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. _____ September Term, 2022

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PETITION FOR WRIT OF CERTIORARI

This petition is from Maryland's first reported opinion applying *Daubert* to lost-profit calculations. The stakes are high. The CSA's rationale would apply to all lost-profit claims, in tort and contract. Across all subjects, the CSA's broad language casts doubt on trial courts' discretion to exclude opinions for an "[in]adequate supply of data" under *State v. Matthews*, 479 Md. 278, 309 (2022).

The circuit court did what this Court has told it to do. It identified the relevant factors. It made findings on those factors and exercised its discretion. The findings included that the expert calculated profits without reviewing the "reimbursement rates"—what health insurers pay for respondent's medical procedures—that control profit margins.

Still, the CSA held that the trial court abused its discretion in excluding the opinion. It is desirable and in the public interest to review

whether Maryland's first lost-profits *Daubert* appeal "is the rare case in which a Maryland trial court's exercise of discretion to admit or deny expert testimony will be overturned." *Matthews*, 479 Md. at 286.

Question Presented

Did the CSA err in finding that the trial court abused its discretion in excluding expert testimony on lost profits?

Pertinent Rules

Md. Rules 5-702 and 5-703.

Facts

Respondent ("PNSI") is a medical practice—a unique combination of neurosurgeons and pain specialists. It accused Petitioners ("KatzAbosch") of accounting malpractice. PNSI said KatzAbosch made errors that caused cash-flow problems and, in turn, a "mass exodus" of seven of PNSI's nine members in 2015 and 2016.

PNSI's damages expert was Meghan Cardell, CPA, CFE. She calculated three categories of damages: fees paid to KatzAbosch; amounts owed to departing doctors; and lost profits from 2016 to 2019.

KatzAbosch moved to exclude Cardell's lost-profits opinion. The circuit court heard Cardell's testimony, summarized its findings,

matched those findings with the *Rochkind* factors, and excluded her lost-profits opinion. *A50-65*. It made five main findings.

Reimbursement Rate (Factor 8): The "reimbursement rate" is what insurers pay for different medical procedures. PNSI said it hired KatzAbosch to rework its compensation model to increase neurosurgeons' pay vis-à-vis pain specialists to reflect the higher reimbursement rates for neurosurgery procedures.

Cardell did not, however, review reimbursement rates for any of PNSI's procedures. She did not know if the rates declined, increased, or were stable in her lost-profit period, compared to 2015. When shown a chart of declining reimbursement rates for PNSI's procedures, Cardell could not comment on its accuracy. *A75-79*.

Judge Bernhardt twice asked Cardell about the impact if, for the same procedure, PNSI received $100 in 2015 and $80 in 2016. *A80-83*. Her roundabout answer was that it would have made no difference in her calculations, and that rising overall demand for medical specialists made review of PNSI's reimbursement rates unnecessary. *Id.*

The circuit court found that this omission weighed against admissibility under *Rochkind* Factor 8—whether the expert has accounted for obvious alternative explanations. *A63*.

Member Draws (Factor 4): Like most professional LLCs, PNSI historically distributed all excess revenue to its members, rather than keep the money in the bank as taxable income. 2015 was the only exception. In projecting lost profits, Cardell assumed 2015 marked a turning point when the LLC itself would have begun to leave increasing money in the bank for years to come.

That assumption followed Cardell's decision to treat member draws from the LLC's coffers as above-the-line expenses and not below-the-line profits. That decision is fundamental to the concept of profitability. Is a professional LLC's financial purpose to maximize (a) distributions to its members, or (b) year-end money in the bank?

Cardell did not know the answer. She contacted an unnamed damages expert, who also knew of no standard. *A70.* Cardell testified that, although she treated member draws as expenses, treating the draws as profits would not have affected her calculation. *A70-71.*

That answer was objectively wrong, in two ways. First, the draws for PNSI's two remaining members stayed at around $1.6 million per year from 2015 to 2019. Cardell emphasized that their "draws were not materially different over this time in any way." *A73.* If a professional LLC's goal is to generate money to distribute to its members, then PNSI

was no less profitable 2017-2019 than in 2015. Second, Cardell identified 2015 as the benchmark only after deducting member draws each year from 2011 to 2019. *A67*. Thus, 2015 stood out, and Cardell disregarded prior years, only because she was comparing PNSI's post-distribution balance in 2015 ($321,000) to 2011-2014 (around $0).

It would be one thing if Cardell had testified that some objective standard, or school of thought among accountants, favored treating member draws as expenses. Such a standard would guard against the risk of an expert working backward from the conclusion that 2015—which coincided with the start of the "mass exodus"—was profitable and the "after" years were not. The trial court gave Cardell every chance to cite an objective standard, and Cardell confirmed she could not. *A66-71*.

Judge Bernhardt found that Factor 4, the existence and maintenance of standards, weighed against admission, because "there didn't seem to be any actual standards, at least none that the witness was aware of." *A61*.

Selection of 2015 Benchmark (Factors 1 and 7): After treating member draws as expenses, Cardell looked at the 2010 to 2015 period, saw only 2015 as profitable, and treated it as the benchmark against which to test 2016-2019. Her explanation for excluding 2010-2014 relied

on generalizations that PNSI had "sort of hit its stride" or gotten through a "squeeze period." *A13-15*. She gave no direct answer when asked whether 2014 was unusually expensive-intensive.

The trial court found that the "before and after" method "certainly can be tested," but the "problem is I couldn't figure out how it could be tested in this case based on [Cardell's] testimony." *A58-59*. Her approach was "so subjective," and "there's nothing I've been presented from which the way that she selected 2015 and the factors that she used in selecting 2015 could be tested." *A59*.

Change on 2016 Profitability (Factors 3 and 10): In May 2021, Cardell updated her opinion to exclude pandemic years, leaving the 2016-2019 period *(A66)*:

	Base Year 2015 [a]	2016 [b]	2017 [c]	2018 [d]	2019 [e]
Revenue	$ 14,752,067	9,901,009	8,668,327	9,330,461	9,772,697
Less: MU Income	*(101,744)*	*(43,032)*	-	-	-
Adjusted Revenue	14,650,323	9,857,977	8,668,327	9,330,461	9,772,697
Expenses	14,495,085	9,941,732	10,241,352	9,726,453	9,902,666
Less: Depreciation	*(66,263)*	*(50,587)*	*(95,141)*	*(41,468)*	*(41,468)*
Less: MU Expense	*(472,364)*	*(5,400)*	*(39,448)*	*(13,520)*	-
Plus: Katz Abosch [1]	*53,015*	-	-	-	-
Plus: Trauma/OnCall Adjustment [2]	-	-	*129,573*	*767,573*	*767,573*
Adjusted Expenses	14,009,473	9,885,745	10,236,336	10,439,039	10,628,771
Adjusted Income	**$ 640,851**	**$ (27,767)**	**$ (1,568,009)**	**$ (1,108,577)**	**$ (856,074)**
		[b] - [a]	[c] - [a]	[d] - [a]	[e] - [a]
Lost Profits		**$ (668,618)**	**$ (2,208,860)**	**$ (1,749,428)**	**$ (1,496,925)**

Three weeks later, on the eve of the *Daubert* hearing, Cardell changed her calculation for those same years *(A67)*:

	Base Year 2015 [a]	2016 [b]	2017 [c]	2018 [d]	2019 [e]
Revenue	$ 14,752,067	9,901,009	8,668,327	9,330,461	9,802,826
Less: MU Income	*(101,744)*	*(43,032)*	-	-	-
Adjusted Revenue	14,650,323	9,857,977	8,668,327	9,330,461	9,802,826
Expenses	14,495,085	9,941,732	10,241,352	9,726,453	9,902,666
Less: Depreciation	*(66,263)*	*(50,587)*	*(95,141)*	*(41,468)*	*(41,468)*
Less: MU Expense	*(472,364)*	*(5,400)*	*(39,448)*	*(13,520)*	-
Plus: Katz Abosch [1]	*53,015*	-	-	-	-
Trauma/OnCall Adjustment [2]	*319,100*	*(395,010)*	*77,000*	*842,400*	*1,233,617*
Adjusted Expenses	14,328,573	9,490,735	10,183,763	10,513,865	11,094,815
Adjusted Income	**$ 321,751**	**$ 367,243**	**$ (1,515,436)**	**$ (1,183,404)**	**$ (1,291,989)**
			[c] - [a]	[d] - [a]	[e] - [a]
Lost Profits			**$ (1,837,186)**	**$ (1,505,155)**	**$ (1,613,739)**

The result was to halve PNSI's profitability in her benchmark year of 2015, and to move 2016 from the loss column, so that 2016 was more profitable than 2015. This move has major implications for Cardell's decision to treat 2015 as her benchmark year.

After Cardell moved expenses between years, PNSI's profitability *grew* from 2015 to 2016—amid the "mass exodus" and a drop in gross revenue from $14.7 million to $9.9 million. What, then, was Cardell measuring? If she found increasing profitability 2015-2016 when revenue dropped 33%, and if remaining members' draws remained steady, how did her particular application of the before-and-after methodology capture changes in profitability from members' departure?

Cardell, however, simply moved expenses between years and re-ran the numbers. She did not grapple with the implications of 2016's

profitability, or why it still made sense to use a before-and-after analysis with 2015 as the sole benchmark.

The circuit court found that this sudden change weighed against admissibility on Factor 3 (known or potential error rate) and Factor 10 (reliability of results). The "findings changed in June of this year for fully subjective reasons, it had nothing to do with any new information. It kind of makes the whole reliability even that much more suspect." *A64.*

Experience with Medical Practices (Factor 6): Cardell had little experience with medical practices. She once calculated lost profits for a medical-type practice, but could not remember whether the entity's structure resembled PNSI's.

The trial court refrained from making a threshold finding whether Cardell was qualified or unqualified: "I want to be clear, I am not finding that she's not an expert. I'm not finding that she is an expert." *A50.* Rather, the trial court explained how, at several points, Cardell's lack of experience heightened its other concerns: "I very carefully put that off because number one I still think that her level of experience and knowledge … comes into play under a *Daubert* assessment." *Id.* Cardell's relative inexperience with medical practices made it harder for PNSI to carry its burden of showing that Cardell reliably applied the before-and-

after methodology when choosing 2015 as the benchmark *(A53)*, treating member draws as expenses *(A57)*, and declining to research or consider PNSI's reimbursement rates *(A57-58)*. The trial court noted that these concerns implicated Factor 6—whether the testimony grows out of the expert's prior research or was developed for the lawsuit—and found that this factor weighed against admission. *A61-63*.

The Appeal: Rather than go to trial, PNSI dismissed with prejudice its claims for the remaining categories of damages that Cardell calculated. On the parties' stipulation that excluding Cardell's lost-profit opinion left PNSI unable to prove damages, the trial court entered summary judgment for KatzAbosch.

PNSI's opening brief addressed none of the *Rochkind* factors or the trial court's findings on those factors. Instead, noting that Judge Bernhardt said he probably would have admitted Cardell's opinion under *Frye-Reed*, PNSI argued that "*Rochkind* changed nothing." Appellant's Br. 20. PNSI mentioned the reimbursement rate only in passing, without addressing the trial court's Factor 8 finding. There was no mention of member draws (Factor 4). After KatzAbosch highlighted these omissions, PNSI first challenged the Factor 4 and 8 findings in its reply brief.

Reversing, the CSA held that the trial court abused its discretion at every turn, including on findings PNSI first challenged in its reply.

Argument

Trial judges want guidance on their gatekeeping role. Knowing this case would likely set precedent, the trial judge approached the "*Rochkind/Daubert* world" with humility and great care. *A46*. Foreseeing "really interesting and good issues to explore in Annapolis," the trial judge did "the best I can to frame the *Daubert/Rochkind* issue because it's a brand new, clean slate in Annapolis on that." *A48-49*. He identified his general concerns and then made findings matching those concerns with the *Rochkind* factors. *A50-65* Considering those findings together, the trial court exercised its discretion to "find that the Plaintiff has failed to meet their burden to demonstrate [under] *Daubert* and *Rochkind* the reliability" of Cardell's lost profit opinion. *A64*.

The CSA's reported opinion turned these findings into a cautionary tale for Maryland trial judges on how not to decide *Daubert* motions. It imposed limits on trial courts' discretion that are likely to create confusion if this Court does not grant review.

Profit Margins: Reimbursement rates are the starkest example, because Cardell built a lost-profits model that did not account for profit

margins. A business' profits are its revenue in excess of expenses. *MAS Assocs., LLC v. Korotki*, 465 Md. 457, 491 n.16 (2019). Cardell's model turned on rising demand. Unlike most professions, however, physicians cannot simply raise their rates when demand rises. Health insurers—not bound by supply-and-demand principles—decide what to pay doctors for procedures.

Cardell acknowledged that fact. Still, Cardell built a model under which it would have made no difference if, for the same procedure, insurers paid PNSI $100 in 2015 and $80 in 2016. The reason the record includes no chart of reimbursement-rate trends for PNSI's procedures is that Cardell did not examine those rates and, therefore, could not authenticate the chart KatzAbosch showed her at the hearing.[1] *A76-79*. The trial court thus found that Factor 8 weighed against admissibility.

KatzAbosch cited authorities under which this finding was correct, and certainly not an abuse of discretion. When courts exclude lost-profit opinions, a frequent reason is the expert's failure to consider enough factors. Although "an expert need not consider *every* possible factor to

[1] Because PNSI presented no evidence of reimbursement rates, there is no concern that the trial court took sides in a credibility contest. *See Frankel v. Deane*, 480 Md. 682, 703 (2022).

render a 'reliable' opinion, the expert still must consider '*enough*' factors to make [the] opinion sufficiently reliable in the eyes of the [trial] court." *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1355 (Fed. Cir. 2005). *MicroStrategy* affirmed the exclusion of a lost-profits opinion that "ignored significant factors that might have excluded the torts as the reason for the losses." *Id.* at 1356. It explained:

> This pre-admission determination (i.e., whether or not *enough* factors have been considered to make an expert report *sufficiently* reliable) is committed to the sound discretion of the district court, *not* the jury. Stated simply, an expert need not consider every possible factor. At the same time, the [trial] court has the responsibility to exclude an expert opinion that overlooks factors that render the testimony unreliable and/or speculative.

Id. at 1355-56 (citations omitted; emphasis in original); *see also MyGallons LLC v. U.S. Bancorp*, 521 F. App'x 297, 307 (4th Cir. 2013) (Niemeyer, J., joined by Motz, J.) (lost-profit projections for a prepaid-gasoline business were unreliable because expert did not examine drivers of profitability like gas prices). "Even if [such] other market factors 'may not have made a difference in the ultimate outcome of [the lost-profit] analysis,' [the expert's] failure to consider them, or to offer an explanation for [that] failure, creates 'enough of a doubt as to the overall reliability of [the] opinions as to render them inadmissible.'" *Concordia*

Pharms., Inc. v. Method Pharms., LLC, 2016 WL 1464639, at *6 (W.D. Va. Apr. 13, 2016) (quoting *Smithers v. C&G Custom Module Hauling*, 172 F. Supp. 2d 765, 771 (E.D. Va. 2000)).

Breadth of the CSA's Opinion: Without discussing Katz-Abosch's citations, the CSA held that the trial court unduly scrutinized Cardell's data. It reasoned that this case "is less about failure to consider alternatives for what caused lost profits—since Ms. Cardell is not a causation expert—and more about alleged failure to calculate lost profits properly, or at least calculate and present to the court all possible variables." *A30*. "Whether Ms. Cardell failed to consider reimbursement rates is not an issue with the methodology—the before-and-after method. Rather, it is an issue with the soundness of the data she used to reach her conclusion." *Id.*

With this framing, the CSA made a sweeping holding: "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." *A33*.

