

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2554

September Term, 2010

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HOUSING AUTHORITY OF  
BALTIMORE CITY

v.

ANTONIO FULGHAM, ET AL.

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Zarnoch,  
Matricciani,  
Graeff,

JJ.

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Opinion by Graeff, J.

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Filed: January 19, 2012

This appeal involves a lawsuit filed by Antonio Fulgham and Brittany McCutcheon, appellees, against the Housing Authority of Baltimore City (“HABC”), appellant, based on a claim of injury from lead paint. A jury in the Circuit Court for Baltimore City found HABC negligent. The HABC appeals the order of the circuit court, which entered judgment in favor of Mr. Fulgham and Ms. McCutcheon in the amounts of \$1,273,000 and \$1,320,000, respectively.

The HABC presents several questions on appeal,<sup>1</sup> which we have consolidated

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<sup>1</sup> The questions presented in the HABC’s brief are as follows:

1. Whether the trial court erred as a matter of law, and therefore abused its discretion, when it excused Fulgham and McCutcheon’s failure to comply with the notice requirement of the [Local Government Tort Claims Act] without considering or ruling upon the prejudice to the HABC’s defense resulting from Fulgham and McCutcheon’s failure to provide timely notice of their claims.
2. Whether the trial court abused its discretion in finding “good cause” to excuse compliance with the notice requirement of the [Local Government Tort Claims Act] where, *inter alia*, Fulgham and McCutcheon failed to present evidence that their alleged mental injury impaired their ability to give timely notice of their claims.
3. Was the trial court legally correct in allowing the jury to consider the circumstantial evidence of the presence of lead-based paint at HABC properties without any direct evidence of the presence of such lead-based paint in light of the fact that the properties at issue had been tested and found to be lead free?
4. Did the trial court abuse its discretion in allowing Dr. Aaron L. Zuckerberg, a medical doctor, to testify regarding the source of Fulgham and McCutcheon’s lead exposure even though he was not qualified to render such an opinion and further lacked sufficient reliable factual data upon which to base such an opinion?

and rephrased:

1. Did the trial court err in denying the HABC's motion for summary judgment on the ground that appellees failed to comply with the notice requirement of the Local Government Tort Claims Act ("LGTCA")?
2. Did the trial court err in allowing the jury to consider the circumstantial evidence of the presence of lead-based paint at HABC properties?
3. Did the trial court err in allowing Dr. Aaron L. Zuckerberg, a medical doctor, to testify regarding the source of Fulgham and McCutcheon's lead exposure?

For the reasons set forth below, we answer the first question in the affirmative, and therefore, we shall reverse the judgment of the circuit court.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

Appellees, Mr. Fulgham and Ms. McCutcheon, assert that they were exposed to lead-based paint at 734 West Fayette Street and 1816 West Fayette Street in the early 1990s. On December 10, 2007, when Mr. Fulgham was 18 years old, and Ms. McCutcheon was 16 years old, appellees filed suit against the HABC, alleging negligence and violation of the Consumer Protection Act. Appellees claimed they were injured when they "ingested and consumed paint and dust containing lead and lead pigment" while living in public housing properties owned or formerly owned by the HABC.

On June 3, 2009, the HABC moved for summary judgment on the ground that appellees "failed to comply, strictly or even substantially, with the notice requirement" of Md. Code (2006 Repl. Vol., 2011 Supp.) § 5-304(b)(1) of the Courts and Judicial

Proceedings Article (“C.J.P.”), the LGTCA.<sup>2</sup> The HABC argued that appellees “have not established, and cannot establish, good cause to waive the notice requirement,” and that “[t]he HABC’s ability to defend [appellee’s] suit herein has been substantially prejudiced by their failure to give the notice required by Section 5-304.”

On July 1, 2009, appellees filed an opposition to the motion for summary judgment. Appellees argued that “the notice provision of the LGTCA is unconstitutionally vague with regards to identity of the proper recipient on behalf of the HABC.” Appellees also argued that “good cause exists for the court to entertain the suit even though notice was not given.”

On July 15, 2009, the circuit court held a motions hearing. At the end of the hearing, the court concluded:

With regards to notice in this matter, it’s questionable at best. With regards to the establishment of good cause to waive that requirement, the [appellees] have managed to convince the Court that there is good cause. So at this time, the Court will be denying the Motion for Summary Judgment.

The court’s order denying the motion for summary judgement was entered on July 30, 2009.

A jury trial commenced October 12, 2010, and continued until October 21, 2010. Tonia Blue, appellees’ mother, testified that Mr. Fulgham was born on June 6, 1989. On November 3, 1989, they moved to 734 W. Fayette Street, a low-income house provided by the HABC. On January 20, 1991, while living at 734 W. Fayette Street, Ms. Blue gave birth to Ms. McCutcheon.

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<sup>2</sup> For the purposes of this appeal, there is no material difference between the current statute and the statute as it was codified in 1989-90.

