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Lead Exposure/Tort Litigation: Maryland Appellate Court Addresses Admissibility of Expert Opinion

Arkansas Environmental, Energy, and Water Law Blog

09/27/2016

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The Court of Special Appeals in Maryland in a September 8th opinion reviewed a causation issue in a lead-based paint case. *See Marie Carter v. Housing Authority of Baltimore City*, 2016 WL 4723475.

The principal issue addressed was whether a pediatrician had a sufficient factual basis to provide an expert opinion on the source of lead exposure.

The plaintiff, Marie Carter, had lived as a child in a public housing property (the “Cherryland Road house”) from 1987 until 1992. In 1989, and again in 1990, Carter was found to have elevated blood-lead levels.

About twenty years later, Carter filed suit against the Housing Authority of Baltimore City (“HABC”), alleging injuries related to lead-based paint exposure sustained while living at the HABC-owned Cherryland Road house. Dr. Howard Klein, a pediatrician, served as plaintiff’s expert witness. In the first trial, the jury handed down a \$21 million verdict, which was later adjusted to comply with Maryland’s cap on non-economic damages.

The verdict for plaintiff, however, was reversed and remanded in favor of HABC.

The basis for the reversal was the determination that plaintiff’s expert testimony should not have been admissible. The Court found that Dr. Klein, a pediatrician, lacked a sufficient factual basis to opine that the Cherryland Road house was the source of plaintiff’s lead exposure. Without expert testimony to confirm that the property was the source of lead poisoning, the court held that plaintiff could not prove causation. Therefore, HABC’s motion for summary judgment was granted.

The 2016 opinion addressed plaintiff’s appeal of the trial court’s grant of summary judgment. The plaintiff argued that:

1. the trial court erred in excluding Dr. Klein’s testimony;
2. the environmental report concerning the property’s lead levels was inadmissible; and
3. even without Dr. Klein’s testimony, there was a *prima facie* case sufficient to withstand summary judgment.

The appellate court disagreed with all three points.

In determining whether a plaintiff has established causation in a lead-based paint case, the court employed the “Dow Theory,” whereby three elements must be met:

1. Plaintiff lived in a house constructed before 1950;
2. Plaintiff tested positive for blood lead while at that house; and
3. The house was the only possible source of lead (also known as “exclusivity”).

Dr. Klein’s expert testimony fulfilled the first two elements because the basis of Dr. Klein’s opinion in support of plaintiff’s claims were (1) the age of the Cherryland Road house; and (2) the fact that plaintiff had elevated lead levels while living at Cherryland Road.

The court held, however, that Dr. Klein had failed to satisfy the exclusivity element of the “*Dow Theory*” because “a pediatrician—without more—is not qualified by virtue of his or her medical training to render an expert opinion as to the source of an individual’s lead exposure.” Thus, plaintiff’s claim that the trial court erred in excluding Dr. Klein’s testimony to prove causation was rejected because all three elements of the *Dow Theory* were not met.

The admissibility of the environmental report (known as the Martel Report) was also addressed. This report showed the presence of lead-based paint on the exterior of the home, but not on the interior surfaces.

Plaintiff argued that the device used to test the paint was not properly calibrated, and therefore (1) the Martel Report itself was inadmissible; and (2) HABC’s environmental expert should have been barred from considering the Martel Report in his expert opinion.

The court disagreed with both points, holding that (1) the evidence showed that the device had been properly calibrated; and (2) data does not have to be admissible into evidence to be relied upon by experts. Therefore the HABC expert’s reliance on the device was deemed proper.

Finally, the court addressed the argument that even without Dr. Klein’s expert testimony plaintiff had still presented sufficient evidence of causation to survive summary judgment.

The court rejected plaintiff’s argument, holding that plaintiff had failed to satisfy the exclusivity element of the *Dow Theory* because she could not show that the Cherryland House was the exclusive source of her lead poisoning. Because the court would not allow Dr. Klein’s testimony to demonstrate causation, the only admissible causation evidence was the Martel Report, which showed only the existence of exterior paint. This was held to be “an insufficient basis from which to infer that the interior paint also contained lead.” The trial court’s grant of HABC’s motion for summary judgment was therefore affirmed.

[A copy of the opinion can be downloaded here.](#)