IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-TS-01866

SHERWIN-WILLIAMS COMPANY — APPELLANT

VS.

TRELLVION GAINES — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, MISSISSIPPI

AMICUS BRIEF OF AMERICAN COATINGS ASSOCIATION, INC.

Thomas J. Graves Vice President and General Counsel American Coatings Association, Inc. 1500 Rhode Island Avenue, N.W. Washington, DC 20005 (202) 462-8743 tgraves@paint.org	Eric Lasker (DCB # 430180) Rebecca Womeldorf (MSB # 101285) Hollingsworth LLP 1350 I Street N.W. Washington, D.C. 20005 Counsel for American Coatings Association, Inc. Telephone: (202) 898-5800 Facsimile: (202) 682-1639

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATEMENT OF INTEREST

American Coatings Association, Inc. ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers, raw materials suppliers, and distributors of paints, coatings, adhesives, sealants and caulks. ACA and its member companies have undertaken significant voluntary efforts to address the risks of lead exposures when property owners fail to maintain their property in lead safe condition, including a 2003 cooperative agreement with Attorneys General from 46 states and the District of Columbia, which established "a national program of consumer paint warnings, point-of-sale information, and education and training to avoid the potential exposure to [EPA-HUD] lead-dust hazards,"[1] and the founding in 1994 of the Community Lead Education and Reduction Corps ("CLEARCorps"), a joint public service partnership of the paint industry and the non-profit Shriver Center at the University of Maryland.[2] These programs were designed to focus on the use of good science to address actual risks posed by long-term lead ingestions where property owners allow historically applied lead paint to chip or deteriorate.

ACA files this *amicus* brief because the trial court's rulings in this case mark a dramatic departure from the dictates of good science. In 2000 and 2003, Mississippi amended Rule of Evidence 702 to incorporate the expert testimony admissibility standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and in 2003 this Court formally adopted *Daubert* as the proper standard for reviewing expert testimony before it may be presented to a jury. *See Mississippi Transp. Comm'n. v. McLemore*, 863 So.2d 31 (Miss. 2003). In adopting *Daubert*, the Court acted to protect litigants in the State from "the pre-*Daubert* days when trials

[1] EPA Sector Strategies Performance Report (March 2006) at 64, available at http://www.epa.gov/sectors/performance.html.

[2] Information about CLEARCorps is available at http://www.clearcorps.org.

were tainted by unreliable junk science purchased from professional witnesses." *Hill v. Mills*, 26 So.3d 322, 331 (Miss. 2010). As the current case demonstrates, however, some Mississippi trial courts have not fulfilled their *Daubert* responsibilities.

For the reasons set forth herein, ACA urges the Court to hold that the trial court fundamentally erred in failing to hold plaintiff to his burden of demonstrating that his experts' testimony satisfied *Daubert* on the core issues of product exposure/ingestion, general causation, and specific causation. Only through such a ruling, and a reversal of the unfounded jury verdict below, can the Court ensure that the *Daubert* principles repeatedly pronounced in its opinions are correctly applied in trial courts through out the State.

ARGUMENT

I. THE FAITHFUL APPLICATION OF THE *DAUBERT* STANDARDS FOR ADMISSION OF EXPERT TESTIMONY IS VITAL TO THE FAIR DECISION-MAKING PROCESS OF JURORS IN MISSISSIPPI COURTS.

This Court has repeatedly stressed the vital role served by Mississippi trial courts in guarding against the admission into the court room of scientifically unreliable or irrelevant expert testimony. As the Court has explained, "[b]ecause of the weight given to expert testimony, it is imperative that trial judges remain steadfast in their roles as gatekeepers under the *Daubert* standard." *Watts v. Radiator Specialty Co.*, 990 So.2d 143, 147 (Miss. 2008). Trial courts must be vigilant in protecting the judicial system from "the danger of unreliable expert testimony and the effect that it can have on the decision-making process of a juror[:]

> Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. Therefore, juries usually place greater weight on the testimony of an expert than that of a lay witness."