When Ms. Blue first moved into 734 W. Fayette Street, there was no peeling paint. Eventually, however, Ms. Blue noticed that the paint was peeling and flaking on the floor, radiators, and pipes in the living room and two bedrooms. During the time that they lived at 734 W. Fayette Street, the children's blood lead levels rose. On June 17, 1992, Ms. Blue called the HABC and told them about the chipping paint and Ms. McCutcheon's high blood lead level.<sup>3</sup>

On July 9, 1992, Ms. Blue signed a lease with the HABC to rent 1816 W. Fayette Street. After Ms. Blue moved in, as she was setting up the house, she noticed chipping paint on the radiators and window ledges in the living room and bedrooms. The paint had chipped off to the extent that she could see the unpainted surface below the paint.

Ms. Blue notified the HABC. The HABC told her that someone would come fix the problem, but no one came.

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<sup>3</sup> A document in Ms. Blue's tenant file, dated June 17, 1992, memorialized this call as follows:

[Telephone call] from Tonia [Blue] to state daughter, Brittany McCutcheon, age 1 and a half year[s] old has lead paint poisoning. When tenant was asked where and when did child come in contact with paint and how did she determine child has lead paint, she became hostile and argumentative and stated she didn't know where baby got the lead paint poisoning or when because she can't watch the baby 24 hours a day because she has other children to care for. . . . Requested tenant come to office and since this is time for an annual review, bring proof of income. She continued to be argumentative by stating she already brought papers in here and it's not time for annual review. I repeated my statement regarding the annual review and asked tenant to come.

The children's lead levels remained high while they lived at that property. They moved out of 1816 W. Fayette Street in 1997 or 1998. The property was boarded up immediately after they moved out. It has since been razed.

Ms. Blue testified that her children visited only her mother, who lived at Clark Davis Court, a property owned by the HABC, which was certified to be lead free. Her children did not have contact with old battery casings, lead toys, naval paint, bullets, fishing weights, old ceramic pottery, folk medicine, or vinyl mini-blinds. They never lived near a processing plant, nor did they play in the dirt outside of the homes.

Both appellees had difficulty in school. Mr. Fulgham had more difficulty staying on task and following directions. He had more disciplinary problems at school.

Dr. Aaron Zuckerberg, a pediatrician, was accepted as an expert in childhood lead paint poisoning. He testified to the blood level test results of appellees while they lived at 1816 W. Fayette Street and 734 W. Fayette Street. Mr. Fulgham's blood levels were documented at 1816 W. Fayette, and his levels ranged from 11 to 28. Ms. McCutcheon's blood levels were documented at both properties and her levels ranged from 9 to 17. The median lead level for children in the United States during that period of time was 3.4.

Dr. Zuckerberg testified that, in his opinion, to a reasonable degree of medical probability, Mr. Fulgham "suffered lead exposure from 1992 through 1994." Testing revealed that Mr. Fulgham had permanent impairments in the areas of general cognitive functioning, basic academic skills, speed of information processing, shifting attention,

auditory attention, tactile perception, visual motor and motor skills, and memory. Mr. Fulgham dropped out of high school in the ninth grade and did not receive a GED. He was illiterate and his IQ was 54. Dr. Zuckerberg stated that, in his opinion, lead exposure was a substantial, contributing factor to Mr. Fulgham's impairments, explaining that Mr. Fulgham "lost between 11 and 16 IQ points as a result of his lead exposure."

Dr. Zuckerberg testified that 734 W. Fayette Street and 1816 W. Fayette Street were a substantial contributing factor in causing the lead injuries sustained by Mr. Fulgham from 1992 to 1994. He stated the basis of his opinion as follows:

Well, first and foremost, identifying where someone lives. This was his residence. He wasn't going to many, many, different places over the course of time based on the information that I have. These properties were both old and as we talked about, older properties were much more likely to have lead in them, lead based paint in them than properties that were built in the middle to late '70's [sic]. There are documented blood lead levels at these properties. Antonio had blood lead levels documented at 1816 W. Fayette Street. Brittany had documented blood lead levels at both properties. What the CDC has said is if there is a house mate living in an older property who has elevated blood lead levels, it's very likely then other children who live at that property are also going to have elevated blood lead levels. It only makes sense. They're living in the same place.

Throughout this period of time, from the time that they were living at 734 W. Fayette Street and 1816 W. Fayette Street. There was only one other property that they visited and that was a property called 1722 Clark Davis Court and that property was certified to be free of lead paint. And, so, this was the place. There were no other sources of lead in their lives during this period of time.

The parties stipulated that 734 W. Fayette Street was in existence as of 1952. There is a 95 percent chance that a house built before 1950 and a 75 percent chance that a house built between 1950 and 1979 has lead paint.

Dr. Zuckerberg testified that Ms. McCutcheon also suffers from permanent mental deficits as a result of exposure to lead from 1992-1996. Her IQ was 69, with her verbal IQ and reading ability in the extremely low range. She suffered permanent impairments in the areas of speed of processing information, tactile perception, visual motor skills, and memory. Her intellectual functioning tested in the “mild mentally retarded to borderline range.” She lost between 9 and 13 IQ points as a result of her exposure to lead. Dr. Zuckerberg testified that 13 IQ points are “the difference between middle school and graduating high school.”

In Dr. Zuckerberg’s opinion, the painted surfaces of 734 W. Fayette Street and 1816 W. Fayette Street were “substantial contributing factors to the exposure to lead that resulted in [Ms. McCutcheon’s] elevated blood levels” and her injuries. The basis for that opinion was “[t]he age of the properties, the condition of the properties, and the absence of other properties that she might have been exposed to,” the evidence of chipping paint at both properties, and Ms. McCutcheon’s elevated lead levels at both properties.

