Circuit Court for Baltimore City
Case No. 24-C-20-000775

UNREPORTED *

IN THE APPELLATE COURT

OF MARYLAND

No. 1550

September Term, 2022

ELISE MONROE, ET AL.

v.

UNIVERSITY OF MARYLAND MEDICAL CENTER, LLC, ET AL.

Leahy,
Friedman,
Gill Bright
(Specially Assigned),

JJ.

Opinion by Leahy, J.
Concurring Opinion by Friedman, J.

Filed: May 24, 2024

* This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Emergency responders rushed two half-sisters, K.B., aged five, and K.M., aged six (also, "the children"), to the University of Maryland Medical Center ("UMMC") on the morning of February 11, 2017, after their mother called 911 and reported them as unconscious and barely breathing. As emergency room staff worked to stabilize the children upon their admission to the hospital,[1] they performed a battery of tests, including VITROS rapid urine tests which came back positive for opiates for both children.[2] K.B. and K.M. were intubated and remained in comas and on ventilators for several days.

After eleven days, K.B. and K.M. were discharged from the hospital; however, it was four months before both children could return home to be with their mother and infant half-sister, K.J. The Baltimore Police Department ("BPD") notified the Child Protection Services ("CPS") of the Baltimore City Department of Social Services ("DSS") shortly after the children arrived at UMMC. Physicians then shared the VITROS test results with the DSS first responder, who initiated a petition for an Emergency Shelter Care Hearing prefatory to a children in need of assistance ("CINA") proceeding. Once discharged, the eldest daughter, K.M., lived with her maternal aunt and cousin. The younger children, K.B. and K.J., lived with their respective fathers for several months through several hearings. Ultimately, K.M., K.B., and K.J. were each declared *not* to be CINA on May 25,

[1] The children received various medications in the emergency room and intensive care unit, including Benadryl to combat any possible allergic reaction, naloxone (Narcan) to combat any possible opiate intoxication, and Fentanyl to facilitate intubation.

[2] UMMC doctor Dr. Howard Dubowitz deposed that the VITROS test is a qualitative "screening" test as opposed to a "confirmatory" test, yielding a binary indication of "whether or not a particular individual contains a threshold amount of opiates[.]" A confirmatory test indicates the specific quantity of the substances detected.

2018. Three years later, while the underlying litigation was already underway, a tragic episode occurred on June 17, 2021, in which the eldest daughter committed suicide.

Appellants, Elise Monroe (also "Mother") and three of her children, K.M., K.B., and K.J. (collectively, "Plaintiffs" below), brought a nine-count tort action against UMMC, the University of Maryland Emergency Medicine Associates, P.A, ("UMEMA"), and Dr. Hong Kim, M.D, ("Dr. Kim"), a consulting physician, (collectively, "Defendants" or "Appellees"), alleging their responsibility for the trauma suffered by Ms. Monroe and her family. Appellants specifically accused Dr. Kim of starting rumors that the children had overdosed on opiates, instigating BPD and DSS to open investigations, and "driving" official proceedings by insisting the children had overdosed on opiates in the face of allegedly contradictory evidence.

Appellees raised affirmative defenses including statutory immunity, absence of duty, and lack of proximate cause. After several hearings, including a *Daubert*[3] hearing during which the circuit court excluded Appellants' expert toxicologist, the court awarded

[3] This legal eponym comes from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which established a new standard for the admission of expert scientific testimony, and provided "a non-exclusive list of factors that may be pertinent when determining whether the scientific testimony at issue is not only relevant but reliable." *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 485 Md. 335, 362 (2023) [hereinafter "*Parkway Neuroscience*"] (quoting *Daubert*, 509 U.S. at 589, 593-94). In the Supreme Court of Maryland's 2020 decision, *Rochkind v. Stevenson*, Maryland adopted the *Daubert* regime so that its focus on reliability would "streamline the evaluation of scientific expert testimony under [Maryland] Rule 5-702." 471 Md. 1, 35 (2020).

summary judgment to Appellees.

Appellants present the following four questions which we have reordered:

I. "Did the trial court err in denying Plaintiffs' motions to compel discovery from defendants regarding their experts and subsequently denying Plaintiffs' motions to limit those experts' testimony?"

II. "Did the trial court err in excluding the opinions of Plaintiffs' expert, Dr. Charles McKay, and by extension, Dr. Lawrence Guzzardi?"

III. "Did the trial court err in granting summary judgment first as to count eight of the complaint – Violation of Maryland Declaration of Rights and subsequently as to all the remaining counts?"

IV. "Did the trial court err in granting Defendants' motion in *limine* that limited the testimony of Plaintiffs' expert, Douglas Wink Coffey, Esquire?"

Appellees, in their cross-appeal, also present three questions for our review:

I. "Maryland compels health practitioners to report suspected child abuse or neglect and gives them broad good-faith immunity when doing so. Here, the court denied the Hospital's motion for summary judgment, finding that a jury should decide its good-faith immunity. Did plaintiffs proffer sufficient evidence to withstand summary judgment?"

II. "[DSS] began investigating two girls' near-fatal injuries when alerted by police. The Hospital told investigators that both girls tested positive for opiates on urine screens but negative on subsequent blood tests. Defendant Dr. Kim believed that opiates exposure occurred and disagreed that properly dosed cough medicines caused "false positives" and comas. Did the Hospital have a duty to recant his opinion or otherwise influence the subsequent Child in Need of Assistance (CINA) proceedings?"

III. "The proximate-cause requirement limits intentional tortfeasors' potential liability. During the 2017 [DSS] investigation, the CINA court placed six-year-old [K.M.] with two aunts for less than four months before returning her to Ms. Monroe's custody. Three years later, [K.M.] committed suicide. Can the Hospital's cooperation with [DSS] be the proximate legal cause of a nine-year old's suicide three years after the CINA proceeding ends?"

The threshold question of Appellees' assertion of immunity to this action is both the alpha and the omega of this case. Although the court initially ruled that it could not grant

Appellees' summary judgment because their evidence had not rebutted *all* charges of bad faith, Appellants' remaining allegations fell apart after the *Daubert* hearing resulted in the exclusion of their expert's testimony. The court then granted the summary judgment that it had earlier denied.

Therefore, we begin our discussion with Appellees' cross-question challenging the circuit court's partial denial of Appellees' summary judgment motion on the grounds of statutory immunity at the motions hearing in May 2022. From our posture of deference, we find no abuse of discretion. We pass on to Appellants' challenges to the circuit court's pre-trial rulings relating to Appellees' experts and then to its exclusion of Appellants' expert's testimony after a hearing on a Rule 5-702 motion, and find the court's rulings sound. At that point, where Appellants had no expert to support their allegations of bad faith, including that Appellees "knew, or had reason to know, the falsity of their statements" and consciously mischaracterized the VITROS rapid urine tests results, the circuit court's grant of summary judgment was inevitable. Accordingly, we do not reach the fourth issue presented by Appellants or the remaining questions in Appellees' cross appeal.

BACKGROUND

A. Medical Crisis and Care at UMMC

During the week of February 6, 2017, Ms. Monroe's two eldest daughters, K.B. and K.M., exhibited symptoms of influenza, which Ms. Monroe treated at home with over-the-counter cough remedies ("OTC medicines"). On the night of February 10, at 9:00 p.m.,

Ms. Monroe administered "half a dose" of the OTC medicines, each, to K.B. and K.M. On February 11, Ms. Monroe awoke to discover the children comatose in their bedrooms. She immediately called 911 and both emergency medical services[4] and BPD responded. Ms. Monroe traveled with the children to UMMC by ambulance, where they were treated in the emergency room for acute respiratory failure.

When the children arrived in the emergency room they were administered a "small dose of Narcan," which "increased [K.M.'s] respiratory rate and BP[,]" but elicited no response from K.B. UMMC doctors stabilized the children and placed them in the Pediatric Intensive Care Unit, ("PICU") where they would remain on ventilator support, comatose, for "roughly a week[.]" Once in the PICU, K.M. received an additional dose of Narcan, resulting in "improvement in blood pressure, dilatation of pupils and initiation of spontaneous breaths[.]"

Within hours of the children's admission, UMMC administered rapid urine drug tests analyzed by an Ortho Clinical Diagnostics VITROS System ("VITROS test"), which indicated opiates in the children's systems. Approximately eleven hours after K.B.'s VITROS test, and seven hours after K.M.'s VITROS test,[5] UMMC also drew blood for

[4] The Baltimore City Fire Department ("BCFD") emergency medical services "Comprehensive Report" for K.M. denotes that "[t]he field impression of the patient was Poisoning."

[5] K.B.'s VITROS sample was collected at 11:43 AM, and her confirmatory blood test sample was collected at 10:27 PM. K.M.'s VITROS sample was collected at 1:06 PM, and her confirmatory blood test sample was collected at 7:50 PM.

confirmatory lab tests for opiates in the children's systems.

In the early evening on February 11, Dr. Kim, the consulting toxicologist, reviewed the VITROS results and met with Ms. Monroe in the emergency family waiting area where he interviewed her about the circumstances of the children's medical crisis. Ms. Monroe recounted her administration of several brands of OTC medicines over the past few days and theorized that the children's crisis had been caused by a reaction to the OTC medicines. Dr. Kim noted his disagreement with Ms. Monroe's theory in his consult note in the children's charts, recording his belief that there "are no known 'false positive' of opiates due to exposure of other substances" and therefore exposure to dextromethorphan ("DXM")—the active ingredient common to the OTC medicines— "would not result in a positive test for opiate urine drug screening test."

Dr. Kim further recorded, in relevant part:

> [K.M.] 6 year old girl, . . . found by her mother at approximately 9 am unresponsive . . . Per history, patient received robitussin/Tussin DM last night for cough. Her sister, who is also suffering from "cold" symptoms, has been taking ibuprofen, Halls cough drop as needed. No other medications are reported to be available/accessible at home . . . . No other exposure outside of robitussin/Tussin DM ([DXM]) is reported.
>
> [K.B.] 5 year old girl . . . , admitted to PICU for lethargy and fever. Intubated for airway protection. Per mother's history, patient was last seen normal last night and was found unresponsive after giving robitussin/Tussin DM for her cough/cold symptoms. Other OTC received included Halls cough drops and

ibuprofen. No other exposure is reported.

On February 16 and 19, UMMC received the blood drug test results for K.M. and K.B. respectively. Both reports were negative for opiates.[6] A UMMC social worker promptly conveyed the results to DSS the following day, February 20.

On February 22, UMMC child psychiatrist Dr. Sarah Edwards ordered genetic testing to investigate the possibility that the children had a condition that would support Ms. Monroe's theory that they overdosed on OTC medicines. If the children had a genetic aberration that made them "poor metabolizers" of the DXM in OTC medicines, they could have had a higher level of DXM in their blood than would be expected from the single dose preceding their medical crisis, as it accumulated from all the doses of OTC medicines they had received over the prior week. However, the genetic testing results showed that the children were typed as genetically "intermediate" rather than "poor" metabolizers of DXM.[7]

During their eleven days in the hospital, the children recovered fully, and as Ms. Monroe later acknowledged, the doctors' actions "save[d] [her] daughters' lives[.]"

B. Preliminary Investigation and Shelter Care Orders

The BPD initial responder, Officer Joshua Rutzen, ("Ofc. Rutzen"), informed DSS immediately of the children's condition on February 11, 2017. The DSS Intake Report

[6] The LabCorp report for K.B. showed that she tested positive for Benzodiazepines.

[7] The results of the laboratory tests of the children's 2D6 genotype identify both K.M. and K.B. as "Intermediate" metabolizers of opioids and related drugs. The reports

(Footnote continued)

written by DSS first responder, Angela Dukes, states that Ofc. Rutzen "called to report that he has 2 children [K.M. and K.B.] at [UMMC] ER" and that they were "breathing but unresponsive." Ofc. Rutzen also informed DSS that Ms. Monroe's "current boyfriend" was "a well known drug dealer in the neighborhood in which [Ms. Monroe] lives" and that he had been "arrested several times for dealing drugs."

In response to Ofc. Rutzen's call, Ms. Dukes went to UMMC where she met with the hospital social worker, Ms. Monroe, and the children's fathers. She observed that K.M.'s father "appeared to be under the influence." Ms. Dukes also spoke with the treating physician, Dr. Linda Kyle Walker, who shared the VITROS toxicology reports indicating "both girls were positive for opiates." The same day, BPD Detective Dennis Bailey ("Det. Bailey"), interviewed Ms. Monroe and she consented to a drug test that returned negative. BPD searched Ms. Monroe's home and car and found no controlled substances.

On February 12, the day after the crisis, Det. Bailey emailed the UMMC child protection team, requesting consultation on "a serious case of physical child abuse[.]" The

include a "Description of Predicted Metabolic Activity Types" that distinguishes between "Intermediate" and "Poor" metabolizers:

> Intermediate metabolizers (IM) have reduced enzyme activity, and may experience some, or none, of the consequences similar to poor metabolizers.
>
> Poor metabolizers (PM) have significantly reduced or absent enzyme activity. Drugs are metabolized slowly or not at all. For drugs that are active when administered, poor metabolizers may have increased concentrations of active drug with potential for serious side effects. For drugs that require activation, poor metabolizers may have lower than expected concentrations of active metabolite and limited effect of the therapy.

child protection team shared the children's medical files with BPD and DSS, including Dr. Kim's toxicology consult notes.

On February 13, DSS filed a formal CINA Petition and request for shelter care in the Circuit Court for Baltimore City.[8] On the same day, the Office of the Public Defender appointed Douglas Wink Coffey ("Atty. Coffey") as Ms. Monroe's counsel. The court issued an Emergency Shelter Care Order, sheltering K.B. and K.M. directly to DSS, and sheltering their uninjured sister, K.J., to her father.

On February 16, a magistrate conducted a hearing in K.B.'s case and determined that K.B. should be temporarily sheltered to her father, and a circuit court judge signed that shelter care order on the same day. On February 21, another magistrate conducted a hearing in K.M.'s case. After hearing arguments from counsel, the magistrate recommended shelter care with her father's sister. The court's shelter care order reflects that Ms. Monroe's counsel, Atty. Coffey, introduced the children's blood test results into evidence and argued that "[b]ased on blood test, [K.M.] was not positive for opiates," and urged that, if children are not returned to mother's care, then Mother "want[ed a] direct shelter care order to the relatives." DSS counsel argued that there was no explanation for what caused the children to be so sick other than opiates, and counsel for K.B. agreed with

[8] Ms. Dukes had already filed an Authorization for Emergency Shelter Care on February 11 for the three children of the household—K.M., K.B. and the infant K.J., who was not present at the hospital—in which she noted that K.M. and K.B. had "both tested positive for opiates" and that their "parents have been unable to explain how [the children] ingested opiates."

the DSS request for shelter care "[b]ased on the severity of the situation[.]"

C. CINA Hearings

On May 18, a contested adjudication hearing was held before a magistrate,[9] during which Ms. Monroe, K.M., K.B., K.J., and their fathers were each represented by counsel. Atty. Coffey retained Dr. Lawrence Guzzardi ("Dr. Guzzardi") as an expert witness, who, it was proffered, "would testify that in therapeutic doses, adult TussinDM would not cause the severe symptoms but both children have been diagnosed with a liver condition." Atty. Coffey also proposed that Dr. Sarah Edwards (University of Maryland Medical Center) "would testify that the genetic makeup of the children (metabolic abnormalities) could lead to a bioaccumulation and could lead to the symptoms that lead to their hospitalization." Attorneys for DSS, K.B., K.J and their fathers opposed testimony of Dr. Edwards and Dr. Guzzardi, claiming the doctors' records were not provided to counsel; however, the hearing was continued before either witness offered testimony. The magistrate stated that, based on arguments presented by counsel, he could not determine that "return to the home would be contrary to the safety and welfare of [K.M.]" The magistrate observed that the "facts that have been agreed upon present a CLEARER, although incomplete, picture of the events that led to [K.M.'s] hospitalization (e.g. The rapid urine drug screening administered was positive for opiates, but a confirmatory blood test was negative for opiates.); and an

[9] At the adjudication hearing, the parties stipulated to facts, including that the VITROS tests administered to the children were "positive for opiates, but a confirmatory blood test was negative for opiates" and that "Mother also told UMMC staff that [the children.], were administered cough syrup, cough drops and ibuprofen for several days prior to [their] being admitted to UMMC."

Order Controlling Conduct should provide appropriate protections for [K.M.] while in Mother's care." Thus, the magistrate recommend that the court continue K.B.'s and K.J.'s shelter placement with their fathers but return K.M. to Ms. Monroe under an Order Controlling Conduct. The order was signed by a circuit court judge on the same day.

Before the next hearing, on June 29, Ms. Monroe reached an agreement with DSS pursuant to which she regained custody of K.M., K.B, and K.J. and DSS abandoned all the remaining contested allegations from the May 18 Order. Consequently, at the hearing on June 29, the magistrate proceeded directly to the disposition hearing,[10] during which he concluded "the facts sustained are sufficient to find 'Neglect,' however, there is no evidence that the mother is unable or unwilling to give proper care and attention to the children and the children's needs[.]" The magistrate declared K.M., K.B, and K.J. "to NOT be Children in Need of Assistance[.]" In sum, on May 18—three months after the hospitalization—K.M. was returned to Ms. Monroe's care, and by June of 2017, all three children were reunited with their mother.[11]

Ms. Monroe ultimately challenged the CINA court's "indicat[ion] for neglect" in an administrative appeal. That appeal was withdrawn, however, after the parties settled and

[10] Unless a CINA petition is dismissed, "the court shall hold a separate disposition hearing after an adjudicatory hearing to determine whether the child is a CINA[,]" which "shall be held on the same day as the adjudicatory hearing unless on its own motion or motion of a party, the court finds that there is good cause to delay the disposition hearing to a later day." Maryland Code (1973, 2020 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 3-819(a).

[11] Contemporaneous with the DSS investigation and CINA hearings, Assistant

(Footnote continued)

the administrative judge agreed to change the disposition from a finding of "neglect" to a finding of "unsubstantiated" on May 25, 2018.

In a tragic coda, three years later K.M., then aged nine, committed suicide.

D. Underlying Complaint and Preliminary Motion to Dismiss

On February 10, 2020, Ms. Monroe, K.M., K.B., and K.J. (collectively, "Plaintiffs") brought an action in the Circuit Court of Baltimore City against UMMC, UMEMA,[12] and Dr. Kim. The complaint included counts of Intentional Infliction of Emotional Distress, False Imprisonment, Intentional Misrepresentation, Constructive Fraud, and Malicious Prosecution. Plaintiffs alleged, among other things, that: 1) two family members of Ms. Monroe who were UMMC employees told Ms. Monroe that "rumors were circulating that she permitted her children to gain access to opiates and that she was a child abuser[,]" that Dr. Kim spread rumors "to other employees who were not personally involved in the treatment of the children"; and 2) that Dr. Kim told DSS that "the urine test was more

State's Attorney Michelle Lambert conducted a separate investigation in contemplation of charges of child abuse and neglect. Dr. Kim later deposed that BPD and State's Attorney personnel both contacted him by email and they met at his office in March or April of 2017 to have a "conversation about what had happened" to the children, but he "never made any reports" to "any state's attorney, detective, or anybody from DSS[.]" In her memorandum closing the agency's investigation of Ms. Monroe, Atty. Lambert recorded that Dr. Kim told investigators that "there could be several explanations as to why the urinalysis was positive and the blood screen was negative." She recorded that while it was possible that "the children may have ingested an illegal substance[,]" she had "no proof of the identity of that substance" or "who, if anyone, administered the drugs to the children," and she concluded that the office "simply [did] not have enough information to sustain any charges against [Ms. Monroe]."

[12] The suit named UMEMA as Dr. Kim's employer, and liable for his actions under the theory of respondeat superior.

accurate than the blood serum test." Dr. Kim acted with actual malice, Plaintiffs alleged, because he "refused to accept and acknowledge that Plaintiff, a low income single black mother in Baltimore City, had not exposed her children to illicit drugs." The thrust of Plaintiffs' allegations, as their counsel later summarized, was "that the reporting [of the VITROS results] was done in bad faith, which then led to a whole cascade of events, including the loss of the children—the separation from the children and their mom, and all the other things that we're alleging that happened in there, [including the] psychological damages that . . . occurred."

The Defendants answered the complaint in March of 2021, following a delay resulting from COVID-19 pandemic. On April 2, 2021, Defendants moved to dismiss the complaint on multiple grounds, including their immunity to suit as mandatory reporters under Maryland Code (1984, 2019 Repl. Vol.), Family Law Article ("FL") § 5-704.[13] Defendants argued that the result of the VITROS test provided reason to believe that the children may have been subjected to abuse or neglect, triggering their duty to report. Defendants asserted that the complaint was "void of any facts to support an argument that Defendants were *consciously and furtively* making a false claim of alleged child abuse[,]" as required to show bad faith. (Emphasis partially removed). Defendants challenged Plaintiffs' claim that "Dr. Kim acted with actual malice toward [Mother] as he refused to accept and acknowledge that [Mother], a low income single black mother in Baltimore

[13] Defendants also argued that Plaintiffs' allegations, to the extent largely based on arguments and documents presented in the CINA proceedings, are not actionable under the absolute litigation privilege.

City, had not exposed her children to illicit drugs[;]" stating that Plaintiffs supplied "no factual allegations to allow for the inference that Dr. Kim was acting with malice due to racial animus."

Plaintiffs responded that "the initial report of child abuse and the subsequent statement, comments and reports were all made in bad faith." They contended that Defendants "absolutely knew that the positive opiate result from the rapid urine drug test was a **FALSE** positive or, at a minimum, should have known the result was a false positive[,]"yet "despite this knowledge falsely made a report of child abuse."

At a hearing held on May 24 on the motion to dismiss, the judge challenged Defendants' assertion that they acted in good faith and suggested that the development of the children's cases—specifically, their alleged lack of response to the administration of Narcan—should have caused the Defendants to doubt the results of the VITROS test so that they would have delayed reporting until they received the confirmatory blood test results. Defense counsel argued that understanding whether or not the Narcan should have affected the children's symptomatology at that point in time would require medical expert analysis and maintained "it's undisputed that the children came into the hospital unresponsive, and that both of their rapid urine tests came back positive for opiates." He urged that good-faith statutory immunity did "not require[] that the reporter verify every single detail of the suspected conduct," and they characterized the complaint as "void of

any facts to support that the defendants made these reports in a malicious manner, or in bad faith."[14]

Plaintiffs cited *Rite Aid Corporation v. Hagley*, 374 Md. 665, 685 (2003), for the proposition that in "almost every case, [good faith] is a jury question" with respect to statutory immunity for reporting suspected child abuse, and added, "[w]e're not even in summary judgment stage." The judge prompted Plaintiffs to explain "the source of the animus" that produced the alleged bad faith and malice, and their counsel offered:

> Why in the world would a medical professional, faced with this obvious fact [disproving opioid exposure], I mean, so obvious, and continue to push this [reporting], but for some sort of animus toward our clients whether it be their race, whether it be their economic situation, whether it could be a whole host of things. But you know what? Until we get some discovery, how can I pin some of that down?

