In The

Court of Appeals of Maryland

COA-PET. No. 0278 September Term, 2022
COA-PET-0278-2022

KATZ, ABOSCH, WINDESHEIM, GERSHMAN & FREEDMAN, P.A., and MARK E. RAPSON,

Petitioners,

vs.

PARKWAY NEUROSCIENCE AND SPINE INSTITUTE, LLC,

Respondent.

On Appeal from the Circuit Court for Howard County
Honorable Richard S. Bernhardt, Judge

ANSWER TO PETITION FOR WRIT OF CERTIORARI

ROBERT D. SCHULTE, ESQUIRE
SCHULTE BOOTH, P.C.
14 N. Hanson Street
Easton, Maryland 21601
(301) 822-1200
rschulte@schultebooth.com

MICHELLE J. DICKINSON, ESQUIRE
DICKINSON LAW
5850 Waterloo Road
Suite 140
Columbia, Maryland 21045
(443) 325-7225
michelle@dickinson-law.com

Attorneys for Respondent

KATZ, ABOSCH, WINDESHEIM, GERSHMAN & FREEDMAN, P.A., et al.	*	IN THE
	*	COURT OF APPEALS
Petitioners,	*	OF MARYLAND
	*	
v.	*	Petition Docket No. 0278-2022
PARKWAY NEUROSCIENCE AND SPINE INSTITUTE, LLC	*	September Term, 2022
	*	
Respondent.	*	

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ANSWER TO PETITION FOR WRIT OF *CERTIORARI*

The Petition for Writ of *Certiorari* filed by Katz, Abosch, Windesheim, Gershman & Freedman, P.A. and Mark Rapson (collectively, "KatzAbosch") should be denied, as this Court's consideration of the admissibility of a lost profits damages expert opinion in an accountant malpractice case is neither desirable nor in the public interest. This case involves nothing more than a routine application of the factors this esteemed Court meticulously set forth in *Rochkind v. Stevenson*, 471 Md. 1 (2020), in a case with a unique factual predicate.

KatzAbosch contends that a review of the CSA's opinion is necessary because the "stakes are high." The stakes surely are high as to these accountants/financial advisors, who admit to misrepresenting to the public that they were experts in the field of medical practice accounting and who otherwise stand accused of accountant malpractice and resulting financial turmoil, a mass exodus of physician Members, and millions of dollars in lost profits suffered by their client, Parkway Neuroscience and Spine Institute, LLC ("PNSI"). The stakes are <u>not</u> high, however, for the public for whom another decision

regarding the admissibility of an expert opinion in such a fact-specific case as this is neither desirable nor of vital importance.[1]

While this may be the first reported CSA opinion involving the application of *Daubert* to an expert opinion specifically on lost profit damages, it is hardly the first of its kind. Maryland jurisprudence has been drifting towards *Daubert* for years. And trial judges have almost thirty (30) years of post-*Daubert* precedent to guide them in their gatekeeping role with respect to damages experts. Indeed, the CSA had to look no further than the Seventh Circuit to find an opinion "on all fours" in *Manpower, Inc. v. Insurance Co. of Pennsylvania*, 732 F.3d 796, 806-7 (7th Cir. 2013).

Here, as in *Manpower*, the trial court abused its discretion and invaded the province of the jury by *hyper*-scrutinizing the data and assumptions underlying the opinion of PNSI's highly qualified damages expert, Meghan Cardell, CPA, CFE, to justify her exclusion. In a thoughtful 40-page reported Opinion, the CSA unanimously determined that in this particular case, based on these specific facts, the trial court overstepped its bounds. On that score, KatzAbosch's petition should be denied.