Dr. Zuckerberg testified that, although appellees had a normal head size when they were born, their heads now measured small relative to other individuals their age. He explained that monitoring head circumference is a way of determining if a brain is growing.

He described a study in which higher blood lead levels in children correlated to a smaller brain size as an adult.

On cross-examination, counsel for the HABC questioned Dr. Zuckerberg about an environmental assessment of 734 W. Fayette performed by Martel Laboratory Services, Inc. (“Martel”) on July 15, 1992. The report listed 32 recorded results, and only one location, a door frame, tested positive for lead. All of the other sites tested “had readings below the threshold.” Dr. Zuckerberg agreed that the only places where Ms. Blue described chipping paint at 734 W. Fayette St. were on a pipe and a radiator, but the report did not indicate that those areas were tested.

Dr. Thomas Borzilleri, an economic consultant, was accepted as an expert in economics, and testified that, due to Mr. Fulgham’s injuries, Mr. Fulgham had an estimated earning loss of approximately \$923,000 over the course of his lifetime. Ms. McCutcheon suffered an estimated earning loss of approximately \$970,000 over the course of her lifetime.

Mr. Fulgham, who was 21 years old at the time of trial, testified that he dropped out of high school in the ninth grade when he was 17 years old because the classes were too fast paced for him. In the four years prior to trial, Mr. Fulgham held only one job, which lasted approximately a week and a half. He testified that he could not keep up with the fast pace of the job. Although he had looked for work, he had not been able to find a job.

Ms. McCutcheon testified about the effect that the lead poisoning had on her life. She struggled with reading, although she had graduated from high school. She wanted to become

a nurse, and attended TESST College of Technology for medical assisting, but she had to drop out because she could not find child care. She held three jobs for approximately four to six months each. She has not been able to find a job since her child was born.

Dr. Barry A. Hurwitz,<sup>4</sup> a neuropsychologist, was accepted as an expert in neuropsychology. He testified regarding the results of intelligence tests he performed on appellees. Mr. Fulgham had a verbal IQ of 57 and a performance IQ of 58, which fall below 99 percent of people his age. Mr. Fulgham was impaired in the areas of general cognitive abilities, sensory and perceptual functions, attention and mental control, visual spatial, motor functions, language, and memory. Ms. McCutcheon had an IQ of 69, which is in the extremely low range for 99 percent of her peers.

Mark Lieberman, a certified vocational rehabilitation counselor and consultant, was accepted as an expert in vocational consulting. He testified that, due to Mr. Fulgham's impairments, he "will not be able to maintain competitive employment." Based on his IQ, Mr. Fulgham would fit the Social Security definition of permanently and totally disabled. "[T]heoretically he might be able to find the lowest level unskilled job out there but the reality is an employer . . . is not going to hire him." Further, if Mr. Fulgham is hired, he will not be able to keep the job. If not for his injuries, "he would have been able to do jobs typically associated with the 9th to 12th grade range which is being able to read and

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<sup>4</sup> Although the transcript indicates Dr. Hurwitz's name is "Larry Herwitz," the record shows that it is "Barry Hurwitz."

recognize some words, to be able to follow directions and to be able to do a wide range of unskilled labor without such a high level of supervision that the job would still be considered competitive.”

Mr. Lieberman also testified as to Ms. McCutcheon’s earning capacity. Ms. McCutcheon was able to follow very basic directions and perform some basic tasks. She will not, however, be able to attain her goal of becoming a registered nurse.

William M. Peach, III, the Director of Housing Management Administration for the HABC, testified that the 734 W. Fayette Street property, a Lexington Terrace project, was demolished in 1996. He acknowledged that tests were performed on Lexington Terrace in connection with a concern regarding lead paint. He described an Operating Order distributed by the HABC on March 1, 1991, to residents of public housing constructed prior to 1978, advising of the hazards of lead-based paint to children, who “may eat paint chips or chew on painted railings, window sills, or other items when the parents are not around,” and “can ingest lead even if they do not specifically eat paint chips.”<sup>5</sup>

With respect to the 1816 W. Fayette Street property, Mr. Peach testified that it had been demolished in approximately 1996. There had been “dust wipe” tests on the property, but he could not locate the report involving XRF testing for lead paint.<sup>6</sup>

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<sup>5</sup> The subject of the Order was “Watch Out for Lead Paint Poisoning” and it “referenced MDE 219 Lexington Terrace.”

<sup>6</sup> Mr. Patrick Connor explained XRF testing as “X-ray flourescent lights” that are “handheld . . . battery operated. . . [carried] around like a little mini-processor and it can produce for you a reading anywhere from 5 to 50 seconds . . . . [T]hey have a radioactive

At the close of appellees' case, appellees withdrew their claim under the Consumer Protection Act. The HABC moved for judgment on the negligence claim on the basis that appellees had insufficient evidence to show there was lead paint in the premises. The court stated that it would consider the motion and continue with testimony.