Conflict in the Law: This holding creates conflict within Maryland case law and puts Maryland out of step with other *Daubert* jurisdictions. The CSA's reference to "missing variables" alluded to

Matthews. In *Matthews*, the CSA found an abuse of discretion in admitting a photogrammetry opinion, because "missing input variables that had not been considered in the seemingly precise height calculation prevented a reliably accurate height calculation." *Matthews v. State*, 249 Md. App. 509, 544 (2021).

Reversing, this Court emphasized the trial court's range of discretion, including to assess the adequacy of the expert's supply of data. To have "a sufficient factual basis" under Rule 5-702, an expert opinion must result from both "(1) an adequate supply of data; and (2) a reliable methodology. Absent either of these factors, an expert opinion is 'mere speculation or conjecture.'" *Matthews*, 479 Md. at 309 (quoting *Rochkind v. Stevenson*, 471 Md. 1, 22 (2020)). The "trial court *could conclude* based on [the expert's] testimony, that [she] applied her reliable technique to an adequate supply of data." *Id.* at 317 (emphasis added). The CSA erred in *Matthews* because "the trial court did not necessarily abuse its discretion by failing to exclude [the] testimony." *Id.*

Still, this Court was careful in *Matthews* "to emphasize that just because the trial court was not required to exclude [the] testimony when [the expert] acknowledged an unknown degree of uncertainty, it does not follow that the trial court was required to admit it." *Id.*

In reversing here, however, the CSA proceeded as though this Court had held in *Matthews* that the trial court lacked discretion to exclude the opinion. The CSA relied heavily on *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013), noting that in *Matthews* this Court quoted from *Manpower* for the proposition that 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 rather than the reliability of the methodology the expert employed." *A33*. The CSA also quoted from a treatise cited in *Rochkind*: "[A]nalytical focus should be on principles and methodology. Trial courts may not reject expert testimony simply because they disagree with the conclusions reached by the witness." *A33-34* (quoting 4 Weinstein & Berger, Weinstein's Federal Evidence § 702.05[2][a] (2d ed. 1997)).

A fuller examination of that section from Weinstein—a treatise this Court often cites—shows how the CSA swung the pendulum too far in finding an abuse of discretion here. Just after the quoted language, the treatise discusses the trial judge's gatekeeping function: "To be *admissible*, expert opinions must be based on sufficient facts or data. Thus, an expert's testimony is *inadmissible* if it is based on suppositions rather than facts." Weinstein § 702.05[2][b] (emphasis added). Weinstein

highlights Factor 6—"whether the witnesses propose to testify based on matters growing naturally out of research they have conducted independently of the litigation"—as particularly relevant to the sufficiency of the expert's facts and data. On Factor 6, Judge Bernhardt expressed these precise concerns as to reimbursement rates, member draws, and the benchmark year. *A53-58, 61-62*.

Later in § 702.05, Weinstein addresses the gatekeeper's role in ensuring that for "an expert's opinions to be *admissible*, the expert must have reliably applied the principles and methods to the facts of the case." Weinstein § 702.05[2][d] (emphasis added). The "issues that trial courts have considered in determining whether the expert witness has reliably applied the principles and methods" include Factor 8, whether "the witness has adequately accounted for alternative explanations for the effect whose cause is at issue." *Id.* Here again, the trial court found such concerns weighed against admission on the reimbursement rates. *A63*.

Manpower, although cited in *Matthews*, does not establish an abuse of discretion here. *Manpower* reversed a trial court opinion excluding an expert based on a single point in the analysis. 732 F.3d at 806. The expert compared the five-month period before and after an insurance loss to extrapolate a 7.76% growth rate. *Id.* The growth rate

would have been 3.8% if the expert had used the 17-month period before the loss, but the expert cited specific facts supporting his cutoff—the business' acquisition by another company, which installed new management. *Id.* at 801-02.

Judge Bernhardt, by contrast, found that PNSI fell short of its burden due to a confluence of problems in Cardell's analysis:

- the reimbursement rate, which Cardell failed to investigate, is the predominant determinant of PNSI's profit margins;
- Cardell chose 2015 as her benchmark after treating member draws as expenses and not profits, despite identifying no standard guiding that choice;
- Cardell, unlike the *Manpower* expert, cited only subjective, untestable generalities in selecting 2015 as the sole benchmark and excluding 2014;
- Cardell moved around expenses at the last minute—halving 2015's profitability and making 2016 more profitable than 2015—without explaining this move, which undermined core assumptions in her before-and-after analysis; and

- Cardell's lack of experience with medical practices, although not a standalone ground for disqualification, exacerbated all of these concerns.

Need for Clarification: The chief problem with the CSA's opinion is that it overcorrected following *Matthews*, missing critical nuances that guide a trial court's exercise of discretion and an appellate court's review of that discretionary decision.

Although it is error when a trial court "*unduly* scrutinizes the quality of the expert's data and conclusions," some scrutiny is due. *Manpower*, 732 F.3d at 806 (emphasis added). The CSA did not address authority holding that, even though experts "need not consider every possible factor," the trial court still "has the responsibility to exclude an expert opinion that overlooks factors that render the testimony unreliable and/or speculative." *MicroStrategy*, 429 F.3d at 1355-56. This responsibility is baked into the *Daubert* factors, especially 7 and 8.

The CSA also overlooked the *Daubert* factors' flexibility. It held that Factor 8 did not apply because "Cardell is not a causation expert." *A33*. Although Cardell was not testifying that KatzAbosch's alleged

negligence caused PNSI members to leave,[2] she was opining that $5 million was the amount of lost profits caused by their exit. In any event, the *Daubert* factors are flexible and non-exhaustive. *Rochkind*, 471 Md. at 36-37. The trial court has the "same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. *Id.* at 37 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999)). Even if courts developed Factor 8 in the medical context, the trial court had discretion to express similar concerns over a lost-profit calculation made without examining the reimbursement rates that dictate PNSI's profit margin for each procedure.

Another significant problem is how the CSA examined each finding as though it were (or had to be) a standalone basis for exclusion, rather than examining how the various findings reinforced one another. A key example is Cardell's qualifications. The trial court made no blanket finding that Cardell was unqualified to testify about medical practices. The trial court could and did consider Cardell's level of experience as it related to other problems and, in turn, the gestalt decision that the opinion lacked a sufficient basis. *See* Weinstein § 702.05[2][b].

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[2] The trial court barred a different PNSI expert who offered such an opinion, and PNSI does not challenge that ruling.

In holding that the trial court abused its discretion in every respect, the CSA undermined trial judges' discretion. A trial judge could reasonably conclude from this opinion that the appellate courts will scrutinize rulings excluding experts more closely than rulings admitting experts. If so, judges will not be exercising true discretion.

No matter how the Court may rule on the merits, there would a great benefit in an opinion that addresses persuasive authorities, like *MicroStrategy*, supporting a holding that the trial court got at least some things right. If the Court were to decide that some findings were within the trial court's discretion but that there were some errors, it could address whether the error was prejudicial and, if so, remand for a new ruling.

For all of these reasons, review of these important issues is desirable and in the public interest.

Rule 8-303(b)(1)(A)-(E) Matters

The references in the lower courts were *Parkway Neuroscience & Spine Institute, LLC v. Katz, Abosch, Windesheim, Gershman & Freedman, P.A., et al.*, Howard County Circuit Court No. C-13-CV-18-000181; Court of Special Appeals No. CSA-REG-0658-2021.

The circuit court entered final judgment on July 8, 2021, adjudicating all claims against all parties in their entirety.

The CSA issued its reported opinion on September 30, 2022. Its mandate issued on November 2, 2022.

Conclusion

The Court should grant the petition.

Respectfully submitted:

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Certification of Word Count and Compliance With Rule 8-112

1. This petition contains 3,825 words, excluding the parts that Rule 8-503 exempts from the word count.

2. This petition complies with the font, spacing, and type size requirements stated in Rule 8-112.

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Certificate of Service

I certify that, on November 14, 2022, I served this petition by first-class mail and email on respondent's counsel:

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Docket Entry Evidencing Circuit Court's Judgment

CIRCUIT COURT FOR HOWARD COUNTY, MD

CASE SUMMARY

CASE NO. C-13-CV-18-000181

Parkway Neuroscience and Spine Institute, LLC vs. Katz, Abosch, Windesheim, Gershman & Freedman, P.A., et al.

Location: **Howard Circuit Court**
Judicial Officer: **Bernhardt, Richard S.**
Filed on: **06/01/2018**

CASE INFORMATION

Related Cases
CSA-REG-0658-2021 (Case Appealed)

Case Type: **Tort - Malpractice Professional**

Case Status: **07/12/2021 Appealed**

DATE	CASE ASSIGNMENT

Current Case Assignment

Case Number	C-13-CV-18-000181
Court	Howard Circuit Court
Date Assigned	06/01/2018
Judicial Officer	Bernhardt, Richard S.

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A1

Docket Entry Evidencing Circuit Court's Judgment

CIRCUIT COURT FOR HOWARD COUNTY, MD

CASE SUMMARY

CASE NO. C-13-CV-18-000181

07/06/2021	Stipulation *Stipulation of Dismissal of Certain Claims and Stipulation of Plaintiff's Inability to Prove Damages in Light of June 30, 2021 Ruling* Party: Plaintiff Parkway Neuroscience and Spine Institute, LLC; Defendant Katz, Abosch, Windesheim, Gershman & Freedman, P.A.; Defendant Rapson, Mark E
07/07/2021	Motion *Motion to Shorten Time to Oppose Motion for Summary Judgment* Filed by: Defendant Katz, Abosch, Windesheim, Gershman & Freedman, P.A.; Defendant Rapson, Mark E
07/07/2021	Motion for Summary Judgment *Defendants' Motion for Summary Judgment* Filed by: Defendant Katz, Abosch, Windesheim, Gershman & Freedman, P.A.; Defendant Rapson, Mark E
07/07/2021	Supporting Exhibit *Ex. 1 - MSJ*
07/07/2021	Supporting Exhibit *Ex. 2 - MSJ*
07/07/2021	Supporting Exhibit *Ex. 3 - MSJ*
07/08/2021	Order (Judicial Officer: Bernhardt, Richard S.) *Defendants' Motion to Shorten Time MOOT.* *07/08/21 e/served to all counsel of record.*
07/08/2021	Order (Judicial Officer: Bernhardt, Richard S.) *Defendant's Motion for Summary Judgment is Granted, Count 1, Count 2, and Count 3 of the Amended Complaint are Dismissed with Prejudice, Any objections to the Court's June 30, 2021 ruling and July 1, 2021 Order and Supplemental Order excluding Plaintiff's damages expert shall be preserved for appeal further ordered that the entire case is hereby Dismissed with Prejudice. E-Service to Counsel 7697400*
07/08/2021	Opposition *Opposition to Motion for Summary Judgment* Filed by:: Defendant Katz, Abosch, Windesheim, Gershman & Freedman, P.A.
07/08/2021	Certificate of Service *Certificate of Service of Opposition to Motion for Summary Judgment*
07/08/2021	**Summary Judgment** (Judicial Officer: Bernhardt, Richard S.)
07/12/2021	Notice of Appeal to COSA *Notice of Appeal* *7/13/21 Sent to COSA;* *PHI&Acknowledgment Form* *E-Served#7716900* Filed by: Plaintiff Parkway Neuroscience and Spine Institute, LLC
07/12/2021	Certificate of Service *Certificate of Service of Notice of Appeal*

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Parkway Neuroscience and Spine Institute, LLC v. Katz, Absoch, Windesheim, Gershman & Freedman, P.A., et al., No. 658, September Term, 2021, Opinion by Adkins, J.

EVIDENCE-EXPERT TESTIMONY: The admissibility of expert testimony is largely within the discretion of the trial court. Such a ruling, however, may be reversed on appeal if it is founded upon an error of law. Judges making discretionary rulings must apply correct legal standards.

EVIDENCE—*DAUBERT-ROCHKIND*: A trial court, in its gatekeeper role under *Rochkind* and *Daubert*, acts improperly in excluding the testimony of a qualified certified public accountant testifying about lost profits of an LLC medical practice—on grounds that the expert's experience with such analysis, although extensive, had only included one medical practice. Any lack of specialized experience is ripe for cross-examination at trial.

EVIDENCE—*DAUBERT-ROCHKIND*: Trial court erred in holding expert testimony unreliable under the *Daubert-Rochkind* standard after accepting expert's methodology—the before-and-after method of calculating lost profits. Court's rationale was (1) using 2015 as the base year; (2) failing to consider changes in insurance reimbursement rates; (3) failing to articulate standards to define economic impact and treat member draws; (4) changing her calculations while the underlying facts remained the same; and (5) failing to offer calculations for profit loss based on variable jury determinations. None of these criticisms addressed methodology, and they were more appropriate for cross-examination and advocacy at trial.

EVIDENCE—MARYLAND RULE 5-702: Maryland Rule 5-702 requirement that there is "a sufficient factual basis" supporting the testimony does not justify a trial court's exclusion of such testimony based upon the correctness of the expert's conclusions. "[A]nalytical focus should be on principles and methodology. Trial courts may not reject expert testimony simply because they disagree with the conclusions reached by the witness." Jack B. Weinstein, Weinstein's Federal Evidence 702.05[2][a] (2d ed. 1997).

Circuit Court for Howard County
Case No. C-13-CV-18-000181

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0658

September Term, 2021

PARKWAY NEUROSCIENCE AND SPINE INSTITUTE, LLC

v.

KATZ, ABOSCH, WINDESHEIM, GERSHMAN & FREEDMAN, P.A., ET AL.

Berger,
Friedman,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, J.

Filed: September 30, 2022

In 1978, the Maryland Court of Appeals adopted the *Frye* standard for expert testimony, which allowed admission of an expert's testimony if the basis of that opinion "ha[d] gained general acceptance in the particular field in which it belongs." *Reed v. State*, 283 Md. 374, 381 (1978) (quoting *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923)). Thus, Maryland's *Frye-Reed* standard was born. During its tenure as the evidentiary standard for expert testimony admission in Maryland, the Supreme Court adopted a new standard for admission of scientific expert testimony in federal courts, commonly referred to as the *Daubert*[1] standard. Rather than focusing on the general acceptance of the expert's methodology—like in *Frye*—the *Daubert* standard focuses on the reliability of the methodology. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–90 (1993).

The Supreme Court later expanded the reach of *Daubert* by applying the standard to admission of expert testimony that was non-scientific in nature. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). The supermajority of states had already jumped aboard the *Daubert* train when Maryland followed suit. In 2020, our Court of Appeals overruled *Reed v. State* and adopted *Daubert* as the new standard for admission of expert testimony in Maryland. *Rochkind v. Stevenson*, 471 Md. 1, 5 (2020). Although Maryland courts had used a *"Frye-Reed* Plus" standard[2]—which considered some of the *Daubert* factors—applying the new *Daubert-Rochkind* standard and sifting through the thousands

[1] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

[2] "In the forty years that followed *Reed*, Maryland experienced a jurisprudential drift: the *Frye-Reed* standard announced in 1978 slowly morphed into a "*Frye-Reed* Plus" standard, implicitly and explicitly relying on and adopting several *Daubert* principles." *Rochkind v. Stevenson*, 471 Md. 1, 5 (2020).

of cases applying the *Daubert* standard may pose a challenge to circuit courts—as it did in the case at hand.