Ultimately, the judge found that the pleading sufficiently alleged bad faith, and said, "[t]he entire case, in my view, does pivot on Dr. Kim's reporting, despite the facts alleged

[14] Defense counsel also asserted that Plaintiffs failed to state a claim for: Intentional Infliction of Emotional Distress (count one), because that requires conduct that is intentional or reckless, extreme and outrageous and there was no allegation of intentional and or reckless conduct; False Imprisonment (count two), because that requires deprivation of liberty and Plaintiffs failed to plead any of the necessary elements; Intentional Misrepresentation—Concealment or Non-disclosure (count three), because it was undisputed that the children did have positive opiate screens, and because Appellants did not plead a confidential relationship and the communications were to a third party; Constructive Fraud (count four), because Appellants failed to plead facts to show a legal or equitable duty or breach thereof; Malicious Prosecution (count five), because CPS and BPD "are the ones that investigated the claims, and chose to pursue an action"; Defamation (count six), because Appellants failed to identify a false statement and to whom it was communicated; False Light (count seven), because it requires a statement to be proclaimed to the general public rather than to a group of fellow workers; and, Violation of the Maryland Declaration of Rights (count eight), because Appellees are not public officials.

leaning towards false positive of the urinalysis conducted." He found that, in light of the "very serious allegations made of intentional torts[,]" the question of "the motivation of Dr. Kim" merited discovery. The judge underscored that the "question is [] will discovery lead all parties to conclude whether that animus truly existed that bad faith existed," and noted**,** "once that discovery is concluded, it could, and very likely should be, motions for partial or complete summary judgment[.]" The court's order denying Defendants' Preliminary Motion to Dismiss was signed on May 24, and entered on the docket on May 27, 2021.

E. Discovery

The parties filed numerous motions and deposition notices during the discovery period. We narrow our description of the discovery obtained by the parties to that which is necessary to address the questions on appeal.

1. Plaintiffs' Motions to Compel Production

Defendants filed a Preliminary Designation of Expert Witnesses on September 26, 2021. On January 12, 2022, Plaintiffs filed three separate motions to compel discovery: from Dr. Kim, from UMMS, and generally. With regard to defense experts' anticipated testimony, Plaintiffs asserted, among other things, that Defendants had failed to respond sufficiently to interrogatories requesting the most recent resume or curriculum vitae ("CV"), all written reports, publications, drafts, working papers, or documents generated by "each of Defendants' expert witnesses, which refers or relates to the opinions and subjects in which the witnesses were expected to testify." Plaintiffs also alleged inadequate

responses to their requests for all documents that were prepared, reviewed or relied upon by any expert that Defendants proposed to call as a witness at trial.

On February 2, 2022, Defendants responded with an omnibus opposition to Plaintiffs' motions. Defendants argued that the motions were not ripe for review because "Plaintiffs failed to comply with Maryland's requirement of 'good faith attempts to discuss with the opposing attorney the resolution of the dispute'" under Maryland Rule 2-431, and they contested Plaintiffs' version of the timeline of events in discovery. Defendants asserted that their expert designations were sufficiently detailed as required by the Maryland Rules, and they had already supplied all of the experts' CVs. Defendants asserted that "[t]o date, defense experts have not produced any reports in this case. If any defense expert does produce such a report, Defendants will promptly produce it." Regarding materials reviewed or relied upon by defense experts, Defendants asserted:

> Defendants' expert designation sets forth the records reviewed by defense experts. Plaintiffs also have the medical records in this case. Moreover, Defendants have also produced through supplementation of discovery the materials reviewed by their experts, their experts' fee schedules and invoices (to the extent they exist), and literature reviewed by their experts.
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> * * *
>
> Literature was previously produced in advance of Defendant Dr. Kim's deposition. Defendants have also produced through supplementation of discovery the materials reviewed by their experts, their experts' fee schedules and invoices (to the extent they exist), and literature reviewed by their experts. . . . Moreover, Defendants have not yet determined what literature will be utilized as exhibits at trial. If additional literature will be utilized by defense experts, it will be timely produced.

The court issued an order denying Plaintiffs' motions to compel discovery on March 3, 2022. The court observed, among other things, that "due to the pettifogging nature of

the dueling pleadings, this [c]ourt is not satisfied that the attempts made to discuss with the opposing attorney the resolution of the discovery dispute were made in good faith" under Maryland Rule 2-431.

2. Plaintiffs' Witness Affidavits and Depositions

Depositions of Ms. Monroe

In her depositions taken on January 19, 2022, and February 14, 2022, Ms. Monroe recounted that she met Dr. Kim only a single time, and "really [did]n't recall the specific conversation" with him but she "believe[d] he said something about figuring in the blood—the urine samples and he was going to do like a drug panel for I guess different types of drugs." She related that Dr. Kim did not "say anything about [her] race" or "ever make any racial slurs." However, she alleged that he made a statement that "insinuated something about" her socioeconomic status. She explained:

> He said **typically when you see cases like this** there's always a positive blood sample from whatever your children have ingested, we'll do a drug panel and one of the drugs that's going to come up it's going to be positive for . . . whatever type of opiate, heroin or whatever.

(Emphasis added). Ms. Monroe said she believed the statement begged the question "A typical case for who?" When opposing counsel suggested that Dr. Kim could have been "referring to the fact that [her] children were unresponsive[,]" Ms. Monroe replied, "I work in the ER, . . . it's not typical for children to come in the ER unresponsive. . . . It's not typical to have a toxicologist come and try to talk to a parent about drug screening and drug

panel." Describing her suspicion of prejudice against her socioeconomic status, Ms. Monroe said:

> I felt that way from the entire University of Maryland staff. No one ever even bothered to ask me or listen to my side about what happened. No one asked me about any cough medication or anything.
>
> All I remember is I was waiting with my family in the waiting area. A nurse came in, she said something about a urine sample and opiates. I asked her what opiates was. Next thing I know from then on out the cough medication that I'd given my children was thrown out of the window. No one cared about that. It was all about drugs, drugs, drugs.
>
> So yes, I do, from the entire University of Maryland staff, including Dr. Kim, I felt, yes, seeing me as a Black woman and the environment and neighborhood that we live in, yes. Yes, I do.

Ms. Monroe clarified that no one "at the University of Maryland [made] any racial slurs toward [her,]" but she perceived an "undertone" of prejudice about "where I live, my race, my children, where we come from," from "a couple of looks, stares, [and] rumors." She said that "[o]ne of the girls' aunts or cousins" who "knew someone who worked in the [hospital] cafeteria" told her that hospital employees were spreading rumors about her and the children. She observed that these rumors "get around. It's Baltimore City. It's social media. It's everything." She reported that "[o]ne comment is like they overdosed on -- on cough medicine. Another one was they had drugs in their system or the mother is on drugs." Nonetheless, she acknowledged that no one at UMMC accused her of being "a child abuser."

Ms. Monroe did recall one incident in which a white man wearing scrubs had interjected what she perceived as a "racial comment" into her conversation with the doctor who ordered the metabolism test by stating his scientific opinion "that there was no way

that two black children with two different fathers would have that type of metabolism disorder because that does not run in African Americans. That's predominantly issues dealing with Caucasians and Asians and such things of that nature."

Ms. Monroe indicated that she held multiple entities collectively responsible for her family's turmoil, including "University of Maryland, [DSS], Baltimore City Police, whoever had their hands in this case from the very beginning. You, all of you. Everyone." Ms. Monroe admitted that she "didn't know" whether Dr. Kim had, in fact, "reported a suspected child abuse to [DSS,]" that she had no personal knowledge that Dr. Kim "was spreading rumors around the hospital[,]" and that she could not identify the hospital employees whom she believed to be responsible for any rumors. She found out later that the man who asked her questions at the hospital about drugs, and asked her to take a drug test, was a special investigator and not an employee of the hospital. Ms. Monroe explained that she could not know whether the social workers who spoke with her were employed by the hospital or DSS, or whether the investigators worked for DSS or BPD, because she had been staunchly focused on the wellbeing of her daughters.

Although Ms. Monroe admitted that she did not know if "anyone from the hospital was interviewed by DSS or the Baltimore City Police Department," she deposed that "whatever communication University of Maryland had with either Baltimore City Police or [DSS], . . . drove all of this, the investigation, [DSS], everything," because "[i]t wouldn't have ever been able to grow without that claim being started to begin with." She admitted,

however, that she was not aware that a social worker at the hospital notified DSS that the blood tests came back negative for opiates.

Ms. Monroe described the traumatic aftermath of the children's medical crisis and the effect it had on their family. She said that her "entire trust within the hospital is just broken[,]" to the extent that she no longer planned to finish her education and become a nurse. She said of her interactions with the children's school:

> [I]t was just a complete circus and embarrassment, a mess, not only for myself but for my kids. I went from people coming up to me giving me compliments on my children, . . . to being looked at completely different, being stared at when I brought them back to school.

She reported that by May 2019, "[K.M.] was being bullied in school. [K.B.] was having emotional anxiety[,]" and that "somebody from [K.M.'s] school contacted DSS" after an outburst, which were frequent at that time. Ms. Monroe also spoke briefly of K.M.'s tragic death. Ms. Monroe summarized that she had filed the lawsuit because:

> They made all of these allegations towards me as a mother, as a person. You destroyed my reputation, you took away my children, you gave them back like nothing ever happened, you destroyed our lives, you've wreaked havoc on relationships that I've had in my community with other people, including my friends, family, everyone.
>
> * * *
>
> I wasn't going to just . . . [s]it back and just let that happen, so I wanted to file a lawsuit because I feel like what happened to me and my children was completely wrong.

Deposition of Dr. Guzzardi

Plaintiffs designated Dr. Lawrence J. Guzzardi as their expert toxicologist, who, it was represented, would testify that "no similarly situated" toxicologist or physician "acting

in good faith" would share Dr. Kim's opinion that the children's symptoms "had resulted from an opiate exposure versus the administration of Robitussin as reported by Elise Monroe." In his January 17, 2022, deposition, Dr. Guzzardi conceded under questioning that "[j]ust because two physicians disagree about a medical or scientific conclusion doesn't mean that one of them is lying[.]" Instead, he said:

> I'm also -- it appears from what I understand from the medical records that no peer review analysis was done of the obvious errors in this case. Now, obviously I'm not going to be presented with any minutes or exact information regarding the peer review process, but in my opinion and in my experience at University of Kentucky and at the York Hospital, a case like this would have been peer reviewed and would have -- and there would have been a frank discussion of issues in the case, and what could have been done better to avoid the obvious psychological trauma to the two children and to Ms. Monroe and whatever other harms she received and the children received. So peer review should have been undertaken and, to my knowledge, there was no peer review done.

When asked what "obvious errors" should have been subjected to peer review, Dr. Guzzardi replied that "[t]he children were considered to be intoxicated with opiates or opioids, when in fact there was no evidence of that, and there was substantial evidence that there were other causes including their flu and including dextromethorphan intoxication." Dr. Guzzardi described what he thought caused "the children's presentation to the hospital":

> the children experienced both flu as documented in the medical records and [DXM] toxicity as a result of the bioaccumulation of [DXM] given on several occasions by Ms. Elise Monroe, and partially due also to the fact that the children were poor metabolizers of [DXM].
>
> I also believe that doxylamine also was a factor in the children's presentation. And it is also possible that Benadryl, diphenhydramine had some impact on

> the children's presentation throughout -- not at their initial presentation but their hospital course.

He stated that he based his opinion on "[t]he facts of the case[,]" namely:

> "the clinical history as taken by Doctor Hong Kim that Ms. Elise Monroe had administered multiple doses of [DXM] over the course of several days[;]"
>
> "the fact that the test that was done, the urine drug screens that were done on the two children, were reported as positive for opiates, but we know that as a result of an analysis of the VITROS testing methodology that [DXM] can cause false positives[;]" and
>
> "that at the serum testing of the two children, one of which was reported as early as the 16th of February at 9:37 a.m. indicated that there was no opiates or opioids present in the blood, . . so that the clinical assumption made that opiates or opioids had caused the children's toxicity was effectively ruled out because of the known half-lives of all drugs that would be potentially involved in this matter."

Dr. Guzzardi theorized that other drugs found in OTC medicines, the flu, and the children's individual susceptibilities could also have been factors in the positive VITROS screen. Dr. Guzzardi alleged that the children did not improve when they were administered Narcan in the emergency room, as one would expect if the children had been exposed to opiates. Therefore, Dr. Guzzardi concluded, "we have much indication that, by February 16, 9:37 a.m., that all individuals participating in the care of the two children . . . would have known that opiate or opioid toxicity was highly unlikely." Dr. Guzzardi accused Dr. Kim of "disregarding obvious information that would have exculpated Ms. Monroe, allowed her to have her children back, and potentially prevented the suicide of [K.M.]."

Dr. Guzzardi acknowledged, however, the precepts that guided Dr. Kim's opinion that the most likely explanation for the opposing outcomes of the VITROS urine tests and

the confirmatory blood serum tests administered later in the day was that the drug had metabolized out of the blood by the time it was sampled. Defense counsel asked Dr. Guzzardi whether he had ever "had cases where someone has tested positive for a drug on a screen and then later on, hours later, that test or a [methodology] which was looking for the same substance was negative," and he agreed he "had that on numerous occasions." He further acknowledged that:

> you can have a positive test with immunoassay such as the VITROS system, and . . . a test done later, say six hours later, eight hours later, *could be negative for two reasons*: One, that it was a false positive on the screening test; *or two, that the drug had metabolized and was no longer present in sufficient quantities* for it to be present at the time of the more definitive gas chromatography mass spectroscopy test.

(Emphasis added). He said that when testing for opioids, "the drug will show up in the urine as long as it's in the blood[,]" and "*the urine can stay, and generally does stay, positive longer than the blood stays positive*." (Emphasis added). He also agreed that "substances such as opiates are continuously and rapidly eliminated from the blood."

Nevertheless, Dr. Guzzardi's own opinion, which he held "to a medical degree of certainty," was "that the two children ingested [DXM], likely doxylamine, and those were the two drugs that were provided to them by their -- by Elise Monroe during the course of their respiratory infection, flu." He had difficulty, however, in tethering that theory to the facts in the case. Dr. Guzzardi deposed that he neither knew how much DXM the children had ingested, how much DXM could have accumulated in their systems, nor how much DXM it would have taken to cause them respiratory depression. He deposed that he could not identify in the record what day the children began to take DXM, and he didn't know

how many doses were given per day or of what size, prior to the crisis on February 11, such that he had "*a general idea* but [not] specific information" about how much DXM the children had ingested. (Emphasis added).

Likewise, when asked if he had "an opinion about how much the children had in their system total of each of those [other OTC medicine] drugs at the time the urine tox screen was done[,]" he replied, "I do not know the level" because the hospital had not tested it.

Dr. Guzzardi explained that from the principles of "basic pharmacokinetics[,]" if a person ingests DXM so frequently as to "exceed the rate at which [her] body metabolizes [DXM], then it bio accumulates" and "as [DXM] accumulates, it has more and more effect" on "a spectrum from initial presentation to a little bit drowsy to very drowsy to respiratory depression." When asked "[w]hat amount of [DXM] ingestion is required to cause respiratory depression[,]" Dr. Guzzardi replied, "*No one knows that exact number*. There is not enough clinical information to tell you a blood level of [DXM] that causes respiratory depression." (Emphasis added). Likewise, when asked if he had "an opinion about how much of either of those [other OTC medicine] drugs that the girls would have had to consume prior to that urine toxicology screen in order to result in a false positive at that particular time[,]" he replied "I can't tell you that because we . . . don't have a good idea of how much they took[,]" and "if we use normal pharmacokinetics, that would not be appropriate because we know these children had abnormal pharmacokinetics." Therefore, he could not estimate how much of the OTC medicine, or at what time, the children would

have had to ingest "in order to achieve the type of [central nervous system] depression that was seen in this case[.]"

Affidavit of Relana Allen

Relana Allen, a crew member/paramedic with BPD, who responded to Ms. Monroe's 911 call for emergency services, stated in her affidavit that "[n]one of the children's symptoms were indicative of opiate/opioid ingestion, including my observation that neither of the children's pupils displayed miosis (their pupils appeared normal). At no time was opiate/opioid ingestion ever suspected and Narcan was not administered[,]" and "[b]ased on [her] experience as a first responder . . . nothing about Ms. Monroe's actions, demeanor, etc. would have me believe that these children suffered from child abuse/neglect."

3. Defendants' Witness Affidavits and Depositions

Affidavit of Pamela J. Sims, Pharm.D., Ph.D.

In an affidavit dated March 7, 2022, Pamela J. Sims, Pharm.D., Ph.D., an expert in pharmacokinetics and toxicology, asserted that "[t]here is no medical or scientific basis for Dr. Guzzardi's opinion that bioaccumulation of [DXM], doxylamine ingestion, and flu" caused the children's medical crisis, and "his opinion regarding causation of their presentations is not supported by the medical literature and is not generally accepted by experts in the field[.]" Further, she stated that "[t]he literature cited by Dr. Guzzardi . . . and the instruction manual for the [VITROS] screens[,]" do not support Dr. Guzzardi's opinion that "therapeutic doses of [DXM] can cause a false positive for opiates

on [VITROS] screens. Rather they stand for the exact opposite premise: therapeutic dosing of [DXM] 'will not yield a false positive for the [VITROS] screen.'" (Internal citations omitted). Dr. Sims attested that the children's status as "intermediate metabolizers does not explain their presentation" and that based on their "clinical presentations, reported history, and course during their hospitalizations, it was reasonable and appropriate for Dr. Hong Kim to interpret the [VITROS] screens, which were positive for opiates, as accurate."

Deposition of Dr. Kim

Dr. Kim qualified his August 9, 2021, deposition by stating that his records showed that he had seen the children only three times during their stay at UMMC because he was called in as a toxicologist consult in the emergency room and "stopped following the patients on the 14th" of February. He noted that his records showed that "the [children's] clinical signs and symptoms were consistent with the opioids intoxication[,]" including pinpoint pupils that were minimally reactive to light, and that K.M.'s "respiratory depression appears to have improved" after she received Narcan. He had also recorded that the children received "either a dose or a half-dose" of DXM, and that "one-single dose or a half a dose, [is] unlikely to cause a false positive" on the VITROS test. Dr. Kim asserted that as a consultant, he does not usually order "any blood serum test of any kind" because his role is to "treat the patients, their signs and symptoms." He said he was not

aware of who ordered the blood serum test, and only learned of its results when interviewed by BPD and the State's Attorney "either in March or April" of 2017.

When counsel pressed Dr. Kim for an explanation of how the blood serum test could be negative if the children had in fact been exposed to opiates, he answered that it was possible "whatever opioids that they may have been exposed to" could have been metabolized and eliminated from their bodies in the hours following the VITROS test, just as the dose of fentanyl that the children received in the E.R. had passed off before the blood serum test. Dr. Kim acknowledged that if the children's blood was clear of opioids by the evening of February 11, it "would be unlikely" that opioids intoxication could account for their critical condition days later, but said that he "c[ouldn't] say" whether the "symptoms ha[d] persisted or not because the primary team was doing other interventions to address other issues[,]" such as their flu. Dr. Kim dismissed the probative value of the single study published in a peer-reviewed journal, upon which Dr. Guzzardi based his theory, asserting it showed only "that, in high concentrations, [DXM] has resulted in a false positive in, I believe, one particular device[,]" and shed little light on the children's condition.

Dr. Kim deposed that he did not notify anyone at DSS about the crisis and when counsel asked when DSS was brought into the case, he had to refer to the medical chart for the answer. He acknowledged that he was contacted by "the detective and the state attorneys" sometime later and that they met once at his office, but he did not remember what they said. Dr. Kim asserted that he had no other meetings with "anybody associated with the state attorney's office, [DSS] or the court" and said that he never made a written

report for any of those agencies. He further recalled that he had been subpoenaed to a CINA hearing but was never called to testify.

Deposition of Dr. Dubowitz

Dr. Dubowitz, in his February 17, 2022, deposition, stated that he led the UMMC Child Protection Team, which supports hospital doctors and staff and cooperates with public officials as required by law. He said that typically both DSS and BPD "feel[] free" to contact the child protection team to "get a consult" on the situation of a child under their care, but emphasized that the "medical piece" is only one factor in "how they move forward."

Dr. Dubowitz outlined his opinion that an opiate overdose was "the most likely explanation" for the children's presentation and emphasized the contrast between the children's medical history and their crisis, when "suddenly [both children] are found in this comatose state [and] both have positive urine tox screens" and "needed to be intubated, put on a respirator, and spent roughly a week in the ICU." He deposed that while the results of the blood serum test raised the possibility that the VITROS result was a false positive, he thought it "improbable" in this case, when one looked at "the whole child, the whole picture[,]" which he summarized as: "[p]reviously healthy kids, suddenly two children, not one, in a coma, two tests, not one, that happen to screen positive."

Dr. Dubowitz addressed Dr. Guzzardi's theory, stating that the children's status as intermediate metabolizers "doesn't explain this clinical picture" when accounting for the small amounts of DXM they had been exposed to over several days. He hypothesized an

alternative scenario: if the children *had* ingested the opiates indicated by correct-positive VITROS tests, the drugs could have passed out of the children's blood before the confirmatory test sample was taken—resulting in correct-negative blood tests—even while the children "were still in a highly compromised condition" from "indirect effects" of the opiates. He explained that such symptoms can persist after the drug has cleared the bloodstream, because "there can be medical problems related indirectly to what [a] drug itself initially caused," such as after a drug has damaged an organ or compromised breathing.

Additional Depositions

Dr. Sarah Edwards, the UMMC child psychiatrist, Ms. Dukes, the DSS first responder who authored the intake report, and Ms. Maybin, the DSS investigator for the children's case were all deposed in early 2022. Dr. Edwards reported that she had initiated the request for genetic testing, even though it was "beyond [her] scope," as a psychiatrist to say whether a slower metabolization of DXM could "account for [the children's] symptoms upon presentation[.]" Dr. Edwards acknowledged that a positive urine toxicology screen for opiates in a child automatically raises "suspicion of [] abuse or neglect." She explained that "[a]s a mandated reporter, you report suspicions of abuse and neglect. The investigation is [DSS'] job, and role, and responsibility. . . . It's very clear

the—the boundaries of me as a treatment provider and the Child Protective Service Agency."

Ms. Dukes recounted that she was on after-hours duty on February 11 when BPD Officer Rutzen called her office to report that "there were two sisters that were brought to University of Maryland unresponsive[.]" Ms. Dukes said that when she arrived at the hospital, a social worker recounted Ms. Monroe's description of events, and a doctor informed her that "the girls had opiates in their system," based on a "positive drug screen," after which she requested a court petition to shelter K.M., K.B., and K.J. Ms. Dukes deposed that a physician's theory of the cause of a child's medical crisis did not affect her duty to report, because "if they have something in their system that they should not have, that's always a concern for a Child Protective Service worker."

Ms. Maybin confirmed that she did receive the negative results of the blood test during her investigation, but asserted that her investigative role is to "gather information and make a decision based on the facts that have been provided[,]" and not to "conclude to exactly what happened."

4. Defendant's Motion to Limit Expert Testimony

On March 18, 2022, the Defendants moved to exclude Dr. Guzzardi's testimony and requested an evidentiary *Daubert* hearing, asserting that Dr. Guzzardi's theory—that the cause of the children's crisis was the "bioaccumulation" of DXM given by Ms. Monroe on "several occasions" combined with an antihistamine ingredient and the flu— "[could] not meet the standards for expert testimony[.]" According to the Defendants, Dr. Guzzardi's

opinion rested on an unproven assumption that the children ingested "multiple doses of [DXM] over the course of several days[,]" and that his analysis was "fundamentally flawed" because his theory was not supported by peer review and publication and was not generally accepted. They also questioned Dr. Guzzardi's qualifications, because his "testimony and opinions regarding [DXM] . . . were previously found unreliable and his testimony and opinions were excluded in full" in a recent unreported Maryland case,[15] because he "failed to 'bridge the analytical gap' between the facts and data and the conclusory opinion that he offered." (Emphasis removed). Plaintiffs described Defendants' motion as a "crude oversimplification" of Dr. Guzzardi's opinion and its rationale. On June 14, 2021, the court granted Plaintiffs' request for an "extension of all deadlines in the scheduling order" because of the recent death of K.M. and rescheduled the trial for July 18, 2022. On June 27, the circuit court scheduled a *Daubert* hearing on Defendants' Rule 5-702 motion to exclude opinions and testimony of Dr. Guzzardi to begin on July 13, 2022.