Id. (quoting *Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007)); *see also Daubert*, 509 U.S. at 596 ("Expert evidence can be both powerful and quite misleading because of the difficulty in examining it.").

"[T]here is universal agreement that the *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony." *McLemore*, 863 So.2d at 38; *see also Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) ((*Daubert* set "exacting standards"). "[I]n shifting the focus to the kind of empirically supported, rationally explained reasoning required by science," *Daubert* and Mississippi Rule of Evidence 702 have "greatly improved the quality of evidence upon which juries base their verdicts." *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002). "Although making determinations of reliability may present a court with a difficult task of ruling on matters that are outside its field of expertise, this is less objectionable than dumping a barrage of scientific evidence on a jury, who would likely be less equipped than a judge to make reliability and relevance determinations." *Id.* (citation omitted).

To survive *Daubert* scrutiny, "[t]he party offering the expert testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." *McLemore*, 863 So.2d at 36. "The sufficiency of foundational facts or evidence on which to base an opinion is a question of law." *Janssen Pharm., Inc. v. Bailey*, 878 So.2d 31, 60 (Miss. 2004) (quoting *Materials Transp. Co. v. Newman*, 656 So. 2d 1199, 1203-04 (Miss. 1995)). Thus, just as this Court has "instructed trial courts to examine the reliability of expert opinion ... [it has] also recognized [its] own authority to do the same on appeal." *Bailey*, 878 So.2d at 60.

"[F]or expert opinions to qualify as scientific knowledge, the expert's testimony must be supported and based on what is known." *Mills*, 26 So.3d at 329. "[T]he facts upon which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as

distinguished from mere guess or conjecture." *McLemore*, 863 So.2d at 36 (quoting *Hickox v. Holleman*, 502 So.2d 626, 638 (Miss. 1987). "[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science, it does not lead it." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996); *see also Daubert*, 509 U.S. at 597 ("That ... is the balance struck by the Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.").

In the present case, plaintiff's experts' opinions rest on speculation in the place of scientifically-required predicate facts. First, Plaintiff's experts cannot point to any scientific evidence showing that the plaintiff experienced long-term elevated blood lead levels and admitted to the contrary that the only blood lead testing of the plaintiff indicated a one-time, asymptomatic lead ingestion of the type that has never been scientifically linked to brain injury. Second, plaintiff's experts cannot point to any specific evidence showing that the transient lead adversely impacted plaintiff's intellectual ability, and they conducted no examination by which they can reliably exclude alternative causes for the plaintiff's mild mental retardation. Third, Plaintiff's experts cannot point to any scientific evidence that identifies Sherwin-Williams lead-based paint in the plaintiff's residence and, indeed, elected not to conduct tests that might have provided evidence on the issue. In fact, they never opine that plaintiff was injured by Sherwin-Williams paint.

"Neither *Daubert* nor the Federal Rules of Evidence requires that a court 'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' as self-proclaimed accuracy by an expert [is] an insufficient measure of reliability." *McLemore*, 863 So.2d at 37 (citations omitted). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Watts*, 990 So.2d at 149 (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). As in this case, "the chasm from the

data" to the expert opinions proffered on the core issues of exposure/ingestion, general causation and specific causation "was more than the trial court could allow." *Id.* at 150 ("We made [the trial courts] the gatekeepers of expert testimony, not the doormen"). Plaintiff's experts' testimony should have been excluded and judgment should be entered in favor of the Appellant.

II. PLAINTIFF'S EXPERTS DID NOT PROFFER SCIENTIFICALLY RELIABLE AND RELEVANT EXPERT TESTIMONY THAT PLAINTIFF'S MILD MENTAL RETARDATION WAS CAUSED BY INGESTION OF SHERWIN-WILLIAMS LEAD-BASED PAINT.