Parkway Neuroscience and Spine Institute, LLC ("PNSI" or "Appellant") brought suit against Katz, Abosch, Windesheim, Gershman & Freedman, P.A. ("Katz Abosch") and Mark Rapson (collectively, "Appellees")—its previous accounting firm and main accountant. As a remedy, PNSI is seeking lost profits damages. In order to establish lost profits damages, PNSI proffered the expert testimony of Meghan Cardell, a Certified Public Accountant ("CPA"). Appellees moved to exclude Ms. Cardell's testimony—asserting that the methodology she employed was unreliable—and to strike the lost profits claim. After a *Daubert* hearing, the Circuit Court for Howard County agreed with Appellees and granted their motion to exclude Ms. Cardell's testimony and strike the lost profits claim. The circuit court—over PNSI's opposition—granted the Appellees' motion for summary judgment on all remaining counts. PNSI timely appealed.

PNSI presents us with the following questions:

1. Did the Trial Court Abuse its Discretion in Granting Defendants' Renewed Motion to Strike Plaintiff's Lost Profits Claim and Exclude Plaintiff's Experts Based on New *Daubert* Standard and Barring Meghan Cardell from Presenting Expert Testimony Regarding PNSI's Lost Profits?

2. Did the Trial Court Erroneously Conclude that Ms. Cardell was not Qualified to Render an Expert Opinion Regarding the Lost Profits of a Medical Practice?

3. Did the Trial Court Erroneously Conclude that Ms. Cardell's Testimony Would Not Assist the Trier of Fact?

For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY

PNSI is a mixed-specialty medical practice whose practitioners provide treatment for brain, spine, and peripheral nervous system disorders. Starting in 2011, PNSI began to expand its operation with the hiring of more physicians and support staff. Between 2013 and 2014, PNSI had ten physician members who owned the practice. Since none of the members had the necessary background in finance and accounting, PNSI entered into a written agreement in October 2013 with Katz Abosch to provide tax, accounting, "and financial guidance and direction to help PNSI continue to grow its practice."

Appellee, Mark Rapson, is a CPA and Chair of Katz Abosch's Medical Services Group. Mr. Rapson—assisted by the CEO of Katz Abosch and another senior accountant—was in charge of PNSI's account. PNSI normally reconciled its books at the end of the year, so Appellees allegedly agreed to prepare the reconciliation beginning at the end of 2013. According to Appellant, Katz Abosch recommended that PNSI wait to make its end-of-year reconciliation payments until October 2014. At that time PNSI paid four members a total of $422,897 in reconciliation payments. PNSI alleged that Katz Abosch and Mr. Rapson failed to properly evaluate PNSI's financial position before making this recommendation.

"Between 2012 and 2014, PNSI received payments totaling over $400,000 as part of the Medicare and Medicaid Electronic Health Record (EHR) Incentive Program," which are also referred to as meaningful use payments. These meaningful use payments are subject to audit and recovery. Allegedly on the advice of Katz Abosch and Rapson, PNSI deposited the meaningful use payments in PNSI's general funds for member distribution.

Soon after, PNSI was required to repay over $400,000 in meaningful use payments to the government. To do so, PNSI alleged, it had to take out a loan.

According to Appellant, Katz Abosch and Rapson proposed a compensation model to PNSI's board in early 2014. Under this compensation model, each member, regardless of their specialty, was allocated an equal portion of two-thirds of PNSI's net increase or decrease in fixed expenses and a portion of the remaining one-third of PNSI's net increase or decrease in expenses based on that member's net collections for the period. PNSI alleged that this model did not address the unique issues of its mixed medical practice. Nor did it provide a reserve for future expenses or Katz Abosch's annual accounting fees. Despite this, PNSI—allegedly relying on Katz Abosch's advice—adopted the proposed compensation model.

After following Katz Abosch's advice on reconciliation payments, meaningful use payments, compensation models, and future payments, PNSI alleged, it was "deeply in debt." Allegedly, as a result of this debt and Appellees' actions, seven of PNSI's nine members[3] left the practice, causing further financial difficulty and lost profits.

PNSI sued Katz Abosch and Rapson for accountant malpractice and negligent misrepresentation in June 2018. In this suit, PNSI included counts against Katz Abosch for breach of contract and unjust enrichment.

[3] PNSI alleged in its complaint that it had ten members between 2013 and 2014 and eight members left as a result of Appellees' conduct between 2015 and 2016. PNSI stated in its brief, however, that seven of its then-nine members left the practice. This discrepancy does not affect the outcome of this decision.

PNSI retained Meghan Cardell as an expert to testify regarding damages and lost profits. In June 2019, Appellees filed a Motion to Compel Certain Depositions and Request for Hearing seeking to depose PNSI's witnesses, including Ms. Cardell. Appellees' motion was denied. In July 2019, Appellees moved to strike PNSI's lost profits claim and exclude Ms. Cardell's testimony. Appellees' motion was again denied. In February 2020, Appellees moved for leave to take certain depositions, including Ms. Cardell's. This too was denied.

When this litigation began in 2018, Maryland followed the *Frye-Reed* standard for admissibility of expert witnesses. The *Frye-Reed* standard required that the principles underlying an expert's opinion be generally accepted within their professional community. *Reed*, 283 Md. at 381 (holding that "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").

In August 2020—as this case was pending—our Court of Appeals overruled *Reed* and adopted the United States Supreme Court's standard set forth in *Daubert*. *Rochkind*, 471 Md. at 5. "*Daubert* . . . refocuses the attention away from acceptance of a given methodology—although that is not totally removed from the calculus—and centers on the reliability of the methodology used to reach a particular result." *Id.* at 31. The Court set forth the five *Daubert* factors and an additional five factors as follows:

> (1) whether a theory or technique can be (and has been) tested;
> (2) whether a theory or technique has been subjected to peer review and publication;
> (3) whether a particular scientific technique has a known or potential rate of error;

> (4) the existence and maintenance of standards and controls; . . .
> (5) whether a theory or technique is generally accepted[;] . . . .
> (6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
> (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
> (8) whether the expert has adequately accounted for obvious alternative explanations;
> (9) whether the expert is being as careful as he [or she] would be in his [or her] regular professional work outside his [or her] paid litigation consulting; and
> (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Rochkind, 471 Md. at 35–36 (citations omitted).

This new standard applies to "'any . . . cases . . . that [were] pending on direct appeal when [the *Rochkind* opinion was] filed, where the relevant question ha[d] been preserved for appellate review.' In this context, the 'relevant question' is whether a trial court erred in admitting or excluding expert testimony under Maryland Rule 5-702 or *Frye-Reed*." *Id.* at 38–39 (internal citations omitted).

Relying on this change to our evidentiary law, Appellees filed a renewed motion to strike PNSI's lost profits claim and exclude Ms. Cardell's expert testimony on May 5, 2021. The circuit court ordered an evidentiary hearing to be conducted on Appellees' renewed motion in light of the new *Daubert-Rochkind* standard and allowed Appellees the opportunity to depose Ms. Cardell. At the hearing, the parties and trial judge questioned Ms. Cardell about her qualifications and how she calculated PNSI's lost profits.

Ms. Cardell graduated from the University of Richmond with a Bachelor of Science in Accounting and a Bachelor of Arts in Leadership Studies. She has been a CPA since 2011—having passed all four sections of the CPA exam on her first try—and is also a Certified Fraud Examiner. Ms. Cardell is also a member of the American Institute of Certified Public Accountants and the Association of Certified Fraud Examiners, as well as an associate member of the American Bar Association. She is the Director of her group—Disputes and Investigations Services—at the consulting firm Alvarez and Marsal. Ms. Cardell—through her employer—provides litigation services to various entities, typically about accounting issues, damages, and lost profits calculations. Ms. Cardell has conducted dozens of economic damages calculations throughout her career—the main type of calculation being lost profits calculation. Ms. Cardell testified that she had conducted at least one lost profits analysis regarding a medical practice.

Focusing on methodology, Ms. Cardell explained several well-accepted methods to calculate lost profits and why she chose the "before-and-after" method. She first explained why she did not utilize other popular methodologies. She did not use the "contractual damages" method because such a method is only used when the contract specifies a formula or method to be used if the contract is breached—which was not present in PNSI and Katz Abosch's contract.

Ms. Cardell also considered the "lost business value" or "diminution in value" method. She explained that such a method is used when the alleged harm causes permanent impairment to future earnings of the business. Although Ms. Cardell thinks there may be some evidence of permanent injury due to the loss of doctors and their revenue streams,

she believes that over time—by replacing doctors and increasing revenue—the practice may recover.[4]

Another method Ms. Cardell considered, the "yardstick" method, is often used for companies where there is not—or not enough—historical data on lost profits. The yardstick methodology is not applicable here—according to Ms. Cardell—because PNSI has historical profit data to analyze.

Ms. Cardell chose the before-and-after method, which, she said, was the most commonly used method to calculate lost profits. This and the above methods, she said, have been

> commonly used in lost profits calculations, they are written about in literature, and specifically, they are named in what's called the AICPA Practice Aid for calculating lost profits. And that's really the, sort of the guiding handbook for damages experts and accountants who are calculating lost profits.

Ms. Cardell further explained that she has used the before-and-after method "many, many times" and has "seen it used by other experts both in and out of litigation settings to calculate lost profits."

> [MS. CARDELL]: [U]nder the before and after methodology what happens is that the damages expert looks at the Plaintiff's performance in two different periods. The first being what we called the benchmark period or the before period. And that's the period that is unaffected by whatever the alleged harm event, breach is. And then that is [compared] to the after period or the loss period, which is the period that is affected by

[4] Ms. Cardell further noted that this methodology is not applicable because the diminution in value method is about future lost profits. Due to the effects of the COVID-19 pandemic, PNSI abandoned its lost profits claims for 2020 through 2025. Cardell subsequently updated her written report to calculate only *actual* lost profits damages from 2015 through 2019.

> whatever the alleged harm, breach, or event is. This methodology essentially calculates what the Plaintiff's profits would have been but for again that alleged breach, harm event.

In this case, the alleged harm event was the exodus of members leaving PNSI's practice.

Ms. Cardell used the exodus of members from PNSI as the benchmark or "before" period —a period reflecting PNSI's profits when all (or most) members were still working at PNSI. As she testified, the first doctor withdrew in June 2015, a few more doctors at the end of 2015, and the final three or four left in early 2016. The harm event—the exodus of PNSI members—occurred during the one-year period from June 2015 to June 2016. Ms. Cardell explained that because it is difficult to look at a half-year to determine profitability, she used 2015 as the before period—or the base period. Ms. Cardell further clarified why she chose 2015 as the base period.

> [MS. CARDELL]: So I used 2015 as the before [period], because there was really only [one] doctor who left in June and the others didn't leave until the end of 2015. So their revenues would have been included in 2015. So 2015 is the before period.

Ms. Cardell opined that 2015 was a good proxy for what future profits would have been, but for the harm event.

> [MS. CARDELL]: [T]his business had profits in 2015 it was growing, the practice had been growing they were investing in growth. The practice had sort of hit its stride in 2015 and if you're looking at sitting in 2015 what does the market look like for this business? What's going to happen to this, this industry in the future? You can see a couple things. One that's important is that this industry is medical care. It's very different from a consumer good, or some sort of luxury good, or service that might be more subject to swings of consumer preference or economic swings. We're thinking, we're talking about, you know, folks getting medical care which is

> something that is needed, these people need medical care to continue to live their lives in a productive way. So it's an industry that's not as open to the swings of consumer preference. Especially this case, when we're talking about such a niche practice where there wasn't much else around to be able to service the patients in the same way.
>
> You also see, if you're sitting in 2015 and this continues to be true today, that the medical industry, the medical specialty industry specifically, was projected to grow. Because we have an aging baby boomer population, we have a prevalence of chronic diseases and chronic issues. And so if you look at the market back in 2015 it would tell you that medical practice specialties and medical practices in general were projected to grow. And so I was able to get comfortable with that that 2015 would be a reasonable proxy for the future. It doesn't even account for the potential growth. I could have grown 2015 over time to say well yes, they were making "X" amount in 2015. But they would have been making "X" plus in '16, '17, '18.

Ms. Cardell noted that she obtained information about PNSI's business from doctors in the practice, as well as the company's accounting manager.

The circuit court asked Ms. Cardell if there was a professional standard for choosing the base period, especially the length of the base period. Ms. Cardell explained that the benchmark can be based on a one-year period, so long as it is a reasonable prophecy for future profits. The judge questioned why Ms. Cardell chose to use 2015 as the base period and not earlier years, such as 2014.

> [THE COURT]: Why did you exclude 2014?
>
> [MS. CARDELL]: I didn't use 2014 because the company had been in a period of growing and the expenses, when you are growing a business, the expenses tend to grow which makes it look like you have less profit. So I looked at the revenue trends over time and saw that those were growing. And by 2015 I thought the business had really sort of hit its sweet spot in terms

> of, they had invested the money they needed to be able to continue that growth in a profitable way.
>
> * * *
>
> [THE COURT]: I mean, the – what occurred in 2014 wasn't unusual, was it?
>
> [MS. CARDELL]: I wouldn't say it was entirely unusual. There will be other expenses. But once you see in 2015 that they were sort of out of that what I call kind of the squeeze period.
>
> [THE COURT]: Uh-huh.
>
> [MS. CARDELL]: And you get to a point where you are profitable. There will be other expenses, but I thought 2015 was a better representation of what that level of expense would be moving forward as compared to 2014.

After considering Ms. Cardell's testimony and each party's arguments, the circuit court granted Appellees' motion and ruled that PNSI did not meet the burden necessary to allow Ms. Cardell's expert testimony at trial. The circuit court was first concerned with Ms. Cardell's lack of experience conducting lost profits calculations for unique medical practices, such as PNSI.

> [THE COURT]: [T]his is not your typical ma and pa hardware store kind of business. This is a business model that deals with a medical practice that has alternate streams of revenue that have alternate considerations when trying to determine expenses and things of that nature. And there was nothing about this witness's background that showed that she had any special exposure to this.

In addition to concerns about Ms. Cardell's lack of specialized experience, the circuit court found her selection of 2015 as the base period to be "speculative." The court doubted "the quality of the information that she was using" because she relied heavily on

PNSI's assertions and lacked independent sources. The circuit court also questioned the usefulness of Ms. Cardell's testimony to the jury.

The judge distilled his reasons for excluding Ms. Cardell as he walked through the *Daubert-Rochkind* factors.

Factor One. The circuit court acknowledged the acceptability of the before-and-after method of calculating lost profits—calling it "old school" and saying it "certainly can be tested." But the court found that Ms. Cardell's calculations in this case could not be tested. It believed that Ms. Cardell made too many subjective decisions and assumptions for the court to determine how to test her calculations—for example, what "economic impact"[5] is and why she chose 2015 as the base year for her calculations.

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[5] Ms. Cardell explained that the phrase "economic impact" or "financial impact" is a term of art used by experts in her industry to determine the impact that a deduction or adjustment might have on the profitability of the business from an economic perspective. She explained that the phrase is also used outside of litigation, such as in mergers and acquisitions.

> [MS. CARDELL]: I have had, [sic] done work in the past in mergers and acquisitions let's say. So not, not litigation related. And in those situations, when someone's coming in and buying a business they also do a similar normalizing adjustment to normalize the earnings because you don't want to pay somebody for a business for earnings that you are not going to get in the future.
>
> So it is a, as I said it's a concept, because you want to get the real economics of the business you're buying. So it's not something in my experience that is limited to litigation, it applies across [a] sort of financial principals, economic and financial principles.

Ms. Cardell further noted the economic impact is based solely on accounting records, not causation or what caused lost profits, and was not a part of her analysis.

Factors Two and Three. The circuit determined that the peer review factor did not apply in this case. It found that factor three—whether the technique has a high error rate—favored exclusion of Ms. Cardell's testimony. The court noted that Ms. Cardell changed her calculations even though the facts underlying her calculations remained the same. Ms. Cardell revised her calculations to get rid of projected lost profits for January 2020 onward, due to the COVID-19 pandemic. She further updated her calculations a second time shortly before her deposition.