CORRECTED STATEMENT OF FACTS

KatzAbosch's Statement of Facts is incomplete and, in certain material respects, inaccurate. The relevant facts supported by record evidence are as follows:

[1] This case does not, as Amicus Child Justice, Inc. contends, deviate from this Court's holding in *Rochkind* or otherwise impact child custody litigants. The purpose of their filing is hard to discern but seemingly is an attempt to revisit their petition for writ of *certiorari*, which was otherwise improvidently granted, in *Ross v. Ross*, 474 Md. 124 (2021).

PNSI is a mixed-specialty medical practice whose practitioners have provided treatment for brain, spine, and peripheral nervous systems disorders since 1998. PNSI began expanding in 2011. Between 2013 and 2014, ten (10) physician Members owned the Practice. Since none had a background in accounting or finance, PNSI relied upon its outside accountants for accounting and financial advice and direction.

On October 22, 2013, PNSI hired KatzAbosch to provide tax, accounting, and financial advice/services to help PNSI continue to grow its practice. PNSI hired KatzAbosch because they held themselves out as experts in the field of medical practice accounting. Their own CEO later admitted in discovery that they were not.

KatzAbosch soon took on the role of *de facto* CFO and, among other bad decisions, directed PNSI to pay out almost $1M in cash flow distributions in a short period of time without any meaningful analysis and despite extraordinary expansion-related capital expenses coming due. In early January 2015, KatzAbosch finally disclosed that PNSI was hemorrhaging money, deeply in debt, and in danger of its lender calling its now-extensive loans, which were personally guaranteed by its Members. The once cash flush PNSI had no cash flow to distribute to Members nor sufficient funds to pay its bills.

PNSI's Members became extremely concerned about the Practice's financial condition and their personal liability. As a result of KatzAbosch's incompetence and the associated financial turmoil, seven (7) of PNSI's then-nine (9) Members withdrew from the Practice between mid-2015 and mid-2016, taking with them substantial revenue streams. PNSI lost millions of dollars in revenue and profits because of the mass exodus. This litigation ensued.

PNSI retained Meghan Cardell as its damages expert. Cardell is a 2011 honors graduate of the University of Richmond, Robins School of Business with two (2) Bachelor's degrees, including one in accounting. She is a Certified Public Accountant ("CPA") and a Certified Fraud Examiner ("CFE"). She is employed by Alvarez and Marsal – a world-wide business consulting firm – and is a Senior Director in that organization's Disputes and Investigations Services Group. In that role, Cardell provides a variety of litigation and consultant services focused primarily on damages calculations, including lost profits. Over the course of her career, she has had dozens of engagements that involve lost profits calculations, including at least one medical practice. She was previously designated as a damages expert in another litigation matter where her qualifications were not challenged.

While both Plaintiff and Defense experts agreed that the departure of physician Members caused PNSI to suffer financial losses, only Cardell calculated PNSI's lost profits damages. KatzAbosch chose not to depose Cardell during discovery.

This Court issued the *Rochkind* opinion long after the close of discovery in this case. Upon a renewed motion by KatzAbosch thereafter, the circuit court permitted Cardell's out-of-time deposition and a pre-trial *Daubert-Rochkind* hearing.

Cardell was the only witness to testify at the hearing. Cardell explained in detail her reasoning for using the "before and after" methodology (*i.e.,* comparing profits before and after a harm event), as opposed to other methodologies, for calculating PNSI's lost profits.

Plaintiff and Defense experts agreed that the "harm event" was the mass exodus of physician Members.

Cardell testified that she selected the full year 2015 as the "before" or base period after analyzing PNSI's actual historical financials and detailed accounting records dating to 2010, and after interviewing and consulting with key individuals in the business – the two (2) remaining physician Members and the Accounting Manager. She further researched and analyzed the market trends in the medical care industry, which she testified included possible fluctuating insurance reimbursement rates which would have been offset by increased access to healthcare via the ACA and demand for medical specialty services by aging Baby Boomers.