Dr. Joel Morse, a professor of financial economics at the University of Baltimore, testified for the defense as an expert in assessing economic loss in lead paint litigation. He testified that Mr. Fulgham's loss of earned income would be \$637,620 over the course of his lifetime, and Ms. McCutcheon had an income loss of \$274,441.

Dr. James Patrick, a vocational rehabilitation counselor, was accepted as an expert in vocational rehabilitation assessments and counseling. He testified that, although Mr. Fulgham had barriers to employment, he also had the following strengths: a desire to work, a desire to get his GED, good personal hygiene, and the ability to use public transportation. He concluded that Mr. Fulgham should be able to seek and maintain unskilled work and would not have an earning capacity loss. Dr. Patrick testified that Ms. McCutcheon would not have an earning capacity loss.

Dr. Joseph Scheller, a pediatrician and child neurologist, testified as an expert in pediatric neurology. He testified, to a "reasonable degree of medical probability," that Mr. Fulgham had not been exposed to lead. He believed that the testing of Ms. McCutcheon

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source inside them." He explained that, at the push of a button, a ray of energy comes out, hits the surface and ricochets back. The machine measures the pulse and the light that comes back.

was inaccurate and that her highest lead level was 10, or possibly 12. He testified that any exposure appellees had to lead resulted in “an insignificant amount of IQ loss.”

Patrick Connor, an environmental and engineering consultant and certified risk assessor, testified as an “environmental expert, generally and as an environmental expert specifically in the applicability of federal and state laws and regulations . . . regarding lead based paint activities.” He testified that, to a reasonable degree of environmental probability, there was no evidence of lead-based paint or lead-based paint hazards at the 734 W. Fayette Street property while appellees resided there. He based his opinion on several factors, including an inspection performed on July 5, 1992, by Martel. According to the Martel report, which he considered reliable, there were no positive results for lead-based paint. Although Dr. Zuckerberg testified that there was a positive test for lead on a doorway in a bedroom, based on a corrected lead content of 1.1, Mr. Connor testified that the paint chip analysis “confirmed no lead-based paint at that location.” With respect to the areas where Ms. Blue stated that there was chipping paint, the “heating system,” which consisted of the radiator and pipes, in the living room and two bedrooms, these areas were tested and the results came back negative. Mr. Connor explained that a lead hazard exists only if there is: (1) deteriorated paint, such as chipping, flaking, or peeling; and (2) the paint contains lead.

With respect to the 1816 W. Fayette Street property, Mr. Connor testified, to a reasonable degree of environmental probability, that there was no lead-based paint and no lead-based paint hazards. He looked to a lead dust test performed by Martel on

December 26, 1991, the results of which showed no lead dust above threshold standards. A test performed on June 25, 1992, shortly before appellees moved into the residence, showed one floor sample in a bedroom that was above the standard.

Mr. Connor indicated that the protocol for testing was to inspect a unit for peeling paint, and if none was found, a dust test would be completed. A dust test, however, does not, indicate anything about lead-based paint. Mr. Connor testified that there was “no evidence of lead-based paint inspections so there’s no evidence of lead-based paint.” Martel conducted another dust wipe test on July 1, 1992, and the results were below the threshold level.

Mr. Connor also referred to a Baltimore City Health Department March 5, 1993, inspection report<sup>7</sup> involving the 1816 W. Fayette Street property. Typically, such an inspection involves a person from the Health Department going to the property to conduct a medical home visit. The report did not indicate, in the line for hazardous items, that there was any loose paint or plaster, and the person from the Health Department did not order an environmental investigation, a step that ordinarily would be taken if the unit was a suspected source of lead paint.

Mr. Connor disagreed with Dr. Zuckerman’s testimony that the most common source of exposure to lead in older homes is lead-based paint. He testified that the “two most

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<sup>7</sup> The document was titled “Baltimore City Health Department, Childhood Lead Poisoning Prevention Program First Inspection Report and Family Sheet.”

predictive data points [of an elevated blood lead level] are a parameter soil sample and dust lead results as you go into the unit or you go into a room within the unit.”

He did agree, however, that lead containing paint was “the greatest contribut[or] of lead poisoning.” He further agreed on cross-examination that Martel did not test any of the pipes at the 734 W. Fayette Street property, and there was no evidence of XRF testing or paint chip samples taken at the 1816 W. Fayette Street property. With respect to the lead dust testing at 1816 W. Fayette Street, Mr. Connor agreed that this occurred prior to the time Ms. Blue saw chipping paint, and it did not eliminate the potential presence for lead-based paint. Counsel for appellees then repeatedly questioned Mr. Connor about his belief that, “in the normal course of things,” the HABC would have conducted XRF lead paint testing on the property, and that HABC could not find any results. Counsel also established that Mr. Connor did “a lot of environmental sampling” in cases for defense lawyers, but he did not do that in this case.

After the HABC rested its case, it renewed its motion for judgment based on a failure to prove negligence. The court denied the motion, stating that there were “substantial factual issues that remained.”

The jury found that the HABC was negligent and returned verdicts in favor of Mr. Fulgham and Ms. McCutcheon in the amount of \$2,423,000 and \$2,220,000, respectively. On November 1, 2010, the HABC filed a Motion for Judgment Notwithstanding the Verdicts and a Motion to Reduce the Jury’s Verdicts in Accordance with

the Noneconomic Damages Cap, pursuant to Maryland's statutory cap on non-economic damages. On December 6, 2010, the court denied the Motion for Judgment Notwithstanding the Verdicts, but it granted the motion to reduce the verdicts to conform to the cap on non-economic damages. The court ordered that the judgment in favor of Mr. Fulgham be reduced to \$1,273,000 and the judgment in favor of Ms. McCutcheon be reduced to \$1,320,000.