> [MS. CARDELL]: [W]hen I was preparing for my deposition I was re-reviewing all the accounting records and I identified an adjustment, a normalizing adjustment that I thought should be made and I made that adjustment. And that lowered the lost profits number for my client. But I believed it was the right answer to do and right adjustment to make regardless of the impact on the number.
>
> [THE COURT]: I'm sorry, what was this adjustment? Which adjustment are we talking about?
>
> [MS. CARDELL]: [I]f you look on schedule two in 2015 and 2016 you'll see there's a trauma and on call adjustment.
>
> [THE COURT]: Right.
>
> [MS. CARDELL]: For a positive $319,000.00 in 2015. And a negative $395,000.00 in 2016. And that had to do with certain trauma and on call monies that were paid in a year to which they didn't relate. And so to normalize that I shifted the expense into the right year which caused lost profits to be reduced. But I, I believe it was the right answer from an economic perspective.

Ms. Cardell assured the circuit court that she again thoroughly reviewed the documents and details of her calculations so that no other adjustment was likely to be

needed in the future. Unmoved, the court considered the calculations to be subjective and subject to error.

Factor Four. The court determined that there was limited existence of standards or controls, which favored exclusion. "[T]here was very little evidence of any standards o[r] controls that exist." The court said that Ms. Cardell could not articulate standards for defining "economic impact" or for how to treat member draws in a lost profits calculation.

An interchange between the judge and the expert transpired about treatment of member draws. Ms. Cardell said that these draws are guaranteed payments that each doctor receives, which are made up of salary and include, *inter alia*, revenues from trauma and on-call payments. She opined that a business can decide to distribute its earnings in whatever way it wishes for tax purposes, but that these draws are expenses for the corporation—as the doctors are not going to work for free. The court took issue with this.

> [THE COURT]: I guess there's two ways to look at it, way one is that if I own a business and when I finish paying all my expenses out including my…cashier for widgets if there's $100.00 left if I don't take a penny of it that's a $100.00 profit for my business.
>
> * * *
>
> [THE COURT]: It seems to me that there's a disagreement in this case. That if I take $100.00 as the owner of the business one line of thought is the company has made no profit that year because I paid myself $100.00. The other thought seems to be I'm the owner, I'm not entitled to anything. What I get is what I take and it's not an expense, it's not a capital [sic] or anything like that. So it's irrelevant how much my draw is on the profit. The company itself still made $100.00 profits. And if I take $100.00, all of it is still $100.00 profit. If I take $5.00 it's $95.00, you know, it's still $100.00 profit. It seems like there's

> the struggle in this case like that. For purposes of calculating lost profits in the accounting industry which is it?

Ms. Cardell explained that she talked with another accounting and lost profits expert about the treatment of member draws and has researched industry standards on how to treat member draws. But—according to Ms. Cardell—there is no industry standard for this issue because the question of how to treat salaries and member draws in lost profits calculations depends on the business. Based upon her research and understanding of damages theory, she opined, "if the business makes $100.00 regardless of whether it stays in the business or is given to a shareholder or an owner, or a member, those are still the business's profits."

Factors Five and Six. The court agreed that the before-and-after method of calculating lost profits has been generally used by qualified professionals for quite some time. But it decided that factor six favored exclusion because Ms. Cardell developed her calculations in preparation for litigation, not independently.

Factor Seven. The court believed that the "unjustifiably extrapolated" factor favored exclusion "if the premise that we're talking about from which the unfounded conclusions roles [sic] would be acceptance of 2015 as the benchmark, as the beginning, as the before."

Factor Eight. The circuit court found that this factor—whether the expert accounted for obvious alternative explanations—favored exclusion. The judge criticized Ms. Cardell's failure to provide calculations showing each individual doctor's "inherent ability to generate revenue over the time periods"—in case the jury found that not all doctors left because of defendant's alleged negligence.

Ms. Cardell calculated lost profits based on the exodus of members from the practice as a whole instead of calculating the lost profits attributed to each individual member leaving. Ms. Cardell readily acknowledged that her calculations were based on what profits would have been had none of the members left PNSI. The circuit court opined that if the jury found—for example—that only four of the seven members left because of Appellees' actions, then Appellees should only be liable for lost profits associated with those four members leaving, not all seven. Based upon this hypothetical, the circuit court expressed doubt about the usefulness of Ms. Cardell's testimony to the jury.

The circuit court also found fault—under factor eight—with Ms. Cardell's failure to opine on whether insurance reimbursement rates affected lost profits. Insurance reimbursement rates are the amount that PNSI—or its members—receive from an insurance company for services it rendered. These reimbursement rates may differ between Medicare/Medicaid and vary based on federal legislation passed. Ms. Cardell explained that she did not account for changes in reimbursement rates because, even though they may have declined slightly, access to healthcare increased. Such increased access, she said, would offset any declines in reimbursement rates.

Factor Nine. The circuit court determined that this factor did not apply—or seemingly favored inclusion of Ms. Cardell's testimony—because the court had "no reason to think that she blew [her calculations and testimony] off as an inconsequential project" and found that "she took this very seriously."

Factor Ten. In the trial judge's mind, "whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would

give"—favored exclusion because "the mere fact the [calculations] changed in June of [2021] for fully subjective reasons" and "had nothing to do with any new information" made "the whole reliability even that much more suspect."

Considering these ten factors, the circuit court granted Appellees' motion to exclude Ms. Cardell's testimony and motion to strike PNSI's lost profits claim. Appellees moved for summary judgment on the remaining counts, which the court granted.[6] This timely appeal followed.

DISCUSSION

"[T]he *Daubert* hearing's purpose is only to determine the admissibility of expert evidence; it is not to determine 'whether such evidence is sufficient with respect to a matter upon which the plaintiff has the burden of proof.'" *Gannon v. U.S.*, 571 F. Supp. 2d 615, 621 (E.D. Pa. 2007) (citation omitted). "[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute ground for reversal." *Rochkind*, 471 Md. at 10 (quoting *Roy v. Dackman*, 445 Md. 23, 38–39 (2015)). We review exclusion of an expert's testimony for abuse of discretion. *Rochkind*, 471 Md. at 10–11 (citing *Blackwell v. Wyeth*, 408 Md. 575, 618 (2009)). "Such a ruling, however, may be reversed on appeal if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Id.* at 11 (quoting *Sippio v. State*, 350 Md. 633, 648 (1998)). As the Court of

[6] PNSI stipulated to the dismissal of its unjust enrichment claim. Appellees moved for summary judgment on the counts of accountant malpractice, negligent misrepresentation, and breach of contract.

Appeals recently said, "The standard of appellate review for *Frye-Reed* determinations is de novo." *Frankel v. Deane*, No. 43, Sept. Term 2021, __ Md. __, slip op. at 17 (filed Aug. 25, 2022); *see also Williams v. State*, 251 Md. App. 523, 546 (2021) (citations omitted) ("[E]ven with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards."), *aff'd*, 478 Md. 99 (2022); *In re Guardianship of Dory*, 244 Md. App. 177, 203 (2019) (quoting *Barrett v. Barrett*, 240 Md. App. 581, 591 (2019)) (holding that the circuit court's failure to consider the proper legal standard in reaching its decision was an abuse of discretion).

PNSI asserts that the circuit court erred and/or abused its discretion in excluding Ms. Cardell's lost profits testimony. It avers that the errors occurred in (1) finding Ms. Cardell unqualified to render an opinion regarding lost profits of its medical practice, (2) finding Ms. Cardell's selection of the 2015 base year unreliable, (3) and assessing the soundness of Ms. Cardell's data and assumptions as impacting admissibility rather than weight. We will address each of these assertions in turn.

Ms. Cardell's qualifications to testify as an expert in this case

The circuit court found that Ms. Cardell "has the capacity to be an expert in some matters," but not in this matter. Although Ms. Cardell has experience calculating lost profits in various industries, the circuit court said, PNSI is "a medical practice that has alternate streams of revenue that have alternate considerations when trying to determine expenses and things of that nature. And there was nothing about [Ms. Cardell's] background that showed that she had any special exposure to this." Based on her testimony, Ms. Cardell could recall conducting a prior lost profits calculation for only one

medical practice. The circuit court stated it did not know "what qualifie[d]" Ms. Cardell to make judgments regarding this "fairly specialized LLC or type of work."

Appellant asserts that the circuit court erred in considering Ms. Cardell's experience with medical practices at the admissibility stage. Admissibility of expert testimony is often broken down into three factors: (1) whether the expert, based on her skills, knowledge, experience, and training, is qualified; (2) whether her methods are reliable; and (3) whether there is a sufficient factual basis to support her testimony and assist the trier of fact. *See, e.g.*, Md. Rule 5-702; *Moore v. Intuitive Surgical, Inc.*, 995 F.3d 839, 850–51 (11th Cir. 2021); *Orbital Eng'g, Inc. v. Buchko*, 578 F. Supp. 3d 727, 731 (W.D. Pa. 2022).

The circuit court did not challenge Ms. Cardell's qualifications as a CPA or her experience evaluating businesses and their profits. Yet the court decided that a medical practice like PNSI was so different from other small businesses that a CPA must possess specialized training or experience before qualifying to testify as to its lost profits. This conclusion is at odds with decisions applying *Daubert*. *See Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001) (holding that the expert economist's lack of experience in real estate development goes "more towards the foundation" of the witness's testimony than his qualifications to calculate damages). We agree with the rationale of the Eleventh Circuit and believe it applies equally to a CPA testifying about lost profits. *See also Moore*, 995 F.3d at 853 (holding that, in a products liability action, the expert surgeon's inexperience with particular surgical tools goes only to reliability and not his qualification to testify as to causation); *Pulse Med. Instruments, Inc. v. Drug Impairment Detection Servs., LLC*, 858

F. Supp. 2d 505, 512 (D. Md. 2012) (holding that any issues with the expert's qualifications in relation to an opposing expert's testimony may be explored on cross examination).

"[I]t is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate." *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996) (citation omitted). "If the expert meets liberal minimum qualifications, then the level of the expert's expertise goes to credibility and weight, not admissibility." *Smolow v. Hafer*, 513 F. Supp. 2d 418, 426 (E.D. Pa. 2007) (quoting *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997)).

Appellees have not cited any decisions supporting the assertion that a trial court—in its gatekeeper role under *Daubert*—acts properly in excluding the testimony of a qualified CPA with significant lost profits expertise on grounds that the expert's experience with such analysis had only included one medical practice. We do not accept the premise that knowledge of the accounting principles and tax laws required to analyze profits for a limited liability company medical practice differs so markedly from that required for other small businesses—especially "pass-through" entities like an LLC—that the proffered CPA must demonstrate particularized experience in medical practice analysis. *See, e.g.*, *Smolow*, 513 F. Supp. 2d at 425–26; *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (citing *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985)) ("As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned [to] that opinion rather than its admissibility and should be left for

the jury's consideration."). Here, we are dealing with generally accepted accounting principles and tax law, not cutting-edge technical developments or scientific theories.[7] Because the circuit court found Ms. Cardell unqualified to testify as an expert due to her lack of medical industry experience, it imposed an unduly high standard. This was error. A CPA with Ms. Cardell's experience certainly has the mathematical and analytical skills to take these specialties into account if she thought it necessary. Her lack of specialized experience is ripe for cross-examination at trial.

The circuit court also took issue with the reliability of—what it considered— Ms. Cardell's methods. We next turn to those issues to determine if the circuit court had a sustainable alternative ground for excluding the expert testimony.

Methodology employed

The circuit court decided that Ms. Cardell's methodology was unreliable under the *Daubert-Rochkind* standard. In its bench opinion, the circuit court expressed five weaknesses it saw in Ms. Cardell's analysis: (1) using 2015 as the base year; (2) failing to consider changes in insurance reimbursement rates; (3) failing to articulate standards to

[7] Generally accepted accounting principles (GAAP) are regularly used in the accounting field and have been recognized in Maryland and other courts. *See, e.g.*, *Dabbs v. Anne Arundel Cnty.*, 458 Md. 331, 360 (2018); *Reiger v. Price Waterhouse Coopers LLP*, 117 F. Supp. 2d 1003, 1009 (S.D. Cal. 2000) ("[GAAP] comprise a set of basic postulates and broad accounting principles pertaining to business enterprises. These principles, approved by the American Institute of Certified Public Accountants ('AICPA'), establish guidelines for measuring, recording and classifying the transactions of a business entity."), *aff'd sub nom.*, *DSAM Glob. Value Fund v. Altris Software, Inc.*, 288 F.3d 385 (9th Cir. 2002); *Marksman Partners, L.P. v. Chantal Pharm. Corp.*, 927 F. Supp. 1297, 1304 (C.D. Cal. 1996) ("[GAAP] are the conventions, rules, and procedures that constitute the professional standards of the accounting profession.").

define economic impact and treat member draws; (4) changing her calculations while the underlying facts remained the same; and (5) failing to calculate lost profits for each individual member leaving PNSI.[8] Many of the circuit court's qualms with Ms. Cardell's calculations overlap with one another, but we will address them separately in turn.

a. Selection of 2015 as the base year

The circuit court considered Ms. Cardell's selection of 2015 as the base year for her lost profits calculations to be speculative. It elaborated by stating "there wasn't any reason to believe that she had the training or the experience or the information to [select 2015 as the base year], it just seems speculative to me." In applying the *Daubert* factors, the court noted that "there's nothing [the circuit court had] been presented from which . . . the factors that she used in selecting 2015 could be tested."

"An expert opinion requires some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion." *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 127 (2d Cir. 2006) (citing Fed. R. Evid. 702). "Unless the information or assumptions that plaintiff's expert relied on were 'so unrealistic and

[8] Appellees, relying in part on this Court's recent opinion in *Tallant v. State*, 254 Md. App. 665 (2022), assert that since PNSI did not fully address the issues of reimbursement rates and treatment of member draws in its initial brief, PNSI waived any challenge to the circuit court's findings on those issues. We disagree. In *Tallant*, we concluded that Appellant lacked in his initial brief and reply brief any support for his request for a different trial judge or for the circuit court's decision to close the courtroom during a proceeding. 254 Md. App. at 689–90. Here, PNSI adequately briefed and proposed legal arguments on the circuit court's alleged errors and abuses of discretion in determining the reliability of Ms. Cardell's methodology in its initial brief. Additionally, unlike in *Tallant*, PNSI specifically addressed sub-issues of reliability regarding member draws and reimbursement rates in its reply brief. Therefore, we do not agree that PNSI waived any arguments related to these specific reliability sub-issues.

contradictory as to suggest bad faith,' inaccuracies in the underlying assumptions or facts do not generally render an expert's testimony inadmissible." *Washington v. Kellwood Co.*, 105 F. Supp. 3d 293, 306 (S.D.N.Y. 2015) (cleaned up) (quoting *R.F.M.A.S., Inc. v. So*, 748 F. Supp. 2d 244, 269 (S.D.N.Y. 2010)).

Here, the circuit court heavily relied on *CDW LLC v. NETech Corp.*, 906 F. Supp. 2d 815 (S.D. Ind. 2012) to support excluding Ms. Cardell's testimony for selecting 2015 as the base year for her lost profit calculations. Careful examination of that case reveals important distinctions that demonstrate that this reliance was misplaced. CDW LLC's expert asserted that "but for NETech's alleged wrongful conduct," its Indianapolis office would have grown in revenue at the same mean rates experienced by the other CDW branches in the Great Lakes region. *CDW LLC*, 906 F. Supp. 2d at 823. CDW's expert used the "yardstick" approach for calculating lost profits for the Indianapolis branch. *Id.* at 824. In using this approach, the expert took the average revenue growth of the other CDW Great Lakes branches to project what the profits of the Indianapolis office should have been—but for defendant's conduct. *See id.* The expert did not compare the Indianapolis branch to its own previous growth rates or "the actual experience of any other business entity." *Id.* The *CDW LLC* court took issue with this because each branch showed "wide variations in branch performance from year to year" and the expert "made no (and did not rely on any) economic analysis of the Indianapolis market or any other market." *Id.*

The *CDW LLC* court noted that the "expert's choice in data sampling"—the sufficiency of the data—"is at the heart of his methodology." *Id.* Unlike CDW's expert,

Ms. Cardell relied on PNSI's accounting records, not records from another comparable entity. She examined PNSI's profits and losses from 2010 and onward and explained why she chose 2015, and not previous years, as the base year for her calculations.