In order to survive *Daubert* scrutiny on plaintiff's causation claim, plaintiff's experts were required to submit scientifically reliable and relevant evidence of both "general causation" (that a one-time lead ingestion of the type experienced by the plaintiff can cause mild mental retardation) and "specific causation" (that the alleged transient ingestion of lead did cause of plaintiff's mental retardation). *See Watts*, 990 So. 2d at 146; *Brooks v. Ingram Barge Co.*, No. 4:07CV62, 2008 WL 5070243, *1 (N.D. Miss. Nov. 21, 2008). Plaintiff failed on both counts.

A. Plaintiff's Experts' General Causation Opinions Do Not Satisfy *Daubert*.

A central premise of toxicology is that "'the dose makes the poison'; this implies that all chemical agents are intrinsically hazardous – whether they cause harm is only a question of dose." *In re Bextra and Celebrex,* 524 F. Supp.2d 1166, 1174 (N.D. Cal. 2007) (quoting Reference Manual on Scientific Evidence at 403). Thus, particularly where, as here, plaintiff seeks recovery for an alleged exposure to a well-studied toxin, "a plaintiff must demonstrate the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover." *Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 781 (10th Cir. 1999); *see also McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1241-42 (11th Cir. 2005) ("when analyzing an expert's methodology in toxic tort cases, the court should pay careful attention to the expert's testimony about the dose-response

relationship, [that is, the] relationship in which a change in amount, intensity, or duration of exposure to an agent is associated with a change – either an increase or decrease – in risk of disease. The expert who avoids or neglects this principle of toxic torts without justification casts suspicion on the reliability of his methodology."); *Allen v. Penn Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996) ("[s]cientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden"); *Wright v. Williamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996) ("It is ... not enough to show that a certain chemical agent causes the kind of harm that he or she is complaining of. At a minimum, we think that there must be evidence from which the fact finder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered.").[3]

The only scientific evidence in this case regarding plaintiff's lead exposure comes from two blood tests conducted five (5) days apart when the plaintiff was 27 months old. The first test on September 15, 1993 reported an elevated blood lead level of 30 micrograms of lead per deciliter ("μg/dL"); the second test on September 20, 1993 reported a rapid decline in plaintiff's blood level to 19 μg/dL. *See* T.3:348. The relationship of these two test results is crucial to a proper understanding of the general causation issue in this case.

As plaintiff's experts conceded, the 11 μg/dL drop in plaintiff's blood lead level in just five (5) days demonstrates that the plaintiff experienced a transient lead exposure event lasting between 24 and 72 hours. D-25, pp. 188-89. Dr. Rosen testified that this decline in plaintiff's

[3] *Franklin Corp. v. Tedford*, 18 So.3d 215 (Miss. 2008) is not to the contrary. In that case, the Court allowed expert testimony without specific evidence that the exposure levels exceeded an established toxicity level because (a) even defendants' experts did not dispute that the exposures had caused some of the plaintiffs' neurological injuries, (b) the measured levels of exposure in the plaintiffs' workplace far exceeded regulatory safety levels, and (c) the case involved a largely unstudied toxin. *Id.* at 227, 237-38. These key factual distinctions highlight the degree to which plaintiffs' experts in this case lacked a sound scientific basis for their causation opinions here.

blood lead level would have continued and that plaintiff's blood lead level would have returned to normal levels, i.e., baseline, within a few weeks. D-27, p. 113; *see also id.* at 109-11, 142-43, 203 (testifying that plaintiff had a single ingestion of lead followed by a "very rapid[]" return to a "baseline" of 2-3 μg/dL). Plaintiff's other causation experts agreed. *See* T.3:343; T.5:713-14.[4]