5. May 9, 2022, Hearing on Motion for Summary Judgment

On March 18, 2022, the Defendants moved for summary judgment[16] asserting, in part, that Plaintiffs "failed to set forth sufficient facts to overcome the statutory immunity

[15] *Deberry v. State*, No. 1483, Sept. Term, 2017, 2020 WL 1659918, at *13 (Md. App. Ct. Mar. 20, 2020), *cert. denied*, 469 Md. 273 (2020).

[16] Defendants' exhibits included depositions of Dr. Kim, Dr. Dubowitz, Dr. Sarah Edwards, Dr. Wendy Lane, Ms. Angela Dukes, and Ms. Myisha Maybin, as well as the

(Footnote continued)

for good faith reporting and participating in the investigation of suspect child abuse/neglect," and that they had "failed to elicit any evidence that Dr. Kim or Defendants acted with a conscious and deliberate attempt to harm Ms. Monroe and her children[.]" They emphasized that it was not they, but BPD who reported to DSS, and that they did not testify in the CINA proceedings. They observed that even if Plaintiffs were to prove negligence or "bad judgment" in their conclusion as to the cause of the children's crisis, that would be insufficient to establish bad faith.

Plaintiffs opposed the motion,[17] arguing that Dr. Kim acted in bad faith and that the information Defendants provided to BPD and DSS "was the singular driving factor behind initiating and continuing the [DSS] proceedings."

The circuit court convened a remote hearing on Defendants' Motion for Summary Judgment on May 9, 2022. Defense counsel contended that the evidence produced in discovery did not "generate a genuine dispute of material fact" regarding bad faith, and

affidavit of Pamela J. Sims, Pharm.D., Ph.D. The Defendants also submitted medical reports for both children, including EMS run reports, toxicology consults, and genetic test results. They further submitted social services reports for both children, including DSS Report and Removal Records, DSS Investigative Notes and 181 Narrative, and CINA Records.

[17] Plaintiffs' exhibits included the affidavit of Ms. Relana Allen, paramedic and emergency responder and depositions of Ms. Monroe, Dr. Guzzardi, and Atty. Coffey. Plaintiffs also submitted articles printed from the internet, as well as the VITROS manufacturer's testing instructions, to support their argument that Dr. Kim's opinion—that DXM would not cause a VITROS false positive result—was outside the pale of scientific discourse. They also produced various emails, including several between Dr. Kim and Dr. Guzzardi, as well as administrative appeal and settlement documents and the memorandum written by Michele Lambert, Assistant State's Attorney for Baltimore City, at the closure of her investigation of Ms. Monroe.

that the Defendants were entitled to statutory immunity under FL § 5-702 as mandatory reporters. And, counsel emphasized, the Defendants did not even report the crisis initially to BPD or DSS. The Defendants' involvement in the BPD and DSS investigations was very limited; in fact, none of the Defendants participated in any court proceedings. Defense counsel asserted that DSS had authorized shelter care for the children in the morning "before Dr. Kim was even involved in the care[,]" and that an emergency room physician had shared the results of the VITROS test with the "[DSS] worker [] already there to investigate the condition of these children." She noted that "no one has been able to identify a person with personal firsthand knowledge of Dr. Kim purportedly spreading th[e] rumor" that Ms. Monroe had allowed the children to ingest opiates, and emphasized that, contrary to Plaintiffs' insinuations, "a social worker *did* provide the information that the [confirmatory] blood draw was negative to [DSS]." (Emphasis added).

Plaintiffs' counsel argued that UMMC's initial disclosure of the VITROS results to the DSS investigator without the "context" that the VITROS "was a preliminary" test was an act of "bad faith" and asserted that the issue of whether they had a duty to provide such context to DSS should go to a jury. Counsel contended that Dr. Kim was personally implicated because his statement "that there are no known false positives, none[,]" was over-conclusive. He admitted that Dr. Kim acknowledged, upon receiving the blood results, that there was a hypothetical possibility that DXM could cause a false positive on the VITROS. However, plaintiffs' counsel asserted that Dr. Kim acted in bad faith when he ruled it out on the grounds that the children "were only given one half of a dose of an

adult version [of OTC medicines] the night before." Plaintiffs' counsel alleged that because Dr. Kim's calculation "ignores" the history he took from Ms. Monroe—that the children had been receiving OTC medicines "for days prior to coming there"—Dr. Kim was "making facts up[,]" providing "more evidence of the bad faith in this case[.]"

The judge asked plaintiffs' counsel how the allegation that Dr. Kim was wrong in his interpretation of the VITROS test could rise to the level of bad faith, and counsel responded that "there's not hardly a person . . . out there that hasn't heard the term 'false positive[,]'" and yet Dr. Kim "falsely [stated] that 'there are no known false positives.'" After the court pressed plaintiffs' counsel whether Dr. Kim's interpretation, even if incorrect, could rise to the level of bad faith, counsel deflected by asserting the question was simply "what the jury needs to be asked[.]" Counsel proposed that the "genuine dispute of material fact" precluding summary judgment on statutory immunity was "whether there was a reasonable basis for Dr. Kim to so tightly hold onto this belief as to his process."

In rebuttal, defense counsel pointed out that "Dr. Kim had zero contact with [DSS] during their investigation. He didn't testify at the CINA hearing. The first conversation that he had with [DSS] was a year after the CINA hearing" just prior to the administrative hearing in Ms. Monroe's appeal of the decision. Defense counsel further cited Ms. Maybin's testimony that "no one can stop a [DSS] investigation once it's in motion[,]" and emphasized that the authorization for shelter care *had already been granted* by the time

Dr. Kim entered his toxicology note in the children's charts at 7:43 pm, as evidence that Dr. Kim had *not* caused the family's turmoil.

Counsel also emphasized that the Defendants have support from "from eight medical experts who all agree that the most likely cause of the presentation was opiates[,]" and pointed to the affidavit of Dr. Sims, whose testimony "[was] that the presentation of these children is consistent with opiates and that it was reasonable and appropriate for Dr. Kim to express the opinion that opiates caused this presentation." Defense counsel concluded her argument, however, asserting that "there's no causation here." The court responded:

> THE COURT: Well, Plaintiffs seem to be arguing here that even if what you've just argued is so that **upon the blood serum test result coming back that Dr. Kim owed these Plaintiffs a duty to reach out to someone or have someone at the hospital, a colleague, who would be responsible for contacting the authorities with this supplemental information from the serum test** that may have undone what Ms. Monroe claims and alleges was the horror that was visited upon her and that therefore that demonstrates bad faith if indeed not actual malice. Correct, Mr. Ballenger?
>
> [PLAINTIFFS' COUNSEL]: Yes, Your Honor. I would like to just --
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> THE COURT: Counsel, thank you so much for your arguments. **The [c]ourt agrees.**
>
> [PLAINTIFFS' COUNSEL]: Okay.

(Emphasis added). After a brief colloquy with counsel on the subject of the constitutional claim, the judge proceeded to his ruling, stating:

> In the view of this [c]ourt, . . . the Plaintiffs have produced sufficient evidence from which a reasonable juror . . . could infer potentially bad faith

> notwithstanding the timing of Dr. Kim's reading and interpreting the presumptive test results and reporting what Dr. Kim reported.

The judge concluded that:

> as to Dr. Kim and UMEM, the [c]ourt reasons that upon that foundational reasoning that Dr. Kim and UMEM are not immune from suit, and that those Defendants' motion for summary judgment respectively is denied.

The judge clarified that he was granting the motion on count eight alleging a violation under the Maryland Declaration of Rights,[18] but that the motion for summary judgment as to all Defendants was denied on all remaining counts. Defendants moved for reconsideration of the holding, which the court denied by order entered on August 5.

6. Plaintiffs' Motion to Limit Expert Testimony

Shortly before the scheduled *Daubert* hearing and trial date, Plaintiffs filed two motions to limit defense experts' testimony in July 2022. The first was a July 5 "Motion to Exclude Certain Opinions and Testimony of Defendants' Experts Regarding Opiate Ingestion as the Reasonable Cause of Minor Plaintiffs' Emergency Department Presentation on February 11, 2017[,]" and the second was a July 8 "Motion to Exclude Defense Experts from Testifying Regarding the Concentration of [DXM] in the Plaintiff Children's Blood[.]"

The court held a hearing on both motions on July 13, 2022. Plaintiffs' counsel explained that, because Defendants recently alerted him "that they intended to use these

[18] The judge found that count eight was not pled with specificity because it did not identify what right, under the Maryland Declaration of Rights, was taken from Ms. Monroe and her children; and the judge determined that there was nothing to establish that the Defendants were public officials.

complicated formulas and that they were coming to some precise blood level for the children[,]" he was requesting that the court exclude the testimony of the defense experts at the *Daubert* hearing scheduled for July (discussed further below) and at trial. Defense counsel replied that the materials recently supplied to Plaintiffs' counsel were "a supplementation" in which the Defendants "provided Plaintiffs with the specifics of the calculations[,]" which their experts had gleaned from previously-produced literature, and that their experts' opinions remained unchanged. Plaintiffs' counsel complained that he had "never gotten one expert report about their opinions. Nothing with any substance[,]" and he described the proceedings as "classic trial by ambush[.]" Defendants noted that their experts "did not write reports in this case" and had only recently given defense counsel the formula; furthermore, Plaintiffs had declined the opportunity to depose those same defense experts. The court denied the Plaintiffs' motion to exclude the defense experts from testifying at the *Daubert* hearing.

F. Daubert Hearing

The *Daubert* hearing on Defendants' Rule 5-702 motion to exclude opinions and testimony of Dr. Guzzardi began on July 13—six days before trial was set to begin on July 19, 2022. The hearing was ultimately divided into two parts:[19] the first began on July 13

[19] On July 6, the court denied Plaintiffs' motion to postpone—which was premised on Dr. Guzzardi's upcoming attendance at a conference in Chicago—and ordered that the "hearing will proceed as originally scheduled." On July 13 and 14, the hearing on Defendants' motion proceeded, with the understanding that Dr. Guzzardi would testify on Monday, July 18. On July 13 and 14 the court heard testimony from Defendants' expert

(Footnote continued)

but ended on July 18 when Plaintiffs informed the court that Dr. Guzzardi would not be able to testify. Over defense objection, the court allowed Plaintiffs to substitute their expert on the condition that any substitute expert testimony would be limited to "support[ing] the opinions that Dr. Guzzardi gave in his deposition." The judge instructed:

> The principle driving opinion is that . . . the minor Plaintiffs in this case, had an overdose, for lack of a better term, of [DXM], that caused a false positive, and I put that term in quotations for opiates or opioid. There are a lot of opinions, but that's the primary driving opinion. And at this stage the [c]ourt is not going to entertain any alternative theories.

After the court granted Plaintiffs' request for postponement and substitution of expert, the hearing proceeded on October 4 through October 6 with Dr. Charles McKay ("Dr. McKay") substituting as the expert toxicologist for Plaintiffs.

Daubert Hearing Part I

Testimony of Dr. Sims

On July 13, Dr. Pamela Jones-Sims testified for the defense as an expert clinical pharmacologist, subspecializing in pharmacokinetics, "a component of [which] is determining mathematical models that describe how we use medications." Dr. Sims testified that excess exposure to DXM causes "stimulant hallucinogenic type of effect and

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witnesses.

The parties appeared before the circuit court on July 18, whereupon Plaintiffs informed the court that Mr. Guzzardi was "unavailable [to testify] due to a medical condition and will not be available." Ultimately, the court granted Plaintiffs' motion to postpone the case and substitute "an expert who can support the opinions that Dr. Guzzardi gave in his deposition." On August 24, Plaintiffs designated Dr. Charles McKay ("Dr. McKay") as a substitute expert toxicologist.

so a person becomes restless and agitated[,]" which is entirely distinct from the effect of high levels of opiates which cause sedation progressing toward depression of the central nervous system. She testified that "the children's presentation in the emergency department" was "not consistent in any way with [DXM] exposure[,]" because "if a child was receiving too much [DXM] they would begin to exhibit the symptoms we talked about earlier with restlessness and excitation and hallucinations. It would not be that of sedation and respiratory depression."

Addressing Dr. Guzzardi's theory, Dr. Sims explained that the

> chart on page six [of the VITROS instructions for use] which is the chart that Dr. Guzzardi and the deposition that I sat in on referred to for his understanding of [DXM] causing a false positive is not a chart of false positives. It's a chart of compounds that interfere with the actual measurement of the opiate that's in the urine sample.

She explained that the chart did not show—as Dr. Guzzardi deposed—that "[DXM] at the level of a .13 milligram per deciliter concentration could trigger a false positive on this urine test for opiates[.]" In fact, she said the chart does not show "what causes false positives" but rather "compounds that interfere with the actual measurement of the opiate that's present so it changes the sensitivity" so that the test "detect[s] opiates at a lower concentration but triggering the positive result which usually occurs at 300 nanograms per mL." Therefore, according to the chart, "in order to get a positive with [DXM] present in your system you must also have opiates on board[.]" She explained that "compounds that actually cause a [false] positive result on the test" are referred to as "cross reactive" not "interferent," and are set out in a different chart and, she emphasized, *do not include DXM*.

Dr. Sims testified that "just to make sure that [she] was not interpreting any of this information incorrectly [she] actually called . . . VITROS and [she] spoke with their department that answers questions about assays and they confirmed that the interpretation of the interference that [she] had was correct[.]" Dr. Sims also testified that the letter to the editor in the journal Clinica Chimica Acta (the "*Clinica Chimica Acta* Letter"), relied upon by Dr. Guzzardi, does not support his opinion that DXM could have caused a false positive on the children's VITROS test, because it described an experiment that had not been designed to replicate clinical conditions[20] and employed a different test.

Dr. Sims discussed literature from several peer reviewed journals to explain the metabolism of DXM in the general population and in "intermediate metabolizers" such as the children. Using slides, she identified the variables she used to build her model of the children's systems, including the child's age, weight, race, and metabolic status, and she identified the studies that calculated the impact of these factors. Dr. Sims explained that by inserting the information that Ms. Monroe had provided about the multiple doses of OTC medicines into those models, she was able to determine the concentration of DXM in the blood would have been at the time they were admitted under those assumptions. Dr. Sims explained that she "assume[d] that the children ingested the highest possible amount

[20] Dr. Sims explained that the *Clinica Chimica Acta* Letter "indicated that in extremely high concentrations for a different amino acid, the [DXM] may cause a false positive. But it's 7000 times the numbers we're talking about here[,]" and she testified that it was the only piece of literature of which she was aware that "references a false positive as a result of [DXM]."

of [DXM] consistent with what [Ms. Monroe] reported"—thereby assuming the facts most favorable to the plaintiffs—as the input for her calculation.

Dr. Sims also discussed what levels of DXM concentration would cause varying degrees of toxicity in either of the children. She demonstrated that K.M. would have needed to have ingested 75 eight-ounce bottles, and K.B. would have needed to ingest 58 eight-ounce bottles, in one sitting, to reach a comatose state. Dr. Sims testified that Dr. Guzzardi's conclusion in the case was not "consistent with what we know in medicine and science[,]" and for him "to utilize a distant, unsubstantiated theory that [DXM] caused a false positive, and then to build the argument on that, doesn't have any foundation in the literature."

In response to questioning by Plaintiffs' counsel, Dr. Sims acknowledged that the children did not respond to the small trial dose of Narcan they received when they arrived at the emergency room. Dr. Sims also acknowledged that she would not expect that opiates at so low a level as to evade detection on a blood test would result in the children still being comatose and on life support. However, she said that sustained hypoxia could have shocked their systems "to the point that they could not recover spontaneously."

Ultimately, Dr. Sims testified that Dr. Kim's note, which said "there are no known false positives" was accurate with regard to the VITROS test that was used.

Testimony of Dr. Heise

Dr. William Heise began his testimony on July 13, and continued it via Zoom the following day. He explained that he was an expert medical toxicologist and a specialist in

critical care toxicology and pharmacogenomics.[21] He related that his practice admits approximately 150 children who have overdosed on opioids per year, and "every couple of months [they] have one" child present with a DXM overdose. He testified that the two have very different signs and symptoms; for example, persons overdosed on DXM "typically appear agitated, hallucinating. They can go to sleep for a couple minutes, and then they'll wake up, and shake around, and make some abnormal movements. . . . [T]hey oftentimes have big bouncing pupils." By contrast, opioid overdoses tend to produce "respiratory depression, [and children who are] comatose, unresponsive[.]"

Dr. Heise testified that Dr. Guzzardi's opinion, "that [DXM], possibly doxylamine, and flu caused the children's presentations in the emergency department[,]" is unsupported by both the facts in the case and Dr. Guzzardi's own assumptions. He said that there was "no way that [a] concentration of [DXM] could have been reached" that would explain the children's presentation, by the interaction of their intermediate metabolizer status and normal therapeutic doses of OTC medicines. He confirmed Dr. Sims' explanation of the chart on the VITROS instructions that includes DXM shows only that the substances listed therein "amplif[y] the presence of opiates over the cutoff value[,]" if there are already "opiates present to get a positive[.]" He said the VITROS chart was "entirely moot [sic] on the point of whether [DXM] causes a false positive in people." Dr. Heise did acknowledge, on cross examination, that scientific literature reflects that "the fact that

[21] Dr. Heise explained that "[p]harmacogenomics is the study of how medications that we take are changed, primarily by the liver, because of the DNA that we have that's specific to us."

[DXM] has been reported in case reports to cause false-positives[22] . . . at an extraordinary high concentrations[,]" but "[i]t has never been shown to be prevalent or relevant at a normal therapeutic amount[.]"

Dr. Heise identified the peer-reviewed literature that provides the specific DXM metabolization-rate modifier for the combination the genetic factors that placed the children within the range of intermediate metabolizers of DXM. He said that the "standard boiler plate" statement included in the genetic test results that "[i]ntermediate metabolizers have reduced enzyme activity and may experience some or none of the consequences similar to poor metabolizers" "is just . . . explaining what intermediate means[,]" whereas "in this case, we know precisely what [the metabolization rate of DXM] is." He said that Dr. Sims' calculations combined "the most significant data possible inside the medical literature" "that was most relevant to [the children's] size, age, et cetera" and "their precision medicine results to know exactly how fast they would metabolize [DXM] in comparison to normal [metabolizers]."

Dr. Heise opined that Dr. Guzzardi was "guessing, based on one single boiler plate that [the children] could have all of the consequences, or at least most of them, of poor metabolizers. And we know that that isn't the case[.]" He categorically declared that "Dr.

[22] Dr. Heise clarified that the term "false positive," as used in literature regarding drug testing for employment purposes, can refer to a threshold for the concentration of the drug in the blood, rather than to the complete absence of the drug. Therefore, an operator of machinery who takes a legally obtained opiate on a day off may still have trace amounts in her system when she returns to work; and thus, an interferent that amplifies the evidence of opiates might cause a VITROS result that falsely indicates she has an unacceptably high concentration of opiates in her system to operate machinery that day.

Guzzardi's theory, that dextromethorphan ingestion caused the children's presentation in the emergency department and false positives for opiates on the urine tox screen" was not "consistent with the published literature[,]" was not "generally accepted in the scientific community[,]" was not "consistent with what is known in the field of pharmacogenomics, toxicology, and generally in the medical field[,]" and further, "Dr. Guzzardi failed to adequately account for obvious alternative explanations, such as an opiate ingestion[.]"

Dr. Heise said his own opinion, based on "[b]oth the medical literature as well as [his] clinical practice of seeing these patients on an everyday basis[,]" was that "the best medical explanation is that [the children] had an opiate ingestion that resulted in a long period of low oxygen. And that caused shock, and the kind of low oxygen brain issues that they demonstrated for two days in the hospital." He said that "the best way to put this together is that" the children were exposed to opiates "sometime the night before" and by the time they were found by their mother and arrived at the hospital, "enough time had gone by that they were starting to recover" and the "opiates are being metabolized and they're likely going away, or entirely gone." Therefore, he said that the most likely explanation for the children's lack of response when "at the emergency room the doctors try a trial of Narcan" is that by then "the opiates [were] metabolized, but they're still dealing with the aftereffects of them."

Deposition of Dr. McKay

On August 24, Appellants designated Dr. Charles McKay ("Dr. McKay") as substitute for Dr. Guzzardi as their expert toxicologist, to offer the opinions that:

1. "[N]o similarly situated toxicologist acting in good faith would opine as Defendant Hong Kim, M.D., did that the Plaintiff minor children's symptomology was the result of an opioid exposure versus the administration of Robitussin as reported by Elise Monroe."
2. "The rapid urine screening tests performed on the children, and which came back positive for opiates was a false positive[,]" and "opiate/opioid exposure would be inconsistent" with the history of events leading up to the girls' medical crisis and the course of their treatment.
3. "[T]he false positive was the result of several factors" including the girls' ingestion of OTC medicines which contain "know[n] interferents with the Vitros rapid urine screening test" and the girls' "status as intermediate metabolizers[,]" "caus[ing] a bio-accumulation of the drugs[,]" and that the girls' clinical condition "compounded" both of those factors.
4. "[A] rapid urine screening test should never be reported to CPS and/or law enforcement without explaining that a confirmatory test is required to be performed before any conclusions can be drawn for any enforcement issues[,]" and that because Appellees knew of investigation by BPD and DSS-CPS, "it was required that the original urine sample be re-tested using a quantitative test" such as the blood test.
5. "That Dr. Hong Kim's statement that there are no known false positives on the rapid urine drug screening test is false" and that Dr. Kim's subsequent actions in refusing to disclaim the statement "resulted in legal actions taken against Plaintiffs, including the forced separation of the children from their mother."
6. "[I]t would be extremely unlikely that opiates or opioids could have been the cause of the results of the urine screening test" given the negative blood tests.
7. "Dr. Howard Dubowitz's communications in this case were misleading and further compounded the misleading narrative started by Dr. Hong Kim."

Dr. McKay's deposition on September 20, 2022, was largely concordant with these proffered opinions and his testimony at the continuation of the *Daubert* hearing that

followed. Therefore, we note only instances where his deposition diverged from the Plaintiffs-Appellants' past and present arguments.

Dr. McKay agreed with defense counsel that "when a child presents with a[n] altered mental status and a positive urine screen for opiates[,]" that would be "enough of a setting and whatnot to instigate an investigation or initiate an investigation." He also agreed, "as a broad question," that he had "seen cases where a child presents following an opiate or an opioid overdose where they present in coma and respiratory depression" and also sustained shock for the next day or so after presenting to the hospital[.]"

When asked, Dr. McKay was "unable to say where Dr. Guzzardi in his deposition says that dextromethorphan plus another interferent on this list caused a false positive in this case[.]" Defense counsel quoted Dr. Guzzardi's deposition and asked Dr. McKay if he "underst[ood] that Dr. Guzzardi offered opinions that the cause of the children's presentation to the emergency department was due to bioaccumulation of [DXM] given on several occasions by Ms. Monroe, possibly doxylamine ingestion and the flu" and whether he agreed with that opinion. He replied:

> I don't agree with that opinion because there are additional components, such as the hypoglycemia, which I know he did mention, the acute deteriorations to the both metabolic and synthetic function that was demonstrated for [K.M.], and the organ system dysfunction presumably attributable to the flu that both of them had demonstrated, as well as the additional medications

> that were listed as having been provided by Ms. Monroe, which include doxylamine, and brompheniramine, diphenhydramine and the [DXM]. . . .
>
> So those would be [] reasons that I would not agree with that opinion as a full or extant, complete opinion.