Cardell explained in detail why she chose the full year 2015 rather than a shorter or longer period. She did not use just the first six (6) months of 2015 (prior to the first Member leaving) because of the difficulty determining profitability based on a half-year period. Further, as all but one Member remained until near the end of 2015, most revenues would have been accounted for by using the full year, providing a conservative proxy for future profits.

She testified that she did not include 2014 in the base period because PNSI had been investing heavily in growth from 2011 to 2014 such that its expenses were unusually high during that period. Based on the Practice's actual historical financial records and interviews with management, Cardell determined that PNSI had emerged from that growth period by 2015 and was incurring a level of expense that could reasonably be expected in the future.

Cardell calculated PNSI's lost profits damages for the period of 2016-19 at $4,956,080.

In a lengthy ruling from the bench, the circuit court granted KatzAbosch's motion and excluded Cardell's lost profits opinion. The court focused on Cardell's lack of experience conducting lost profits calculations specifically for multispecialty medical practices and found her selection of 2015 as the base period to be speculative. The court criticized the "quality of information" she relied on because it came from PNSI (*albeit,* PNSI's own accounting records and management) – rather than some unidentified independent source. The court also found that Cardell's testimony – on the penultimate issue of the quantum of damages – would somehow not be useful to the jury. The court found that the following factors favored exclusion:

Factor 1 – Ignoring Cardell's detailed testimony regarding how she chose 2015 as the base period, the court found that her calculations could not be tested because certain decisions/assumptions, like the 2015 base year, were "subjective."

Factor 3 – The court found that Cardell's revision of her calculations before her deposition (*albeit,* at the court's invitation and based on new information) indicated a high rate of error in her technique – the generally accepted "before and after" methodology.

Factor 4 – The court found a lack of industry standards or controls for the treatment of LLC employee-member draws in determining lost profits – misapplying the factor, which applies to standards controlling the *technique's* operation, and further ignoring Cardell's undisputed testimony that the treatment of member draws is a fact

specific inquiry and that PNSI paid draws to non-passive employee Members as salaries (i.e., a cost of doing business properly treated as an expense).

Factor 6 – The court found that Cardell calculated lost profits in preparation for litigation – as almost all damages experts do.

Factor 7 – The court found that Cardell "unjustifiably extrapolated" her damages opinion from the premise of 2015 being the proper base period – which the court found problematic, despite being based on PNSI's actual financial data.

Factor 8 – The court found that Cardell's opinion may not be useful if the jury hypothetically were to find that any Member did not withdraw because of KatzAbosch's negligence, even though Cardell was not rendering a causation opinion and all Members testified the financial debacle created by KatzAbosch was a cause of their leaving. The court also found that Cardell failed to opine on whether insurance reimbursement rates affected lost profits – ignoring Cardell's testimony that her market analysis included the possibility of slightly declining reimbursement rates which would have been offset by increased access and demand for specialty healthcare and also the fact that Plaintiff and Defense experts agreed that PNSI's lost profits were caused by the exodus of Members *period*, not a hypothetical decline in reimbursement rates.

Factor 10 – The court found that Cardell's revision of her calculations at the invitation of the court and before her deposition suggested that her field of expertise (i.e., lost profits damages) is not known to reach reliable results.

The circuit court thereafter granted KatzAbosch's motion for summary judgment, which PNSI timely appealed. After briefing and argument, the CSA issued

a 40-page unanimous reported opinion reversing the circuit court. The CSA held that in finding Cardell's opinion unreliable under the *Daubert-Rochkind* standard, the circuit court usurped the role of the jury, made an error of evidentiary law, and abused its discretion. Specifically, the CSA found the following errors/abuses:

- The circuit court improperly found Cardell, a qualified CPA with significant lost profits expertise, unqualified to testify regarding lost profits in this case due to her lack of experience in a particular industry. *Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001) (expert economist's lack of experience in real estate development goes "more towards the foundation" of their testimony than qualifications to calculate damages); *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996) (level of expert's expertise goes to credibility and weight, not admissibility); *Pulse Med. Instr., Inc. v. Drug Impairment Detection Servs., LLC,* 858 F. Supp. 2d 505, 512 (D. Md. 2012) (issues with expert's qualifications may be explored on cross-examination).