The general causation question presented in this case is thus whether a transient, asymptomatic ingestion of lead can cause a decrease in intellectual function leading to mild mental retardation. *See In Re Hanford Nuclear Reservation Lit.*, 292 F.3d 1124, 1133 (9th Cir. 2002) (general causation inquiry is whether "the level of exposure alleged by the plaintiffs is capable of causing the alleged injuries"); *Watts*, 990 So.2d at 147 n.9 (noting that expert could not rely on study in support of general causation unless the study provided exposure level information because "[t]his information is crucial under the case study methodology to show specific causation so that [plaintiff's] level of exposure could be specifically compared to subjects with similar exposure"). Plaintiff's experts, however, readily acknowledged that they could not point to any scientific literature making that causal link. *See* T.5:715; D-25, pp. 68, 188-89; D-24, 99. 121-23. Instead, plaintiff's experts relied upon studies of the physical effects of long-term elevated blood lead levels. *See* T.5:715.

Plaintiff's experts' general causation opinions are thus fatally flawed. Courts have repeatedly rejected expert testimony that relies on studies finding adverse effects from prolonged or high dose exposures to extrapolate a causal relationship at lower levels. *See Brooks*, 2008 WL 5070243, at *3, *5 (expert's opinion inadmissible where expert testified that diesel exhaust can

[4] As Sherwin-Williams' medical expert, Dr. Banner, explained, in cases of long-term lead exposure "[i]t usually takes nine months for a lead level to drop from 30 to 19." T.8:1092. The evidence showing this decline in just five days leaves no scientific doubt that plaintiff was only acutely exposed: "[Y]ou can't expose someone to lead over a period of a year and then have [his blood lead levels] drop from 30 to 19 [in five days]. That is just physically impossible." *Id.* "[T]he general rule of mathematics that govern how lead moves in the body, the basic rule of thumb you can use is how long it takes to come down is how long it took to go up." *Id.*

cause cancer if there is "an extended period of exposure" but was unable to determine level of plaintiff's exposure); *In re Bextra*, 524 F. Supp.2d at 1180-81 (rejecting expert testimony that drug can cause heart attack at 200 mg/d based on studies of drug at 400 mg/d); *Amiorgianos v. National RR Passenger Corp.*, 137 F. Supp. 2d 147, 177-78, 185 (E.D.N.Y. 2001) ("none of the articles provides evidence on the CNS effects of short-term exposure to xylene or any other organic solvent, as opposed to long-term exposures of several months to many years"); *Sutera v. The Perrier Group of America Inc.*, 986 F. Supp. 655, 662-63 (D. Mass. 1997) (rejecting expert opinion that benzene can cause leukemia at low doses based on findings from high dose studies).

Nor can plaintiff's experts support their burden under *Daubert* by arguing that no studies have been conducted looking at short-term lead exposures, particularly given the decades of scientific research into the health effects of lead exposure. *Cf. Tedford*, 18 So.3d at 237 (contrasting toxic exposure involving "a relatively new field of study"). As the court explained in *In re Bextra*: "Plaintiffs cite no case … that suggests that they can satisfy their burden of proof based on a lack of evidence; plaintiffs filed these lawsuits and plaintiffs carry the burden of proving [general causation] today based on currently available scientifically valid evidence." *See also Rider*, 295 F.3d at 1202 ("Given time, information, and resources, courts may only admit the state of science as it is. Courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. The courtroom is not the place for scientific guesswork, even of the inspired sort.").

B. Plaintiff's Experts' Specific Causation Opinions Do Not Satisfy *Daubert.*

Plaintiff's experts' specific causation opinions fail on two separate grounds. First, plaintiff's experts do not have any scientifically reliable evidence that plaintiff experienced long-term lead exposures of the type discussed in the scientific literature. Second, plaintiff's experts cannot reliably exclude alternative causes for plaintiff's mild mental retardation.