Later counsel asked Dr. McKay whether it was his opinion that "the fact that [DXM] in therapeutic doses or cough medication in therapeutic doses causes a presentation like was seen in these girls[,]" and whether that opinion was "so well-known in the toxicology community that no reasonable toxicologist could believe that these children's presentations were caused by opiates[.]" Dr. McKay replied, "[N]o, that's not my opinion." In fact, he deposed that he had never "in [his] practice when [he] w[as] seeing patients clinically, . . . seen children or even just one child present to the emergency department like these children" either due to "therapeutic [DXM] ingestion" or to "therapeutic administration of cough medication[.]"

In response to defense counsel's statement that "in Dr. Guzzardi's deposition he indicates that he believes in this case dextromethorphan at the value of .13 milligrams per deciliter is what causes a false positive for opiates[,]" Dr. McKay indicated that he "would not agree that from what the information is there that a .13 milligram per deciliter of [DXM] would cause a positive opiate in the VITROS assay."

Daubert Hearing Part 2

On October 3, 2022,[23] the circuit court resumed the *Daubert* hearing, which had been continued from July, so that Dr. McKay could offer remote testimony in support of the opinions of Dr. Guzzardi. Defendants moved to preclude Dr. McKay's testimony, on the grounds that his opinions were "fundamentally different" and he had "come up with his own new theory" because he was "unable to support Dr. Guzzardi's theory of the case[.]" Defendants' counsel argued that "although Dr. McKay keeps [DXM] involved in his theory, he's added multiple new components[,]" and would fail to limit testimony to "the same opinions that were offered by Dr. Guzzardi at his deposition[.]" Defendants argued that the gravamen of Plaintiffs' argument was that Dr. Kim "must not have acted in good faith because he failed to agree with Dr. Guzzardi's [DXM] theory[,]" and Dr. McKay's "new theory that Dr. Kim was not presented with back in 2017" could not help the court "determin[e] whether or not he acted in good faith when he disagreed with Dr. Guzzardi[.]"

Plaintiffs' counsel argued that Dr. McKay and Dr. Guzzardi followed the same logic in ruling out the possibility of opiate ingestion based on the timing of the tests and "the half-life of how much opiate." Counsel said that the problem is how to account for the children's presentation with "what we do have" which is "[t]he contents of the cough medicine[,]" comprising four compounds across the different brands of OTC medicines the

[23] Prior to the continuation of the *Daubert* hearing, Appellants filed additional motions to limit defense experts' testimony. The court did not hear arguments or rule on these motions and they were rendered moot after the court granted summary judgment to Defendants on October 7, 2022.

children ingested. However, counsel acknowledged in response to the court's questioning that "Dr. Guzzardi did not mention anything about hypoglycemia as a cause . . . the presentation." The court emphasized that "to the extent that Dr. McKay has a different or more expansive view point than Dr. Guzzardi, this [c]ourt will not allow it[,]" describing it as "impermissible" and "push[ing] the boundaries of what already was a very permissive grant of extra time to the plaintiffs."

Testimony of Dr. McKay

Dr. McKay admitted that "in [his] 30 years of clinical practice," he had "seen or encountered 100,000 patients" but he had "never seen the presentation like these girls from the therapeutic administration of [DXM]," or from therapeutic use of "cough medication generally." However, he expressed his opinion, "to a reasonable degree of medical and scientific probability" that "the presentation and course of the two children is not consistent with being caused by an opiate or opioid overdose or exposure." He acknowledged that the girls' *initial* presentation at the E.R. was "consistent with an opioid exposure" but also "with a number of other things[.]" However, he said that "[w]hen more history was obtained and there was no opioid exposure, but a history of several days of febrile, a respiratory illness in the setting of underlying respiratory disease, the asthma, and changes in their behavior and activity and intake," it raised "a number of other possible concerns."

He stated that K.B. had no response to the naloxone she was administered in the E.R., which would have "reversed the effects" of an opioid.

Dr. McKay opined that the cause of the girls' medical crisis was:

> a combined effect of their illness, the Influenza A, on top of asthma with dehydration and the combined effects of the medications that they had been taking for the cough and cold symptoms in the setting of a significant cytochrome p450 2D6 inhibition by the medication, brompheniramine and diphenhydramine, along with the medic status that they were . . . determined to have from the hospital's sake.

Dr. McKay further opined that the cause of the positive test for opiates on the VITROS was:

> predominately the [DXM] that was excreted was not converted into dextrorphan in the way it normally is for the vast majority of the population. There would have been some contribution from doxycycline and brompheniramine as well, but that would have been less just based on the dosing and the, you know, medications that were given to the children.

He stated that "the total amount of the various drugs that were administered to the children via the cough medicine" that Ms. Monroe gave the girls was "enough to have the false positive" on the VITROS. However, he admitted that he "can't tease out, you know, how much each of those main factors, you know, that played a role in causing their presentation at the hospital, but it certainly is a fact or a contribution."

Dr. McKay stated that it was not possible to "conduct a study with all of the variables that are present" to arrive at the "exact amount of contribution that these substances would have caused to both affect the children's symptoms and to cause a false positive on the test," because "there are too many variables" whereas "experiments are done generally to control all of the variables, except for maybe one." The judge asked Dr.

McKay if he would be able to model the levels based on the evidence that is in the record, and he responded that "[y]ou could get somewhere with that, but you will have to make assumptions regarding the activity of the enzyme."

He differentiated his methodology from "making assumptions" as "taking known interactions that then fit with the clinical picture" and that he "look(s) at it as that's what makes this story fit together." The judge challenged him on this statement, stating, "What you said is that you couldn't model it because you would have to make assumptions, but you just said you are making assumptions because there is no other reasonable explanation in your mind for the false positive and the coma-like presentation." The colloquy continued:

> **DR. MCKAY**: . . . [W]hen I said "assumptions" in that sense, you would have to take the drugs, the active drugs, as in inhibitors, come up with a way of dosing individuals with known genetic makeup and a known phenotypic expression of that. Like I showed on that figure, that can be quite varied with the same genetic makeup. So once you had identified those people and you gave them [DXM] with none of the other drugs that were involved here, then you would make that measurement, how much dextrorphan to [DXM] they put out in their urine at a given point in time, usually six hours, eight hours later, and then you could go back and add in each of those other drugs, your diphenhydramine[.]
>
> **THE COURT**: . . . [Y]ou are saying that you are going off of the articles that you relied on, but is there any research that suggests that there are individuals who are essentially allergic to cold medicine for whom cold medicine is essentially a poison? Because that's basically what you are telling me, right, like that because these combinations of drugs are commonly ingested in people and children when they have cold or flu and what you are saying is that the interactions of those drugs cause certain individuals who have intermediate metabolism that essentially it's a poison to them. Is there

> any evidence of that, that there are individuals for whom the routine therapeutic dosing of cold medicines is essentially deadly?
>
> **DR. MCKAY:** So, yes, but it's -- so the surveys or the guideline development process or the [] article that talks about the poison center send in guidances, you know, mentions, well, you know, we know that idiosyncratic or therapeutic adverse effects can occur, we're not talking about . . . the percent of people who have symptoms, well lethargy or somnolence, with therapeutic dosing. So that's getting to that. I mean, lethargy and somnolence in somebody who is also sleeping while they have an acute respiratory infection and asthma, that could have a bad outcome and then they have to get hypoglycemic.

Dr. McKay acknowledged "case reports" of individuals who went "into a coma or died" due to therapeutic dosing of OTC medicine, but indicated those reports were "very problematic to interpret" due to the extremely high "concentration in the blood . . . post-mortem[,]" such that, Dr. McKay said "I don't know we believe this story[.]" He did not "know of a way" that these OTC medicines "could cause . . . life-threatening hypoglycemia" for K.M.

Moving on, Dr. McKay asserted that it was not necessary for an individual to have any opiates in their system in order for the individual's urine to generate a false positive for opiates.[24] Dr. McKay continued that the children had "[b]rompheniramine as an interferent, . . . [DXM], and . . . doxycycline" in their systems at "the relevant time frame" and that if the children were dehydrated, "it would increase the concentration." He said

[24] Dr. McKay noted that the VITROS instructions for use stated that "[a] positive result does not always mean a person consumed opiates" and that this statement would be unnecessary if "you had to have an opiate present to trigger a positive[.]" The instructions also indicated that the VITROS assay provided only a preliminary test result and, in Dr. McKay's opinion, "[i]n order to use the result with confidence, as any laboratorian would do, you need to [conduct a] confirmatory test."

that "the reason" the "VITROS urine assay" was positive was the combination of the amount of these OTC medicines the children received, "their metabolic status, and . . . flu and the other items [he had] talked about[.]"

In response to a follow-up question from the judge, however, Dr. McKay conceded he was unaware of any follow-up study corroborating the findings of the *Clinica Chimica Acta* Letter. However, he maintained that the letter supported the inference that [DXM] can cause a false positive on an opiate screening test because, as it described, an individual's "urine drug assay, rapid urine test turned up positive for opiates" but the subsequent confirmation test "showed no opiates whatsoever"; to the contrary, the "confirmatory methodology" identified DXM. While the test used in the *Clinica Chimica Acta* Letter was not the VITROS, Dr. McKay stated that "there's no difference in the technology[,]" and he believed each would produce like results. Dr. McKay concluded his testimony on direct by stating that he had sufficient data to support his conclusions and rule out "all obvious alternatives" for his opinions, using methods "used by toxicologists[.]"

On cross-examination, Dr. McKay stated that it was "unknown" whether the children were poor or intermediate metabolizers of DXM; he acknowledged that they lacked the "genotype that would make them . . . poor metabolizers" but maintained "the phenotype does not always follow the genotype[.]" Shortly thereafter, Dr. McKay simply declared that he "believe[d] they were poor metabolizers[.]"

Dr. McKay acknowledged that Dr. Guzzardi, in his deposition, did not ascribe any importance to the presence of brompheniramine in discussing the children's "positive tox screen"; Dr. McKay "disagree[d] with that aspect" of Dr. Guzzardi's deposition testimony. Dr. McKay also disagreed with Dr. Guzzardi's opinion that diphenhydramine did not play a role "in [the children's] presentation[.]"

On further cross examination, Dr. McKay admitted that—to his knowledge—there were no peer-reviewed articles to support an inference that cough medicine, in therapeutic doses, can cause coma or respiratory arrest. He said that some articles "allude[d]" to the potential for cough medicine in therapeutic doses containing DXM and antihistamines to cause a coma if the children taking the medicine were intermediate metabolizers, but that those articles "d[idn't] have any data to specify, because they didn't do the genetic testing on the kids[.]" A bit later, Dr. McKay also conceded that he could not identify any warnings from a governmental agency, the American Academy of Pediatrics, or the American College of Medical Toxicology, related to adverse interactions between antihistamines and DXM in OTC cough medicines for people who are intermediate metabolizers.

Dr. McKay agreed that he could not say, with a reasonable degree of medical certainty, the specific concentration of DXM, doxylamine, brompheniramine, or

diphenhydramine[25] that the children had in their systems on the morning of February 11, 2017. Pressed as to what specifically caused the positive screening test for opiates, Dr. McKay indicated DXM had the "largest contribution" and was the "major role" in the positive test—accounting for "at least 25 percent" but, perhaps, as high as "90 some odd percent" to the positive test. The remainder was caused by:

> a contribution from a brompheniramine as having a long half life and being administered for the longest amount of time. It would have been a possible contribution from doxylamine, although that would have been only one dose. And diphenhydramine probably made up a – well, diphenhydramine interfered with the enzyme system. But we don't have diphenhydramine as far as a listed cross reacting substance.

Dr. McKay elaborated that it would be possible for the "positive opiate tox screen [to be caused] entirely from the [DXM]" without any antihistamines. However. Dr. McKay later agreed acknowledged that, other than a half dose each of adult Robitussin, the cough and cold medicine consisted of "Target Up and Up Cough and Cold medication," and that the children had taken these medications previously without "coma or respiratory arrest[.]" He agreed that the medical records gave no indication that K.M. or K.B. experienced

[25] Dr. McKay explained that doxylamine, brompheniramine, diphenhydramine and DXM are all drugs found "within the multi-component cold medications that were listed as having been given to the children" by Ms. Monroe "at some point in the prior couple of days." Dr. McKay identified the "photographs of the cough medicine bottles" including generic versions of Children's Dimetapp Daytime Cold & Cough and Children's Dimetapp Nighttime Cold & Congestion, and generic versions of Non-Drowsy Tussin DM and Nighttime Tussin DM. He explained that the "children's daytime cold and cough [] includes brompheniramine" but not "diphenhydramine and doxylamine[.]" By contrast, the "non-drowsy Tussin DM" contained DXM but "no doxylamine, no diphenhydramine, no brompheniramine[,]" whereas, "the nighttime Tussin DM [has] [DXM] and doxylamine but . . . not . . . brompheniramine or diphenhydramine[.]"

hallucinations or excitability before their admission to the hospital. He also reiterated that K.M. and K.B.'s initial presentation to the hospital was "consistent with opiate exposure" due to their "[a]ltered mental status" and, at that time, "respiratory depression[.]" On re-direct, Dr. McKay stated that K.M. and K.B. "act[ed] . . . like . . . poor metabolizer[s]" even though, by genotype, they were classified as intermediate metabolizers, due to "their medication" and "the other factors that are present in this case[.]"

Testimony of Dr. Sims

On October 4 the defense recalled Dr. Pamela Sims to the stand.[26] Dr. Sims testified that Dr. McKay's testimony the previous day differed from the opinions provided by Dr. Guzzardi. While Dr. McKay indicated four compounds—DXM, doxylamine, brompheniramine, and diphenhydramine (the "four compounds")—caused what, in his view, was a false positive on the urine toxicology screens; Dr. Guzzardi merely "stated that

[26] Defendants' exhibits included a Power Point presentation to illustrate their expert's calculations. The first two illustrative slides graphed the concentration of DXM in K.M. and K.B.'s systems if they had received "1 teaspoonful of cough syrup containing 10 mg of DM for every four hours for several days followed by 1 teaspoonful of cough syrup containing 15 mg of DM at 9 pm on 2/10/17[,]" which illustrated a precipitous drop before the time of her admission. These were followed by a chart that illustrated the correlation between the dosage of DXM per kilogram of the person's weight and the blood concentration of DXM per liter of blood and marked the stages and symptoms beginning with a therapeutic effect, through unconsciousness and then death. The next four slides identified the concentrations of DXM in K.M. and K.B.'s systems predicted by those timeline and dosages, and located them in the "therapeutic" range. The next two slides illustrated that in order for K.M. to have reached a comatose state from DXM she would have had to ingest "60 8oz bottles," and K.B. would have had to ingest "46.5 8 oz. bottles" of OTC medicine. The final two slides illustrated that, in order to have reached the amount DXM required for toxicity in K.M., she would have had to ingest 96 teaspoon doses of OTC medicine. K.B. would have had to ingest 74.4 teaspoons does required for toxicity.

it was [DXM.]" Regardless, Dr. Simms asserted the available literature did not support Dr. McKay's theory of what caused the positive test.

Dr. Sims also indicated that she did not believe that the *Clinica Chimica Acta* Letter provided useful support to Dr. McKay's theory. For example, the letter's analysis arose from "the spiking of urine by a high concentration of [DXM] yielding the results that would create a false positive"; but, as Dr. Sims explained, DXM is "a fat soluble drug [that is] extensively metabolized by our bodies[,]" and thus the level of DXM in the urine described by the letter to the editor had never been reported "in a person that is present in the emergency department." Additionally, Dr. Sims asserted that the literature did not support an inference that the "Siemens Syva EMIT test" used for the letter to the editor had the "same interferences as the VITROS test[.]"

The doctor continued, stating Dr. McKay's theory that DXM "is the cause of harm" was not generally accepted in the field of toxicology and pharmacokinetics, nor anywhere else in the medical literature. Additionally, Dr. Sims indicated that the "articles Dr. McKay referred to [in order to] support this theory about antihistamines inhibiting the metabolism of [DXM]" did not, in fact, support his theory of the case. According to Dr. Sims, the available literature did not support the proposition that "antihistamines inhibit[] the metabolism of [DXM]"; moreover, two large clinical databases—Lexicon and Clinical Pharmacology—did not give any indication that antihistamines, if given in conjunction with DXM, require "any kind of monitoring[.]"

Defense counsel directed Dr. Sims' attention to a chart that had been referenced by Dr. McKay the previous day. The chart depicted, on the vertical axis, genotypes that were being evaluated; and, on the horizontal axis, a range of decimals representing how quickly an individual metabolized DXM into the metabolite, dextrorphan. Dr. McKay had indicated the chart supported the proposition that some genotypic intermediate metabolizers are actually phenotypic poor metabolizers. But Dr. Sims pointed out that, for individuals depicted by the chart with a genotype matching K.M. and K.B., "two of the five individuals that had that genotype were phenotypically normal metabolizers, and three of them were intermediate metabolizers[,] [n]one of them were poor metabolizers."

Dr. Sims also explained the "calculations [she performed] to assess whether the children could have gone into a coma . . . and respiratory distress accounting for Dr. McKay's new theory that the children['s] intermediate metabolization status was further reduced or slowed by the presence of antihistamines[.]" At length, she stated how, wherever possible, she designed her calculations to favor Dr. McKay's theory of the case, to achieve "the maximum accumulation [of DXM] that could occur" for children like K.M. and K.B.[27] Ultimately, according to her calculations, "even accounting for Dr. McKay's" theory of the case, the concentration of DXM in K.M.'s blood would have been "far below even [a] minimal toxic range[.]" Likewise, K.B. would have had a blood concentration

[27] For example, Dr. Sims stated she incorporated assumptions into her analysis to assume the presence of antihistamines would reduce K.M. and K.B.'s ability to metabolize or otherwise clear DXM from their bodes by approximately 25 percent, even though she did not believe that antihistamines would have this effect.

level "[i]n a fairly similar place[, s]o low in the therapeutic range." Thus, if K.M. and K.B. had taken the doses of medicine described by Ms. Monroe, Dr. Sims said there was not "any way" the result would have been a coma in either child.

Dr. Sims concluded her testimony on direct with the following exchange:

> [DEFENSE COUNSEL]: [I]s there any medical literature anywhere that supports that therapeutic doses of cough medication can cause coma or respiratory depression?
>
> [DR. SIMS]: There is not.
>
> [DEFENSE COUNSEL]: Is there any medical literature, in the world, that supports that therapeutic doses of cough medication can cause a false positive for a[n] opiate on a urine toxicology screen?
>
> [DR. SIMS]: There is not.
>
> [DEFENSE COUNSEL]: Is there any basis in the medical literature or articles to support the opinions and theories that Dr. McKay has offered in this case?
>
> [DR. SIMS]: There . . . are not.
>
> [DEFENSE COUNSEL]: [Has] Dr. McKay's hypothesis about what happened in this case been tested in any way?
>
> [DR. SIMS]: It has not.
>
> [DEFENSE COUNSEL]: Why not?
>
> [DR. SIMS]: . . . [T]here's no science to support the need for the test. . . .
>
> * * *
>
> [DEFENSE COUNSEL]: Is Dr. McKay's new theory about the four compounds causing a false positive generally accepted in the fields of toxicology and pharmacokinetics?
>
> [DR. SIMS]: It's not accepted at all, no.
>
> * * *
>
> [DEFENSE COUNSEL]: Is Dr. McKay's new theory about the four compounds causing a false positive accepted by anyone, in the world, who is

in the field of toxicology and pharmacokinetics, who is not an expert for the plaintiffs in this case?

[DR. SIMS]: No, it is not.

On cross-examination, Dr. Sims asserted that the children's ability to metabolize DXM would not have been impacted by hypoglycemia or the flu. She also indicated that if an individual had sufficient quantity of DXM in their urine to cause a false-positive for opiates on an "EMIT"[28] test, this would be a "result of consequences that would have been incompatible with life." Moreover, as concerned the VITROS test used in the instant case, Dr. Sims maintained that the available literature did not support an inference that DXM could cause a false-positive for opiates absent the presence of any actual opiates.[29]

Testimony of Dr. Heise

The defense recalled Dr. Heise, who emphasized that there were "something like a 100 million almost people using therapeutic [OTC medicines] while they have sickness we, neither Dr. McKay nor I, in our 40 combined plus years of clinical practice have ever seen a patient where this has happened[.]" He said that FDA-regulated OTC medicines

[28] Presumably, Dr. Sims referred to the Siemens Syva EMIT test.

[29] Asked whether "VITROS will . . . register a false positive ever on any amount of [DXM] without an opiate present[,]" Dr. Sims answered, "I don't know the answer to that. It hasn't been tested." But on re-direct, Dr. Sims explained, referring to a particular page of the "VITROS instructions for use[,]" that, while this page stated "[a] positive test result does not always mean a person consumed opiates[,]" an earlier portion of the page also stated that "[p]oppy seeds contain opiates, and ingestion of products containing poppy seeds may cause a positive test result." Dr. Sims also explained that the body has multiple ways of metabolizing DXM, and that even if the primary mechanism for metabolizing DXM (namely, 2D6) is inhibited—i.e., by an antihistamine—the body's other pathways could continue to function. Thus, 2D6 inhibition would not result in DXM "stay[ing] in your system forever[.]"

have been in use for about fifty years and that, consulting the FDA's adverse event database, it has never "been reported in the world that therapeutic doses of [OTC medicines] can cause coma and respiratory depression in children[.]" Nor, he said, "[i]s there any literature, even included in individual case reports, anything anywhere that says a therapeutic dosing can essentially act as a poison to a child[.]" Dr. Heise testified that the number of "intermediate and poor metabolizers in the United States that are ingesting therapeutic doses of OTC medicines per year" is "in the hundreds of thousands." Dr. Heise agreed with counsel that Dr. McKay's opinion described "something [that] has never happened in the world before . . . [yet] happened twice on the same day to two different girls living in the same house." Dr. Heise characterized it as "pretty ludicrous."

Dr. Heise echoed Dr. Sims' testimony that Dr. McKay's opinion differed from Dr. Guzzardi's, and said there was "no evidence that Dr. McKay's hypothesis about the cause of the children's presentation was shared with Dr. Kim back in 2017[.]" He explained that "part of the reason we didn't talk at all about the drug interactions [in the July hearing] is because there wasn't any mention of that by Dr. Guzzardi." The opinions also differed, he said, in that "Dr. Guzzardi didn't even mention brompheniramine or diphenhydramine in his initial opinion, nor did he mention asthma, nor did he mention hypoglycemia, particularly not as causative agents." Underscoring the unsoundness of Dr. Guzzardi's theory of bioaccumulation, Dr. Heise stated that the FDA had recently approved a drug that is designed "to inhibit the metabolism of [DXM]" that was tested and found to be "safe and efficacious" for all types of metabolizers.

Dr. Heise also addressed the reasoning by which Dr. McKay had ruled out opiate exposure as a cause of the children's medical crisis. Regarding Dr. McKay's testimony that "the children would have either been dead or recovering from an opiate ingestion around 9:00 a.m. when they were found in the morning if they had, in fact, ingested opiates between 9:00 p.m. and midnight[,]" Dr. Heise asserted:

> Well I mean clearly that can't be right. . . . You can't have kids that are either completely recovered back to normal or that are dead from opiates without having something in the middle. Like otherwise there would be no need to admit folks who have opiate overdoses to the hospital, they would all be better or they would be dead. The idea that they couldn't come in with a level of shock and severe medical illness and that wouldn't be a possibility from an opiate overdose is silly. I mean, you know, we see this every single week at our institution with kids as well as adults.

Dr. Heise addressed the publications that Dr. McKay had referenced and explained why they did not support his opinion. He also noted that Dr. McKay's "hypothesis" had not "been tested in any way[,]" because there have been no reported incidents to suggest a potential for research. Finally, he said that no "reasonable medical toxicologist" would "believe that this clinical presentation was due to the therapeutic use of cough medicines" because that would assume "that a one in a multi-billion first happening happened twice in the same household in the same night." He said that the presence of "flu and asthma and hypoglycemia" doesn't distinguish the children's condition from the majority of other therapeutic OTC medicine users they are intended to be used when "you have the flu, you have a cold, you are sick[.]"