> [THE COURT]: I mean isn't there some understanding within your profession that you have to use a hundred years or five years or something [as the benchmark]? I mean, something period, or is any expert free to pick…as short or as long a period as they feel they want to?
>
> [MS. CARDELL]: So what we are told is to, to pick a before or a benchmark number that is going to be a prophecy for the future. And that can be determined based on one year. That can be determined based on an average if that's applicable. But if for example you have past years that aren't going to be representative of the future by including those in your before period you are, you are not getting a reasonable picture of what the earnings would have been.

Unlike the expert in *CDW LLC*, Ms. Cardell did not sample data from other markets; she relied on PNSI's own data to determine the benchmark. She provided an explanation as to why 2015 was the appropriate base year, and unless the data and assumptions she made were "so unrealistic and contradictory as to suggest bad faith," her testimony should be admissible. *See Washington*, 105 F. Supp. 3d at 306 (quoting *R.F.M.A.S., Inc.*, 748 F. Supp. 2d at 269). It is not so unrealistic or contradictory as to suggest bad faith when an experienced CPA opines that a company reached a reasonably predictable level of profits in a particular year after several years of enduring extra expenses during a growth period. 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. *See Packgen v. Berry Plastics Corp.*, 46 F.

Supp. 3d. 92, 111 (D. Me. 2014) (denying a motion to exclude testimony of a CPA, despite projecting a 10 years' lost profits period based on only one profitable year, opining that "legal sufficiency of the evidence supporting a ten-year loss period" is not a *Daubert* issue); *Furmanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1126, 1132 (M.D. Fla. 2007) (citation omitted) ("Errors in an expert's application of a reliable method go to the credibility of an expert's opinion rather than the opinion's reliability under *Daubert*."). Therefore, the circuit court erred.

b. Other data and assumptions

Another prominent concern of the circuit court was Ms. Cardell's failure to consider alternatives for lost profits, such as change in insurance reimbursement rates. We agree that an expert's failure to consider alternative explanations can be grounds for excluding her opinions. *Wendler & Ezra, P.C. v. Am. Int'l Grp., Inc.*, 521 F.3d 790, 791 (7th Cir. 2008) (upholding the exclusion of an expert's testimony for failing to disclose what software and data he used and how alternative explanations were ruled out); *Waytec Elecs. Corp. v. Rohm and Haas Elec. Materials, LLC*, 459 F. Supp. 2d 480, 489 (W.D. Va. 2006) (citations omitted) ("[I]f an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding the expert's testimony."). *But see Astra Aktiebolag v. Andrx Pharms., Inc.*, 222 F. Supp. 2d 423, 488 (S.D.N.Y 2002) (citation omitted) (holding that an expert need not "categorically exclude each and every possible alternative cause in order to render the proffered testimony admissible").

This case, however, is less about failure to consider alternatives for what caused lost profits—since Ms. Cardell is not a causation expert—and more about alleged failure to calculate lost profits properly, or at least calculate and present to the court all possible variables. Ms. Cardell did not include in her calculations the possible changes in insurance reimbursement rates for PNSI from 2016 to 2019. When presented with an unauthenticated chart of reimbursement rates at the evidentiary hearing, Ms. Cardell noted that those reimbursement rates were declining, but said that these decreases would be offset by the market increase caused by more access in the general population to healthcare, which would increase revenue overall.

Whether Ms. Cardell failed to consider reimbursement rates is not an issue with the methodology—the before-and-after method. Rather, it is an issue with the soundness of the data she used to reach her conclusion.[9] The Seventh Circuit in *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796 (7th Cir. 2013), addressed a remarkably similar expert admissibility issue. In *Manpower*, one party offered a forensic accounting expert, Mr. Sullivan, to calculate lost profits. 732 F.3d at 801. Sullivan used the before-and-after method to calculate lost profits. *Id.* at 803. The district court was concerned by Sullivan choosing "such a short base period for calculating lost profits." *Id.* at 802.

Sullivan chose a base period of five months—which he used to calculate the projected revenue growth rate in the after period. *See id.* at 801–02. He used an estimated

[9] Many of the issues overlap in this section. Analyzing reimbursement rates, selecting the base year, and relying on data from and conversations with PNSI all are issues with the soundness of the data.

growth rate of 7.76%—calculated by comparing the company's revenues from January to May 2006 (before the "collapse") to the total revenues earned in the same five-month period in 2005. *Id.* at 801. The district court thought that the growth rate calculated from the chosen period was not representative of the company's historical growth rate. *Id.* at 801–02.[10]

The expert reviewed the company's financial data from 2003 forward and concluded that the company turned a corner by the end of 2005. *Id.* at 802. In deciding to use January to May 2006 as the base period, Mr. Sullivan relied on statements made by the company managers. *Id.* Sullivan further noted that the growth rate during this period was a more conservative estimate than if he had used a longer 12- or 14-month period which would have yielded growth rates of 20.1% and 13.67%, respectively. *Id.* at 803.

Despite Sullivan's growth rate extrapolation being "the simplest and most frequently used revenue forecasting method," the district court found his methods unreliable and excluded his testimony. *Id.* at 802. The district court criticized Sullivan's reliance on conversations with the company managers, using such a short base period, and failing to consider other indicators that may have impacted the growth rate—thus finding that his calculations were based on assumptions that caused his calculations to be deemed unreliable. *Id.* The Seventh Circuit reversed. *Id.* at 812. It concluded that Sullivan's expert opinion—"although not bulletproof—[was] sufficiently reliable to present to a jury"

[10] The company's average annual growth rate from 2003 to 2009 was negative 4.79% and only 3.8% from January 2005 to May 2006. *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 801–02 (2013).

and the district court abused its discretion by "exercis[ing] its gatekeeping role under *Daubert* with too much vigor." *Id.* at 805.

Although judges have much flexibility and leeway in determining reliability of expert testimony, reliability—according to *Manpower*—"is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced." *Id.* at 806.[11] The *Manpower* court relied on another Seventh Circuit decision, *Smith v. Ford Motor Co*., 215 F.3d 713 (7th Cir. 2000), to explain the same concept: "The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment." *Manpower*, 732 F.3d at 806 (quoting *Smith*, 215 F.3d at 718).

Similarly, the Maryland Rule 5-702 requirement that there is "a sufficient factual basis" supporting the testimony does not justify a trial court's exclusion of such testimony based upon "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions." *See Manpower*, 732 F.3d at 806. The requirement

[11] Our Court of Appeals recently cited *Manpower* in describing the gatekeeping function under Rule 5-702. *State v. Matthews*, 479 Md. 278, 316 (2022) ("For these reasons, in exercising its gatekeeping function under Rule 5-702, a trial court generally should be most concerned about the reliability of an expert's methodology. 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. *See Manpower, Inc. v. Ins. Co. of Pennsylvania*, 732 F.3d 796, 806 (7th Cir. 2013) . . . ."). In *Matthews*, the Court of Appeals concluded that the trial court did not abuse its discretion in admitting the expert's testimony. *Matthews*, 479 Md. at 325.

outlined in Md. Rule 5-702 means that the "sufficient facts [must] underlie the expert's opinions that indicate the use of 'reliable principles and methodology in support of the expert's conclusions' so that the opinion constitutes more than mere speculation or conjecture." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 478–81 (2013) (quoting *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182–83, (2003)) (upholding admission of testimony on diminution in value of real property despite the expert appraiser having ignored sales of nearby properties).

Ms. Cardell calculated lost profits using the company's actual accounting data and used a base period before the exodus of most members occurred. "[T]hese are the kinds of data that accountants normally rely on in calculating future earnings [and lost profits]." *See Manpower*, 732 F.3d at 809. Additionally, "[i]t may be true that using specific variables"—such as insurance reimbursement rates—"would have resulted in a . . . more accurate figure. However, ... whatever shortcomings existed in [the expert's] calculations [goes] to the weight, not the admissibility of the testimony." *See Cummings v. Standard Reg. Co.*, 265 F.3d 56, 65 (1st Cir. 2001).

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. *See Manpower*, 732 F.3d at 806 ("[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 rather than the reliability of the methodology the expert employed."); Jack B. Weinstein, Weinstein's Federal Evidence 702.05[2][a] (2d ed. 1997) ("[A]nalytical

focus should be on principles and methodology. Trial courts may not reject expert testimony simply because they disagree with the conclusions reached by the witness.").

c. Treatment of member draws

The circuit court also criticized Ms. Cardell's "lack of industry standards" for treatment of the draws that each individual member takes from PNSI.[12] Ms. Cardell noted that the member draws are part of what accountants consider "guaranteed payments."

> [MS. CARDELL]: The guaranteed payments, in my review are made of two things, the draws that the doctors receive which are essentially salary. And then for some doctors it includes the trauma and on call payments for revenues that they earned working that.

Regardless of whether the owners elected to take a draw or if that money stayed in the business, the money generated by medical services was still a profit to the business, according to Ms. Cardell.

The circuit court suggested that the treatment of member draws is a "pretty basic issue" and seems to be "capable of rearing its head in every case" that involves such owner draws. We agree that such an issue may arise again, but that is because treatment of member draws and classifying fixed and variable expenses are fact-laden endeavors. The trial court seemed to recognize this at one point when—in response to defense counsel's cross-examination of Ms. Cardell on this point—it said:

[12] The circuit court also found that Ms. Cardell cited no industry standards in defining the term "economic impact." Defining such a term does not impact the reliability of the methodology Ms. Cardell employed. The issue here is PNSI's lost profits. Whether Cardell correctly used the broader concept of economic impact—which focuses on effects upon other business and the relevant economy—is not material.

> [Ms. Cardell's] view is it doesn't matter how much these Plaintiffs took out, it doesn't affect the profits. . . . [I]t may have some legal effect at some point. [Your line of questioning] may mean a lot to a jury, but I'm not really sure where it fits into this hearing.

Yet in announcing its ruling, the trial court appeared to disagree with Ms. Cardell's conclusion about how a CPA, in calculating a business's lost profits, should deal with correlating reduced expenses. It also required Ms. Cardell to cite a specific accounting rule governing these particular circumstances and implied that her own professional opinion based on training, certification, and experience was insufficient. Ms. Cardell testified that she had researched the accounting literature and determined that there was no established rule on this issue. In this context, a court's belief that an experienced CPA's judgment call based on accounting principles is not sufficient and that there should be an explicit, citable accounting rule, has no place in a *Daubert-Rochkind* ruling.

The Eastern District of Missouri addressed such an issue in the context of a *Daubert* hearing. *See OCI Chem. Corp. v. Am. Railcar Ind., Inc.*, No. 4:05CV1506FRB, 2009 WL 890525, at *1 (E.D. Mo. Mar. 30, 2009).[13] In *OCI Chem.*, the defendant sought to exclude

[13] The Court of Special Appeals allows the citation of unreported opinions from federal courts and courts of other states as long as the jurisdiction where it was issued would allow its citation for persuasive value in its courts. *Gambrill v. Bd. of Ed. Of Dorchester Cnty.*, 252 Md. App. 342, 352 n.6 (2021), *rev'd on other grounds*, No. 34, Sept. Term 2021, __ Md. __ (2022) (filed Aug. 26, 2022); *CX Reinsurance Co. Ltd. v. Johnson*, 252 Md. App. 393, 414 n.7 (2021), *rev'd on other grounds*, No. 47, Sept. Term 2021, __ Md. __ (2022) (filed Aug. 29, 2022). The Eastern District of Missouri permits citation and reliance on its unpublished opinions under certain circumstances. *See Federal Trade Commission v. Neiswonger*, No. 4:96CV2225SNLJ, 2008 WL 11434564, at *1 n.3 (E.D. Mo. Oct. 16, 2008) ("Although it is not the Court's usual practice to cite unpublished opinion, it does so in circumstances wherein the unpublished opinion offers legal guidance to the Court in

plaintiff's lost profits expert—Kenneth Giambagno—under *Daubert* because the defendant asserted Mr. Giambagno "failed to deduct all applicable expenses." *Id.* at *2.

> In general, in calculating lost profits damages, lost revenue is estimated, and overhead expenses tied to the production of that income are deducted from the estimated lost revenue. Overhead expenses include both fixed and variable expenses. Fixed expenses are the continuous expenses of the business that are incurred regardless of the loss of a portion of the business, for example rent, taxes, and administrative salaries. Variables expenses, also called direct expenses, are costs directly linked to the volume of business.

Id. at *3 (quoting *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 55 (Mo. 2005) (en banc)).

OCI Chem. held that whether expenses are fixed or variable is a factual issue to be determined on a case-by-case basis. *See* 2009 WL 890525, at *3. The defendant disagreed with some of Mr. Giambagno's determinations on what costs he treated as variable expenses. *Id.* at *4. Because the treatment of expenses is a factual issue, it goes to the credibility of the witness and "such [a] dispute may be brought out at trial by the defendant through cross-examination and the presentation of contrary evidence." *Id.*

Just like in *OCI Chem.*, Ms. Cardell used an approved methodology—the before-and-after method. She relied on the actual records maintained by PNSI for the period in question, which enhances reliability. Whether Ms. Cardell should have deducted the

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reaching a determination on the issue(s) at hand."); *Burke v. Univar USA, Inc.*, 354 F. Supp. 2d 1047, 1051 n.4 (E.D. Mo. 2005) ("Although it is not the Court's customary practice to cite to unpublished opinions, it does so only in those instances wherein the unpublished opinion(s) addresses a significant issue before the Court and contributes to the Court's decision in a meaningful way."). We address *OCI Chem.* for those reasons.

member draws from the projected profits is something the Appellees can attack during cross-examination before a jury—but not at the *Daubert-Rochkind* hearing. Like the Eastern District of Missouri, we consider this to be a fact-laden issue—involving credibility, not reliability. *See id.* at *2. As such, under *Daubert-Rochkind,* the court's criticism was misplaced.[14] *See Acker v. Burlington N. and Santa Fe Ry. Co.*, 347 F. Supp. 2d 1025, 1031 (D. Kan. 2004) ("Although [the expert] does not distinguish hard expenses from lost profits, the court fails to see how this makes his testimony unreliable.").

d. Correction of calculations

The circuit court found Ms. Cardell's testimony to be unreliable under the third *Daubert* factor—a "known or potential rate of error." The court decided Ms. Cardell's calculations had a known or potential rate of error because she corrected her calculations.[15] After reviewing her work in preparation for her deposition, Ms. Cardell made a "normalizing adjustment" to her calculations that lowered lost profits, thus reducing the plaintiffs' claim. The underlying data did not change—instead she merely corrected a mistake in her calculations. The circuit court determined that because Ms. Cardell changed her calculations when the underlying facts remained the same, her calculations had a high rate of error.

[14] We are not deciding that a trial court would be barred from ruling against a plaintiff on grounds that damages had not been proven with sufficient certainty to go to a jury on a motion under Maryland Rule 2-519 or 2-532.

[15] First, Ms. Cardell updated her calculations to restrict the period of lost profits through December 31, 2019, because the COVID-19 pandemic would have affected profits from 2020 onward. The circuit court did not take issue with this change.