1. Plaintiff's Experts Have No Scientifically Reliable Evidence That Plaintiff Experienced Chronic Exposures to Lead.

Recognizing the lack of scientific evidence that a transient lead exposure event can cause permanent and irreversible brain damage, one of plaintiff's experts – in direct contradiction to his earlier deposition testimony, *see infra* – testified at trial that the plaintiff likely experienced long-term elevated lead levels. D-24, p. 51. Plaintiff's expert failed, however, to present any scientific data to support this testimony. As discussed above, the only two measured blood lead levels during the period at issue point to a transient lead exposure. And because the plaintiff's house burned down, plaintiff's experts have no basis to even speculate as to any measure of potential ingestion of deteriorated lead paint in the home.[5] Accordingly, to the extent plaintiff's experts sought to avoid the flaws in their general causation opinions by opining that plaintiff in fact experienced long-term lead exposures, those opinions were likewise inadmissible.

The decision of the federal district court for the Northern District of Mississippi in *Brooks* is directly on point. *See Brooks*, 2008 WL 5070243. In *Brooks*, plaintiff's expert opined that the plaintiff's cancer was caused by his exposure to diesel exhaust while working on barges operating along the Mississippi River. Plaintiff's expert presented studies showing that diesel

[5] Plaintiff's experts could not reliably place Sherwin-Williams lead-based paint in the home, could not opine whether lead based paints were at the surface rather than buried under subsequent layers of paint, and had no way to determine whether exposed paint was deteriorated (and thus presented a possible route to exposure). Indeed, plaintiff's inability to identify any factual evidence of exposure inspired one of their experts to invent mythical "bite marks" on painted wood samples taken from the house. D-24, p. 83.

exhaust can cause cancer if there is an extended period of exposure which the court held sufficient under *Daubert* for the expert to opine that diesel exhaust can cause cancer. *Id.* at *3. However, the Court excluded the expert's specific causation opinion that diesel exhaust had caused the plaintiff's cancer because the expert did not offer any scientifically reliable evidence that the plaintiff had been exposed to diesel exhaust for the duration addressed in the scientific literature. *See id.* at *6 ("it is still unclear what [plaintiff's] exposure levels were. Absent this information one cannot determine if [the diesel exhaust] contributed to [plaintiff's] cancer.").[6] *See also Junk v. Terminix Int'l Co.*, 594 F. Supp. 2d 1062, 1072 (S.D. Iowa 2008) (excluding expert's specific causation testimony because expert did not have sufficient data to determine that plaintiff's exposure to chlorpyrofis exceeded safe levels); *Bowers v. Norfolk Southern Corp.*, 537 F. Supp. 2d 1343, 1362 (M.D. Ga. 2007) (evidence that vibrations at a certain level can cause back injury insufficient where expert could not show that plaintiff was subjected to vibrations at that level); *Savage v. Union Pacific RR Co.*, 67 F. Supp. 2d 1021, 1032 (E.D. Ark.

---

[6] As in this case, plaintiff's expert in *Brooks*, after stating at deposition that he could not opine to the plaintiff's exposure level, sought to opine at trial that plaintiff had experienced a long-term exposure to diesel exhaust. The Court found that this litigation-inspired change in opinion only further demonstrated why the expert's methodology was not reliable under *Daubert*:

> In deciding to strike [the expert's] additional testimony, the court was mindful that [the expert] seemed to be working the scientific method backwards. That is, he came to the conclusion he wished to state to this court and then kept adding new information in an attempt to support that conclusion to the point this court would accept it. The court finds this is not the same level of intellectual inquiry [the expert] would use in developing studies or opinions in his field. This method offers no assurance of reliability, but instead allows an expert to mold his supporting evidence in order to testify to any conclusion he wishes.

Brooks, 2008 WL 5070243, at *5 n.5; *see also, e.g., Haller v. AstraZeneca Pharms., LP,* No. 6:07cv15733, 2009 WL 428915, at *21 (M.D. Fla. Feb. 6, 2009) ("the drastic changes in Dr. Tulloch's opinions illustrate that he reached his initial conclusions prematurely and based on incomplete data, then later gathered what additional information he could to shore up his initial opinions. This approach smacks of post-hoc rationalization and is devoid of the intellectual rigor that *Daubert* demands").