On cross-examination Dr. Heise acknowledged that one of the children presented with "hypoglycemia at a level that was incredibly dangerous[,]" which alone could lead to

a coma, "[b]ut the other one did not." While he testified that "[t]here is no basis in the literature" to think that the VITROS test and the test used in the *Clinica Chimica Acta* Letter "are exactly the same[,]" he agreed that the latter had received FDA approval by "piggybacking" on the VITROS approval, which requires that the technology be "substantially equivalent."

When asked if he would ever "rely on a [VITROS test] for legal matters," Dr. Heise replied that "in a situation in the emergency department for instance, many times all you have is your immunoassay because oftentimes it isn't sent for confirmatory testing in most emergency departments in the United States." He agreed that the way "you definitively [determine] whether the urine test was a false positive or a true positive" is to conduct a gas chromatography mass spectroscopy test on the same sample and that the VITROS lab instructions state "that they keep the urine for three days." However, he noted that while the hospital did not request a retest, "that Dr. Kim didn't have ordering privileges, right. And in a perfect scenario, then I guess they keep it for three days, but of course that doesn't always happen either."

Closing Arguments

In his closing argument, defense counsel conceded that Dr. McKay fulfills the first prong of the Rule 5-702 analysis of "whether the witness is qualified as an expert by knowledge, skill, experience, training, or education[.]" However, he argued that the testimony did not meet the second prong of "the appropriateness of the expert testimony on the particular subject," because the "fit requirement go[es] to the idea of does this

materially advance resolution of the case." He argued that the testimony "does not fit the case because it does not meet what is required," which is testimony about "reporting a suspicion of abuse or neglect when two girls showed up in a coma in an emergency room" and the reporters' immunity. The court assured him that:

> THE COURT: No, I understand, I understand that part of it. I'm just trying to maybe reframe your argument somewhat so that it's in the format that I view the issue.
>
> [DEFENSE COUNSEL]: Sure.
>
> THE COURT: The lens of [Md. Rule] 5-702. So moving on to the third prong, whether there's a sufficient factual basis that supports the expert testimony, that of course has two prongs, which includes a sufficient amount of data, as well as a reliable methodology. So I'm wondering, your argument with regard to Dr. McKay's testimony, how would you frame it within that analysis?
>
> [DEFENSE COUNSEL]: He lacks a sufficient factual basis because he does not have the data. And what we have in what I'll call ground one, we prevented a Daubert challenge to Dr. Guzzardi. And for lack of a better term, he was dead in the water. He had the analytical gaps everywhere. He did not have the sufficient factual basis. He was going to preclude it and he was withdrawn at the last minute. And what Plaintiffs have done is they've gone and found a second witness who has qualifications.

The court asked defense counsel to "sort out" the structure of the analysis under the third prong of Rule 5-702:

> THE COURT: So whether there's a sufficient factual basis to support the expert testimony . . . do you believe that that refers to both the information and data that comes from the case itself, essentially knowledge of the facts of the case, as well as a supply of data, meaning the research that would be brought to bear?

> [DEFENSE COUNSEL]: Yes. In this case, because of its nature, that is what it would require. An expert cannot be ignorant of the case itself. An expert cannot be ignorant of a body of literature that exists.
>
> THE COURT: Okay. And so the reliable methodology, what would you describe as the methodology that the [c]ourt should be focused on from Dr. McKay's testimony?
>
> [DEFENSE COUNSEL]: I would say is, I think this is a generic case. This is a case of profound analytical gaps, and an expert relying on credentials to offer ipso dixit testimony. And that opinion is that therapeutic use of the over-the-counter cough medication can cause coma and death.
>
> THE COURT: But that's his conclusion. But what would you describe as his methodology to reach that conclusion?
>
> [DEFENSE COUNSEL]: I would call it speculation.

Before plaintiffs' counsel began closing argument, the judge apprised the parties of some of her conclusions pertinent to that stage of the proceedings:

> I'm not going to decide this issue on the basis of the difference in testimony between Dr. Guzzardi and Dr. McKay. . . . There are differences, but I'm just not going to entertain that as the basis of any ruling that I make today.
>
> In addition, I would like to say that there's no argument against the qualifications of your expert. And with regard to the second prong, the fit, whether the witness's opinion and testimony is appropriate to the particular subject, I've heard the Defense argument on that and I think it is appropriate to the topic. . . . I understand the Defense argument that, you know, this is not a malpractice case, this is not a mere negligence standard, but I don't think that that is proper focus of the second prong of 5-702. . . . I am much more interested in the question of sufficient factual basis under Maryland law.

For the Plaintiffs' argument the judge asked plaintiffs' counsel to "identify[] the primary opinions of your expert and why they demonstrate an adequate supply of data and a reliable methodology." She represented, and plaintiffs' counsel agreed, that Dr. McKay's "primary opinion" was that:

> the VITROS screen, which showed the presence of an opiate, was a false positive, that that was the result of the lack of metabolism of the [DXM] as

> a result of the other drugs, the other medicines that have been mentioned, the burden of those other medicines on the [DXM.]"

The judge characterized this as a "somewhat unusual viewpoint" that was "an extrapolation" from articles that Dr. McKay relied on and the *Clinica Chimica Acta* Letter. In response, plaintiffs' counsel said there were "plenty of studies out there," and added that Dr. McKay also opined "that the confirmatory test should have been done, and none of us[]would have been here."

Concerning his methods, plaintiffs' counsel noted that Dr. McKay said,

> there's only two possibilities in this case that are reasonable, okay-- was it an opiate exposure or was it related to the [DXM] as we're talking about the test right now, not so much the symptoms. And . . . he talked about the initial presentation by EMS, how they quickly ruled out opiates at the emergency room level, had to switch to a different theory of being potentially an allergic reaction. And then, the treatment the children received subsequent to that just was not consistent with an opiate, so he rule[d] that out.

Then, as he was "left with the cough medicine" Dr. McKay considered the children's status as intermediate metabolizers, and "the data" that was "Mom's testimony," "the photographs of the bottles at issue with the contents of the drugs," and "the VITROS instructions for use that listed three of the four drugs that he talked about as being interference with the drug test. From there, Dr. McKay reasoned "that they got enough in combination of those drugs for two things to happen, to take them from an intermediate metabolizer, move them toward to poor metabolizer status[,]" and that because of the children's "dehydration," there was a "concentration build up in the urine that [was] beyond . . . what you would expect from a therapeutic dose." He concluded that Dr. McKay had provided "a sufficient methodology, [in which he] analyzed it both from the

science and the literature and like the known interference and the VITROS test and the clinical picture that the kids presented with and how it progressed throughout their hospitalization."

Daubert Ruling

At the close of arguments, the court ruled to exclude Dr. McKay's testimony. Focusing on the third prong of Maryland Rule 5-702, "which is whether there is a sufficient factual basis to support the expert opinion," the judge stated, "I do not believe that the sufficient factual basis has been established and that Dr. McKay's opinion amounts to, really, unacceptable speculation or conjecture." She began by articulating her reasoning as to why Dr. McKay's methodology was not reliable under the *Daubert* analysis:

> In this case, the methodology that was put forth by Dr. McKay, I think, in some respects was reliable that he testified that he laid out a time line and, essentially, reviewing the evidence and based on his knowledge and expertise, endeavored to provide an explanation for what happened from the toxicology perspective. That, I think, is exactly what the Defense experts did as well. However, I found Dr. McKay's methodology to be lacking insofar as he did not attempt to model or project his theory of the ingestion amounts, the metabolism of the dextromethorphan as well as the other cold medicine drugs that were mentioned to present any calculations. I found that the calculations that were provided by the Defense witnesses in this case to be very persuasive and very reliable and every aspect of those calculations was based in research and science and for those reasons, they were very persuasive.

Describing Dr. McKay's opinion, that "the drug screen that was done in the hospital showed a 'false positive' based on the ingestion of the therapeutic amounts of dextromethorphan as well as therapeutic amounts of the other drugs that were mentioned[,]" the judge said that "Dr. McKay just failed to root that theory in the science,

so there is not sufficient data to support his opinion and that theory." The judge further observed on testing:

> The theory has not been tested. I don't think it's really testable. The theory is based on extrapolations from articles and research that frankly I found to be inapposite. Either the studies dealt with other medications and drugs and they didn't support his opinion.

The *Clinica Chimica Acta* Letter was described by the judge as "clearly an outlier" and "literally the only piece of evidence that McKay put forward to show that there can be a true false positive that exists as a result of [DXM] but no opioid or opiate." The judge noted that the letter was based "on the researcher's experience with one individual and then they followed up with a study that was very limited, and it involved the intentional creation of the urine sample that had a large amount of [DXM] added to it in the laboratory setting." "[E]ven if you would accept from that scant evidence . . . almost statistically insignificant evidence" the possibility of a false positive in a urine sample with no opioid present, "there would have to be such a vast amount of [DXM] to cause that to happen." The judge explained why she found no factual basis for Dr. McKay's opinion and how this left an "analytical chasm that cannot be bridged":

> The evidence does not support the opinion that therapeutic amounts or therapeutic dosing of dextromethorphan, even in combination with the other cold medicine drugs, would cause an amount of [DXM] to result in a positive for opioid. It is simply unsupported. There is nothing, nothing to support that. And frankly, taking, you know, just taking a common sense view, the idea that -- the theory that was advanced by Dr. McKay that these children had -- they were intermediate metabolizers -- even if you accept his viewpoint that the interaction of the other cold medicine drugs caused them, in effect, to be poor metabolizers, it's the theory that the false positive or even their presentation in combination with their illness would cause them to present in a coma with the depressed respirations that they were

> experiencing, it just does not bear out in the research. And it doesn't because it frankly doesn't make any sense. Like you want to talk about a[n] analytical gap, this is an analytical chasm that cannot be bridged.
>
> You cannot point to the Clinica letter to the editor with one human purportedly had a false positive and stand that up against the millions of people and children who take cold medicine while they are sick because that's why they're taking the cold medicine because they have flu symptoms which also can exacerbate glycemic problems. Of course, I will point out that only one child had a diagnosed hypoglycemia. The other one had low glycemic levels but not dangerously low.

She noted that "Dr. McKay testified that in his personal experience as an emergency room doctor as well as a toxicologist, he's never been presented with a patient who had . . . the symptoms that would have exemplified his theory" and "[h]is extrapolation from the other research is not justified." She stated that Dr. McKay "failed to account for obvious alternative explanations[,]" the "most obvious" being that "the children [may have been] exposed to an opioid[,]" which "was credibly described by the Defense experts . . . with reference to the clearance rates and the known half-life of the various substances." Furthermore, the judge emphasized that, even if she accepted Dr. McKay's theory, "there is an unacceptable analytical gap because the data, the amount of [DXM] ingested is nowhere near the levels identified in the Clinica letter nor are the girls here poor metabolizers." The theory that the children "were made to be poor metabolizers or that their metabolism was blocked or slowed by the other drugs is simply not supported in the evidence[,]" the judge found. And, the judge observed, the "obvious reality that cold medicine often has multiple different components including [DXM] as well as the antihistamines and other cold medicines that were referenced in this case, they're often

given together and there is simply no research and no report on drug-drug interaction that would result in coma as was present with these girls."

Summarizing, the judge found that Dr. McKay's testimony did not rest on "reliable grounds, but rather advance[d] scientifically unsupported conjecture[,]" and as such, "is squarely the type of testimony that should not be passed on to the jury and for that reason [I] am exercising the [c]ourt's gatekeeping function in excluding it."

Defense counsel moved for judgment, and the court granted plaintiffs' counsel's request to postpone argument on the motion until October 6.

October 6 Ruling

At the hearing on October 9, defense counsel clarified that the defense was moving for summary judgment. Defense counsel's argument was brief:

> Every claim in this case rests on the premise that the urine screen yielded a truly false positive result, and that all professional health care providers have no good faith basis to disagree with the theory that two comatose girls were not exposed to opiates. No lay juror could reasonably find either of these -- either of these things without expert testimony, so this case cannot proceed at this time without a medical expert[.]

Plaintiffs' counsel responded, "we oppose but offer no argument." The judge found:

> there is no expert who will testify in this case regarding the scientific evidence that would be required for the premise that the urine screen was a true false positive or was a false positive as necessary for each claim that has been presented. So under these circumstances, the [c]ourt does find that there are no material facts that are in dispute because obviously the material -- the primary and necessary material evidence regarding the expert is now

> currently unavailable to the Plaintiff. So under these circumstances, the [c]ourt finds as a matter of law that the case cannot proceed.

By order entered October 7, 2022, the judge granted summary judgment on all remaining counts. Appellants noted a timely appeal to this court, and Appellees followed with a timely cross-appeal.

DISCUSSION

Given the complexity of the facts and the legal issues raised, we tackle the issues presented in chronological order. We deal first with the court's initial denial of summary judgment for Appellees on the grounds of statutory immunity in May 2022. From there we pass to the court's denial of Appellants' motions to restrict defense expert testimony. Next, we review the court's grant of Appellees' Rule 5-702 motion to preclude the testimony of Dr. McKay. Finally, we consider the court's grant of summary judgment for Appellees in October 2022.

I.

May 2022 Ruling on Statutory Immunity

A. Parties' Contentions

In their cross-appeal, Appellees challenge the circuit court's decision to deny their motion for summary judgment, following the close of discovery, on the ground that they were entitled to statutory immunity under Maryland Code (1973, 2020 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 5-620, and under Maryland Code (1984, 2019 Repl. Vol.), Family Law Article ("FL"), § 5-708, as persons who "in good faith make[] or participate[] in making a report of abuse or neglect" of a child. They underscore that the

Maryland General Assembly has "repeatedly passed laws to punish those who do not report suspicious injuries to children and to protect those who report or cooperate with [DSS] investigations." Appellees contend that, "[t]o overcome the natural reluctance to report suspected child neglect" because of the potential for "intrusive follow-up investigations, workplace trouble, [and] lawsuits for 'false' reporting," the Maryland General Assembly "took the decision out of potential reporters' hands by (1) *requiring* them to report reasonable suspicions and (2) *immunizing* them from liability for doing so." Mandatory reporting requirements, they assert, "sweep[] so broadly that health practitioners must report suspicions of even *past child* abuse—even if the child is now an adult[.]" Appellees posit that statutory immunity, intended to counter the natural reluctance to report suspicions of child neglect or abuse, would be meaningless it if could be defeated "merely by (1) alleging 'bad faith,' (2) arguing that reporting physicians were unreasonably disagreeing with a plaintiff's explanation, or (3) speculating that reporters harbored subconscious discriminatory animus."[30] Quoting *Rite Aid Corporation v. Hagley*, 374 Md. 665, 680-81

[30] Amicus Curiae Child Justice, Inc., joins Appellees to ask the Court to protect good-faith reporting of suspected child abuse or neglect, as "[t]his broad immunity remains 'an essential tool for an effective reporting system.'" (Quotation omitted). Child Justice, Inc., reports that, according to the United States Government Accountability Office, "[i]n 2019, the largest sources of child abuse and neglect reports were education (21 percent of reports); legal and law enforcement (19.1 percent); and medical personnel (11 percent)." (Quoting U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-483, CHILD WELFARE: PANDEMIC POSED CHALLENGES, BUT ALSO CREATED OPPORTUNITIES FOR AGENCIES TO ENHANCE FUTURE OPERATIONS 8 n.21 (2021), available at https://perma.cc/P4C9-JDSE. It states that the need for "these extra, 'watchful eyes' . . . in helping protect children from parental abuse or neglect" "cannot be overstated, "especially . . . in those instances where the child is the subject of a custody proceeding."

(2003), Appellees urge that bad faith "is *not simply* bad judgment or negligence, but implies a dishonest purpose or some moral obliquity and a *conscious* doing of wrong." *Id*. at 42 (Emphasis supplied by Appellees' brief).

Appellees reject any claim that there is any evidence of their alleged animus against Ms. Monroe in the record, and they state that the motions court [on the motion to dismiss] itself "noted that no factual allegations explained the source of Dr. Kim's purported animus towards Ms. Monroe." They assert that such a claim "requires much more than reckless and never-substantiated allegations that Dr. Kim "had an extreme bias towards economically challenged people of color" or that Appellees "inexplicably tried to destroy the family of the two little girls whose lives they had just saved." According to Appellees, Appellants' arguments about Dr. Kim's 'confirmation bias' only *dis*prove bad faith[,]" because it builds upon implicit bias, thereby negating conscious animus or knowing discrimination. They describe Appellants' argument that Dr. Kim's actions are inexplicable in the absence of bad faith, as an unfounded inference of bad faith flowing out of the fact that Dr. Kim disagreed with Dr. Guzzardi's analysis. In fact, Appellants contend, discovery "substantiated that the Hospital had an honest 'reason to believe' that the [children] were exposed to opiates or another poison and therapeutic dosing of cough medicine did not explain their injuries and test results" "that entitled it to immunity and 'obliged' the court to grant summary judgment."

Appellants counter that immunity from civil or criminal liability only attaches if the initial reporting and subsequent participation in any investigation or judicial proceeding

were done in good faith, and that Appellants produced sufficient facts to create a reasonable doubt as to Appellees' good faith to overcome Appellees' motion for summary judgment. Relying, in part, on an opinion of the Maryland Attorney General, Appellants note that the Maryland General Assembly only provided qualified immunity rather than, as in some other states, absolute immunity for anyone making a report of child abuse whether in good faith or not. (Citing 80 Md. Op. Atty. Gen. 130 (1995)). Appellants posit that in Maryland, "in almost all cases involving determinations of 'good faith,' the issue is not resolvable on a motion for summary judgment and must instead go the jury."

Appellants claim that they "developed testimony and evidence" showing that "a more comprehensive and accurate confirmatory test is always needed before reporting out adverse results" of a VITROS test. They characterize as "false information" Dr. Kim's notation that "[t]here are no known 'false positive' [on the VITROS test] of opiates due to exposure of other substances."[31]

Appellants' argument that Appellees acted in bad faith cluster around three assertions: 1) that Appellees bore animus against Ms. Monroe; 2) that Dr. Kim's opinion was not honestly held and that he knowingly mislead BPD and DSS; and 3) that Appellees' actions "drove" the investigation by DSS.

First, Appellants assert that "[i]t is commonly accepted that there exists implicit bias and racial disparities in the American healthcare setting. It is often a lived experience

[31] Appellants cite the phrase "[t]here are no known 'false positive' of opiates due to exposure of other substances" in the children's medical records and in the DSS investigative report.

where Black patients perceive that their medical providers automatically refuse to find their complaints and explanations credible." Appellants allege that Appellees held such an "improper bias[,]" which they support with a quotation from Ms. Monroe's deposition that, in her brief conversation outside of the PICU with Dr. Kim, he said: "when you see cases like this there's **always** a positive blood sample from whatever your children have ingested." The statement reveals, according to Appellants, that "Dr. Kim had already passed judgment on Ms. Monroe and convicted her of child abuse and neglect." They quote from Ms. Monroe's deposition when asked if "Dr. Kim ever ma[de] any comments to indicate to you that he was prejudiced against you because of your socioeconomic status" and she explained that she "felt that way from the entire University of Maryland staff. No one ever even bothered to ask me or listen to my side about what happened." As an example of this, Appellants claim that Dr. Kim and the Appellees "gave zero credence" to Ms. Monroe's explanation that the children's symptoms may have been caused by the Robitussin that she had given them. And, they charge, Appellees "indifferently lost the Robitussin bottles after taking possession."

Second, Appellants claim that Appellees "knew, or had reason to know, the falsity of their statements[,]" and "consciously mischaracterized the urine results due to improper bias and prejudgment of Ms. Monroe." They allege that "in the context of a potential criminal prosecution against Ms. Monroe, Dr. Kim privately admitted to the prosecutor and

police that there were indeed potentially false positives involved[.]"[32] Appellants also claim that they produced evidence that "under the totality of the circumstances no reasonable toxicologist acting in good faith would proc[e]ed in this manner."[33] They allege that Dr. Kim must have known that his statement was false because he had manufacturer's literature in his possession, and because he later brought to Dr. Guzzardi's attention the *Clinica Chimica Acta* Letter that purportedly "identif[ies] [DXM] as a known cause of false

[32] Appellants cite an email written by Dr. Kim on March 8, 2017, in which he agrees to meet with BPD and Atty. Lambert, and the memorandum she wrote at the closure of her investigation of Ms. Monroe. *See, supra*. There, Atty. Lambert writes:

> On February 17, 2017, your writer, ASA Shauna Lee, and Detective Bailey meet with Toxicologist Dr. Kim Hong [sic] at the University of Maryland. Dr. Hong [Kim] did not know why the children were unresponsive to the Narcan. He also stated there could be several explanations as to why the uranalysis was positive and the blood screen was negative. One explanation could be the time lapse between the ingestion of the substance and when the blood screen was performed. Or, the positive urinalyses could have been a [] false positives, but this is very unlikely with two children.
>
> Dr. Hong [Kim] also stated that there is at least one study that found that [DXM] (AKA Robitussin) in high doses could cause an individual to test positive for opiates and become unresponsive. He did exclude the theory that Narcan would result in a positive opiate test. Finally, Dr. Hong [Kim] could not tell us what substance, if anything, was ingested by the children and when it occurred.

In his deposition, Dr. Kim acknowledged that he was contacted by "the detective and the state attorneys" and that they met once at his office, but he did not remember what they said.

[33] Appellants cite to the deposition of Dr. Charles McKay, Appellants' proffered expert toxicologist named in place of Dr. Guzzardi to testify at the *Daubert* hearing on October 4, 2022. As Dr. McKay's evidence was not before the court at the May 2022 hearing on the motion for summary judgment, we do not address it here.

positives[,]" claiming that both documents contravene Dr. Kim's medical opinion.[34] Appellants further allege that, "[o]nce the confirmatory blood serum test came back negative for opiates, Dr. Kim changed tactics but not his conclusion" when he explained that the most likely reason that the blood work was negative was because it was collected hours later.

Third, Appellants claim that Appellees' "dogmatic and absurd opiate theory drove the State [DSS] action against Ms. Monroe and her family until the agency came to doubt [Appellants]' explanation." They say that Appellees "drove" the CINA proceedings in bad faith when they initially reported the VITROS test results to BPD and DSS without "confirmatory tests[,]" and claim that Appellees' medical opinions "were the reason legal proceedings were initiated and continued against Ms. Monroe" and "led to the removal of her children from her care and custody." Appellants note that DSS worker "Ms. Dukes spoke to the hospital staff and was informed that [the children] had opiates in their system."

[34] Appellants cite the VITROS "Instructions for Use." According to the testimony of Dr. Sims at the July 2022 *Daubert* hearing, Dr. Guzzardi misinterpreted the chart he relied upon to form his opinion that DXM can cause a false positive on the VITROS. Dr. Sims testified that the chart actually shows compounds that interfere with the measurement of an opiate that is present in the sample causing it to be detected at a lower than usual concentration. The chart does not say that DXM could trigger a positive result where no opiate is present.

Appellants also neglect to point out that, in the email written by Dr. Kim on May 10, 2017, in which he refers Dr. Guzzardi to the letter to the *Clinica Chimica Acta* Letter, Dr. Kim underscores the distinction between high and therapeutic doses:

> I have considered the possibility of false positive based upon available published data, false positive from [DXM] while using less than or equal to therapeutic dose has not been reported. [H]igh dose [DXM]/abuser, on the other hand, have tested positive on opiate urine testing.