The HABC noted this timely appeal on January 4, 2011.

### **DISCUSSION**

The HABC argues that the circuit court erred in denying the HABC's motion for summary judgment, which was based on the argument that appellees failed to give notice of its claims within 180 days of the injury, as required by the LGTCA. It contends that "the circuit court abused its discretion in concluding that [Mr.] Fulgham and [Ms.] McCutcheon presented good cause for excusing compliance with the notice requirement of the LGTCA," asserting that "appellees' mother, Tonia Blue, failed to act with the requisite diligence of an ordinarily prudent person in pursuing her children's tort claims." The HABC further argues that the court "erred as a matter of law by denying the motion for summary judgment without considering, or ruling upon, the HABC's showing of prejudice from the lack of timely notice under the LGTCA."

Appellees contend that the court properly denied the motion for summary judgment. They argue that the court properly exercised its discretion in finding that they had good cause for failing to comply with the notice provisions of the LGTCA. Counsel points to "the

severity of the children’s brain damage” and argues that appellees were “incapable of comprehending the notice statute, much less of complying with it.” Appellees assert that, given their serious mental injuries, their young age at the time of injury, and “the latent nature of their injuries,” the trial court properly exercised its discretion in finding good cause. Appellees further argue that, although the court did not specifically mention prejudice, it clearly considered the issue. Finally, appellees argue that, “[e]ven if the trial court erred or abused its discretion in finding good cause and lack of prejudice, it was harmless error” because: (1) evidence subsequently produced by the HABC supports the finding of good cause and lack of prejudice; and (2) evidence produced at trial “demonstrates substantial compliance with the notice provisions of the LGTCA.”

**A.**

**Statutory Scheme**

The LGTCA provides that “an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 180 days after the injury.” C.J.P. § 5-304(b)(1).<sup>8</sup> It requires that “[t]he notice shall be in writing and shall state the time, place, and cause of the injury.” *Id.* § 5-304(b)(2).

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<sup>8</sup> The Housing Authority of Baltimore City qualifies as a “local government.” *Mitchell v. Housing Authority of Baltimore City*, 200 Md. App. 176, 189 (2011), *cert. denied*, \_\_\_ Md. \_\_\_ (Nov. 21, 2011).

The Court of Appeals has explained the purpose of the notice requirement is as follows:

[It is] intended to apprise a local government “of its possible liability at a time when it could conduct its own investigation, *i.e.*, while the evidence was still fresh and the recollection of the witnesses was undiminished by time, ‘sufficient to ascertain the character and extent of the injury and its responsibility in connection with it.’”

*Rios v. Montgomery County*, 386 Md. 104, 126 (2005) (quoting *Faulk v. Ewing*, 371 Md. 284, 298-99 (2002)). The notice requirement is “a condition precedent to maintaining an action against a local government or its employees.” *Id.* at 127. *Accord Hansen v. City of Laurel*, 420 Md. 670, 682, 689 (2011).

This Court has noted, however, that a litigant may be excused from strict compliance with the notice requirement if “the purpose of the notice statute was fulfilled by substantial compliance with the statutory requirements.” *Wilbon v. Hunsicker*, 172 Md. App. 181, 191 (2006) (quoting *White v. Prince George’s County*, 163 Md. App. 129, 144 (2005)), *cert. denied*, 398 Md. 316 (2007). “Substantial compliance requires some effort to provide the requisite notice and, in fact, it must be provided, albeit not in strict compliance with the statutory provision.” *Id.* (citations and quotations omitted).

The General Assembly has provided an avenue of relief for a plaintiff who has not complied, or substantially complied, with the notice requirement. The statute provides: “Notwithstanding the other provisions of this section, unless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for

good cause shown the court may entertain the suit even though the required notice was not given.” C.J.P. § 5-304(d).

There was no argument below that appellees complied with the requirement. Rather, the argument centered on whether a waiver of this requirement should be allowed. There are two prongs to a waiver of the notice requirement: (1) a showing of good cause; and (2) a failure to show prejudice to the defense. *Mitchell v. Housing Authority of Baltimore*, 200 Md. App. 176, 204 (2011), *cert. denied*, \_\_\_ Md. \_\_\_ (Nov. 21, 2011). We will address each of these two prongs.

## **B.**

### **Good Cause to Waive the Notice Requirement**

“The question of whether good cause for a waiver of a condition precedent exists is clearly within the discretion of the trial court.” *Rios*, 386 Md. at 121. In determining whether there has been an abuse of discretion by the circuit court, the Court of Appeals has explained:

There is an abuse of discretion “where no reasonable person would take the view adopted by the [trial] court[.]” . . . or when the court acts “without reference to any guiding principles.” An abuse of discretion may also be found where the ruling under consideration is “clearly against the logic and effect of facts and inferences before the court[.]” . . . or when the ruling is “violative of fact and logic.”