1999) (excluding specific causation opinion where expert testified that "prolonged exposure" to creosote could cause cancer but could not reliably opine to plaintiff's duration of exposure).

2. Plaintiff's Experts Cannot Reliably Exclude Common Alternative Causes For Plaintiff's Mild Mental Retardation.

Plaintiff has an IQ of approximately 70, which places him within the roughly one to three percent of the population or three to nine million people in the United States with mild mental retardation. *See* T.5:705; *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002); *Lynch v. State*, 951 So.2d 549, 559 (Miss. 2007). Plaintiff's experts opined that plaintiff's alleged ingestion of lead paint caused a decrease in his IQ leading to his mild mental retardation. However, plaintiff's experts do not explain how they excluded the numerous alternative causes of mental retardation as to which the plaintiff was not tested or the fact that 50% or greater of cases of mental retardation are idiopathic (*i.e.*, have no known cause). *See* Appellant's Br. at 30-35; L.A. Croen, *et al.*, *The Epidemiology of Mental Retardation of Unknown Cause*, 107(6) Pediatrics e86 (2001) (finding 77.1% of cases of mild mental retardation with no known cause as compared to 1.3% caused by any type of injury or poisoning). Rather, plaintiff's experts simply assert that because ingestion of lead (at doses/durations not experienced by plaintiff) is associated with decreases in IQ, and because plaintiff had two (acutely) elevated blood lead measures in 1993, his current mild mental retardation was caused by lead exposure.

Plaintiff's experts' opinions suffer from the type of *post hoc ergo propter hoc* (after this consequently caused by this) reasoning that this Court has long rejected,[7] and that this and other courts have repeatedly rejected under *Daubert*. *See Janssen Pharm., Inc. v. Bailey*, 878 So.2d

[7] *See Herrington*, 733 So.2d at 779 ("We have repeatedly held that *post hoc ergo procter hoc* ... is a misplaced argument in modern tort law."); *Jackson v. Swinnet*, 140 So.2d 555, 557 (Miss. 1962) ("*Post hoc ergo prompter hoc*, without more, does not qualify under anyone's causal standard."); *see also Cuevas v. E.I. Dupont de Nemours and Co.*, 956 F. Supp. 1306, 1311 (S.D. Miss. 1997) (same, citing cases).

31, 61 (Miss. 2004) (reversing plaintiff jury verdict and finding that trial court erred in admitting expert causation testimony where plaintiffs' experts "failed to address and account for the innumerable preexisting conditions and other causative factors ..."); *Guinn v. Astrazeneca Pharms. LP*, 602 F.3d 1245 (11th Cir. 2010) (affirming exclusion of experts specific causation testimony where expert failed to reliably exclude alternative causes of disease); *Kolesar v. United Agri Prods., Inc.*, 246 Fed. Appx. 977, 981 (6th Cir. 2007) (same); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202-03 (4th Cir. 2001) (same); *Brooks*, 2008 WL 5050243, at *5-*6 (same). "The fact that exposure to [a substance] may be a risk factor for [a disease] does not make it an actual cause simply because [the disease] developed." *Guinn*, 602 F.3d at 1255 (quoting *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 846 (W.D. Tex. 2005)). "[I]n order to result in an admissible conclusion, [the expert's] analysis should 'reliably rule out alternative causes of [the alleged harm] or idiopathic causes.'" *Henricksen v. ConocoPhillips Co.*, 605 F. Supp.2d 1142, 1161-63 (E.D. Wash. 2009) (quoting *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 567 (W.D. Pa. 2003)). Plaintiff's experts did not do so and their testimony should have been excluded.

