Order and Discovery Violations: *Butler v. S&S P'ship*, 435 Md. 635, 80 A.3d 298 (2013).

The Court of Appeals ruled that a trial court may not, *sua sponte*, exclude an expert's opinions based on discovery violations found under Maryland Rule 2-432(b) without a party first moving for an order to compel or filing a motion for discovery sanctions. Considering the factors set forth in *Taliaferro v. State*, 295 Md. 376, 456 A.2d 29 (1983), regarding whether evidence should be excluded, the Court concluded that the trial court abused its discretion in excluding a lead-paint testing report produced sixteen (16) days before the discovery deadline. The report was disclosed within the time limits for discovery, and the failure to provide notice was a technical, rather than a substantial, failure. The Court held that any potential prejudice to Defendants could have been cured by postponement or some other measure less drastic than exclusion. Absent a showing of an egregious violation, a court should not exclude fundamental evidence that effectively dismisses a case for a violation of a scheduling order.[2]

The Court distinguished manners of seeking relief for a scheduling order violation and a discovery rule violation under Maryland Rule 2-432. A trial court has inherent authority to issue sanctions when a scheduling order is not followed; however, it does not possess the same authority to issue sanctions under Maryland Rule 2-433 without a party first moving for such action. This is because a scheduling order is the Court's order and discovery disputes are between the parties, and cannot be initiated by the Court.

The Court also held there is no requirement, under the operative scheduling order, that a lead-paint Plaintiff provide notice of lead-paint testing to any parties who do not currently own the property. The Court held that the language of the scheduling order at issue applies only to current property-owning Defendants. The intent of the scheduling order was to limit a current property-owning Defendant's ability to refuse testing. Such a refusal would result in a motion to compel that would assuredly be granted. Non-owner Defendants can accomplish validation of testing through cross-examination.

Finally, the Court held that a lead-paint Plaintiff must show defective paint at the inception of the lease to establish a *prima facie* case of a Consumer Protection Act violation claim. Further, where there is no testimony or specific facts regarding defective paint at the onset of the tenancy, answers to interrogatories containing general statements of defective paint are insufficient to prevent summary judgment.

10. Upcoming Cases in 2014: *Hamilton v. Kirson; Alston v. 2700 Virginia Avenue Assocs.*

The Court of Appeals has recently issued a writ of certiorari in two cases where the successful Defendants were represented by the Leder Law Group. These cases will directly address the admissibility of expert causation testimony and the legal sufficiency of a Plaintiff's use of circumstantial evidence to prove causation: *Hamilton v. Kirson*, Case No. 78, Sept. Term 2013; *Alston v. 2700 Virginia Ave. Assocs.*, Case No. 100, Sept. Term 2013. The Court will hear oral argument on these appeals back-to-back on Thursday, April 3, 2014, and we suspect that these appeals will interpret and clarify several of the cases discussed above. Specifically, the defense-oriented opinions in *West and Taylor* will be at issue.

[2]*See also Logan v. LSP Marketing Corp.*, 196 Md. App. 684, 11 A.3d 355 (2010), *cert. denied*, 418 Md. 588, 16 A.3d 978 (2011). In *Logan*, the Court of Special Appeals affirmed the trial court's exclusion of experts, including experts needed to proceed with a *prima facie* case, because the plaintiff did not properly designate his experts and did not comply with court orders regarding the discovery failures.