Questions within the discretion of the trial court are “much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.” In sum, to be reversed “the decision under consideration has to be well removed from any center

mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.”

*Id.* (quoting *Wilson v. Crane*, 385 Md. 185, 198-99 (2005)). Thus, “an abuse of discretion should only be found in the extraordinary, exceptional, or most egregious case.” *Id.* at 122.<sup>9</sup>

The test for good cause pursuant to the LGTCA is “whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.” *Rios*, 386 Md. at 141 (quoting *Heron v. Strader*, 361 Md. 258, 271 (2000)). The Court of Appeals has identified five categories that may constitute good cause: (1) “excusable neglect or mistake (generally determined in reference to a reasonably prudent person standard); (2) “serious physical or mental injury and/or location out-of-state”; (3) “the inability to retain counsel in cases involving complex litigation”; (4) “ignorance of the statutory notice requirement”; and (5) “where representations made by local government representatives are misleading.” *Id.* at 141-42.<sup>10</sup>

Here, counsel for appellee urged the court to find good cause based on appellees’ ages at the time of exposure, their mental injury due to brain damage from lead exposure, and their ignorance of the statutory notice requirement. The court questioned appellees about the good

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<sup>9</sup> As this Court noted a couple of years ago: “[A]lmost all of the appellate decisions in Maryland on the issue of good cause have held that the trial judge did not abuse his or her discretion.” *Wilbon v. Hunsicker*, 172 Md. App. 181, 211 (2006) (recognizing this concept but finding an abuse of discretion in that case).

<sup>10</sup> In *Rios v. Montgomery County*, 386 Md. 104, 142 n.18 (2005), the Court of Appeals recognized that this Court, in *Williams v. Montgomery Co.*, 123 Md. App. 119, 134 (1998), specifically rejected ignorance of the law regarding notice as good cause, but it noted that it had not addressed the issue and stated that the “question continues to remain open.”

cause argument, inquiring about the IQs of appellees and their mother, as well as the significance that testing of appellees in the early 1990s revealed elevated blood levels. Counsel downplayed the initial notice of elevated blood levels, stating that damage from lead paint is latent and does not manifest until much later and the understanding of the significant danger of lead exposure has changed in the past years.

The court ultimately was persuaded by appellees' arguments. In denying the HABC's motion, the court stated:

With regards to notice in this matter, it's questionable at best. With regards to the establishment of good cause to waive that requirement, the [appellees] have managed to convince the Court that there is good cause. So at this time, the Court will be denying the Motion for Summary Judgment. [E 128-9]

This ruling was not so removed from the center mark to require reversal as an abuse of discretion.<sup>11</sup>

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<sup>11</sup> Appellant argues that a finding of good cause is inconsistent with *Mitchell*, 200 Md. App. at 210-11, in which this Court upheld the circuit court's finding of no good cause on similar facts. Appellant's assertion of similarity between the facts of the two cases is well taken. The procedural posture in each case, however, is different. The circuit court in *Mitchell* granted the motion for summary judgment, finding no good cause, whereas in this case, the circuit court found good cause and denied the motion. The different results on appeal are based on the deference given to a discretionary decision by the circuit court. See *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 198-99 (2004) ("Just because we affirm a judge's discretionary decision to exclude an expert opinion does not necessarily mean that we, on precisely the same facts, would not also affirm the decision of another judge to admit the opinion.").

## C.

### **Prejudice**

As indicated, a waiver of the notice requirement involves two prongs: (1) a showing of good cause; and (2) no showing of prejudice to the defense. *Mitchell*, 200 Md. App. at 204. The HABC argued below that a waiver was not warranted because it was prejudiced in its defense of its case by the delay in notice.

As HABC notes, the purpose of the notice requirement is as follows:

“to protect the municipalities and counties of the State from meretricious claimants and exaggerated claims by providing a mechanism whereby the municipality or county would be apprised of its possible liability at a time when it could conduct its own investigation, i.e., while the evidence was still fresh and the recollection of the witnesses was undiminished by time, sufficient to ascertain the character and extent of the injury and its responsibility in connection with it.”

*Moore v. Norouzi*, 371 Md. 154, 167-68 (2002) (quoting *Williams v. Maynard*, 359 Md. 379, 389-90 (2000)).

### 1.

#### **Finding of Prejudice**

HABC argues on appeal that the court “erred as a matter of law by denying the motion for summary judgment without considering, or ruling upon, the HABC’s showing of prejudice from the lack of timely notice under the LGTCA.” It asserts that, had the court considered the “substantial and uncontradicted evidence of prejudice to its defense,” as a

result of the appellees' delay of more than 13 years in giving notice, the court "would have been constrained to conclude that [appellees'] untimely notice prejudiced the HABC."

Appellees assert that, because the issue of prejudice was raised in the pleadings and discussed at the hearing, we should presume that the circuit court addressed the issue. They further argue that, based on documents found after the summary judgment ruling, HABC was not prejudiced by the delay in notice, and any error in the court's ruling was harmless.

