

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
*
* Petition Docket No. 278
* September Term, 2022
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**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

PNSI begins by arguing that trial courts do not need further *Daubert* guidance from this Court. PNSI overlooks that last month the Court granted certiorari in a lead-paint case, *Oglesby v. Baltimore School Associates*, No. 26, Sept. Term 2022. The issues include: “Did the trial court abuse its discretion when it found that Petitioner’s medical expert lacked an adequate supply of data to opine as to the source and source causation of Petitioner’s lead exposure?”

Because *Oglesby* and this case address “adequate supply of data” in two different contexts, decisions from this Court in the two cases would together give trial courts even better guidance as they “learn to be comfortable refocusing their thinking about the building blocks of what truly makes evidence that is beyond the knowledge and experience of lay persons useful to them in resolving disputes.” *Rochkind v. Stevenson*, 471

Md. 1, 38 (2020) (quoting *United States v. Horn*, 185 F. Supp. 2d 530, 554-55 (D. Md. 2002)).

PNSI concedes that some scrutiny of a factual foundation is permissible, just not “undue” scrutiny. But how much scrutiny is due or undue? Under the CSA’s broad language, it is difficult to see how a trial court can exercise *any* scrutiny without crossing the line into undue scrutiny. A30 (“Whether Ms. Cardell failed to consider reimbursement rates is not an issue with the methodology[.]”); A33 (“Because the circuit court excluded Ms. Cardell’s testimony—in part—based on missing variables, the court misapplied the law and thus abused its discretion and usurped the role of the jury.”).

Underscoring the dearth of guidance for trial judges, PNSI does not try to reconcile the CSA’s analysis with the treatise the CSA cited, Weinstein’s Federal Evidence § 702.05. To exercise discretion in the wide range of cases before them, trial judges need more guidance than a federal decision involving a single methodological flaw. *See Answer*, at 2, 8-9, 11-13 (citing *Manpower* decision eight times).

The circuit court acted within its discretion in finding this particular opinion unhelpful to the jury. The general validity of the before-and-after method was not in dispute, only Cardell’s peculiar

application of that method. Her benchmark analysis turned on her decision to treat member draws as expenses, even though: (1) she could identify no standard for that treatment; and (2) increasing member draws is favorable to PNSI's members, even as it reduced the entity's taxable income; and (3) member draws were stable in the lost-profits period. From there, Cardell could not explain how her recalculation showing increased profitability in 2016 matched her use of a 2015 benchmark. Nor had she considered reimbursement rates or profit margins.

These weaknesses had nothing to do with disputed facts. They are fundamental holes in Cardell's opinion—holes that made her testimony unhelpful to the jury in measuring with reasonable certainty the profits PNSI asserted it lost as a result of its members leaving.¹ Cardell could not answer fundamental questions on whether her calculations measured profitability at all, much less with reasonable certainty.

The only question here is whether a reasonable judge could have ruled how Judge Bernhardt did here. Already, Maryland trial judges are

¹ Cardell testified to other categories of damages that would have supported the damages element of PNSI's tort claims. PNSI decided, however, to forego those other categories of damages.

asking for supplemental briefing on the effect of this reported decision, as they wonder how much they can scrutinize an opinion for an “adequate supply of data” under *State v. Matthews*, 479 Md. 278, 309 (2022). Review is desirable and in the public interest.

Respectfully submitted:

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1. This paper contains 677 words, excluding the parts that Rule 8-503 exempts from the word count.
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I certify that, on December 13, 2022, I filed this paper by MDEC,
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