- The circuit court *unduly* scrutinized the data relied upon by Cardell and found her calculations unreliable because she used 2015 as the base period, despite her reliance on PNSI's actual accounting records and providing detailed testimony regarding her reasoning for choosing 2015 based on that data. *Washington v. Kellwood Co.,* 105 F. Supp. 3d 293, 306 (S.D.N.Y. 2015) (expert testimony admissible unless data and assumptions "so unrealistic and contradictory to suggest bad faith") (citation omitted); *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) (reliability "is primarily a question of the validity of the methodology employed by an expert, not the quality of data used in applying the methodology or the conclusions produced");

State v. Matthews, 479 Md. 278, 316 (2022) (trial court satisfied that expert applied reliable methodology to adequate supply of data should not exclude expert because conclusions may be inaccurate).

- The circuit court further *unduly* scrutinized the data and found that Cardell failed to consider whether hypothetical changes in reimbursement rates impacted PNSI's profits – ignoring her testimony that any such decrease would have been offset by increased access to healthcare and demand for specialty healthcare services by aging Baby Boomers, which would have increased overall revenue. *Manpower, Inc.*, 732 F.3d 796, 806 (7th Cir. 2013) ("soundness of factual underpinnings…and correctness of expert's conclusions based on that analysis are factual matters to be determined by the trier of fact…").

- The circuit court also *unduly* scrutinized the data and decided that Cardell improperly used Member draws in her calculations of profits – ignoring her undisputed testimony that there are no industry standards for treatment of Member draws in a lost profits calculation and her explanation for treating as expenses draws paid to non-passive employee Members based on the facts of this particular case.

- The circuit court improperly applied *Daubert-Rochkind* Factor 3 and found a high "error correction rate" based on Cardell correcting a mistake in her calculations, where Factor 3 refers to unknown errors in the *methodology employed* – here, the generally accepted before and after methodology. *Aetna Inc. v. Express Scripts, Inc.*, 261 F.R.D. 72, 79-82 (E.D. Pa. 2009) (expert's revision of damages opinion is for cross-examination, not exclusion); *Crowley v. Chait*, 322 F. Supp. 2d 530, 540 (D.N.J. 2004).

- The circuit court found Cardell's opinion unreliable because she calculated lost profits based on the seven (7) Members departing rather than on a member-by-member basis in case the jury were to find causation lacking as to certain Members – ignoring the fact that causation was not at issue in the *Daubert-Rochkind* hearing.

The CSA further rejected KatzAbosch's post-oral argument supplemental brief arguing that Cardell's testimony was properly excluded because her calculations are full of analytical gaps based on *State v. Matthews*, 479 Md. 278 (2022). The CSA held that any perceived issues with the 2015 base year, hypothetical fluctuations in insurance reimbursement rates, and treatment of Member draws go to weight and credibility, not admissibility.

ARGUMENT

I. The CSA Opinion Is Clear – Even on The Most Insignificant Issues

KatzAbosch's main concern is that the CSA's Opinion will be confusing to trial judges on the issue of insurance reimbursement rates – a purely academic issue of miniscule import in this case. In fact, there was no record evidence of any change in reimbursement rates introduced at the *Daubert* hearing or otherwise. KatzAbosch's own damages expert – who agrees that the mass exodus (not some hypothetical rate change) caused the lost profits at issue – never mentioned reimbursement rates in deposition or in any of the four (4) versions of his expert report.