Moreover, plaintiff's specific causation opinions here fail even as a matter of *post hoc ergo propter hoc* reasoning because plaintiffs have no evidence even that the plaintiff's IQ dropped after his alleged lead exposure.[8] In very similar circumstances, another court recently excluded an expert's specific causation opinion as "pure speculation." *Palmer v. Asarco Inc.*, No. 03-CV-0498, 2007 WL 2298422, *6 (N.D. Okla. Aug. 6, 2007). In *Palmer*, plaintiffs alleged that exposures to low levels of lead (albeit in that case over an extended period of time)

[8] To the contrary, the evidence concerning plaintiff's early pre-exposure development – including his delays in walking and talking – suggest pre-existing mental deficits. *See* T.8:1136-37.

caused the plaintiffs to lose IQ points. But plaintiffs' experts did not have any IQ measurements prior to the alleged lead exposure. The court excluded the expert's testimony, explaining:

> While published studies have associated IQ loss with reduced IQ on a community level, these studies do not provide a reliable basis to diagnose individual children with IQ loss absent some type of pre-exposure testing. Defendants are correct that [plaintiffs' expert's] opinion ... that plaintiffs have lost IQ points from lead exposure is pure speculation, and [plaintiffs' expert] will not be allowed to testify at trial that plaintiffs have lost IQ points.

Id. at *6. The same ruling is appropriate here.

III. PLAINTIFF'S EXPERTS DID NOT PROFFER SCIENTIFICALLY RELIABLE AND RELEVANT EXPERT TESTIMONY THAT PLAINTIFF WAS EXPOSED TO LEAD-BASED SHERWIN-WILLIAMS PAINT.

The house in which the plaintiff lived at the time of his alleged ingestion of Sherwin-Williams lead-based paint burned down in 1994. As a result, none of plaintiff's experts was able to test the intact structure to determine whether lead based paint was even used in the home, let alone whether any such paint was (1) manufactured by Sherwin-Williams or (2) on the surface of structures in the house at the time of the alleged exposure or (3) in deteriorated condition (and thus in a condition where ingestion of lead could occur). In an attempt to bridge this gaping chasm in their case, plaintiff's expert Dr. Dowling conducted lead testing on a debris pile of rotting wood at the property some seven years after the house had burned down. Based upon this testing, Dr. Dowling opined to the jury that lead-based paint was present in the house.

Dr. Dowling's testimony is based upon speculation and should not have been allowed before the jury. Dr. Dowling had no factual basis to conclude that the wood he tested from the debris pile in 2001 even came from the plaintiff's residence. *See* T.2:282, 3:303 (Dr. Dowling testifying that he "assume[d] that the wood samples came from the residence.). None of the fact witnesses connected the wood in the debris pile to the home, and the record evidence is that there was no fencing or other structure to prevent access to and from the debris pile during the seven

years after the fire and prior to Dr. Dowling's tests. *See* T.2:298; P-8, p. 125. This case is accordingly on all fours with *Smith v. Clement*, 983 So.2d 285 (Miss. 2008), where similarly unsubstantiated expert product ID testimony was excluded.

In *Clement*, plaintiffs alleged that a school bus fire was caused by copper tubing that had been installed in a school bus 14 years earlier. Because of the school's record retention policy, however, several years of maintenance records for the bus no longer existed. Thus, there was no way to "construct an exact chain of custody for the fourteen years between the 1981 installation of the original propane system [and the copper tubing] and the May 23, 1995, incident at hand." *Id.* at 287. Plaintiffs attempted to bridge this gap through an expert affiant who opined that the copper tubing in place at the time of the fire was the same copper tubing previously installed by the defendant. *Id.* at 288. However, plaintiffs' expert could not dispute the lack of any reliable chain of custody, and he offered no other factual basis upon which he could scientifically conclude that the copper he examined in the bus at the time of the fire was the same tubing installed years earlier. *Id.* at 290. This Court affirmed the exclusion of the expert's testimony because the expert could not demonstrate that his opinion linking the copper tubing to the defendant "was properly grounded in science." *Id.* at 290.