The record shows that the issue of prejudice was thoroughly addressed. The HABC argued in its motion for summary judgment that, although appellees knew of their alleged injuries between 1989 and 1995, they "did nothing to put the HABC on notice of their claims, nor did they serve their Complaint on the HABC until January 2008, thirteen years after their last alleged exposure at the HABC's second property." It stated that the delay frustrated its ability "to investigate while the *evidence was fresh* and the recollection of witnesses *undiminished by time*," asserting: "[T]he HABC has been unable to locate any tenant folders, any lease information or documentation, any maintenance documentation, or any other information, records or documentation regarding [appellees] or their family."<sup>12</sup>

The HABC attached to its motion the affidavit of Mr. Peach, the Director of Housing Management Administration for the HABC. The affidavit stated, in pertinent part, as follows:

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<sup>12</sup> Mr. Connor, who testified for the defense, described the tenant folder as "a running chronology of the family's participation in public housing."

4. I have searched the HABC's archived records in an effort to obtain the tenant folder, any lease information or documentation, and any other information or records regarding [appellees] or their family and their alleged residence at 734 W. Fayette Street during 1989-1991 and at 1816 W. Fayette Street during 1992-1995. I have been unable to locate the tenant folder, any leases, or any other records or documentation regarding Plaintiffs or their family.
5. The HABC's record retention policy provides for the destruction of all maintenance records after three years. The HABC no longer has maintenance records for 734 W. Fayette Street for the time that [appellees] allegedly lived there (1989-1991). The HABC also has no maintenance records for 1816 W. Fayette Street for the time that [appellees] allegedly lived there (1992-1995).
6. The development where 734 W. Fayette Street was located (Lexington Terrace) was built in 1959 and razed in July 1996. The HABC does not know when 1816 W. Fayette Street (Rehabilitated Housing) was built. The HABC presently owns 1816 W. Fayette Street and, based on information and belief, owned this property during 1992-1995.
7. Most, if not all, of the HABC personnel who worked at Lexington Terrace or for Rehabilitated Housing during the times that [appellees] allegedly lived there (1989-1991 for 734 W. Fayette Street and 1992-1995 for 1816 W. Fayette Street) are no longer employed by the HABC.
8. I have searched all of the HABC's files and records for any complaints, letters, notices or related documentation made by [appellees] or anyone in their family prior to January 2008 regarding their alleged exposure to lead-based paint at either 734 W. Fayette Street during 1989-1991 or 1816 W. Fayette Street during 1992-1995, as alleged in the Complaint and the Amendment by Interlineation, and have found none. The first knowledge or notice the HABC had regarding [appellees'] alleged exposure to lead-based paint at either address was when we were served with a Summons and Complaint in this matter on January 2, 2008.
9. The HABC has been substantially prejudiced in its ability to defend this case, because [appellees] failed to notify it of their claims until January 2008.

At the hearing on the motion, counsel for the HABC reiterated its argument of prejudice due to the delay. He asserted that the HABC did not “have documentation of any kind and we have no witnesses,” noting that appellees’ only response to its assertion of prejudice was that the HABC was at fault for not keeping records for longer than 13 years.

Appellees argued below that the HABC did not meet its burden of showing that it was prejudiced. Counsel asserted in its motion that, although the HABC stated that its witnesses were no longer employed by the HABC, it had “done nothing to try to locate the witnesses.” Counsel suggested, without any specificity, that information could be obtained by “record subpoenas of third parties.” With respect to the argument that documents had been destroyed, counsel argued that the loss of documents was due to the HABC’s “woefully inadequate” document retention policy, and that, if the HABC was “going to have the business, [it had] to keep the records.” Finally, counsel argued that “[t]he access to the evidence is the same for Plaintiffs as it is for Defendants in this case. The ultimate burden is on the Plaintiff to prove this situation.”

As the HABC points out, the court did not mention prejudice in its ruling denying appellant’s motion for summary judgment. It points to this absence to support its assertion that the court did not consider the prejudice prong. As this Court has stated, however, the absence of an express reference to prejudice in a court’s ruling on waiver of the notice requirement of the LGTCA “does not mean that the judge did not consider th[e] issue[] or the evidence” in making its decision. *Mitchell*, 200 Md. App. at 210. We noted in *Mitchell*

that “judges are presumed to be ‘men [and women] of discernment, learned and experienced in the law and capable of evaluating the materiality of evidence.’” *Id.* (quoting *N. River Ins. Co. v. Mayor & City Council*, 343 Md. 34, 90 (1996)).

Here, as indicated, both parties addressed the prejudice prong of the analysis in their written pleadings and at argument. Moreover, as in *Mitchell*, 200 Md. App. at 209, the court asked appellees questions about the prejudicial effect of the lack of notice on the HABC, asking how the HABC was “supposed to adequately investigate and adequately defend itself,” when one building had been razed 13 years ago, and the HABC was not able to locate records. Thus, given the presumption that judges know the law and apply it correctly, and because prejudice was an issue before it, we reject the argument that the court did not address the prejudice argument. Rather, although not explicitly stated, we presume it rejected the argument in denying the motion.

We thus turn to whether the finding of no prejudice was warranted, given the record before the court. This second prong of the waiver analysis, similar to the good cause prong, is reviewed for an abuse of discretion. *Westfarm Assocs. Ltd. P’ship. v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669, 677 (4th Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996). *See Madore v. Baltimore County*, 34 Md. App. 340, 345 (1976) (where legislation permits, but does not require, a court to excuse the failure of a party to perform an act within a prescribed time period, it commits the determination to the discretion of the court).