Indeed, the circuit court mentioned reimbursement rates exactly two (2) times in its twenty (20) page opinion – as an example of the "quality of information" relied upon by Cardell, which the court *unduly* and improperly scrutinized (A.57), and as an example of a

possible "alternative explanation" for PNSI's lost profits (A.63), which all experts agreed were caused by the mass exodus, not some hypothetical slight decrease in insurance reimbursement rates.[2]

The CSA did not create some new bright line rule regarding insurance reimbursement rates and lost profits calculations for medical practices. It simply followed the well-worn precept regarding the circuit court's gatekeeping function under Rule 5-702, as espoused by this Court most recently in *State v. Matthews*, 479 Md. 278, 316 (2022), that a trial court's main concern should be the reliability of an expert's methodology, not the quality of the data used. "Once a trial court is satisfied that an expert has applied a reliable methodology to an adequate supply of data, the court should not exclude the expert's testimony merely because the court is concerned that the expert's particular conclusions may be inaccurate." *Id.* (citing *Manpower, Inc. v. Ins. Co. of Pennsylvania*, 732 F.3d 796, 806 (7th Cir. 2013). While some scrutiny is permitted, a court may not exclude a damages expert based upon their conclusions or the reliability of the underlying data and assumptions in applying an accepted methodology, unless the assumptions are wholly speculative and not supported by the record. *Brightview Group, LP v. Teeters*, 2021 WL 2627960, *3 (D. Md. Feb. 8, 2021); *Manpower, Inc.*, 732 F.3d at 806-7 ("[A] court usurps the role of the jury, and therefore abuses its discretion, if it *unduly* scrutinizes the quality of the expert's data and conclusions….") (emphasis added). Judgment calls regarding the use of variables in an accepted methodology, like the "before and after"

[2] KatzAbosch's suggestion that PNSI mentioned reimbursement rates "only in passing" in its initial Brief is consistent with the minimal attention devoted to the issue by the circuit court.

approach, should be explored in cross-examination and decided by the jury. *Washington v. Kellwood Co.*, 105 F. Supp. 3d 293, 307 (S.D.N.Y. 2015).

The CSA held that it was not the role of the trial judge to *hyper*-scrutinize the quality of the data upon which Cardell relied. That holding is not novel and will not have far-reaching impact on Marylanders. Indeed, insurance reimbursement rates would only come up, if at all, in the context of a lost profits damages calculation for a medical practice – and, for that matter, one accepting Medicare or Medicaid. The Parties have not found a single case requiring an expert to analyze insurance reimbursement rates when calculating medical practice lost profits. It is a red herring and nothing more. Review based upon this issue is neither desirable nor in the public interest. Maryland Rule 12-203.

II. The CSA Opinion Is Consistent with Existing Law

KatzAbosch further suggests that the CSA's Opinion is contrary to the law in Maryland and other *Daubert* jurisdictions. Specifically, KatzAbosch baldly contends that esteemed Judges Berger, Friedman, and Senior Judge Adkins – being gun shy from this Court's reversal of the CSA in *Matthews v. State*, 479 Md. 278 (2022) – "overcorrected" by interpreting that decision as a prohibition of any exercise of trial court discretion or scrutiny of data in excluding, as opposed to admitting, expert opinions.[3] The CSA made no such ruling in this case.

[3] Notably, the CSA did not, as KatzAbosch suggests, "allude" to *Matthews* when it held that the circuit court improperly excluded Cardell, in part, based on "missing variables" (*i.e.*, hypothetical reimbursement rates). The CSA specifically referenced *Manpower*, a case which is on "all fours" with this case.

Indeed, over a period of six (6) months, the CSA crafted a thoughtful 40-page Opinion carefully applying the law of *Rochkind*, *Daubert,* and their progeny to the facts of this specific case. The CSA appropriately reviewed the circuit court's opinion and its application of the *Daubert-Rochkind* factors and found that while a trial court certainly has discretion to exclude an expert, the circuit court in this case overstepped its bounds as gatekeeper and abused that discretion. Indeed, the circuit court slammed the proverbial gate in the face of a highly qualified lost profits damages expert applying the generally accepted "before and after" methodology because the trial judge felt she did not have sufficient experience in a particular field and, as in *Manpower*, chose a base period he disagreed with.

