Katz, Abosch, Windesheim, Gershman & Freedman, P.A., and Mark E. Rapson, *Petitioners*, v. Parkway Neuroscience and Spine Institute, LLC, *Respondent*.	*	IN THE COURT OF APPEALS OF MARYLAND COA-PET-0278-2022 September Term, 2022

* * * * * * * * * * *

BRIEF FOR AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus curiae Child Justice, Inc.[1] concurs with Petitioners that this Court should issue a writ of certiorari because review is desirable and in the public interest. The reported decision below got the *Rochkind*/*Daubert* standard wrong, and it will certainly have unintended

[1] Child Justice, Inc. is a national organization that advocates for the safety, dignity, and selfhood of abused, neglected, and at-risk children. The mission of Child Justice is to protect and serve the rights of children in cases where child sexual abuse, physical abuse, or domestic violence are present. It works with local, state, and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, legal services, community service referrals, court-watching services, research, and education. Child Justice also serves important public interests by securing *pro bono* representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats faced by abused, neglected, and at-risk children.

Child Justice is an approved legal services provider for low-income individuals as identified by the *Maryland Legal Services Corporation*. *See* https://bit.ly/3B41UGE.

spillover that will harm Maryland's children if this Court doesn't intervene. From Amicus's perspective, the problem is the decision's expansive holding that trial courts may not exercise their gatekeeping function to exclude expert opinions that use accepted methods but are predicated on junk data. *E.g.*, Op. 24 ("The court, acting as gatekeeper, acts outside of its role when it second guesses the expert's choice of data to rely on when applying the indisputably legitimate choice of methodology—the before-and-after method."). *The Daily Record* picked this up too, broadcasting the decision statewide with the headline "Md. Appeals court: Judges assess method, not data in admitting expert testimony."[2]

That holding is erroneous. *Rochkind*/*Daubert* is intended to allow trial courts wide discretion to "ensure the reliability and relevancy of expert testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). An expert's opinion may be based on a scientifically accepted

---

[2] Steve Lash, *Md. Appeals Court: Judges Assess Method, Not Data in Admitting Expert Testimony*, THE DAILY RECORD (Oct. 11, 2022), https://thedailyrecord.com/2022/10/11/md-appeals-court-judges-assess-method-not-data-in-admitting-expert-testimony/ [https://perma.cc/8U4L-PF83] ("Judges in civil cases may bar experts from testifying when their scientific methodology – the cause and effect – is flawed but may not exclude their testimony because the judges disagreed with the data points used, Maryland's second-highest court . . . .").

methodology but is nonetheless unreliable and irrelevant if its inputs are useless data. In other words, an expert using flawed data can arrive at the correct conclusion those data indicate; but that conclusion is neither reliable nor relevant ***to that case*** because its foundation led the expert astray. Federal circuit courts of appeal that have examined the issue appear to be in accord. *See, e.g.*, *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002) ("Thus, when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony."); *In re TMI Litig.*, 193 F.3d 613, 697 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000) ("If the data underlying the expert's opinion are so unreliable that no reasonable expert could base an opinion on them, the opinion resting on that data must be excluded.").[3] The opinion below removes trial court

[3] *See also EEOC v. Freeman,* 778 F.3d 463, 467 (4th Cir. 2015) ("Most troubling, the district court found a 'mind-boggling' number of errors and unexplained discrepancies in Murphy's database. . . . The sheer number of mistakes and omissions in Murphy's analysis renders it outside the range where experts might reasonably differ.") (cleaned up); *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005) ("Under Matson's method, temperature data from the Texas storage site could be applied to the Georgia and Florida sites because storage conditions were supposedly similar and the sites were all in the same basic latitudinal

discretion to look under the hood to see if an expert's shiny opinion really is what he's claiming.[4]

If the opinion below is permitted to stand, Maryland's children will be immediately impacted by unreliable conclusions proffered by experts and accepted by judges in child custody litigation. Two examples from Amicus's experience help illustrate the point.

1. In recent custody litigation in Frederick County, undersigned counsel represented a mother seeking to regain access to her children (a years-old court order made her visitation limited and supervised). But the custody evaluator wanted to recommend to the court that mother's

---

range. Transposition of data based on such conjecture and rough approximation lacks the 'intellectual rigor' required by *Daubert*.").