In doing so, the circuit court misinterpreted the third prong of *Daubert*. The error rate that *Daubert* speaks of is the rate of unknown errors in the methodology employed, not an "error *correction* rate." *Crowley v. Chait*, 322 F. Supp. 2d 530, 540 (D.N.J. 2004) (emphasis in original).

> *Daubert* does not require that an expert's testimony be excluded simply because [she] admitted and corrected [her] own mistakes or retracted [her] false statements. In fact, one of the very purposes of a *Daubert* hearing . . . is to give experts a chance to explain and even correct errors that they made in their reports. . . . There is no stigma attached to such error correction, nor should there be. If anything, it strengthens the quality of the expert report. The known or potential rate of error discussed in the third prong of *Daubert* more likely refers to the rate at which unknowable mistakes that cannot be corrected have been made in a data or statistical set; the known or potential rate of error then serves as an indication of how reliable or unreliable that data may be.

Id.; *see also Moe v. Grinnell Coll.*, 547 F. Supp. 3d 841, 850 (S.D. Iowa 2021) (analyzing the known or potential rate of error rate of the techniques and methods used); *Janopoulos v. Harvey L. Walner & Assocs., Ltd.*, 866 F. Supp. 1086, 1097 (N.D. Ill. 1994) (holding that the expert satisfied the *Daubert* standard even though he may not have known "the known or potential rate of error" because the expert's methods were generally accepted). We agree with these cases. Any other rule would be a disincentive to disclose and explain errors.

The circuit court found a high rate of error even though Ms. Cardell employed a generally accepted methodology in this case and relied on accounting data from PNSI itself when conducting her lost profits calculation. This was an error in applying the *Daubert-Rochkind* standard.

e. Failure to calculate lost profits attributed to each individual member of PNSI

The circuit court took issue with Ms. Cardell calculating lost profits because of all seven doctors leaving, without also calculating profits lost with respect to each individual doctor leaving.

> [THE COURT]: Well let me cut to what's interesting to me. Let's say you testified Plaintiff's 2, your schedules go into evidence. Your testimony goes swell, it mirrors what you did today, nothing new. And then the jury comes back and finds that three of the seven doctors left for reasons totally unrelated to the Defendants while four of the seven left for reasons caused by the Defendants?
>
> What good is your testimony . . . [to] the jury in terms of trying to figure out what that lost profit is? Because it wouldn't be fair to make the Defendants pay for all seven since they only drove out three, or they only drove out four under my hypothetical. How do you take into account that maybe all seven didn't leave because of the Defendants?

The circuit court brought up similar issues with causation and PNSI's damages theory throughout the *Daubert-Rochkind* hearing. For example, the circuit court asked Ms. Cardell, "can you say from your examination of the records that the only reason for the reduction [in lost profits] is the doctor leaving as opposed to other sources such as the reimbursement rate from the insurance company declining?" Ms. Cardell emphasized that she was not a causation expert in this case and did not have an opinion on causation. She further explained that she "looked at the practice wholistically. So not on a doctor-by-doctor basis."

"The purpose of a *Daubert* hearing is to filter out expert evidence based upon unreliable expert evidence." *Lenawee Cnty. v. Wagley*, 836 N.W.2d 193, 208 (Mich. Ct. App. 2013).

> A *Daubert*-type hearing . . . is *not* a judicial search for truth. . . . The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation.

Id. at 208–09 (emphasis in original) (quoting *Chapin v. A & L Parts, Inc.*, 732 N.W.2d 578, 587 (Mich. Ct. App. 2007)); *see also Gannon*, 571 F. Supp. 2d at 621. "Thus, the question here is not whether damages for lost profits are proper, but whether the amount of lost profits to which [Ms. Cardell] contends [PNSI] is entitled is founded on a judicially-recognized methodology." *See Natchez Reg'l Med. Ctr. v. Quorum Health Res., LLC*, 879 F. Supp. 2d 556, 579 (S.D. Miss. 2012) (stating that the before-and-after and yardstick methodologies are reliable).

The circuit court—by looking to causation of lost profits—circumvented the purpose of a *Daubert* hearing. The purpose—in this case—is to determine whether Ms. Cardell used reliable methodology in coming to her conclusion—not whether PNSI met its burden of proof on whether Appellees' conduct caused its lost profits. *See, e.g.*, *Gannon*, 571 F. Supp. 2d at 621; *Natchez Reg'l*, 879 F. Supp. 2d at 579. The circuit court can hear causal evidence and decide later whether there is sufficient evidence of a causal connection to submit to the jury. *See Jacobs v. Flynn*, 131 Md. App. 342, 355 (2000) (citing *Hughes v. Carter*, 236 Md. 484, 486 (1964)). The circuit court will be able to rule on such causation issues through a Rule 2-519, 2-532, or other motion. And Ms. Cardell's failure to compute the lost profits on a per-doctor basis falls decidedly within the realm of cross-examination or refutation by opposing expert. The circuit court therefore erred in finding Ms. Cardell's

testimony unreliable because she did not calculate lost profits for each individual member leaving.

Analytical Gap

Considering the Court of Appeals' recent *Daubert-Rochkind* opinion in *State v. Matthews*, 479 Md. 278 (2022), Appellees ask us to find that—even if Ms. Cardell's methodology is reliable and there is an adequate supply of data—her calculations are full of "analytical gaps," and therefore her testimony should still be excluded. Appellees assert that Ms. Cardell using 2015 as the base year, failing to account for changes in reimbursement rates, and failing to articulate a standard for treatment of member draws constitute analytical gaps. We do not agree.

"An 'analytical gap' typically occurs as a result of 'the failure by the expert witness to bridge the gap between his or her opinion and the empirical foundation on which the opinion was derived.'" *Matthews*, 479 Md. at 316 (quoting *Savage v. State*, 455 Md. 138, 163 (2017)). The *Matthews* court used the expert testimony in *Savage* as an example of an analytical gap because the defense expert failed to "connect the dots between the results of the psychological tests he had administered on the defendant and his opinion that the defendant was more likely to have greater difficulty controlling his reactions under conditions of chaos and stress." *Id.* at 318 (internal quotations omitted) (citing *Savage*, 455 Md. at 164).

In *Savage*, a trial court barred a neuropsychologist expert from testifying that the defendant—due to a brain injury resulting from previous gunshot wounds to the head—was "untrusting" and "hyper-vigilant to possible threats." 455 Md. at 164. The expert used

a reliable methodology—the Personality Assessment Inventory ("PAI") test—but there was an "analytical gap" between the PAI test and the expert's conclusions that the defendant "tends to view the world in untrusting terms." *Id.* at 160–171. The PAI test has been a reliable clinical tool used to determine "diagnosis, symptom severity, level of risk, and treatment planning," as well as being used to "assess factors salient to psycholegal decision making." *Id.* at 167 (quoting Tatiana M. Matlasz et al., *Cognitive status and profile validity on the Personality Assessment Inventory (PAI) in offenders with serious mental illness*, 50 Int'l J.L. & Psychiatry 38, 38–41 (2017)).

The *Savage* court held that use of the PAI test required application of a rigorous and complex protocol, and the expert failed to provide evidence or explanation as to how he reached the conclusion about the defendant using the PAI test. 455 Md. at 169. In this case, to reach her opinion about lost profits based on the before-and-after method, Ms. Cardell faced a far simpler task—without so many complex analytical steps. Ms. Cardell relied on PNSI's own accounting data and explained why she picked 2015 for the base year. First, this reflected the timing of the doctors' exodus. Second, 2015—according to Ms. Cardell—was the most accurate reflection of the LLC's predictable profits because the company had achieved that profitable year after several years of growth. The before-and-after method utilized by Ms. Cardell is clearly connected to the conclusion she reached, not simply based on the *ipse dixit* of the expert. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in . . . *Daubert* . . . requires a . . . court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

Issues with the base year, insurance reimbursement rates, and treatment of member draws are not "analytical gaps" between the methodology and the conclusion reached. Rather, they are issues with the actual conclusion reached—a dollar amount measuring lost profits. As explained above, such issues go to weight and credibility of Ms. Cardell's testimony. *See Cummings*, 265 F.3d at 65. Appellees may utilize all the advantages of the adversarial process to challenge Ms. Cardell's lost profit calculation, but—based on the record before us—her testimony should not have been excluded on grounds that her testimony is unreliable, filled with analytical gaps, or would not assist the trier of fact.

CONCLUSION

The circuit erred in holding that Ms. Cardell was unqualified to testify regarding lost profits due to her lack of experience in a particular industry. The circuit court also erred when it determined that Ms. Cardell's calculations were unreliable because she used 2015 as the base year, failed to consider insurance reimbursement rates, included member draws in PNSI's profits, corrected a mistake in her calculations, and calculated lost profits of PNSI arising from all the doctors departing, rather than each member individually. Not one of these issues, however, affects the reliability of Ms. Cardell's testimony under *Daubert* and *Rochkind*.

The circuit court was troubled with Ms. Cardell's opinion on an accounting issue and whether PNSI could prove that Appellees caused all of PNSI's members to leave. As to the latter issue, Ms. Cardell disclaimed any role as to causation. Excluding Ms. Cardell's testimony on either of these grounds usurps the role of the jury. *See Manpower*, 732 F.3d at 806. When a trial court usurps the role of the jury, it makes an error of evidentiary law

and abuses its discretion. *Id.*; *Moore*, 995 F.3d at 852–53. We reverse the circuit court's decisions excluding Ms. Cardell's testimony, striking the lost profits claim, and granting summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED. REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.

ditto that you're here. The same spectators are here, I don't think anything's changed. You all must be riveted to this case.

COURT'S RULING

BY THE COURT:

The Motion that's before the Court right now is the renewed Motion to -- let me get to the title of it -- the Defendant's Renewed Motion to Strike Plaintiff's Lost Profit Claims and exclude Plaintiff's Expert. And in this instance, the procedure that would, that is being used, the before and after procedure to measure lost profits I have no reason to think that that's something brand new. I have no reason to think that this isn't a procedure that's been utilized by qualified professionals for quite some time. I've seen reference to it in several federal cases that I've read.

So I say that because we're not dealing with a Frye-Reed type issue in the new *Daubert*/*Rochkind* world. If *Rochkind* had never been decided, if we were still doing Frye-Reed, in all likelihood even if we had had the same hearing with the same testimony I probably would be one of those trial judges that tend to be very, very much in the, let -- this all goes to the weight. I can see that the Defense has a lot of issues

here, there's a lot of questions, but it goes to the weight. Let the jury figure it out, it's not a Frye-Reed question because the process is the process. That means that there's lots of testimony that can be given to it.

We're not in the old days, we're not in the Frye-Reed, we're in the *Rochkind/Daubert* world. And as such, let me just say preliminarily there's not a whole lot of Maryland case law because the Court of Appeals kind of did a slow migration towards it through Blackwell and things like that. But there is a healthy and robust federal body of case law as to *Daubert*. Which is probably going to be quite useful and applicable to Trial Judges and also on Appellate review.

I'll just note, on that note from *Maryland Casualty Company vs. Therm-O-Disc, Incorporated*, that's 137 F3d 780, which is a Fourth Circuit Court of Appeals case, quoting from, and gosh, I'm always challenged when I'm trying to find the reported page number in a Westlaw printout.

(Brief pause.)

THE COURT: From page 783, I'll quote, "All *Daubert* demands is that the Trial Judge make a preliminary assessment of whether the proper testimony

is both reliable, in essence based on scientific knowledge. And helpful in essence of assistance to the trier of fact in understanding or determining a fact in issue." And it, "The burden is on the proponent of the proposition to establish be a preponderance of the proof", it's the burden of production as it's noted.

In this case, the Court of Appeals also notes that the Court has a gate-keeping function. It's not the, it's not the burden of the Plaintiff to meet that level of satisfaction that the Plaintiff would have to meet before a jury. And because it's not two trials in essence.

In *Rochkind* itself, on or about page thirty-four, Court of Appeals writes, "instead they", referring to Trial Judges, "Need not make much more" make a much more limited inquiry -- "Need only to make a much more limited inquiry, meaning whether the, there is sufficient indicia of legitimacy that exists to support the conclusion that the evidence derived from the principle may be profitably considered by a fact finder at trial. The Judge does not have to be trained in science to evaluate the reliability of a theory or technique."

That's my job today. The primary move in my view in reading *Rochkind* is that we look at

methodology. It seems to, it seems that the issue of challenging the methodology meaning having hearings where the burden is thrust upon the proponent from the mere filing of a challenge to produce evidence and litigate it. That has developed through *Rochkind*. Well, it may be unfair in the future to certain positioned plaintiffs, such as lead paint victims and things like that to have to bear the burden of this litigation.

That's not the issue here. There's no, there's no social justice issue here. It's, there's no reason to think that both sides were not equally suited to litigate the *Daubert* question.

Let me just, as I said earlier, I think it's important to resolve this today in that the trial date's July 19th. The reasoning won't be as crisp and as thorough as it would be on a written opinion. I hope that it's sufficient to explain not only to Counsel and the parties what I'm trying to communicate to them, but also to frame the issues properly for the Appellate Court.

There is no doubt in my mind that there is going to be, not going to be, that there will be an appeal in this case. This case has all of the earmarks of lasting forever. And I say that not to be funny,

but to be accurate. This is the projected timeline of this case as I see it. If we go to trial on July 19th, we'll get a verdict some time by August. There will be post-verdict litigation attempted that will put off the time for appeal to be filed. There will be an appeal filed. It will go to the Court of Special Appeals, it will take between one and three years to be resolved.

Given the aggressive nature of the litigation, the likelihood of reversible error probably increases. The loser in the Court of Special Appeals, no doubt, will file a petition for a certiorari. And quite frankly, with this *Daubert* Issue there may be some really, really interesting and good issues to explore in Annapolis.

If the Court of Appeals takes it, then it'll be another year or more before it's resolved. If the Court of Appeals does not take it, well then whatever would have happened in the Court of Special Appeals controls. So at best if there's a verdict and it's affirmed, at best litigation is going to be over in three years, probably. More likely you are looking at some period of time far beyond that. Not to mention the costs involved.

So I'm going to do the best I can to frame it because this may be the most interesting issue to the

Appellate Courts, the *Daubert*/*Rochkind* issue because it's a brand new, clean slate in Annapolis on that.

Let me start by saying I'm going to grant the Defendant's Motion. And I'm going to try to explain why now. The witness in this case has the capacity to be an expert in some matters, but I don't think in this matter. And I want to be clear for the witness's sake, I want to be clear, I am not finding that she's not an expert. I'm not finding that she is an expert. I very carefully put that off because number one I still think that her level of experience and knowledge and stuff comes into play under a *Daubert* assessment.

But number two, unless a ruling must be made I don't want any person who is trying for the first time to be an expert to be denied unless the Court has no choice between accepting or rejecting. And that, in essence, this witness is the first attempt to be an expert.

As I understand it, she's a certified public accountant licensed in the State of Virginia. She graduated cum laude from -- and I've misplaced her CV unfortunately -- but she graduated cum laude from undergraduate with a dual degree in accounting and, business accounting and leadership, I think. And she's worked in, in essence forensic accounting for quite

some period of time. There's nothing special about her designations which I'll explain more why that's important to me later. There's no specialized, there's no specialized training that she has received within the general accounting industry or even if there's such a thing forensic accounting industry. She has been published, but there doesn't appear to be a peer review process so there's really nothing you can point to in the publications as necessarily being of significance and importance in terms of determining her situation. She's been working for ten or eleven years in the field.

This is not your run of the mill business lost profits case, at least not from what I've heard today. The witness testified that this is a niche business. A niche business is a special business, it's unique, it's, there's, it's boutique, it's not typical. And my recollection is that she testified that she reached that conclusion from talking to the Plaintiffs directly. Or perhaps the Plaintiffs took that position and communicated it to her. I don't know that the Defendants necessarily would adopt the phrase niche business. I hope I'm saying it correctly. But it was important.