They allege that "it was not until the hospital relayed this information that the children first became suspected victims of child abuse/neglect[.]" They say that "[t]he hospital staff never informed Ms. Dukes that the test that they were relying on was a preliminary test ONLY."[35] According to Appellants, Dr. Dubowitz and Dr. Kim "acted in bad faith by inserting non-medical facts into their communications" and "impugned the family with drug references[,]" where, for example, Dr. Dubowitz wrote, in a February 21, 2017, follow-up email to BPD:

> The blood test for drugs sent the evening of 2/11 did return negative. However, that could have missed several opioids that are quickly excreted by the body in a few hours. The cough medicine in the dose said to have been given does not likely explain the positive urine tox and their clinical picture. Putting it all together, and given the lack of a good alternative explanation, and the info (I think from LE) that mother's BF deals in drugs, it does seem likely the children were given or took an overdose of an opioid.

In reply, Appellees insist that in order to pierce their statutory immunity, Appellants must prove that they acted "actual malice[.]" (Citing *Rite Aid*, 374 Md. at 682, 688). Accordingly, Appellants "needed to show that [Appellees] reported their suspicion of [the children]'s opiate exposure despite knowing full well that neither comatose girl had been exposed to any opiate." Appellees insist that Appellants did not produce any evidence that

[35] Appellants also cite to "49 C.F.R. § 40.87(b), [] incorporated by reference by COMAR 10.10.01.04," for the precept that, "[o]n an initial drug test, you must report a result below the cutoff concentration as negative. If the result is at or above the cutoff concentration, you must conduct a confirmation test." However, we note that 49 C.F.R. § 40.87 falls within Code of Federal Regulations ("C.F.R."), Transportation Title, 49 C.F.R. § 1.1, *et seq*., and regulates workplace drug testing. Appellants provide no authority that suggests the regulation applies diagnostic testing for the purpose of medical treatment in a hospital emergency-room setting.

Dr. Kim's opinion was not honestly held. They emphasize that Dr. Kim acted with a sincere belief in his stated medical opinion and that "Dr. Kim *did* share with investigators the inherent uncertainty in his differential diagnosis."[36] They stress, Appellants have offered "nothing to show that Dr. Kim and the other [Appellees] do not sincerely believe that (1) the girls' presentation is difficult to interpret and (2) the most likely cause of both girls' comatose presentation and positive urine screens remains opiate exposure[,]" and "[w]ith discovery complete, that is all that is needed to immunize their reporting from further scrutiny."

Appellees also aver that there is no evidence in the record to show that their actions 'drove' the investigation by DSS. They point out that Dr. Kim had "no obligation to say *anything* to Dr. Guzzardi[,]" who had been retained for Ms. Monroe's defense, yet he "corresponded with him at length about the case." Appellees assert that "Dr. Kim's extensive correspondence with Dr. Guzzardi and investigators exemplifies good-faith cooperation during an investigation of suspected child neglect." Appellees assert that Dr. Kim wrote to DSS investigators that:

[36] "'Differential diagnosis' is a process whereby medical experts seek to determine what caused a person's illness when a clear cause is not evident. In performing a differential diagnosis, a physician begins by 'ruling in' all scientifically plausible causes of the plaintiff's injury." 6 Jones on Evidence § 52:18 (7th ed.) (internal quotation marks and citation omitted).

- high doses of dextromethorphan "have resulted in false positive for opiates,"
- blood testing "did not show any detectable level of opioids," and
- "there is no confirmatory test to support [his] conclusion" that opiate exposure was likely.

Furthermore, Dr. Kim wrote to police detectives and prosecutors that:

- he did not know what opiate was ingested,
- "the blood test for the drug screen was negative"
- a 2014 case reported [(in the *Clinica Chimica Acta* letter)] a positive opiate test result from high dosing of dextromethorphan, and
- he did not know why naloxone was ineffective.

In sum, Appellees assert that "[Appellants]' arguments against statutory immunity amount to forcing [Appellees] to either agree with Dr. Guzzardi's . . . theories or stand trial for maliciously destroying a vulnerable family[,]" a situation not contemplated by the immunity statute."

B. Standard of Review and Legal Framework

Parties may move for summary judgment, under Maryland Rule 2-501, "on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." *Coit v. Nappi*, 248 Md. App. 44, 52 (2020) (quoting Md. Rule 2-501). The trial court "must resolve all inferences in favor of the party opposing summary judgment," but, nevertheless, "those inferences must be reasonable." *Id.* at 53 (quoting *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 739 (1993). We review the trial court's denial of a motion for summary judgment for abuse of discretion "and in the absence of such a showing, the decision of the trial judge will not be disturbed." *Webb v.*

Giant of Md., LLC, 477 Md. 121, 135-36 (2021) (citing *Dashiell v. Meeks*, 396 Md. 149, 165 (2006)).

The Child Abuse and Neglect Act was codified at FL § 5-701, *et seq.* in 1987, to protect children by mandating "the reporting of any suspected abuse or neglect" and "giving immunity to any individual who reports, in good faith, a suspected incident of abuse or neglect[.]" FL § 5-702. It requires "each health practitioner, police officer, educator, or human service worker, acting in a professional capacity in this State who has reason to believe that a child has been subjected to abuse or neglect" to notify "the local department or the appropriate law enforcement agency" and, in some instances, the head of the reporter's employing institution. FL § 5-704(a).

Section 5-708 of the Family Law Article further provides that such a reporter, "or particip[ant] in an investigation or a resulting judicial proceeding[,]" shall have the immunity described in CJP § 5-620, which states:

> Any person who **in good faith** makes or participates in making a report of abuse or neglect under § 5-704, § 5-705, or § 5-705.1 of the Family Law Article or participates in an investigation or a resulting judicial proceeding is immune from any civil liability or criminal penalty that would otherwise result from making or participating in a report of abuse or neglect or participating in an investigation or a resulting judicial proceeding.

(Emphasis added).

In a 1995 advisory opinion, the Maryland Attorney General confirmed that in the context of the Child Abuse and Neglect Act, "a person reports in 'good faith' if the report is made with an honest intention, even if the report turns out to be unfounded. A person reports in bad faith if the report is deliberately dishonest." 80 Md. Op. Att'y Gen. 130,

1995 WL 479804, at *2 (Md. A.G. Aug. 4, 1995). Therefore, when "a person makes a report [under FL § 5-704] with an honest intention, without malice or a design to defraud or seek an unconscionable advantage, that person is protected from civil or criminal liability." *Id.* at *3 (footnote omitted) (citing *Catterton v. Coale*, 84 Md. App. 337, 342 (1990)). Notably, "there is no requirement under Maryland law that the citizen reporting a crime to the police make an independent investigation to ascertain if there is exculpatory evidence available in favor of the accused." *Nasim v. Tandy Corp.*, 726 F. Supp. 1021, 1025 (D. Md. 1989) (citing *Reaves v. Westinghouse Corp.*, 683 F. Supp. 521, 524 (D. Md. 1988)) (other citation omitted).

Maryland appellate courts have examined the acts that do and do not indicate good faith in the reporting of suspected child abuse or neglect in *Rite Aid Corporation v. Hagley* and *Catterton v. Coale*, which bear upon Appellants' claims that they have presented direct evidence of Appellees' alleged animus and insincerity.

In *Rite Aid Corporation v. Hagley*, 374 Md. 665 (2003), our Supreme Court held that the defendant *was* entitled to statutory good-faith immunity because he reported the suspected child abuse in good faith. There, Mr. Rosiak, a clerk at Rite Aid, was developing the defendant's film when he identified a photo of the defendant bathing with his young child as depicting possible child abuse. *Id.* at 670-71. Mr. Rosiak discussed the matter with a Rite Aid security officer and refused to give the father the prints when he came to collect them. *Id.* at 671-72 & n.2. The father, Mr. Hagley, returned later in the day with

the child's mother and gave an explanation that did not allay Mr. Rosiak's fears. *Id.* at 671-72.

Mr. Rosiak reported the photographs and his suspicions to the police but did not relay the parents' explanation of the photographs. *Id.* at 688. Police took Mr. Hagley to the station and "after questioning and investigation, the State's Attorney's Office had determined that no criminal charges were warranted[,]" and he was released. *Id.* at 673. Mr. Hagley brought an action in the Circuit Court of Baltimore City against Mr. Rosiak and Rite Aid for Mr. Rosiak's acts, alleging claims including false imprisonment, malicious prosecution, and negligence. *Id.* at 674. The trial court granted summary judgment to Rite Aid. *Id.* at 674-75.

The Supreme Court acknowledged that "questions involving determinations of good faith which involve intent and motive '*ordinarily*' are not resolvable on a motion for summary judgment." *Id.* at 684 (citations omitted and emphasis added). However, the Court also held that, in order to defeat Rite Aid's motion for summary judgment, the father "must have made a showing, supported by particular facts sufficient to allow a fact finder to conclude that Mr. Rosiak lacked good faith in making the report of suspected child abuse" such as by "producing specific facts showing that Mr. Rosiak knew, or had reason to know, that the photographs did not depict a form of child abuse and, in total disregard of that knowledge, filed a report anyway." *Rite Aid*, 374 Md. at 688.

The Court held that Mr. Hagley had failed to establish any basis for the supposition that Mr. Rosiak lacked good faith. *Id.* at 686. It emphasized that the two men did not know

one another, and "there was no suggestion of any fact that might even suggest a motive, other than a belief that the photographs depicted a form of child abuse, for Rosiak to call the police." *Id.* (quotation omitted). Further, "Rosiak's conduct toward Hagley after he saw the photographs might suggest feeling of anger, disgust, or perhaps revulsion, but such emotions can only be explained as reactions to what Rosiak believed that the photographs depicted." *Id.* at 687 (quotation omitted). In sum, the Supreme Court held that Mr. Hagley had produced only "general allegations, that simply show that all of Mr. Rosiak's actions in making the report can be second guessed." *Id.* at 688. "Legitimizing this sort of Monday-morning quarterbacking would render the immunity conferred by [CJP] § 5-620 and FL § 5-708 essentially useless." *Id.* As a result, the Supreme Court found that Mr. Rosiak was entitled to statutory good-faith immunity and on that ground affirmed the trial court's summary judgment. *Id.* at 688-89.

By contrast, in *Catterton v. Coale*, a case involving a social worker's investigation of suspected child abuse, this Court found that "the question of bad faith remain[ed] in dispute" as to whether a social worker fabricated evidence in the underlying investigation and therefore the social worker *was not* entitled to dismissal on the grounds of statutory good-faith immunity. 84 Md. App. 337, 343 (1990) (citation omitted). Mr. Catterton, a police officer, had been accused of sexually abusing his two-year old daughter by his estranged wife, and Ms. Coale, a social worker, was assigned to investigate. *Id.* at 340.

Ms. Coale's investigation revealed abundant evidence that indicated the abuse *may* have taken place but was not conclusive. *See id.*

Ms. Coale alleged that she received a report that Mr. Catterton's attorney had told his employer, Maryland State Police, that he had taken a private polygraph examination in which he admitted to the sexual abuse. *Id.* at 341. Ms. Coale reported the allegations as confirmed, and police initiated criminal charges and an internal investigation against Mr. Catterton. *Id.* Prosecutors eventually *nol prossed* the criminal charges and an internal investigation by Mr. Catterton's employer cleared Mr. Catterton of all charges. *Id.*

Mr. Catterton filed a civil suit in the Circuit Court of Anne Arundel County, against Ms. Coale and her state employer that included claims of negligence, malicious prosecution, negligent supervision, and violation of Article 24 of the Maryland Declaration of Rights. *Id.* She alleged that Ms. Coale had fabricated the polygraph examination report. *Id.* at 343 (footnote omitted). The court found that Ms. Coale had statutory immunity under FL § 5-708 and dismissed the case against her. *Id.* at 341-42.

On appeal from the dismissal, this Court defined "good faith" as "an intangible and abstract quality that encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage." *Id.* at 342 (citation omitted). Therefore, we inferred that "the definition of 'good faith' under [FL] § 5-708 means with an honest intention." *Id.* (citation omitted). By contrast, "[b]ad-faith" means "not simply bad judgment or negligence, but it implies a dishonest purpose or some moral obliquity and a conscious doing of wrong." *Id.* (citation omitted). Thus,

we held that bad faith "differs from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with a furtive design." *Id.* (citing *New Amsterdam Cas. Co. v. Nat'l Newark & Essex Banking Co.*, 175 A. 609, 616 (N.J. Ch. 1934)). We further held that the allegation that Ms. Coale had had fabricated the report "implies that Coale acted with a dishonest purpose[,]" rather than negligence. *Id.* at 343. Therefore, we held that because "the question of bad faith remains in dispute, a motion to dismiss was not the appropriate context for resolution of this issue[,]" and we reversed the circuit court's dismissal of Mr. Catterton's claims. *Id.* (citation omitted).

We have not found a Maryland case that addresses the apparently novel theory of a mandatory reporter acting as a the "driving force" of a tort in the context of the Child Abuse and Neglect subtitle. However, our analysis is assisted by a Maryland decision regarding statutory good-faith immunity for a mandatory reporter of suspected insurance fraud. In *Bricker v. Warch*, 152 Md. App. 119 (2003), this Court considered whether a mandatory reporter of insurance fraud lost his entitlement to good-faith immunity by his actions subsequent to his initial good-faith report. In that case, John Bricker—himself an insurance adjuster—claimed compensation for injuries sustained from a fall on the grounds of a county public school. *Id.* at 123. Larry Warch, an adjuster for the school's insurer, investigated the claim and identified several anomalies in the surrounding circumstances and concluded that Mr. Bricker had potentially committed insurance fraud. *Id.* at 123-24. Mr. Warch brought his suspicions to the Insurance Fraud Division of the Maryland Insurance Administration, which determined that Mr. Warch's investigation had produced

insufficient evidence for it to bring criminal charges. *Id.* at 124. We recounted that after this decision:

> Warch "felt further review was warranted." He allegedly contacted Bricker's past and current employers, co-workers, and friends, and even his children's teachers. He told them Bricker was under investigation for insurance fraud. As a result of this additional investigation, Warch allegedly learned from Bricker's former co-worker in the Frederick City Police Department, who perceived Bricker as a person who "would do anything and cheat anyone to get what he wants," that Bricker had a long history of initiating lawsuits.[] Warch allegedly reported Bricker to the National Insurance Crime Bureau ("NICB"), a data repository regularly visited by insurance companies.
>
> On May 17, 1996, Warch presented his accumulated evidence to the State's Attorney in Frederick County. Bricker claims that the information supplied by Warch was the sole basis for the case against him. Warch appeared before a grand jury in June 1996. The grand jury indicted Bricker for insurance fraud. In response, Great American reduced its reserve, which had been set at 80% of the claim, to only $2,500. Bricker claims that Warch also contacted his employer with news of the indictment. This report and the report to the NICB allegedly cost Bricker his 17 year job as a claims manager for an insurance company, and prevented him from finding another job in the insurance industry.
>
> At trial, after the State rested its case, the Circuit Court for Frederick County granted Bricker's motion for acquittal. Thereafter, Warch allegedly made no effort to notify Bricker's employer or other persons he had contacted during his investigation, or to revise either Bricker's record at the NICB or Great American's reserve.

Id. at 124-25 (footnote omitted).

After his criminal acquittal, Mr. Bricker brought claims, including that of malicious prosecution against Mr. Warch and the insurance company in the Howard County Circuit Court. *Id.* at 121, 125-26. The circuit court judge granted summary judgment on the malicious prosecution claim for both defendants, based on his finding that they had qualified immunity under a Maryland insurance statute mandating the report of suspected

insurance fraud. *Bricker*, 152 Md. App. at 126, 129 (citing Md. Code, Insurance Article ("Ins."), § 27–802(a)(1)).

On appeal to this court, Mr. Bricker challenged the summary judgment for the Appellees on the malicious prosecution claim, along with other decisions of the circuit court. *Id.* at 122. We reviewed circuit court's finding that Appellees had qualified immunity under the insurance article, which then provided:

> (a) *In general.*—(1) *An authorized insurer, its employees,* producers, as defined in § 20–101 of this article, or agents, *who in good faith have cause to believe that insurance fraud has been or is being committed shall report the suspected insurance fraud* in writing *to* the Commissioner, the Fraud Division, or the appropriate federal, *State, or local law enforcement authorities.*

Id. at 129 (emphasis supplied by *Bricker*) (quoting Ins. § 27–802(a)(1)). The section further provided, in pertinent part, that "[*a*] *person is not subject to civil liability* for a cause of action by virtue of reporting suspected insurance fraud *if:* . . . the person that reported the suspected insurance fraud acted in good faith when making the report." *Id.* at 130 (quoting Ins. § 27–802(c)(2)).

Addressing the statute's good faith requirement, this Court approved the circuit court's "very thorough analysis" which concluded that "even viewing it in the light most favorable to the plaintiff," "the proffered evidence *could not* 'show the lack of "good faith" necessary to maintain the action.'" *Id.* at 131-33 (emphasis added). We emphasized that the circuit court's finding that:

> [f]rom the summary judgment record before the Court, *the facts disclose that there was no contact of any type between Mr. Bricker and Mr. Warch before the insurance claim began. Mr. Warch is not accused of having any motive*

> *to harm Mr. Bricker for any personal or other purpose unconnected to his job as an insurance investigator*.

Bricker, 152 Md. App. at 132. We found that the holdings of *Catterton v. Coale* supported the circuit court's finding that, at most, "the record may show that Mr. Warch was overzealous and was not as careful or objective as he should have been in reporting all aspects of the claim investigation to the prosecutor." *Id.* at 132. While Mr. Bricker had alleged that Mr. Warch had not "disclosed everything that may have exonerated [him]" we further agreed with the circuit court that "there does not appear to be any basis to infer 'bad faith' or that Mr. Warch was acting with anything other than 'an honest intention' even if it was wrongly directed in reporting insurance fraud." *Id.* at 132 (emphasis removed) (citation omitted). In so holding, we emphasized that:

> There was no evidence of any personal animus on the part of Larry Warch toward Bricker. He had never met him or heard anything about him. Warch was simply in the business of investigating the *bona fide* nature of insurance claims. He received Bricker's claim of an accident on school property which seemed to be squarely contradicted by 1) the personal observation of the school's custodian and 2) a videotape of an apparently uninjured Bricker several hours after the alleged accident. Subsequent surveillance of Bricker strengthened the suspicion that the claim of injury was false.
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> * * *
>
> After Warch presented his findings to the Frederick City Police Department and the Frederick County State's Attorney's Office, the Assistant State's Attorney investigating the case concluded that there was enough evidence of fraud to present to the Grand Jury. The Grand Jury, in turn, concluded that fraud was present and returned an indictment.

Id. at 133-34.

This Court concluded that we "agree[d] with [the circuit court] that, in the language of *Catterton v. Coale*, 84 Md. App. at 342, [] there was no evidence of 'a dishonest purpose

or some moral obliquity and a conscious doing of wrong.'" *Id.* at 134. Holding that Mr. Warch retained statutory good-faith immunity, we affirmed the circuit court's grant of summary judgment. *Bricker*, 152 Md. App. at 134.

C. Analysis

At the May 2022 hearing on Appellees' summary judgment motion, the dispositive question was whether there was a dispute of material fact as to whether Appellees acted in good faith. Therefore, irrespective of whether Dr. Kim was right or wrong about how the body metabolizes DXM, for example, Appellees were entitled to the statutory immunity promised to good faith reporters under CJP § 5-620 if the record showed that Dr. Kim held this belief in good faith. On appeal, Appellants argue that the trial court correctly denied the motion because they had produced sufficient evidence that "under the totality of the circumstances no reasonable toxicologist acting in good faith would proc[e]ed in this manner."

The record reveals that, at the time of the hearing in May 2022, Appellants had generated sufficient evidence, by virtue of their expert's opinion, challenging Dr. Kim's utilization and reliance on the VITROS drug tests. The allegations against Appellees flow mainly from their alleged acts—or non-actions—based on these drug tests. Appellants alleged that Dr. Kim and UMMC's actions were driven by racial and economic animus. We pause to note that the American Medical Association has acknowledged that many professionals and patients suffer from discrimination in the health care setting. *See President Jesse M. Ehrenfeld, MD, MPH, Inauguration Address, 2023 Annual Meeting*,

AM. MED. ASSOC. (June 13, 2023), https://www.ama-assn.org/press-center/speeches/president-jesse-m-ehrenfeld-md-mph-inauguration-address-2023-annual-meeting, *archived at* https://perma.cc/885Z-9PUM. Throughout these proceedings the circuit court acknowledged the gravity of Appellants' allegation that Ms. Monroe was subjected to racial and economic bias during her time at UMMC. The court found her testimony that she believed that Appellees were disregarding her views and treating her disrespectfully compelling. It is only in rare circumstances that we overturn a trial judge's denial of summary judgment where a question of good faith has been raised, *see Rite Aid*, 374 Md. at 684 (recognizing that "questions involving determinations of good faith which involve intent and motive 'ordinarily' are not resolvable on a motion for summary judgment" (citations omitted))—and this is not one of them.

II.

Motions Concerning Expert Evidence

A. Parties' Contentions

Appellants contend that in denying their motions to compel production of documents related to defense expert qualifications and opinions, the court permitted Appellees to "with[o]ld critical expert discovery until ambushing [Appellants] during the *Daubert* Hearing with undisclosed expert opinions, phone calls with unknown persons, calculations, and diagrams[—]which Judge Avery found persuasive and reliable." Specifically, they describe a "a red notebook full of [Dr. Sims's] notes, calculations, and other materials" that she "relied upon . . . to formulate her opinions[,]" which was never

produced to Appellants. Appellants state that their counsel "sought to examine the contents of the folder possessing the basis for Dr. Sims' opinions but was inexplicably denied permission to do so" by the judge. Appellants claim that the judge's evidentiary rulings "constitute an abuse of discretion requiring reversal[,]" because under Maryland Rule 2-402(g), the documents should have been produced during the discovery period.

Appellees respond that "Plaintiffs were not prevented from understanding the bases of the Hospital's experts' opinions" before the October *Daubert* hearing. They note that Appellants interrogated both Dr. Sims and Dr. Heise "over two days in July, received Dr. Sims's complete folder in early September, and then chose not to depose either expert before the October hearing, where they interrogated them again." Appellees also assert that "Plaintiffs show no prejudice and fail to even identify a specific non-disclosure or how it harmed them."

Although Appellants also present for our consideration the question of whether "the trial court err[ed] [by] . . . denying Plaintiffs' motions to limit [defense] experts' testimony[,]" they do not provide any argument on that point. Appellees respond that "Rule 2-402(g) expert-disclosure obligations cannot preclude the *judge* from hearing testimony at a pre-trial *Daubert*/5-702 hearing[,]" which is "for the *court's* benefit in its

gatekeeping role[,]" and "the court may consider whatever it reasonably considers useful in evaluating the *Rochkind*[37] factors."

B. Legal Framework

Trial courts "are vested with a reasonable, sound discretion in applying [the discovery rules], which discretion will not be disturbed in the absence of a showing of its abuse." *Falik v. Hornage*, 413 Md. 163, 182 (2010) (alteration in original) (quoting *Ehrlich v. Grove,* 396 Md. 550, 560 (2007)). "The fundamental objective of discovery is to advance 'the sound and expeditious administration of justice' by 'eliminat[ing], as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind, concerning the facts that gave rise to the litigation.'" *Gallagher Evelius & Jones, LLP v. Joppa Drive-Thru, Inc.*, 195 Md. App. 583, 595 (2010) [hereinafter "*Joppa Drive-Thru*"] (alteration in original) (quoting *Balt. Transit Co. v. Mezzanotti,* 227 Md. 8, 13 (1961)). "Even in the absence of a particularized rule or statute, trial courts inherently have the power 'to definitively and effectively administer and control discovery.'" *Kadish v. Kadish*, 254 Md. App. 467, 494-95 (2022) (quoting *Joppa Drive-Thru*, 195 Md. App. at 596).