As set forth in detail, *supra*, the HABC represented that the delay in giving notice after the injury was more than 13 years, and that its defense to the suit was prejudiced because, during that time period, records relevant to the houses and appellees' residence at these houses had been lost, and one of the buildings had been razed. Counsel for the HABC stated at the hearing that, due to the delay, the HABC did not "have documentation of any kind and we have no witnesses." Appellees, although disagreeing with the prejudice argument, did not dispute the HABC's factual assertions.

In *Mitchell*, 200 Md. App. at 183, there was a 19-year delay in notice from the time that the claimant received a blood test showing exposure to lead. The HABC argued, similar to the argument here, that, due to the delay, the tenant file was destroyed, maintenance records for the premises were destroyed, and "virtually all" of the HABC employees involved with the premises were no longer employed by the HABC. *Id.* at 208. This Court, in upholding the circuit court's decision declining to waive the notice requirement, stated that "the HABC made what a reasonable judge deciding the motion could have believed was a strong showing of prejudice, as it no longer had any documents or witnesses, and the mere passage of 19 years would be sufficient to dim even the brightest memory." *Id.* at 211.

Here, the affidavit provided by the HABC was similar, but it also stated that one of the properties had been razed, preventing any current testing of the building. Given the record before the circuit court, including the lengthy delay in notice, more than 13 years, and

that evidence was lost due to the delay, a finding that there was no prejudice was an abuse of discretion.

## 2.

### **Harmless Error**

Appellees contend, however, that, even if the court abused its discretion in finding a lack of prejudice, it was harmless error because the HABC subsequently found evidence it claimed was missing, which shows that the HABC was not prejudiced. They note that the HABC subsequently found the tenant folder it claimed could not be found, and that the HABC produced “the Martel report of XRF lead testing of 734 W. Fayette St., and a report of lead dust testing for 1816 W. Fayette St.”<sup>13</sup> They further assert that the trial testimony indicated that Ms. Blue advised the HABC about Ms. McCutcheon’s lead paint poisoning in 1992, as well as advising it of chipping paint, and the HABC had the ability, at that time, to investigate the circumstances.

The HABC argues that its discovery of the tenant folder shortly before trial did not cure the prejudice due to the delay. It argues that, because of the delay, it was unable “to perform contemporaneous inspections of the subject properties, or to identify and interview fact witnesses at a point in time in close proximity to the alleged lead poisoning,” noting that

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<sup>13</sup> Mr. Connor testified, based on these reports, that the XRF lead testing of the 734 W. Fayette Street property indicated there was no lead-based paint at the property, and that, of the three lead dust wipe tests that were performed at the 1816 W. Fayette Street property, only one had a result above the threshold level.

“the discovery of the tenant folder did not allow the HABC to investigate Appellees’ claims while the evidence was still fresh and the recollection of witnesses was undiminished by time.”

We are not persuaded by appellees’ harmless error argument. Initially, appellees cite no authority to support its argument that we could look to facts elicited at trial to overturn a pre-trial motion, particularly in a situation such as this, where the notice requirement is a precondition to suit. *Rios*, 386 Md. at 127 (notice requirement is “a condition precedent to maintaining an action against a local government or its employees”).

Moreover, although the HABC was able to find some additional documents after the motion hearing, it appears that other relevant documents remained missing, which prejudiced the HABC’s ability to defend itself. Appellees’ trial counsel repeatedly questioned Mr. Connor about the lack of records regarding any XRF testing at 1816 W. Fayette Street. Mr. Connor testified on cross-examination that, although the HABC would have had this testing done, it could not locate the records.

During appellees’ rebuttal closing argument, counsel seized on this missing evidence and sought to use it to appellees’ advantage. Counsel stated:

Where is the XRF report for 1816 West Fayette Street? Very important. And according to Mr. Connor, you just heard him testify a couple of hours ago, the Housing Authority would have done XRF testing in the ordinary course. That would have been part of the procedure. The Housing Authority is still looking for the XRF testing. **They can’t find it. Well that’s strange.** When they find reports that they think help them like on the Martel Report for 734, they put it into evidence. But then when it comes to the Martel report, the XRF report for 1816, well, they can’t find it. What kind of nonsense is that?

You know what kind of nonsense that is. **They're hiding the ball.** Where are the documents?

(Emphasis added). The record belies appellees' claim that there was no prejudice to the HABC's defense due to the delay.

Appellees also make a harmless error argument on the ground that Ms. Blue's testimony that she called the HABC about chipping paint and Ms. McCutcheon's high lead levels showed substantial compliance with the notice provisions. We find no merit in this claim. Ms. Blue informed the HABC only that her daughter had lead paint poisoning, but she stated that she did not know the source of the poisoning. The call did not put the HABC on notice that it would be sued for damages. *See Wilbon*, 172 Md. App. at 204 ("Statement of Incident" letter was not substantial compliance with notice requirement; it was a notice of an occurrence of police brutality, not a notice of a tort claim, which prompted an investigation that "was vastly different from an investigation into a tort claim for damages"). Appellees' harmless error argument has no merit.

**JUDGMENT REVERSED. COSTS TO  
BE PAID BY APPELLEE.**