But the Defendants also point out that

there's, this is not your typical ma and pa hardware store kind of business. This is a business model that deals with a medical practice that has alternate streams of revenue that have alternate considerations when trying to determine expenses and things of that nature. And there was nothing about this witness's background that showed that she had any special exposure to this. She had one case prior where she dealt with a, a medical practice, I think.

And all of that is important because she's decided to use the before and after procedure or process however you want to say it. And that clearly, I agree that that's, you know, anybody would agree that's the appropriate procedure to use. The question is, how do you get a benchmark. And the first of the issues I have is she selected a benchmark of 2015. Now in 2010 I'll say that the LLC had a marginal income, a marginal profit. Some might say it's nominal, I'll use the word marginal, $22,000.00 is still a nice chunk of change in my pocket. It wouldn't buy me the Ford Maverick pick up truck I want to get some day, but it's noticeable.

Then there were three years of losses which then turned around in 2015 to profit. And she selected 2015 as the benchmark for the reasons that she stated.

Looking at factors of profits, the practice was growing, the market is growing. Now I don't know what qualifies her to take a fairly specialized LLC or type of work and most those judgment, that was never put out there. To the contrary, given her background it seems that to me there's not much daylight between her view of why she selected 2015 as the benchmark and the word speculation. That's, as a fact finder that's my view.

What I thought when listening to that part, and what I was considering was business valuation. I've done lots of cases, I've been doing this for far too long and I've dealt with business valuators in multiple settings and I tend to know their backgrounds and what they look at. And, you know, if you're going to say I understand that, this plaintiff's industry and I understand the market as it existed in 2015 and I understand that the theory of capitalizing and growing a practice, and I'm familiar enough with that industry that this particular practice represents in 2015 to say they were on the right track, they were on their way. That, you know, the rocket had left the launch pad and was going straight up. Well there wasn't any reason to believe that she had the training or the experience or the information to do that, it just seems speculative to me. So I had some difficulty with that.

I also had concerns with the quality of the information that she was using. She seems to rely an awful lot on oral communications directly with the Plaintiffs or Plaintiff's employees. Ordinarily you see experts who index the information they get and rely on and the information is available for everybody to look at and consider including the jury if necessary if it's permitted in.

But here this witness, the impression I'm given in listening to the testimony is that she feels no difficulty with the proposition of picking up the phone, giving them a call and asking a few questions here and there in order to further enlighten her.

And I don't mean to be disrespectful in putting it that way, that's just the way that I am going to put it. I mean one example of that is to discuss the type of business. The other example of that she relies entirely on representations from within the business and the Plaintiffs. She doesn't seem to have any independent source that I've heard of. So again, it's, it leads me off to considering her selection of the 2015 to be suspect and somewhat speculative.

She seems to place a value on accepting the rightness of the Plaintiff's litigation position. Now,

to be clear, I'm not saying that she seemed to be, to say I need to believe in the honesty, and integrity, and the correctness of the Plaintiff's claims. But it's difficult to, to not get from her that if she did not support, feel that the Plaintiff's claims had legs of some type that she wouldn't be a part of doing this report. And in that, there's an inherent bias which is made even more concerning to me by the amount of subjectiveness there is to the decisions being made. There's all of the, often she said well it's judgment, there's judgment calls, these normalizing decisions are judgment calls. The economic impact is a judgment call. And that was of concern.

There of course is the normalizing adjustment of June 2021. Which is a significant concern. There's no explanation for happening in June of 2021 as opposed to May of 2019. To think that an expert is just going to shift because they had a second thought later on if we had had this trial when initially scheduled we would have been using, had she testified, we would have been using something that wasn't right according to her. Something that was incorrect.

And again, we're left with judgment call. And the, the issue of the all or nothing with the seven doctors having left or not left because of the

Defendant's activities and actions, I didn't permit the Defendant to prevent that testimony nor am I stepping back from that decision in any way, shape, or form.

But one of the things is how helpful to the jury is the information. And this information is only helpful if the jury accepts that each and every doctor of the seven, the magnificent seven, to go back in time to that western movie. If all seven of them left solely because the, of the acts of the Defendant. So it's -- the failure to look at the doctors individually is a problem for me. Not for the reasons presented by the Defense when they were proffering the witnesses or the purpose for them. But it goes beyond that.

Not every doctor, necessarily is going to make or contribute the same amount of money each and every year. There was nothing presented in the Report to, that considered whether or not the income, the revenue generating ability of the remaining doctors or the leaving doctors was considered. It was just, let's take 2015 and go from there. Let's just use the numbers as we get them without examining whether or not, you know, the doctors who have income would have had that income and things of that nature. And again, there's nothing about her training to me that would qualify her to make those assumptions that all these

numbers would not be affected by passage of time and the doctor's passage of time.

The, there's also a concern about the lack of awareness or presence, either way it's a concern as to whether there's any standards in her industry for things like whether owner draws reduce profits or not. Like a salary expense for an employee, or what economic impact is. I think she may have said yes in essence to my question, your view of economic impact may be different than another expert's view of that economic impact based on the exact same information just because of the way you view these things, and the answer is yes. And it's, if there are no such standard, well then going to her experience and going to her reliance on the Plaintiffs is even more significant to me because the terms is reliability here. And the Court of Appeals for *Rochkind* has tasked me with being a gate-keeper in this case.

There was also a lack of looking, of the quality of information as I heard it being testified to. Were there other income streams to look at beyond just these particular doctor's revenue from historical revenue and things like that. You know, the primary example would be the insurance reimbursement rates changing. So those are a list of, and it's not an

exhaustive list, but those are a list of things that stood out to me.

As it relates to the application of the various factors on or about page thirty-seven of the *Rochkind* Opinion. The Court of Appeals writes, "Simply put all of the *Daubert* factors are relevant to determining the reliability of expert testimony yet no single factor is dispositive in the analysis. A Trial Court may apply some, all, or none of the factors depending on the particular expert testimony at issue. And I think that that, you know, means, that means that not each and every factor has to be resolved, and not each and every factor of the ten have to be resolved against the witness."

But I'll try to go through the factors as it is. My effort is to try to explain myself and explain myself in a clear enough manner that each part affected its ability to have it properly reviewed on appeal is protected, that's my goal here.

As to the *Daubert* collection and of the *Rochkind* factors, the one through five, whether a theory or technique can be and has been tested. As I said, I mean, you know, before and after is, that's old school. You know, it certainly can be tested. The problem is I couldn't figure out how it could be tested

in this case based on her testimony. Because of all of these kind of intangible things like economic impact what is it how can, you know, how can that be tested when it's so subjective.

The, there's nothing I've been presented from which the way that she selected 2015 and the factors that she used in selecting 2015 could be tested. And also, again, there is this, this lack of experience for this particular matter. And I now, instructing I'm not, I don't want this case to be used against her at a later point for some other kind of case. You know, for this particular case. I just don't believe that she has the sufficient demonstrated experience.

Now perhaps *Daubert* factor one was looking more to the big picture. Can before and after be the tested and I would think that it can, I mean, you know, profit's profit. But apparently it can't.

Number two, whether a theory or technique has been suggested to peer review in publication. I, I don't think that factor applies in this case, to me peer review and publication refers to the methodology actually used. And there's no reason to think that she didn't use the, at least in her mind the methodology.

Whether a particular scientific technique has a known or potential rate of error. I don't know that

that factor applies as is ordinarily considered. Like for example in DNA testing, the probabilities are, of being correct are like, or being in error are one in, you know, a gillion, or a quadrillion or something like that. You know, that's the error rate I think that they are really considering in that factor. But what's of concern to me here is that there was a change. So from the perspective of is this a technique if it's correct subject to alteration or change at any given time. And apparently it is. Because it changed in June of this year. The facts didn't change, the information didn't change. Just the view of if changed.

THE COURT: -- at least in her mind, the methodology. Whether a particular scientific technique has a known or potential rate of error. I don't know that that factor applies as it's ordinarily considered. Like for example in DNA testing, the probabilities are of being correct are like or being an error are one in, you know, a gagillion or quadrillion, or something like that, you know, that's the error rate I think that they're really considering in that factor.

But what's a concern to me here is that there was a change from the prospective of, is this a technique, if it's correct, subject to alteration or

change at any given time. And apparently it is because it changed in June of this year. The facts didn't change, the information didn't change, just the view of it changed.

The existence of maintenance of standards and control. Again, there was very little evidence of any standards of controls that exist. The specific areas of importance or concern to me, there weren't any economic impact for example, the way to treat owners draws as in the profits computation, there didn't seem to be any actual standards, at least none that the witness was aware of.

What we were left with was her judgment and there's no reason to think that she has sufficient experience this type of business and that this type of business and the concerns involved, are so standard especially when she views it as (word unintelligible) business.

Then we get to the *Rochkin* factors, whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted in the pending litigation, whether they have developed their opinions expressly for purposes of testifying.

Well, I guess the best kind of expert is the

one who has done research into the freshness of peaches and how many days after they have been pulled off the tree, do they have to sit under the seller's tarp before they reach optimal level of natural sweetness. And that this person just happened to do it because that's what this person does. And there's a need for that particular testimony in the case so the person produces the results of the research that was done without the case in mind at all. I think that that's what referred to, I say peaches cause I was able to go to the farmer's market today and I got fresh peaches, I got fresh strawberries, black raspberries and red raspberries, at Miller Branch down on Frederick Road, it's going on the time to get out of here.

And that's not what we have here, we have whether or not the opinion was expressly for the purposes of testifying. And there's nothing wrong with that, I mean you know, experts are retained for the purposes of testifying in cases, that's why they exist. There's no inherent negativity there. But it just seems that this is, you know, it makes you think even more or even more concerningly about her views of the Plaintiffs in this case and the reliance of the Plaintiffs for their oral views of yeah, this is a niche business or you know, whatever other opinions

they gave her that she relied on.

Seven, whether the expert has unjustifiably extrapolated from the accepted premise to an unfounded conclusion. This applies if the -- if the premise that we're talking about from which the unfounded conclusions roles would be the acceptance of 2015 as the benchmark, as the beginning, as the before.

Whether the expert has accounted for obvious alternative explanations. And no, that clearly didn't happen here, I mean alternative explanations could be the doctors own inherent ability to generate revenue over the time periods that we're talking about.

Whether or not the insurance reimbursement was adjusted and if so, to what extent does that affect the revenue stream. And there's other factors, I had mentioned. Whether the expert is being as careful as he or she would be in his or her regular professional work outside of his or her paid litigation consulting. I don't find that to be applicable, I don't know what to say about that and I have no reason to think that she blew this off as an inconsequential project, I mean she took this very seriously.

Whether the type of -- whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert

would give. I mean I think I just incorporate everything I said for that. As I said, the mere fact the findings changed in June of this year for fully subjective reasons, it had nothing to do with any new information. It kind of makes the whole reliability even that much more suspect.

So I'm going to find that the Plaintiff has failed to meet their burden to demonstrate from the *Daubert* and *Rochkin* the reliability and usefulness to the jury but primarily the reliability. The usefulness is a very, very slight factor and I don't want to dwell on it because I don't want to create reversible error just by you know, somehow linking into that testimony I didn't allow. I'm not relying on that theory.

But certainly I have difficulty, significant difficulties with the reliability. I'll find the Plaintiff did not meet its burden and the terminology, this is the first *Daubert* hearing or at least the first I ran into it, certainly her report will not be permitted into evidence, her report. She will not be permitted to testify as to the issue of lost profits. And that's what we're talking about here, lost profits. And I just want to stress, that's my understanding because where we go from here, I think maybe has something to do with that.

CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND
8360 Court Avenue
Ellicott City, Maryland 21043
Main: 410-313-2111 Civil: 410-313-3844 Criminal: 410-313-3822 Juvenile: 410-313-3827 Land Records: 410-313-5850 Calendar Office: 410-313-3575 Family Law: 410-313-2225

Case Number: **C-13-CV-18-000181**
Other Reference Numbers:

PARKWAY NEUROSCIENCE AND SPINE INSTITUTE, LLC VS. KATZ, ABOSCH, WINDESHEIM, GERSHMAN & FREEDMAN, P.A., ET AL.

SUPPLEMENT TO ORDER GRANTING DEFENDANT'S MOTION TO STRIKE

The Court ruled from the bench on June 30, 2021 when granting the Defendant's Renewed Motion to Strike Plaintiff's Lost Profit Claims and Exclude Plaintiff's Expert based on New Daubert Standard" and in doing so gave reasons for that ruling. The Court, however, neglected to discuss the persuasive value of *CDW LLC, CDW Direct LLC and Berbee Information Corporation v. Netech Corp.*, 906 F. Supp. 2d 815 (S.D. Ill. 2012) (Southern District of Indiana, Indianapolis Division) (hereafter CDW"). The Court shall remedy that omission in this supplemental order with a brief discussion.

CDW involved a case in which various torts sounding in contract law were alleged and the damages requested included lost profits. The defendant successfully moved to exclude the plaintiff's expert testimony as to lost damages on Daubert grounds. The alleged tortious conduct occurred in one of the plaintiff's several branches. The expert was tasked with determining the lost profits in the branch that was the focus of the alleged conduct. To accomplish this the expert used the "yardstick method" in which he compared the targeted branch with the performance of the plaintiff's other branches. The Court noted "An expert's choice in data sampling is at the heart of his methodology. (cites omitted) A yardstick approach is an acceptably reliable method under Daubert for calculating lost profits only if the benchmarks (or yardsticks) are sufficiently comparable that they may be used as accurate predictors of what the target would have done." (CDW at page 824) The Court then noted that for the yardstick method to have value, the benchmark must be truly comparable. "Absent the requisite showing of comparability, a damage model that predicts either the presence or absence of future profits is impermissibly speculative and conjectural..." (CDW at 824, citing *Loeffel Steel Prods. V. Delta Brands, Inc.*, 387 F. Supp.2d 794, 812 (N.D. Ill. 2005) In excluding the expert the Court held that the expert had not provided reasons supporting his determination that the chosen branches were comparable, nor had the expert compared the target branch to the actual business experience of any other business entities. The court held that the expert's lost profits calculations based on the yardstick methodology did not satify Rule 702 and were excluded on Daubert grounds. (CDW at 825)

The Court believes that the expert's choice of a benchmark in CDW is analogous to the expert's choice of 2015 as the benchmark in the instant case. The fact that the method used in CDW was the yardstick method and the method used in the instant case was the before and after method is not significant because each relies on the establishment of a benchmark. Thus Court cites CDW as having persuasive value in finding that the Plaintiff has not satisfied Maryland Rule 5-702 and this Court's decision to exclude this expert on Daubert grounds.