The Maryland Rules allow for a party to obtain discovery regarding a matter that is not privileged and is "relevant to the subject matter involved in the action," or "appears reasonably calculated to lead to the discovery of admissible evidence." Md. Rule 2-402(a).

[37] *Rochkind v. Stevenson*, 471 Md. 1 (2020).

A party may not resist discovery solely because "the information sought is already known to or otherwise obtainable by the party seeking discovery or that the information will be inadmissible at the trial[.]" Md. Rule 2-402(a).

By use of interrogatories, one party may require another to identify each expert witness that the other party plans to call and provide the subject matter and substance of the findings and opinions that the expert is expected to offer at trial, as well as the grounds for each. Md. Rule 2-402(g)(1)(A). Parties may depose the expert and require them to produce any written report they have made concerning their findings and opinions. *Id.* The Rules impose additional discovery obligations for experts who are retained and whose findings and opinions were obtained in anticipation of litigation or for trial. Md. Rule 2-402(g)(1)(B).

A court "need not" wade into a discovery dispute unless the complaining attorney has made "good faith attempts to discuss with the opposing attorney the resolution of the dispute" and certified, with the court, that they were "unable to reach agreement on the disputed issues." Md. Rule 2-431.

C. Analysis

As detailed in the background above, Appellants filed three motions on January 12, 2022, to compel discovery and the court denied all of them without hearing by orders dated March 3, 2022. In their motions, Appellants produced a list of interrogatories to which Appellees' response was allegedly inadequate. Further, each motion was accompanied by

a "Certificate of Good Faith" that included the dates and subjects of emails Appellants' counsel sent to Appellees requesting discovery.

Appellees opposed the motions, claiming that they had complied with the interrogatories and produced materials in a timely fashion. They explained that "[t]o date, defense experts have not produced any reports in this case. If any defense expert does produce such a report, Defendants will promptly produce it." Likewise, with regard to literature reviewed and relied upon by their experts, Appellees said that they had already disclosed what they had, and if "additional literature will be utilized by defense experts, it will be timely produced." Appellees also argued that none of Appellants' motions were ripe because Appellants had not made "good faith attempts to discuss with the opposing attorney the resolution of the dispute[.]" (Emphasis removed; quoting Md. Rule 2-431).

While Appellants' motions comported with discovery permitted under Maryland Rule 2-402 and were accompanied by the certificates contemplated by Maryland Rule 2-431, Appellees' opposition was likewise facially valid. Therefore, the question before us is a matter of fact, not of law, and we are in the realm of the trial judge's "discretion to limit the scope of discovery in order to prevent its employment in an abusive fashion." *Drolsum v. Horne*, 114 Md. App. 704, 712-13 (1997) (citation omitted). Here, in denying the motions to compel, the judge found that the motions—which were filed at least three months after Appellees' alleged failures—had not been filed with "reasonable promptness" as required by Maryland Rule 2-432(d). (Quoting Md. Rule 2-432(d)). The judge also found that "due to the pettifogging nature of the [parties'] dueling pleadings, th[e] [c]ourt

is not satisfied that the attempts made to discuss with the opposing attorney the resolution of the discovery dispute were made in good faith" under Rule 2-431. (Emphasis removed). We discern no abuse of discretion in the court's ruling, and conclude that the judge's discretion was guided by the "fundamental objective of discovery" to deliver "sound and expeditious administration of justice[.]" *Joppa Drive-Thru*, 195 Md. App. at 595 (quotation omitted).

We address only two of Appellants' four motions to limit the scope of the defense experts' testimony, which the court denied, as the latter two[38] were resolved as moot once the court granted summary judgment to Appellees. The July 5, 2022, motion sought to exclude expert opinions that opiate ingestion was a reasonable cause of the children's medical crisis. The July 8, 2022, motion sought to exclude defense expert testimony regarding the concentration of DXM in the children's blood. At the time, Appellants argued that Appellees' intention to use "complicated formulas" to reach a "precise blood level [of DXM] for the children" constituted a "classic trial by ambush." Appellees argued that the specific formulas they had recently produced were "simply a supplementation" to what their experts had gleaned from literature in Appellants' possession, and that the

[38] On September 28, 2022, Plaintiffs filed a Motion to Preclude Defendants' from Offering Testimony, Evidence or Argument Regarding Their Experts' Purported Call(s) to Undisclosed Person(s) at Vitros. On October 5, Plaintiffs filed a Motion to Preclude Defendants from Raising or Otherwise Arguing Children Overdosed with Cough Medicine.

experts' opinions were unchanged. Appellees also raised the fact that Appellants had the opportunity to depose their experts but had declined to do so.

Again, we discern no abuse of discretion here by the trial court. Appellees' intention to use a formula to calculate the amount of DXM that would be needed to support Appellants' own theory is hardly a surprise that would cause them to go to "trial in a confused or muddled state of mind, concerning the facts that gave rise to the litigation." *See Joppa Drive-Thru*, 195 Md. App. at 595. Appellants had an expert toxicologist with access to the same data and research as Appellees, and Appellants had every opportunity to depose Appellees' experts. Accordingly, we hold that the circuit court judge did not err or abuse her discretion in denying the motions to limit defense expert testimony.

III.

Exclusion of Testimony by Dr. McKay

This case presents an unusual *Daubert* problem. In order to evaluate whether Dr. McKay's testimony would have been helpful to a jury, we must bear in mind the purpose for which Appellants offered it. As there was no assertion of malpractice, the only element that the medical evidence was intended to support was Dr. Kim's putative bad faith. Therefore, Appellants did not seek to show that the therapeutic doses of OTC medications *caused* the children's medical crisis. Instead, they sought to show that—given the information that Dr. Kim had at the time—the likelihood that the doses might have caused

the crisis was so high that no reasonable toxicologist could have dismissed it for any reason other than bad faith.

A. Parties' Contentions

Appellants assert that the court readily accepted both Dr. McKay's expert qualifications and the appropriateness of expert testimony on the utilization and purpose of the VITROS test, and that the judge "decided the *Daubert* challenge" on the third prong of Maryland Rule 5-702: whether a sufficient factual basis existed to support the expert testimony. They contend that "[t]he ten *Daubert* factors were not explored by the court[,]" and claim that "Dr. McKay's opinion as an expert toxicologist that opiates do not fit the clinical picture satisfies Rule 5-702[.]"

Appellants argue that Dr. McKay's opinion "that the children's medical history, presentation and hospital course were inconsistent with an opiate/opioid ingestion satisfies [Md.] Rule 5-703(3) [sic] because it is supported by adequate data and utilizes a reliable methodology." Appellants state that Dr. McKay "sourced information from the medical records and other case documents[,]" "created a timeline of facts[,]" "formulated a differential diagnosis[,]" and ruled out opiates based on "the undisputed evidence." They further claim, citing to the transcript of the October 4, 2022, *Daubert* hearing, that Appellees "conceded that Dr. McKay's methodology was sound."[39] They assert that

[39] In the pages to which Appellants cite, the defense attorney agrees that Dr. McKay "create[d] a timeline and project[ed] . . . [his] analysis on to that timeline for the individuals in this case" and, thus, that Dr. McKay "articulated a coherent methodology" that would be appropriate "if the issue were general causation[.]"

Appellees "failed to impeach Dr. McKay or otherwise establish that he had erred in any aspect of his records review."

Appellants enumerate facts that they assert are inconsistent with the possibility of opiate ingestion, and they assert that Dr. McKay tested and rejected all possible scenarios under which the children ingested opiates. They argue that "[a]fter ruling out opiates, Dr. McKay then took all the pre-toxic phase factors that would account for the children's presentation[,]" which "included severe flu, hypoglycemia, dehydration, and ingestion of numerous substances contained in the cough medicine they had taken over the previous days[,]" into an analysis that "speaks to the court's concern about an analytical gap between a therapeutic regimen of cough medication and a patient achieving a coma-like condition." They emphasize that "[a]t no time did Dr. McKay or Dr. Guzzardi ever state that the dosage of cough medicine administered to the children solely caused the children to present in a coma or near coma state[,]" but rather, Dr. McKay's opinion was that "it was a combination of the flu, hypoglycemia, dehydration, asthma, and the accumulations of the drugs contained in the cough medicine."

Appellants characterize Dr. McKay's "ample supply of data" as: the contents of the children's medical records, including the notes by the pediatric psychiatrist Dr. Edwards and the genetic test results; Ms. Monroe's testimony; and photographs of the cough medicine packaging. Appellants claim that the scientific literature supporting Dr. McKay's opinion is "extensive[,]" and they note that "[t]he concept of false positives on urine drug screens and the necessity for confirmatory tests is not only found in the scientific literature,

but also in regulatory law and publications produced by the test manufacturers themselves." In support of this claim, Appellants cite to the VITROS instructions chart of 'known interferents' and to a 2016 article in the journal Clinical Laboratory Medicine that discusses "[i]nterferences with toxicology testing[,]" including where a "false-positive" is "a result that is screen positive for a particular class of drugs, when in reality, the donor has not ingested any of those substances." (Quoting Michael P. Smith & Martin H. Bluth, *Common Interferences in Drug Testing*, 36 CLINICAL LAB'Y MED. 663 (2016); emphasis supplied by Appellants' brief removed). They also reference the *Clinica Chimica Acta* Letter, a paper in the Journal of Analytical Toxicology[40] reporting "researchers found that the false-positive rate for opiates was 34%." Appellants argue that "[t]he issue of false positives on urine drug screens is so well known"—citing Maryland's adoption of federal regulations governing workplace drug testing in the transportation sector.

Appellees respond that Appellants have failed to allege any legal error in the court's decision to exclude Dr. McKay's testimony. They claim that Appellants seek to misdirect our attention by arguing that Dr. McKay "had a sufficient basis to opine that the girls were not exposed to opiates[,]" and that "urine screens are not infallible" even though those were *not* the opinions that the judge precluded. According to Appellees, the court excluded the opinion "that therapeutic dosing of cough medicine" or "any combination of" DXM, diphenhydramine, brompheniramine, and doxylamine, "causes (1) truly false positives on

[40] Kamisha L. Johnson-Davis *et al.*, 40 ANALYTICAL TOXICOLOGY 97 (2015).

urine screens and (2) comas in intermediate metabolizers of [DXM]"; or, more specifically, "that any combination of the four compounds causes a truly false positive on the VITROS test[.]"

First, Appellees deny Appellants' assertion that "it is undisputed that '[DXM], brompheniramine and doxylamine are all known to cause false-positives on rapid urine tests.'" Instead, citing in part to Dr. McKay's testimony, Appellees urge that "[d]espite billions of doses over several decades, no one has ever shown that these three drugs, either individually or in any combination, have caused a truly false positive at therapeutic dosing levels." They point out that the VITROS instructions do not list any of those drugs as cross-reactants, which they identify as the "substances that can cause 'truly false positives.'" They identify the causal connection that Appellants propose between therapeutic doses of the four compounds and a truly false positive on the VITROS test as an "unfounded analytical leap . . . that [the judge] was unwilling to make."

Second, Appellees assert that the record does not support Appellants' claim that "therapeutic dosing of cough medicine can cause *comas* in children who are 'intermediate' (or even 'poor') metabolizers[,]" and that Appellants "conspicuously fail to provide any citation for their conjecture that those who do not properly metabolize [DXM] to dextrorphan experience coma." They argue that the judge did not mischaracterize Appellants' position as being that "that drug-drug interaction in therapeutic dosing of cough medicine can put children into comas as stating that the medication can do so *by itself* with no other contributing factors like flu or hypoglycemia." Appellees point out

that, to the contrary, the judge explained that OTC cough medicines were "normally given to sick people," in the presence of those factors. Furthermore, they assert, the judge acknowledged that slow and poor metabolizers of DXM constitute "a significant percentage of the hundreds of millions of patients who take cough medicine[,]" and "Dr. McKay's hypothesized injury has *never* been documented or reported with therapeutic dosing, despite the FDA regulated products' decades of widespread use."

Finally, Appellees argue that Dr. McKay's opinions differ from Dr. Guzzardi's at critical points, and emphasize that "admitting Dr. McKay's novel hypotheses" would not "assist the trier of fact" to determine whether "Dr. Kim acted in bad faith by not agreeing with Dr. *Guzzardi's* opinion in 2017[.]"

B. Standard of Review

Maryland courts "review[] a trial court's decision to admit or exclude expert opinion for an abuse of discretion." *Oglesby v. Balt. Sch. Assocs*., 484 Md. 296, 327 (2023). Our cases instruct that, under the abuse of discretion standard:

> an appellate court does "not reverse simply because the . . . court would not have made the same ruling." *Devincentz v. State*, 460 Md. 518, 550 [191 A.3d 373] (2018) (internal quotation marks and citation omitted). "Rather, the trial court's decision must be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* (internal quotation marks and citation omitted).

State v. Matthews, 479 Md. 278, 305 (2022). The Supreme Court, in *Rochkind,* "reiterated that a trial court's ruling to admit or to exclude expert witness testimony 'will seldom constitute a ground for reversal.'" *Id.* at 306 (quoting *Rochkind*, 471 Md. at 10). The abuse

of discretion standard, however, "is not monolithic[.]" *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 485 Md. 335, 406 (2023) (Booth, J., concurring) (quotation omitted). Judge Booth recently observed in her concurring opinion in *Parkway Neuroscience*, that in the "context of reviewing expert testimony admissibility determinations," *id.* at 385 (Booth, J., concurring), "the actual degree of scrutiny in a particular case [may] depend[] on the particulars of that case rather than on the label affixed to the standard of appellate review." *Id*. (Booth, J., concurring) (quoting *Haugh v. Jones & Laughlin Steel Corp*., 949 F.2d 914, 916-17 (7th Cir. 1991)).

C. Legal Framework

The Maryland Rules grant that "[e]xpert testimony may be admitted . . . if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Md. Rule 5-702. In doing so, a trial court must assess:

> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
>
> (2) the appropriateness of the expert testimony on the particular subject, and
>
> (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Rule 5-702. Always, it is "the proponent of the expert opinion that bears the responsibility of demonstrating its admissibility by a preponderance of the evidence." *Muldrow v. State*, 259 Md. App. 588, 620 (2023) (quoting *Parkway Neuroscience*, 485 Md. at 379).

Prior to the Supreme Court of Maryland's opinion in *Rochkind* in 2020, "Maryland courts admit[ted] expert testimony through two channels—the [then-prevailing] *Frye-Reed*

standard and Maryland Rule 5-702." *Rochkind v. Stevenson*, 471 Md. 1, 12 (2020). The Court acknowledged that in *Daubert*, "the Supreme Court of the United States upset the applecart of the admissibility of expert scientific testimony" when it "held that Federal Rule of Evidence ('FRE') 702 superseded *Frye*'s general acceptance test[,]" and in its place the Court "provided a list of flexible factors to help courts determine the reliability of expert testimony." *Id*. at 5 (construing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

In *Rochkind*, the Maryland Supreme Court "adopt[ed] the *Daubert* standard in Maryland because [the Court found] those factors persuasive in interpreting Maryland Rule 5-702." *Id*. at 38. The Court explained that "applying *Daubert* factors to our interpretation of Rule 5-702 and eliminating *Frye-Reed* provides a simpler, more straightforward analysis of expert testimony[,]" in which there is "no longer a need to distinguish new or novel techniques or determine if testimony embraces a 'scientific technique.'" *Id*. at 37. Building on *Rochkind*, the Court has instructed trial courts to "consider a number of factors in determining whether the proffered expert testimony is sufficiently reliable to be provided to the trier of fact" when they apply the *Daubert* under Maryland Rule 5-702. *Parkway Neuroscience*, 485 Md. at 364 (quoting *Matthews*, 479 Md. 278, 310 (2022)). Those factors are:

(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.

Id. at 364-65 (alterations in original) (quoting *Matthews*, 479 Md. at 310-11).

The Court has explained that the "third factor [of Md. Rule 5-702], the existence of a sufficient factual basis, has been interpreted as encompassing two sub-factors—whether the expert had an adequate supply of data and whether the expert used a methodology that was reliable," and, "[a]bsent either sub-factor, an expert's opinion is inadmissible." *Oglesby*, 484 Md. at 327-28 (citing *Rochkind*, 471 Md. at 22; and *Sugarman v. Liles*, 460

Md. 396, 415 (2018)). In order to satisfy the requirement of "a reliable methodology, an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data and must have an adequate theory or rational explanation of how the factual data led to the expert's conclusion." *Id*. at 328 (internal quotation omitted). Furthermore, in its assessment of "whether an expert has a sufficient factual basis to offer an opinion, a court may consider whether there is too great an analytical gap between the data relied upon and the opinion proffered." *Id*. (citation omitted). The "hallmark of the analytical gap is 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." *Sugarman*, 460 Md. at 425 (quoting *Savage v. State*, 455 Md. 138, 163 (2017)). "Conclusory or *ipse dixit* assertions are not helpful—an expert 'must be able to articulate a reliable methodology for how she reached her conclusion.'" *Id*. at 415 (citation omitted). *See also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

In *Rochkind*, the Supreme Court acknowledged that a "differential diagnosis" process is "a generally accepted diagnostic method[.]" 471 Md. at 18. The Court described a differential diagnosis as "a process of elimination, . . . defined as, the process of weighing the probability of one disease versus that of other diseases possibly accounting for a patient's illness." *Id*. at 18 n.9 (cleaned up). *See also* 6 Clifford S. Fishman & Anne Toomey McKenna, Jones on Evidence § 52:18, Westlaw (database updated Nov. 2023)

("'Differential diagnosis' is a process whereby medical experts seek to determine what caused a person's illness when a clear cause is not evidence. In performing a differential diagnosis, a physician begins by 'ruling in' all scientifically plausible causes of the plaintiff's injury. The physician then 'rules out' the least plausible causes of injury until the most likely cause remains." (some internal quotations omitted)); David L. Faigman et al., 3 Mod. Sci. Evidence § 21:12, Westlaw (database updated Dec. 2023) ("Almost all cases excluding differential diagnosis testimony under [FRE] 702 are concerned with the application of the method in a particular situation. . . . [C]ourts have found that a failure to 'rule in' a cause before 'ruling out' other causes is methodologically inadequate." (footnote omitted)).

D. Analysis

Appellants offered Dr. McKay's testimony to support his opinion that "no similarly situated toxicologist acting in good faith would opine as Defendant Hong Kim, M.D., did that the Plaintiff minor children's symptomology was the result of an opioid exposure versus the administration of Robitussin as reported by Elise Monroe." Stated differently, Appellants sought to show that a differential diagnosis of the children's condition so overwhelmingly favored OTC medicines as the cause of the crisis that, by refusing to adopt that view, Dr. Kim revealed an animus that stripped him of the protection of statutory immunity for mandatory reporters. Therefore, to succeed, Appellants needed to show that no reasonable toxicologist could have disagreed with that conclusion, and not merely that it was more likely than not that OTC medicines caused the children's crisis.

At the outset, we agree with circuit court's determination that Dr. McKay satisfied the first and second prongs of Maryland Rule 5-702—"whether the witness is qualified as an expert by knowledge, skill, experience, training, or education," and "the appropriateness of the expert testimony on the particular subject[.]" Md. Rule 5-702(1)-(2). The dispositive factor in this case, therefore, is "whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702(3). The circuit court found that Dr. McKay "failed to root [his] theory in the science, so there is not sufficient data to support his opinion and that theory." We agree.

Daubert-Rochkind Factors

In her bench ruling, the judge articulated the *Daubert-Rochkind* factors that she found applicable to the case.[41] With regard to factor (1) "whether a theory or technique can be (and has been) tested[,]" *Parkway Neuroscience*, 485 Md. at 364 (quotation omitted), the judge criticized the fact that Dr. McKay "did not attempt to model or project his theory of the ingestion amounts, the metabolism of the [DXM] as well as the other cold medicine drugs that were mentioned to present any calculations[,]" whereas the defense experts had demonstrated that such modeling was easily accomplished, with "every aspect" of their supporting calculations grounded "in research and science[.]" We find the judge's

[41] The court did not contest, and neither do we, Dr. McKay's satisfaction of *Daubert* factors (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." *Parkway Neuroscience*, 485 Md. at 365 (alterations in original) (quoting *Matthews*, 479 Md. at 311).

reasoning to be sound.

We also agree with the judge's finding that Dr. McKay's theory failed to satisfy factor (2), "whether a theory or technique has been subjected to peer review and publication[.]" *Parkway Neuroscience*, 485 Md. at 364 (quotation omitted). The judge noted that Dr. McKay's theory "ha[d] not been tested" and was not "really testable" because it was "based on extrapolations from articles and research" that were "inapposite" in that "the studies dealt with other medications and drugs and they didn't support his opinion." Indeed, as the court noted, it was especially striking that Dr. McKay had failed to account for "the elephant in the room"; namely, the complete absence of reports "of intermediate or poor metabolizers essentially having . . . a toxic or poisonous response to therapeutic doses of cold medicine" that would inevitably follow from his theory. As the judge said, under the circumstances presented by this case, "you can't get past that here."

We further observe that Dr. McKay's theory failed to satisfy either factor (3), "whether a particular scientific technique has a known or potential rate of error[,]" or (4) "the existence and maintenance of standards and controls[.]" *Parkway Neuroscience*, 485 Md. at 364 (quotation omitted). The defense experts synthesized data from peer reviewed studies to account for the children's race, genetic status, age, and weight, and determined the children's likely rates of metabolization of both DXM and opiates. By contrast, Dr. McKay did not even attempt to identify those rates, much less project the children's metabolization onto his timeline to confirm a congruence with their evolving condition.

Regarding factor (5) "whether a theory or technique is generally accepted[,]" *id*., Dr. McKay professed to have conducted a differential diagnosis, which is a generally accepted technique to show specific causation of a medical condition. *See Rochkind*, 471 Md. at 18. We agree with the judge's assessment that Dr. McKay's method was "reliable" insomuch as he "laid out a time line[,] . . . review[ed] the evidence[,] and based on his knowledge and expertise, endeavored to provide an explanation for what happened from the toxicology perspective." However, we also agree that Dr. McKay failed to satisfy factor (8) "whether the expert has adequately accounted for obvious alternative explanations[,]" *Parkway Neuroscience*, 485 Md. at 365 (quotation omitted). As stated by the court, the proposition that "the children were exposed to an opioid" was the most "obvious alternative explanation[]" that Dr. McKay "failed to account for[.]" Indeed, this failure constitutes a failure to execute the differential diagnosis procedure. *See Faigman et al*., *supra*, at § 21:12 ("[C]ourts have found that a failure to 'rule in' a case before 'ruling out' other causes is methodologically inadequate.") (footnote omitted)). In fact, Dr. McKay's only gesture toward ruling out opioid exposure was a rough approximation of the children's metabolization of the opiates from a few hypothesized times of exposure.

As for factor (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[,]" *Parkway Neuroscience*, 485 Md. at 365 (quotation omitted), we observe that Dr. McKay had not, independent of the litigation, conducted studies on the effects of DXM on children,

nor its potential to cause false positives on the VITROS test. He also did not claim to have personal knowledge of a case in which a patient's presentation with a coma or a false positive on a VITROS test was traced back to ingestion of DXM. By contrast, defense witness Dr. Heise testified to extensive experience treating children for toxic doses of DXM, and described their presentation as markedly different from that of Ms. Monroe's children in almost every way.