The CSA further found that while the circuit court could ensure there was an adequate supply of data which was connected to the expert's conclusions (not *ipse dixit*), the circuit court abused its discretion when it *unduly* scrutinized the quality of the data Cardell relied upon (the actual financial records of the Practice and her market analysis which, in fact, included reimbursement rates) and her conclusions. In short, the CSA determined that – in this particular case, based on these unique facts – the circuit court improperly excluded Cardell based on issues that went to weight, not admissibility, thereby invading the province of the jury. The CSA decidedly did not rule or imply, however, that the circuit court lacked discretion to exclude Cardell had the facts warranted exclusion. To the contrary, the CSA specifically acknowledged that discretion and its well-recognized limits which, in this case, the circuit court exceeded.

KatzAbosch contends that even if this Court were to affirm the CSA decision on appeal, some unidentified group may benefit from an opinion addressing *MicroStrategy Inc. v. Business Objects, S.A.*, 492 F.3d 1344 (Fed. Cir. 2005) – a case upon which the Petitioner relied, but which the CSA did not address in its Opinion. The *MicroStrategy* court properly excluded an expert because, unlike Cardell, that expert ignored evidence of *obvious* factors contributing to a company's losses – a major accounting error requiring downward adjustment of earnings reports, stock plummeting as a result, an SEC investigation, a series of class action lawsuits, a massive layoff, and introduction of new products. Put simply, *MicroStrategy* is inapposite.

This case involves nothing more than a routine application of the factors this Court meticulously set forth in *Rochkind* just two (2) years ago and an acknowledgement that a trial court's discretion has its limits, which under *Daubert* and its progeny is nothing new. KatzAbosch's Petition should be denied.

CONCLUSION

For these reasons, PNSI respectfully requests that this Court DENY the Petition for Writ of *Certiorari* as it is neither desirable nor in the public interest that it be granted.

Respectfully submitted:

/s/ ROBERT D. SCHULTE
ROBERT D. SCHULTE
CPF No. 9512140133
SCHULTE BOOTH, P.C.
14 N. Hanson Street
Easton, Maryland 21610
(410) 850-4600
rschulte@schultebooth.com

/s/ MICHELLE J. DICKINSON
MICHELLE J. DICKINSON
CPF No. 9812160003
DICKINSON LAW
5850 Waterloo Road, Suite 140
Columbia, Maryland 21045
(443) 325-7225
michelle@dickinson-law.com

Counsel for Respondent

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3581 words, excluding the parts of the brief exempted from the word count by Rule 8-503; and
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

By: /s/ Robert D. Schulte
Robert D. Schulte

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CERTIFICATE OF SERVICE

Court of Appeals
No. 0278, September Term 2022
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Gershman & Freedman, P.A., et al.
Petitioners,
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Parkway Neuroscience and Spine
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Respondent.
----------)

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Schulte Booth, P.C., Attorneys for Respondent, to print this document. I am an employee of Counsel Press.

That on the **30th day of November 2022**, I served the within **Answer to Petition for Writ of *Certiorari*** upon:

Steven M. Klepper, CPF# 0112120030
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030 (t)
(410) 539-1269 (f)
Attorneys for Petitioners Katz, Abosch, Windesheim, Gershman & Freedman, P.A., *et al.*

David R. Dorey, CPF# 2204110004
8720 Georgia Ave., Suite 703
Silver Spring, MD 20910
(301) 254-2745 (t)
Attorneys for Amicus Curiae Child Justice, Inc.

via MDEC and FedEx, overnight delivery, by causing a true copy, enclosed in a properly addressed wrapper, to be deposited in an official depository of Federal Express.

November 30, 2022

/s/ Robyn Cocho
Robyn Cocho