The facts here provide an even stronger basis for exclusion because, unlike in *Clement*, where plaintiffs could point to concrete evidence that the defendant's copper tubing was in the bus at some time, here plaintiff's expert failed to conduct tests that would have allowed him to reach a scientific conclusion that Sherwin-Williams lead-based paint was present even in the wood samples taken from the debris pile, which itself could not be connected to plaintiff's one-time exposure. Dr. Dowling thus could not opine as to the chemical composition of the lead-based paint in the wood debris samples (and whether it matched any Sherwin Williams composition) or even as to the color or layer of the paint on the wood samples that tested positive

for lead. *See* T.2:292, 304-05, 308-310. This "failure to test, although not determinative of a proffered expert's status, is instructive," and numerous courts have "found that a failure to test a hypothesis may disqualify a witness from testifying as an expert." *Indiana Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 852 (N.D. Ohio 2004) (citing cases); *see also Watkins v. U-Haul Int'l*, 770 So.2d 970 (Miss. App. 2000) (affirming exclusion of expert testimony under *Daubert* based in part on fact that expert did not conduct testing to support his proffered opinion). Indeed, as this Court has instructed, because plaintiff elected not to conduct these tests, "we must presume [the test results] would be detrimental to [plaintiff's] case." *Herrington v. Leaf River Forest Prods., Inc.*, 733 So.2d 774, 778 (Miss. 1999).

CONCLUSION

For the foregoing reasons, ACA urges the Court to grant judgment to the Appellant.

Thomas J. Graves Vice President and General Counsel American Coatings Association, Inc. 1500 Rhode Island Avenue, N.W. Washington, DC 20005 (202) 462-8743 tgraves@paint.org	Respectfully submitted, Eric Lasker (DCB # 430180) Rebecca Womeldorf (MSB # 101285) Hollingsworth LLP 1350 I Street N.W. Washington, D.C. 20005 Counsel for American Coatings Association Inc.

CERTIFICATE OF SERVICE

I certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to the following persons at the addresses indicated:

COUNSEL FOR APPELLANT THE SHERWIN-WILLIAMS COMPANY

W. Wayne Drinkwater (MSB # 6193)
Margaret Oertling Cupples (MSB # 9656)
Bradley Arant Boult Cummings LLP
Post Office Box 1789
Jackson, MS 39215-1789
Telephone: (601) 948-8000
Facsimile: (601) 948-3000

Luther T. Munford (MSB #3653)
Fred L. Banks, Jr. (MSB #1773)
PHELPS DUNBAR LLP
Post Office Box 23066
Jackson, MS 39225-3066
Telephone: (601) 352-2300
Facsimile: (601) 366-9777

John G. Corlew (MSB #6526)
Kathy Smith (MSB #10350)
CORLEW MUNFORD& SMITH PLLC
Post Office Box 16807
Jackson, MS 39236-6807
Telephone: (601) 366-1106
Facsimile: (601) 366-1052

Richard H. Deane Jr. (*pro hac vice*)
(Georgia bar # 214875)
JONES DAY
1420 Peachtree St., N.E. Suite 800
Atlanta, Georgia 30309-3053
Telephone: (404) 581-8502
Facsimile: (404) 581-8330

COUNSEL FOR APPELLEE

Michael J. Casano
The Casano Law Firm
4370 Leisure Time Drive
Diamondhead, MS 39525

Timothy W. Porter
Post Office Box 12768
Jackson, MS 39236

Dennis C. Sweet III
Sweet & Associates
Post Office Box 1178
Jackson, MS 39215-1178

TRIAL COURT JUDGE

The Hon. Lamar Pickard
Circuit Court Judge
Post Office Box 310
Hazelhurst, MS 39083

This the 2nd day of July, 2010.

Rebecca Womeldorf