Entered: Clerk, Circuit Court for
Howard County, MD
July 1, 2021

7/1/2021 — Date
Judge

PNSI v. Katz Abosch & Mark Rapson
Schedule 2 - Calculation of Lost Profits
Updated May 17, 2021

	Base Year 2015 [a]	2016 [b]	2017 [c]	2018 [d]	2019 [e]
Revenue	$ 14,752,067	9,901,009	8,668,327	9,330,461	9,772,697
Less: MU Income	*(101,744)*	*(43,032)*	-	-	-
Adjusted Revenue	14,650,323	9,857,977	8,668,327	9,330,461	9,772,697
Expenses	14,495,085	9,941,732	10,241,352	9,726,453	9,902,666
Less: Depreciation	*(66,263)*	*(50,587)*	*(95,141)*	*(41,468)*	*(41,468)*
Less: MU Expense	*(472,364)*	*(5,400)*	*(39,448)*	*(13,520)*	-
Plus: Katz Abosch [1]	*53,015*	-	-	-	-
Plus: Trauma/OnCall Adjustment [2]	-	-	*129,573*	*767,573*	*767,573*
Adjusted Expenses	14,009,473	9,885,745	10,236,336	10,439,039	10,628,771
Adjusted Income	**$ 640,851**	**$ (27,767)**	**$ (1,568,009)**	**$ (1,108,577)**	**$ (856,074)**
		[b] - [a]	[c] - [a]	[d] - [a]	[e] - [a]
Lost Profits		**$ (668,618)**	**$ (2,208,860)**	**$ (1,749,428)**	**$ (1,496,925)**

1. See Schedule 7.
2. See Schedule 3.

Source:
2015 P&L; 2016 P&L; 2017 P&L; 2018 P&L; 2019 P&L

PNSI v. Katz Abosch & Mark Rapson
Schedule 2 - Calculation of Lost Profits
Updated June 11, 2021

	Base Year 2015 [a]	2016 [b]	2017 [c]	2018 [d]	2019 [e]
Revenue	$ 14,752,067	9,901,009	8,668,327	9,330,461	9,802,826
Less: MU Income	*(101,744)*	*(43,032)*	-	-	-
Adjusted Revenue	14,650,323	9,857,977	8,668,327	9,330,461	9,802,826
Expenses	14,495,085	9,941,732	10,241,352	9,726,453	9,902,666
Less: Depreciation	*(66,263)*	*(50,587)*	*(95,141)*	*(41,468)*	*(41,468)*
Less: MU Expense	*(472,364)*	*(5,400)*	*(39,448)*	*(13,520)*	-
Plus: Katz Abosch [1]	*53,015*	-	-	-	-
Trauma/OnCall Adjustment [2]	*319,100*	*(395,010)*	*77,000*	*842,400*	*1,233,617*
Adjusted Expenses	14,328,573	9,490,735	10,183,763	10,513,865	11,094,815
Adjusted Income	**$ 321,751**	**$ 367,243**	**$ (1,515,436)**	**$ (1,183,404)**	**$ (1,291,989)**
			[c] - [a]	[d] - [a]	[e] - [a]
Lost Profits			**$ (1,837,186)**	**$ (1,505,155)**	**$ (1,613,739)**

1. See Schedule 4.

2. 2017 - 2019: Based on Drs. Holmes & O'Malley Trauma/OnCall Revenue earned in each year less any amounts paid.
Includes adjustment for 2015 Trauma/OnCall paid in 2016.

Source:
2015 P&L; 2016 P&L; 2017 P&L; 2018 P&L; 2019 P&L; Account Detail for 8230

revenues that they earned working that.

Q. And isn't it true that the doctors can leave as much in the business as they choose or take out every penny at the end of the year?

A. A business can decide to distribute their income and their earnings in whatever way they wish for tax purposes. It doesn't change the fact that we had an entity that has earned being PNSI that earns revenues and has expenses and those expenses include paying the doctors because the doctors aren't going to work for free. So the cost to generate those revenues has to be included in profits.

THE COURT: I guess there's two ways to look at it, way one is that if I own a business and when I finish paying all my expenses out including my, you know my cashier for widgets if there's $100.00 left if I don't take a penny of it that's a $100.00 profit for my business.

THE WITNESS: Right.

THE COURT: My LLC.

THE WITNESS: Right.

THE COURT: The question is, what if I decide to take that $100.00 as my income because I don't have any other income and, you know, I have a house that the business doesn't pay for, you know, that type of stuff.

THE WITNESS: Um-hum.

THE COURT: It seems to me that there's a disagreement in this case. That if I take that $100.00 as the owner of the business one line of thought is the company has made no profit that year because I paid myself $100.00. The other thought seems to be I'm the owner, I'm not entitled to anything. What I get is what I take and it's not an expense, it's not a capital or anything like that. So it's irrelevant how much my draw is on the profit. The company itself still made $100.00 profits. And if I take $100.00, all of it is still $100.00 profit. If I take $5.00 it's $95.00, you know, it's still $100.00 profit. It seems like there's the struggle in this case like that. For purposes of calculating lost profits in the accounting industry which is it?

THE WITNESS: So to me it is your --

THE COURT: No, no, no --

THE WITNESS: I'm sorry.

THE COURT: If -- there's an industry, you're an expert.

THE WITNESS: Yes.

THE COURT: There's one standard, it's not how you feel about it today and how they feel about it today. What is the standard?

THE WITNESS: So the, there is no -- and I've done research on this -- there is no specific identified this is how you treat it that I have been able to locate and I, I don't believe it exists. I -- I've discussed with another damages expert as well.

THE COURT: But it seems like a pretty basic issue that seems to be, capable of rearing its head in every case in which there is an owner's draw is possible.

THE WITNESS: Yes. So the, the way that the industry would tell you to look at it is based on the business. And the profit to the business because that's why there's no sort of delineation, because lost profits are based on lost profits to a business. And if there are expenses that might be draws, that's an expense.

And the question is what did the business suffer. And in your example, if you took $100.00 out and that left the business with zero but then somebody harms you and in the future the business can't make that $100.00 to give to you there's still lost profits.

THE COURT: Well let's forget about anything that happens after the day that I have to make the decision if I take my $100.00 buck or not. Does it matter to you as an expert that I do? Or are you, are

you, is your view the profit's $100.00 bucks regardless of what I do?

THE WITNESS: My view, the profit is $100.00 regardless of whether you leave it in the business or take it for yourself.

THE COURT: But you don't know that if that is in line with the industry standard, the accounting industry standard because you are not aware of an industry standard on this issue.

THE WITNESS: Yes. And I have researched it and I have not seen any, anything that specifies one way or the other. But my understanding of damages theory would be that if the business makes $100.00 regardless of whether it stays in the business or is given to a shareholder or an owner, or a member, those are still the business's profits.

THE COURT: Okay.

Q. In regard to the doctors at PNSI, did they take the same amount of compensation every year?

A. I believe it depended on the year. Some years yes, and some years no.

Q. Well would you agree that in 2016 doctor O'Malley took out guaranteed payments of $959,000.00?

A. Yes, and I can explain --

Q. Well let's --

May 2019 and then May of 2021.

A. Okay.

Q. Isn't it correct that the base year you selected of 2015 was the only profitable year other than 2010?

A. That's right.

Q. And then when you made a change in, on June 11 or June 12 when we finally received it, you turned 2016 into a profit, profitable year.

A. The adjustment that I made had 2016 showing a profit, yes.

Q. And in regard to the compensation that Dr. Holmes and O'Malley were drawing out of the practice in 2017, 2018, and 2019, were they the only owners during that timeframe?

A. They were the only owners during that timeframe, yes.

Q. So in 2016, if Dr. Holmes took out $690,000.00 and Dr. O'Malley took out $959,000.00 did you in examining the records and the profit and loss see that they were setting any sums aside for future expenses into 2017 or were they drawing out all the cash?

A. So it's important, as I said, to look at the guaranteed payments, the numbers you're talking about I

did do a deep dive on them which I think is really important in this case, to understand what comprises those numbers you're talking about. And so we have to put aside the trauma and on call, because again no effect on profitability. Any dollar they take out is a pass-through.

But then, when you look at the draws that Drs. Holmes and O'Malley were taking, Dr. O'Malley took the same draw for '15, '16, '17, and '18. The draws were not materially different over this time in any way. It wasn't as though the, Drs. Holmes and O'Malley were increasing their draws to sort of take money out of this practice. That's just not what happened. Any material increase in guaranteed payments in this period that we're talking about, the loss period is driven by an increase in trauma and on call monies received. There is no increase in, or no material increase in the amount of the draws that were taken.

Q. In regard to the expenses that you've identified, in regard to expenses not including guaranteed payments, in 2016 expenses, not including guaranteed payments were $7,353,000.00, do you agree with that?

THE COURT: What page of the document are you looking at?

MR. McGAVIN: I'm asking her based upon not one of the documents.

THE COURT: Okay.

MR. McGAVIN: But based upon our calculations.

THE COURT: Okay.

A. I, I can't tell you that off the top of my head, but…

Q. All right and in -- do you, did you try to analyze whether or not the doctors actually reduced their expenses separate and apart, meaning Holmes and O'Malley, separate and apart from the compensation they drew out?

A. Can you clarify what you mean by, "their expenses"? Do you mean the practice's expenses, or their personal expenses?

Q. Yes, I do. I mean the practice's expenses. How did they, how much did they reduce their expenses in 2016 and 2017?

A. If you look at the expense numbers, expenses in 2015 were 14.5 million. If you look at '16, we're down to 9.9, in '17, we're down in the 9 Million Dollar range, so expenses were reduced.

Q. What I mean is expenses separate from guaranteed payments compensation to Holmes and

O'Malley, did you analyze that?

A. Well since the guaranteed payments are made up of the trauma and on call which is a flow through. And the other, the salary, the draw portion for Holmes and O'Malley didn't change. Any decrease in expense would be associated with something else.

Q. In regard to the expenses in 2016, and '17, '18, and '19, what is your understanding of what the practice did to reduce their expenses since they had fewer doctors?

A. I believe there was a pretty significant lay-off that occurred of, of, I don't know the exact specifics of the titles of the folks that were laid off. But, you know, support, supporting the, people who supported the physicians, there were so many less physicians to support, nurses, PA's, it's my understanding that there was a lay-off there.

Q. Okay. In regard to reimbursement rates, what's a reimbursement rate in the world of medicine?

A. A reimbursement rate is the amount that you receive from the payor. The payor is an insurance company for services rendered.

Q. And what was the reimbursement rate trend for PNSI from 2014 through 2019?

A. I didn't do a detailed analysis of the

reimbursement rate. I looked at the revenues.

Q. And did you do any analysis of what the impact of federal legislation versus Medicare/Medicaid reimbursement rates whether -- what those had on the impact of reimbursement to a health care business?

A. The, the market research that I looked into showed that revenues were expected to grow in the medical industry for a variety of reasons including Medicare and Medicaid accessibility. And the ACA.

Q. Did you review -- if I showed you a chart that documents reimbursement rates would that be something that might help you in understanding reimbursement rates for neurosurgeons?

A. Sure.

Q. Okay, let's see if we can --

THE COURT: Is this a chart that shows reimbursement of rates in general? Or is this related to the operating agreement in this case or something like that?

MR. McGAVIN: Unrelated to the operating agreement. It shows reimbursement rates per CPT codes, Your Honor.

THE COURT: Okay, all right.

MR. McGAVIN: So it helps explain to the neurosurgeons what the reimbursement rates were doing

across time.

THE COURT: All right.

MS. DICKINSON: Your Honor, we're going to object to the extent that there was no expert to authenticate the information. Or maybe their source documents that we need to see.

THE COURT: Overruled in that the witness said looking at it may assist her. If the Plaintiff believes that she is an expert and that as such if she has familiarity with reimbursement and stuff like this, perhaps the chart will assist her. If she looks at it and she can't understand it then it won't assist her. At this juncture, I'm treating it the same way as something to refresh her recollection.

MS. DICKINSON: Thank you, Your Honor.

THE COURT: Overruled.

Q. All right. So in -- I'm trying to stand so everybody can see this. So you know what a CPT code is, right?

A. Sure.

Q. Okay, let's see if we can --

THE COURT: Is this a chart that shows reimbursement of rates in general? Or is this related to the operating agreement in this case or something like that?

MR. McGAVIN: Unrelated to the operating agreement. It shows reimbursement rates per CPT codes, Your Honor.

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MS. DICKINSON: Thank you, Your Honor.

THE COURT: Overruled.

Q. All right. So in -- I'm trying to stand so everybody can see this. So you know what a CPT Code is, right?

A. Yes.

Q. And do you know what is a CPT Code?

A. It's a code for whatever the procedure is that's being billed to the insurance company.

Q. Right and do you know that there are specific CPT Codes that are pertinent to, for example an laminectomy, which is a procedure that neurosurgeons do?

A. I accept your representation on that specific procedure. But I understand that there are codes for medical procedures.

Q. Okay, and what did you do to check to see what the reimbursement rate is for a 63042, just as an example for a laminectomy, which is a common neurosurgical procedure.

MS. DICKINSON: Objection. Our objection --

THE COURT: I think the question is what if any, what if any knowledge do you have in changes of reimbursement rates over the time period of 2015 through 2019? That's the real issue, isn't it?

MR. McGAVIN: Yes, sir.

A. So um, I'll, yeah. I don't know about this --

THE COURT: The, this is what I understand the whole thing is about.

THE WITNESS: Yeah.
THE COURT: These doctors do certain things.
THE WITNESS: Yes.
THE COURT: Then they submit it to your insurance.
THE WITNESS: Um-hum.
THE COURT: And then insurance pays them money.
THE WITNESS: Right.
THE COURT: And how much they get paid depends on how they submit it.
THE WITNESS: Right.
THE COURT: It also depends on various codes and things like that.
THE WITNESS: Right.
THE COURT: And insurance companies often change their reimbursement rates from year to year.
THE WITNESS: Right, um-hum.
THE COURT: Which means that if, if this Plaintiff received $100.00 for doing procedure A in reimbursements because they did three procedure A's in reimbursement in 2015. Perhaps the reimbursement rate was lowered so they could do the same number of procedures in 2016.
THE WITNESS: Right.

THE COURT: And get $80.00.

THE WITNESS: Right.

THE COURT: I think that that's the thrust of the question. And what, if any knowledge do you have of any change of any reimbursement rates as it would affect that revenue source over this time period. That is the question.

THE WITNESS: Yes.

THE COURT: As I understand it.

A. Yes, so can I see the chart again?

Q. Yes.

THE COURT: Good luck with that, you know. That thing is like…

A. You know, when I look at this, you know the literature, which I talked a lot about this industry and the medical industry because of Medicare and Medicaid specifically, and in addition, more access to private health care because of the Affordable Care Act, and I'll get back to that. If there looks, if you're looking at '15 to '18, there looks like in this chart there was some decrease.

But you can't just look at that in a vacuum. You have to look at the other revenue trends that might be going, so yes, reimbursement rates might be declining slightly. I don't know what the source of

this chart is, so I, I'll just have to talk about what it says, but --

THE COURT: Well, the bigger question is did you look at all of the various revenue threads that come up with the fabric of their yearly income? Because maybe some of the reimbursements would go down, so that thread gets weak. But maybe some of the other --

THE WITNESS: Right.

THE COURT: -- other revenue sources maybe they're, they're, you know, something else went up.

THE WITNESS: That's right, so --

THE COURT: Or were you just looking at numbers without understanding from further records of where those numbers came from?

A. Yes, so I looked at the revenue numbers and I looked at generally what the trends were in the industry and so it, the declines in the reimbursement rate, like you said, something would be going up.

THE COURT: Um-hum.

THE WITNESS: Which if more people are having access to any health care and so that, that would offset declines in reimbursement rates and that's why as a whole, as a whole the industry was projected to have an increase in revenues.

THE COURT: Right. But the question is in this particular LLC's case.

THE WITNESS: Um-hum.

THE COURT: If they got a hundred bucks from doing procedure A in one year and only eight bucks from doing procedure A in another year and a doctor left, can you say from your examination of the records that the only reason for the reduction is the doctor leaving as opposed to other sources such as the reimbursement rate from the insurance company declining?

A. Yes. So for the doctors who left, there wouldn't be -- the question is if you lost a lot of revenues from those doctors that we can't use to offset expenses. So whether, for that doctor they would have been able, if it changed, that doctor is still not there and that's what we're accounting for.

THE COURT: Okay.

Q. All right. Let's ask it this way. A slightly different issue. In your review of the literature what literature did you find that doctors stay at a particular practice more than five years?

A. I did not find any literature that talked about, specifically, how long doctors stay at a practice.

Q. All right, and so you have at --