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## **Expert Testimony is Changing in Maryland**

Two recent rulings from Maryland's highest court have clarified the legal sufficiency of the data underlying expert causation testimony in lead paint cases.

In the first such case, *Stanley Rochkind v. Starlena Stevenson*, No. 76, September Term, 2016 (July 11, 2017), the Court of Appeals, relying on Maryland Rule 5-702(3), held that a medical expert witness did not have a sufficient factual basis to testify that lead exposure can cause Attention Deficit Hyperactivity Disorder ("ADHD") generally, or that it caused the plaintiff's ADHD specifically. As such, the trial court erred in admitting the expert's testimony.

Maryland Rule 5-702 requires that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" To this end, Rule 5-702 requires that a trial court evaluate "(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." The third prong of this analysis - sufficient factual basis - includes two subfactors: an adequate supply of data and a reliable methodology. Without adequate data and a reliable methodology, the expert's opinions constitute nothing more than mere speculation or conjecture.

In *Rochkind*, the Court of Appeals found that Plaintiff's causation expert lacked adequate data upon which to base her opinion that lead exposure can cause ADHA. In particular, the Court found that "[a]lthough research shows that lead exposure can cause general attention deficits and hyperactivity, these lead-caused behaviors do not necessarily indicate that an individual has ADHD because the behaviors are also symptoms of a variety of other disorders and learning disabilities." At best, the expert in *Rochkind* demonstrated an association between lead exposure and ADHD. However, in order to be probative of general causation, an epidemiological study must "properly account[] for potential confounding factors and concludes that exposure to the agent is what increases the probability of contracting the disease." Because the expert did not account for potential confounding factors, including the Plaintiff's family history of ADHD, the epidemiological studies relied upon could not support her general causation testimony.

The second case considered by the Court of Appeals, *Stewart Levitas v. Michael Davon Christian*, No. 58, September Term, 2016 (July 11, 2017), reached the opposite conclusion as *Rochkind*. In *Levitas*, the Court of Appeals found that plaintiff's medical causation expert had a sufficient factual basis under Maryland Rule 5-702 to testify about the source of the plaintiff's lead exposure. Specifically, "[t]he expert considered information given to him by the plaintiff's attorney, which included positive lead testing on the subject property, the age of the property, Maryland Department of the Environment and Department of Housing and Community Development records,

the plaintiff's Department of Health and Mental Hygiene testing records, and family members' deposition testimony, and explained how he assessed this information. Additionally, the expert took into account the other possible source of the plaintiff's lead exposure when developing his opinion." For these reasons, "the trial court abused its discretion in precluding [the expert] from testifying about source causation on the ground that his opinion lacked an adequate factual basis."

Similarly, *Levitas*' causation expert "had the requisite qualifications and factual basis under Maryland Rule 5-702 to testify about the nature and extent of the plaintiff's lead-caused injuries. Because the expert was experienced in treating lead-poisoned children and familiar with current lead-poisoning research and the IQ test used to assess the plaintiff, he was qualified to testify. A neuropsychologist's report, medical records, and other information regarding the plaintiff and the properties [where] he lived [as] a child were an adequate factual basis for the expert to opine about the cause of the plaintiff's cognitive impairments. Additionally, a study on IQ loss in lead-poisoned children provided a sufficient factual basis for expert to testify about the plaintiff's IQ loss. Thus, the trial court abused its discretion in precluding the expert from testifying about medical causation on the grounds that he was not qualified and his opinion lacked an adequate factual basis."

These cases demonstrate the need for careful expert selection and preparation in complex causation cases, such as those involving lead paint exposure. Experts must be up-to-date on the latest developments in his or her field of expertise and must be able to use the discovery record in its entirety as an adequate factual basis for their opinions. In some cases, it may be necessary for the expert to not only to render an opinion as to causation but also to rule out competing theories of causation (such as family history). To this end, experts should be provided with as broad a factual record as possible so as to have a strong basis for a legally sufficient causation opinion.

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