To the extent that it applied at all, Dr. McKay's opinion failed to satisfy factor (7) "whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion." *Id*. (quotation omitted). We agree with the court that the *Clinica Chimica Acta* Letter was "the only piece of evidence that McKay put forward to show that there can be a true false positive that exists as a result of [DXM] but no opioid or opiate[,]" and note that Dr. McKay conceded he was unaware of any follow-up study corroborating its findings. Furthermore, that report—a "very limited" study which was inspired by "the researcher's experience with one individual"—involved "the intentional creation of the urine sample that had a large amount of [DXM] added to it in the laboratory setting." The court credited the testimony of defense experts, who found that K.M. would have needed to ingest "60 8oz bottles," and K.B. "46.5 8 oz. bottles" of OTC medicine to reach a coma from the DXM they contained. The judge remarked:

> [E]ven if you accept his viewpoint that the interaction of the other cold medicine drug caused [the children], in effect, to be poor metabolizers, . . . the theory that the false positive or even their presentation in combination with their illness would cause them to present in a coma with the depressed respirations that they were experiencing, it just does not bear out in the research. And it doesn't because it frankly doesn't make any sense. Like

> you want to talk about a[n] analytical gap, this is an analytical chasm that cannot be bridged.

Dr. McKay's extrapolation from the *Clinica Chimica Acta* Letter that therapeutic doses of DXM, even if metabolized at a reduced rate, could cause the children's "present[ation] in a coma with the depressed respirations that they were experiencing" is indeed a leap over an "analytical chasm[.]"

As instructed by the *Oglesby* Court, to satisfy the requirement of "a reliable methodology, an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data and must have an adequate theory or rational explanation of how the factual data led to the expert's conclusion." 484 Md. at 328 (internal quotation omitted). Here, Dr. McKay's opinions markedly fail to meet that basic standard and we find no error or abuse of discretion in the circuit court's exclusion of that expert testimony.

Without Dr. McKay's testimony, Appellants were not able to show that the therapeutic doses of OTC medications *caused* the children's medical crisis. More importantly, without Dr. McKay's testimony, they could not show that *no reasonable toxicologist* would have blamed the crisis on anything other than the OTC medications *for any reason* other than bad faith.

IV.

October 2022 Summary Judgment Ruling

Our analysis of the October 2022 grant of summary judgment picks up where our analysis of the May 2022 denial of summary judgment left off. In Section I above, we addressed the issue raised in Appellees' cross appeal:

> Maryland compels health practitioners to report suspected child abuse or neglect and gives them broad good-faith immunity when doing so. Here, the court denied the Hospital's motion for summary judgment, finding that a jury should decide its good-faith immunity. Did plaintiffs proffer sufficient evidence to withstand summary judgment?

We determined in Section I that, at the hearing in May 2022, the trial court did not abuse its discretion in denying Appellees' summary judgment motion on all counts, except count eight alleging a violation under the Maryland Declaration of Rights. We concluded that Appellants had generated sufficient evidence to withstand summary judgment at that time by virtue of their expert's opinion challenging Dr. Kim's utilization and reliance on the VITROS drug test, thereby creating a reasonable doubt as to Appellees' good faith. Given our holding that, following the *Daubert* hearing, the trial court properly excluded Appellants' expert, we now turn to address the following question raised by Appellants on appeal:

> Did the trial court err in granting summary judgment first as to count eight of the complaint – Violation of Maryland Declaration of Rights and subsequently as to all the remaining counts?

The motion for summary judgment filed by Appellees was renewed before the trial court following the *Daubert* hearing on October 6, 2022. We summarize here the relevant arguments from the lengthy summary judgment memoranda, including Appellees' argument that:

> **Plaintiffs have failed to set forth sufficient facts to overcome the statutory immunity for good faith reporting and participating in the investigation of suspect child abuse/neglect.** Defendants did not report Ms. Monroe to CPS for suspected child abuse/neglect. Defendants' participation in the CPS and B[]PD investigation was mandated by law, and was reasonable, appropriate, and done in good faith. There is no evidence of bad faith by any of the providers cooperating with CPS and B[]PD. Disagreement

> among physicians as to the cause of the children's presentation to UMMC on February 11, 2017 does not amount to bad faith.

(Emphasis in original). Appellees also argued that Appellants' failure to show malice or bad faith entitled them to summary judgment because "[e]very single count in the [c]omplaint rises and falls on intent." Appellees cautioned,

> This Court can certainly imagine the terrible precedent that would be set if health care providers may be sued for millions of dollars based upon reports of suspected child abuse or neglect. Indeed, such precedent is against the policy underlying the reporting requirement – to protect children. **Permitting this lawsuit to continue based on vague, non-specific, unsupported allegations of animus and bad faith would undoubtedly have a chilling effect on reports of suspected child abuse and neglect.**

(Emphasis in original).

Appellants filed an opposition setting forth many of the allegations recited in our background above, including:

> Defendant Kim started with the lie that there are no known false positives on a rapid urine drug test. When the confirmatory serum blood test came back negative for opiates/opioids he needed to pivot to the amount of dextromethorphan is a ½ dose is not enough to cause a false positive or the children's symptoms. Of course, this is a lie as well because he took a history of the children getting several doses over several days. This lie also supports his lie that the children's inability to properly metabolize dextromethorphan and Benadryl was not relevant because of the½ dose given the night before. He lied about the Narcan being effective in the ED.

Appellees concluded by arguing, in relevant part,

> Despite all the contradictory evidence that continued to surface even while the children were hospitalized and after they were released, Defendant Kim refused to acknowledge the evidence that clearly pointed to the cough medicine being the culprit. To the contrary, Defendant Kim began to misrepresent the facts to fit a narrative which he thought would only support

an opiate exposure. He knew he was dealing with lay persons who have no training in medicine and that they would rely on his statements.

A. Parties' Contentions on Appeal

In addition to their arguments concerning statutory good-faith immunity, addressed above in Section I, Appellants offer two additional arguments under this issue. First, they argue that Appellees were state actors, and thus "[t]he trial court committed legal error when it threw out Plaintiffs' State constitutional count on summary judgment." More specifically, Appellants claim that Dr. Dubowitz and Dr. Wendy Lane are part of the "Child Protection Team" at UMMC and work "directly in conjunction with BCDSS, CPS, B[]PD and the [c]ourt when there are allegations of child abuse." After citing to several out-of-state cases, Appellants contend that "[t]he close nexus between these individuals and the State itself establishes state actor status."

Second, Appellants assert that the court "committed reversible error in precluding Dr. McKay from testifying," and so the court's "grant of summary judgment on that basis must also be reversed."

Appellees maintain that they are not state actors. They argue that claims for violating the Maryland Declaration of Rights can only be brought against public officials or government agents. Appellees point out that the University of Maryland Medical System ("UMMS"), the alleged principal of UMMC and all Appellees, is defined as "a private, nonprofit, nonstock corporation formed under the general corporation laws" of the State under Maryland Code (1978, 2022 Repl. Vol.), Education Article, ("Educ."), § 13-301(m). Also, under Educ. § 13-303(a)(2), the General Assembly specified that UMMS

"shall not be a State agency, political subdivision, public body, public corporation, or municipal corporation and is not subject to any provision of law affecting only governmental or public entities." Appellees press that the only State actors relevant to the case are non-parties—BPD and CPS. Appellees assert that Appellants' arguments directed to Dr. Dubowitz and Dr. Lane are "scattershot" because it is "impossible to discern what exactly is the unconstitutional State action"; and, they point out, the "record contains no evidence that either physician ever communicated with anyone from BCDSS or CPS about this case."

Regardless, Appellees contend, "any error in understanding [Appellants'] opaque State action theory would be harmless" because the Appellees have statutory immunity for participating in a child-welfare investigation and because Judge Avery did not abuse her discretion when precluding Dr. McKay. The Appellees aver they are entitled to summary judgment on all counts because they were immune from civil liability and because Appellants lacked vital expert testimony.

B. Legal Framework

We review the grant of a motion for summary judgment without deference to the trial court, and we review the record in the light most favorable to the nonmoving party, thereby construing any reasonable inferences that may be drawn from the facts against the moving party. *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296, 327 (2023) (citing *State v. Rovin*, 472 Md. 317, 341 (2021)). The Supreme Court of Maryland has instructed that, "[i]n granting a motion for summary judgment, the trial judge may not resolve factual

disputes, but instead is limited to ruling on matters of law. Summary judgment is generally inappropriate when matters such as knowledge, intent, and motive are at issue." *Okwa v. Harper*, 360 Md. 161, 178 (2000) (citations omitted). However, as the Court observed in *Rite Aid Corp. v. Hagley*, "even in cases involving intent and motive, if the prerequisites for summary judgment are met—there being no material dispute of fact—summary judgment may be granted." 374 Md. 665, 685 (2003) (alteration omitted) (quotation omitted).

By statute, in Maryland "any individual who reports, in good faith, a suspected incident of abuse or neglect" is "giv[en] immunity[.]" FL §§ 5-702(2), 5-708. For a plaintiff to prevail on a claim against a person who reports suspected child abuse or neglect pursuant to the statutory mandate, the plaintiff must show the absence of good faith by presenting evidence of "a dishonest purpose or some moral obliquity and a conscious doing of wrong." *Catterton v. Coale*, 84 Md. App. 337, 342 (1990) (citation omitted); *see also Rite Aid*, 374 Md. at 685 ("[E]ven in cases involving intent and motive, if the prerequisites for summary judgment are met—there [being] no material dispute of fact—summary judgment may be granted." (second alteration in original) (quotation omitted)); *see also* 80 Md. Op. Att'y Gen. 130 (1995).

Under Maryland law, claims alleging a violation of the Maryland Declaration of Rights can only be brought against a "government official" whose actions were "in accordance with or dictated by governmental policy or custom." *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 362 (2000) (quoting *Ritchie v. Donnelly*, 324 Md. 344, 370 (1991)).

Violations of the Maryland Constitution are distinguished from common law torts, "which are designed generally to protect private persons from each other," while State Constitutional claims "have the more narrow focus of protecting citizens from certain unlawful acts committed by government officials." *DiPino v. Davis*, 354 Md. 18, 50-51 (1999) (citation omitted). The Supreme Court of Maryland has instructed that "[i]t is a basic tenet, expressed in . . . the Maryland Declaration of Rights, that a plaintiff injured by **unconstitutional state action** should have a remedy to redress the wrong." *Jackson v. Dackman Co.*, 422 Md. 357, 377 (2011) (alteration in original) (emphasis added) (internal quotations omitted). *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 923 (1982) ("Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State.").

C. Analysis

In light of our holding that the circuit court did not abuse its discretion in excluding Dr. McKay's testimony, it is axiomatic that we reject Appellants' argument that summary judgment must be reversed because the trial erroneously excluded the expert testimony.

Turning to the Appellants' remaining arguments, we reiterate that because there was no assertion of malpractice in the case, the sole purpose of the expert testimony was to support Appellants' theory that Appellees were not entitled to statutory immunity and to prove that Dr. Kim acted with bad faith or malice in order to satisfy the intent element of each remaining count in the complaint. More specifically, the purpose of Dr. McKay's testimony was to show that—given the information that Dr. Kim had at the time—the

likelihood that the therapeutic doses of OTC medications might have caused the crisis was so high that no reasonable toxicologist could have dismissed it for any reason other than bad faith. We agree with the court that, once Appellants' expert testimony was excluded, their case fell apart without any evidence of "a dishonest purpose or some moral obliquity and a conscious doing of wrong." *Catterton*, 84 Md. App. at 342 (citation omitted). We explain.

Appellants claim that Appellees "knew, or had reason to know, the falsity of their statements[,]" and "consciously mischaracterized the urine results due to improper bias and prejudgment of Ms. Monroe." They further assert that "[Appellees'] dogmatic and absurd opiate theory drove the State [DSS] action against Ms. Monroe and her family until the agency came to doubt [Appellants'] explanation." In the absence of an admissible opinion to the contrary, these arguments were rebutted by the thorough demonstration—by Appellees' expert witnesses—that Dr. Kim's opinion was more than plausible, and that the medical community at large would reject Dr. Guzzardi and Dr. McKay's counter-narratives. Simply put, there is insufficient evidence to generate a reasonable inference that Dr. Kim's purportedly "stubborn" adherence to his opinion was malicious or born out of bad faith. Without their expert's testimony, the court correctly recognized that Appellants could not prove the malice or bad faith necessary to satisfy the intent element

of each remaining count,[42] and implicitly found that they could not show the lack of good faith necessary to overcome the Appellees' statutory immunity for good faith reporting and participating in the investigation of suspect child abuse/neglect.

We observe that Appellants failed to produce any direct evidence of an action or statement by Dr. Kim that demonstrated his alleged animus to economically-disadvantaged African American mothers. Indeed, Ms. Monroe deposed that Dr. Kim did not "say anything about [her] race" or "ever make any racial slurs when talking" to her. The 'smoking gun' statement identified by Ms. Monroe was that Dr. Kim told her that "typically when you see cases like this there's always a positive blood sample from whatever your children have ingested[.]" But even though Ms. Monroe believed the phrase "typical case" "insinuated something" about her economic status, she acknowledged that Dr. Kim "did not use any words specifically that referred to [her] socioeconomic status[,]" and that Dr. Kim never indicated any prejudice against her because she was single.

In addition to their failure to produce evidence of Dr. Kim's alleged racism and classism, Appellants have not pointed to evidence of any *personal* animus by any of the

[42] As previously noted, the complaint included the following counts: (1) Intentional Infliction of Emotional Distress, (2) False Imprisonment, (3) Intentional Misrepresentation – Concealment or Non-Disclosure, (4) Constructive Fraud, (5) Malicious Abuse of Process, (6) Defamation, (7) False Light, (8) Violation of Maryland Declaration of Rights, and (9) Demand for Punitive Damages. Appellants voluntarily dismissed the Defamation and False Light claims after the close of discovery. On appeal, other than the general contention that the trial court erred in precluding Dr. McKay from testifying and then granting summary judgment, and their argument that the court erred in dismissing their claim under the Maryland Declaration of Rights, Appellants offer no specific argument on appeal relating to counts one through five or count nine.

Appellees that could have saved their claim of bad faith. In the *Rite Aid* opinion, our Supreme Court considered the lack of evidence of personal bias. *See Rite Aid*, 374 Md. at 686-87. Here, as in *Rite Aid*, the Appellees had no prior acquaintance or relationship with Ms. Monroe or her children that could explain the alleged hostility; Ms. Monroe acknowledges that she met Dr. Kim only once.

Appellants attempt to overcome the obstacle that BPD and DSS conducted the investigations and participated in the proceedings that led to Ms. Monroe temporarily losing custody of K.M., K.B., and K.J., by alleging that Dr. Kim was the driving force behind the investigation, and that the authorities were, in effect, acting as his agents. However, throughout her deposition, Ms. Monroe herself refused to distinguish which actors she held accountable for her nightmare. When defense counsel asked Ms. Monroe whom she held responsible, she replied "University of Maryland, [DSS], Baltimore City Police, whoever had their hands in this case from the very beginning. *You, all of you. Everyone.*" (Emphasis added).

The facts in the present case stand in sharp contrast with those in *Bricker v. Warch*, 152 Md. App. 119 (2003), although the conclusion we reach—that the mandatory reporter did not sacrifice his good-faith immunity by his actions following his initial report—will be the same. In *Bricker* it was the defendant, Mr. Warch, who first reported the suspected insurance fraud. *Id*. at 124. Even though Mr. Warch allegedly informed Mr. Bricker's employer of the news of his indictment, causing Mr. Bricker to lose his 17-year job, after Mr. Bricker was cleared of the charges by the circuit court, Mr. Warch "allegedly made no

effort to notify Bricker's [former] employer or other persons he had contacted during his investigation[.]" *Id*. at 125.

By contrast, in the case at bar, the uncontested evidence shows that Appellees did not pursue any independent investigation of the matter and, aside from promptly relaying the results of the blood serum tests, only provided medical data and opinions when directly requested by BPD, DSS, and Ms. Monroe's counsel. *See Nasim v. Tandy Corp.*, 726 F. Supp. 1021, 1025 (D. Md. 1989) (observing "[c]ourts in numerous jurisdictions have held that mere provision of information to the authorities does not constitute instituting or continuing a criminal proceeding[,]" and "there is no requirement under Maryland law that the citizen reporting a crime to the police make an independent investigation to ascertain if there is exculpatory evidence available in favor of the accused.") (citations omitted), *aff'd*, 902 F.2d 1566 (4th Cir. 1990) (per curiam). As Atty. Coffey admitted in her deposition, Appellants dropped their allegation that either Dr. Kim or UMMC had reported the suspected child abuse to the authorities following discovery, acknowledging that it was the BPD officer who had responded to the scene before the children were transported to the hospital and who notified DSS of their condition. It is plain that Appellees were not a "driving force" behind the DSS or BPD investigations. We reach the same conclusion as we did in *Bricker* that the reporter's post-report actions did not represent bad faith.

In *Rite Aid*, the Court instructed that the statutes granting immunity "do not require a reporter of suspected child abuse to verify every detail of the suspected conduct or perfectly recount all that he or she is told in order to be found to have acted in good faith

when making the report." *Rite Aid*, 374 Md. at 688. Thereafter, it is the duty of "law enforcement or the appropriate department of social services personnel" to "investigat[e] the facts surrounding that report." *Id.* The Court observed that Mr. Rosiak's failure to disclose the parents' return to the store and the explanation they offered was "not suggestive of a lack of good faith" because "Mr. Rosiak was certainly under no duty to convey the suspected child abusers' explanation of the photographs to the authorities." *Id.* (citation omitted).

In the instant case it is *uncontested* that a UMMC social worker *did* promptly contact DSS with the results of the blood serum test, and the CINA court considered both the blood serum test results and Ms. Monroe's explanation of the children's medical history. Appellants complain, however, that Dr. Kim should have gone further and *changed his own medical opinion* as a result of the blood serum test results. But the record establishes that Dr. Kim had only seen the children for a short period of time before they were no longer in his care; and the testimony and evidence proffered by the defense experts at the *Daubert* hearing established that Dr. Kim's medical opinion, in light of the blood serum tests and what point in time they were obtained from the children, was reasonable and supported by the medical literature. In any case, UMMC and Dr. Kim were fully transparent with BPD and DSS, both in the data they collected and the conclusions that they drew from them. In fact, Dr. Kim went out of his way to be helpful to Appellants' counsel, providing the VITROS manufacturer's testing instructions and the *Clinica Chimica Acta* Letter well before discovery commenced; both documents that Appellants

relied upon heavily. These acts of good faith surpass Mr. Rosiak's passivity with respect to the investigation in *Rite Aid*, where the Court affirmed summary judgment. *Rite Aid*, 374 Md. at 687-89.

Dr. Guzzardi's theory, that DXM could accumulate in the children's blood, due to the flu and metabolic irregularities, in such amounts as would pass the VITROS threshold, was far outside the pale of scientific opinion. Despite that, Appellants' counsel accused Dr. Kim of "making facts up" when he failed to subscribe to Dr. Guzzardi's theory. Even if the theories proffered by Appellants' expert toxicologists were correct, and the children *did* have genetic abnormalities that would bring those earlier doses into relevance, the evidence before the court, particularly the affidavit of Dr. Sims, shows that Dr. Kim's medical opinion was well within the scientific mainstream. This evidence demolishes Appellants' assertion that *no* toxicologist with Dr. Kim's credentials could have disbelieved Dr. Guzzardi's theory. Likewise, the fact that Dr. Kim recorded the parts of Ms. Monroe's account that he believed had direct bearing on the children's presentation supports Appellees' assertion that he *did* take Ms. Monroe's account seriously.

With regard to the initial grant of summary judgment on count eight invoking the Maryland Declaration of Rights in May 2022, we observe that the trial court dismissed the claim on the ground that it was not pled with specificity as it did not identify what right, under the Maryland Declaration of Rights, was taken from Ms. Monroe and her children; and, the Appellants failed to produce any evidence to show that any of the Appellees were public officials or a government agency. We also failed to locate anything in the record on

appeal to suggest that any of the Appellees were "government official[s]" acting "in accordance with or dictated by governmental policy or custom." *Manikhi,* 360 Md. at 362 (quotation omitted).

In conclusion, we hold that following the *Daubert* hearing and the exclusion of Appellants' expert toxicologist, Appellees were entitled to statutory immunity as a matter of law and, by extension, they were also entitled to summary judgment on all counts.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

Circuit Court for Baltimore City
Case No. 24-C-20-000775

UNREPORTED *

IN THE APPELLATE COURT

OF MARYLAND

No. 1550

September Term, 2022

ELISE MONROE, ET AL.

v.

UNIVERSITY OF MARYLAND MEDICAL CENTER, LLC, ET AL.

Leahy,
Friedman,
Gill Bright
(Specially Assigned),

JJ.

Concurring Opinion by Friedman, J.

Filed: May 24, 2024

The majority relies on *Dashiell v. Meeks*[43] for the proposition that we review the *denial* of a motion for summary judgment on the abuse of discretion standard. Slip Op. at 81 (citing *Dashiell v. Meeks*). And that's correct as far as it goes. *Dashiell* often gets read broadly, as if it said that all denials of motions for summary judgment get evaluated on the abuse of discretion standard. *See, e.g.*, *Webb v. Giant of Maryland, LLC*, 477 Md. 121, 347 (2021); *Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. 569, 583-84 (2020). I believe a closer reading of *Dashiell* reveals, however, that the standard of review is only supposed to be relaxed where the trial judge is better situated than the appellate court to determine if additional facts may be forthcoming to support the denial. *Dashiell,* 396 Md. at 164 (quoting *Metropolitan Mortgage Fund, Inc. v. Basiliko,* 288 Md. 25, 28-29 (1980)).[44] Otherwise, *Dashiell* suggests—and I believe—the standard of review for denial of summary judgment where further development of the factual record would be inconsequential is whether it was legally correct. *Id*.

Here, however, discovery was long-since closed by May of 2022, Slip Op. at 18-32, and the only things that remained to do before trial were the deposition of plaintiff's expert, Dr. McKay, and the hearing to determine the admissibility of his opinion. Slip Op. at 32, 46. There was no more discovery planned or permitted into Dr. Kim's alleged racial bias against the plaintiffs. On this issue, the factual record was complete and the plaintiffs

[43] 396 Md. 149 (2006).

[44] It seems particularly inapt to apply this relaxed standard of review where the basis for the motion for summary judgment is statutory immunity, which if appropriate, is supposed to protect a defendant from the expense and inconvenience of discovery and trial.

had failed to make a showing supported by particular facts that Dr. Kim lacked good faith. *Compare Rite Aid Corp. v. Hagley*, 374 Md. 665, 688 (2003) (holding that general allegations that show that a mandatory reporter's actions can be second guessed do not create a genuine issue of material fact with regard to good faith) *with Catterton v. Coale*, 84 Md. App. 337, 343 (1990) (holding that allegations that the defendant fabricated a piece of evidence create a fact question about whether there was bad faith). Unsupported allegations of racial and economic animus and assertions that Dr. Kim could have second guessed the VITROS test result are insufficient to create a question of fact as to the good faith of the mandatory reporter. Indeed, "legitimizing this sort of Monday-morning quarterbacking would render the immunity conferred by [the General Assembly] essentially useless." *Rite Aid*, 374 Md. at 688. I would, therefore, hold that *Dashiell* doesn't apply and that the appropriate standard of review of the denial of summary judgment here is *de novo*, that is, whether the decision was legally correct. And because I think it was not legally correct (for the reasons that my colleagues in the majority discuss in their review of the June, 2022 grant of summary judgment, Slip Op. at 120-25), I would hold that the trial court erred as a matter of law by not granting summary judgment in May, 2022. Thus, I concur in the judgment only.[45]

[45] Although my analysis would preclude my reaching the question of whether Dr. McKay was appropriately excluded under the *Rochkind*/*Daubert*/Rule 5-702 standard and whether the trial court erred in granting summary judgment thereafter, I would, without doubt, join the majority's excellent opinion.