[4] The opinion below is a substantial step backwards in the development of *Rochkind*/*Daubert* in Maryland. It is likely to be interpreted by circuit courts as pushing Maryland back into some form of *Frye*/*Reed*—only permitting courts to look at whether an expert's methodology is "generally accepted" and not whether his opinion is both reliable and relevant ***to the case at hand***. *See Reed v. State*, 283 Md. 374, 381, 391 A.2d 364, 368 (1978) ("That is to say, before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. Thus, according to the Frye standard, if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence.").

access to her children not be changed based on the results of psychological and medical tests that were conducted many years before. Counsel successfully convinced the court that new testing needed to be done—the circumstances, whatever they were before, had materially changed. And any expert opinion based on those old tests was unreliable to the reopened case at hand. Amicus is pleased to report that the new tests produced totally different results and mother is now happily reunited with her children in their best interest. This very good result, which is typical of Amicus's work, could never have happened if the opinion below was law at the time; the thoughtful trial court judge would have lacked discretion to exclude the unhelpful conclusion founded on old data.[5]

---

[5] It is of no moment that the gatekeeper and factfinder are the same in child custody litigation. Unfortunately what typically happens is custody evaluators, who are expert witnesses, make recommendations and the court accepts them without conducting an independent analysis. If courts do not (or, now, cannot) act as gatekeeper then most child custody litigation decisions are going to be completely outsourced to custody evaluators. To be sure, that is a preexisting and significant problem that Amicus believes this Court ultimately needs to address—and it has written to this Court about it before. *See Brief for Amici Curiae Child Justice Inc., DV LEAP, Professor Joan Meier, and the Battered Mothers Custody Conference* in *Ross v. Ross*, COA-REG-0057-2020, at 2 (arguing that the Court should explicitly say that *Rochkind*/*Daubert* applies in child custody matters: "If our courts

2. In another recent custody case in Montgomery County, a psychological evaluator diagnosed a protective mother with a delusional disorder because mother believed (based on her child's disclosures to her) that her child was being sexually abused by her father. Although delusional disorder is a valid diagnosis in the abstract, the evaluator got there because of faulty evidence and bad data—a poorly conducted CPS interview and the fact that during SAFE exams of the child no physical evidence was found. The evaluator failed to assess and understand the inadequacy of the CPS interview and the limitations of CPS investigations. She similarly failed to understand and address the fact that physical evidence of sexual abuse is very rare.[6] Instead, based on faulty inputs, the evaluator decided that mother's beliefs were unfounded and she must be suffering from a delusional disorder.

Using our own expert witnesses, undersigned counsel were able to show the court that the evaluator's diagnosis was faulty. But if the

---

continually fail to perform this core gatekeeping function [respecting custody evaluation] in family law matters, they will remain an opaque realm of pseudoscience and conjecture—to the detriment of thousands of Maryland's children every year.").

[6] Nancy D. Kellogg et al., *Genital Anatomy in Pregnant Adolescents: "Normal" Does not Mean "Nothing Happened"*, PEDIATRICS Vol. 113, Issue 1 (January 2004), *available at* https://bit.ly/3GgGsDi.

opinion below existed then, the court would have lacked discretion to keep that bad diagnosis out. And the downstream consequences would have been drastic—not only would it have impacted the custody decision in the moment, but it would likely have affected mother's federal government security clearance and caused her to lose her job.

* * *

The petition should be granted and this Court should issue a writ of certiorari.

Respectfully submitted.

CHILD JUSTICE, INC.

/s/ David R. Dorey
David R. Dorey
(Md. Bar No. 2204110004)
Paul G. Griffin
(Md. Bar No. 9712170016)
Nathaniel T. Grube
(Md. Bar No. 1812110158)
Molly E. Conway
(Md. Bar No. 1206200050)
CHILD JUSTICE, INC.
8720 Georgia Ave., Suite 703
Silver Spring, MD 20910
(301) 254-2745
paul.griffin@child-justice.org

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH MARYLAND RULE 8-112

1. This brief contains 1,495 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ David R. Dorey
David R. Dorey

This brief was prepared using Century Schoolbook, a proportionally spaced type, at 13-point font.

MARYLAND RULE 8-511(e)(2) STATEMENT

If this Court issues a writ of certiorari, Amicus intends to seek the consent of the parties to file an amicus curiae brief on the issues before the Court. If a party(ies) does not consent, Amicus intends to move this Court for permission to file that brief.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2022, I caused the foregoing to be served by MDEC, and two copies hand delivered on the 17th day of November to:

Steven M. Klepper,
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201

Michelle J. Dickinson
Law Office of Michelle J. Dickinson, LLC
5850 Waterloo Road, Suite 140
Columbia, Maryland 21045

Robert D. Schulte
Schulte Booth, P.C.
14 N. Hanson Street
Easton, Maryland 21601

/s/ David R. Dorey
David R. Dorey