

No. 79
September Term 2014

IN THE
COURT OF APPEALS OF MARYLAND

LAUREN McCLANAHAN,

Petitioner,

v.

WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
(Circuit Court for Washington County, Donald E. Beachley, Judge)

**BRIEF OF CHILD JUSTICE, INC., LEADERSHIP COUNCIL ON
CHILD ABUSE AND INTERPERSONAL VIOLENCE, AND FIRST
STAR, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

Amici curiae Child Justice, Inc., the Leadership Council on Child Abuse and Interpersonal Violence, and First Star, Inc. respectfully submit this brief in support of Petitioner Lauren McClanahan. *Amici* are non-profit organizations that advocate on behalf of at-risk, abused, or neglected children. *Amici* also analyze the practices of mental health professionals providing services to abused children. *Amici* have a substantial interest in this case because the Court of Special Appeals decision undermines their efforts to protect children by educating parents on the need to seek medical assistance and report child abuse.

Child Justice, Inc. is a national organization that seeks to protect and serve abused children. The organization provides public policy recommendations, community service referrals, court-watching services, research, and education, and seeks appropriate judicial solutions to the threats these children face.

The Leadership Council on Child Abuse and Interpersonal Violence supports the ethical application of psychological science to

¹ Per Md. Rule 8-511(a)(1), all parties have consented to the filing of this brief. Per Md. Rule 8-511(b)(1)(E), no person, other than *amici*, its members, and attorneys, have made a monetary or other contribution to the preparation or submission of this brief.

human welfare. The Council helps judges, attorneys, mental health professionals, and the media by providing information on issues concerning young victims and the provision of psychological services. The Council's scientific advisors are leading practitioners and researchers on interpersonal abuse and trauma.

First Star, Inc. is a child advocacy organization that promotes law, policy, and practice aimed at improving life for abused and neglected children in the United States. First Star supports children's basic rights through programs and publications that support legal counsel for abused and neglected children, increase transparency with respect to child deaths, and advocate on a variety of physical, educational and mental health issues. First Star has regularly provided testimony and other information to lawmakers and to courts as *amicus curiae* regarding issues impacting the protection of children.

SUMMARY OF ARGUMENT

The decision below by the Court of Special Appeals unnecessarily endangers children in Maryland by exposing protective parents to unwarranted legal risk. Under any applicable standard, parents should be *encouraged* to report—not, as here, penalized for reporting—

suspected sexual abuse to authorities when confronted with a child who discloses and exhibits physical symptoms of abuse. If the lower court opinion is allowed to stand, conscientious, protective, non-abusive Maryland parents will be thrust into an impossible dilemma: disclosing suspected sexual abuse of their children and thereby incurring the risk of being held liable for “unconsciously” causing a mental injury to their children, or concealing suspected sexual abuse to avoid liability and loss of custody. The Court of Special Appeals ignored well-accepted tenets regarding how parents are supposed to address suspected child abuse.

The hazy and unformulated standard upheld by the Court of Special Appeals—that a parent can “unconsciously” create a cycle of “exaggerated positive feedback”—is not supported psychological theory.² Further, parents and other adults are often *required* to disclose suspected sexual abuse to authorities and are immune from retribution or liability when disclosure occurs in good faith.

The idea of “unconscious intent” to commit an act is not a verifiable, reliable, or scientific concept. There are no psychological

² Freud’s theory of the psyche states unconscious ideas are not easily accessible but can be inferred, recognized, and explained through analysis. Sigmund Freud, *An Outline of Psychoanalysis* 31 (1949).

tests, instruments, interview questions, or other existing methodology that can reliably assess unconscious intent. This Court should be wary of experts, like those relied upon by the ALJ, who misuse psychology to present subjective opinion as if it were verifiable evidence. The decision by the Court of Special Appeals upheld a finding by which a mother was sanctioned for her “thoughts” that were not proven by her actions. This is unsupported by psychological theory, as discussed herein.

The lower court opinion also provides encouragement to abusers of children. This decision provides a precedent that punishes protective parents, exonerates Department of Social Services (DSS) employees who instruct medical professionals to destroy physical evidence of abuse, and provides a pathway for abusers to hold their families hostage with threats that the disclosing parent has just as much to lose as the abusing parent.

If allowed to stand, the lower court’s decision will be harmful to Maryland’s children, and for this undeniably compelling reason, should be reversed.

ARGUMENT

I. The Decision Below Endangers Children by Deterring a Parent from Reporting Suspected Child Abuse and Seeking Necessary Medical Assistance

What should a parent do when a child reports sexual abuse, the parent witnesses physical signs of sexual abuse, and the parent believes that the child has been abused? The answer to this question, under both Maryland's mandatory reporting statutes and accepted practice, should be obvious: all such instances should be reported to authorities.

The decision below, however, creates perverse incentives impacting how parents should answer this question. This encourages parents to make decisions that are not in the best interest of their children. Parents now face an agonizing and troubling decision: whether to report suspected abuse and risk losing custody of their child for "unconsciously" creating a "positive feedback" loop, or to stay silent and allow the abuse to go uninvestigated (which likely violates state law).

Parents are not the only ones negatively impacted by the opinion below. Children will also suffer because, by imposing penalties on parents who report abuse in good faith, the Court of Special Appeals has denied abused children their primary protector and advocate: a non-abusing parent who observes and reports suspected abuse.

Children who fear that they may be removed from the custody of their non-abusing parent may suffer in silence in an effort to ensure that they do not lose the one adult who cares for and does not harm them. Children now have a reason to fear further punishment of their non-abusing parent if they report sexual abuse.

Because there is no evidence that Ms. McClanahan acted consciously to harm her child, the below decision should be reversed.

A. The Ruling by the Court of Special Appeals Creates a Catch-22 for Custodial Parents Who Witness Signs of Child Abuse

The Court of Special Appeals has created an unthinkable dilemma for parents who are confronted with evidence that their children have been abused: whether to report the suspected abuse to authorities, or whether to cover up or conceal any evidence of abuse to avoid subjecting themselves to liability. This is a difficult premise for parents who have the best interests of their children at heart because it encourages parents to put their own interests and potential liability before the welfare of their children. Even if a parent suspects abuse, the parent must now decide whether reporting could bring a harsher penalty for the disclosing parent than for the suspected abusive parent—with

potentially dangerous consequences for the child. This is likely to have a chilling effect on reporting suspected child abuse.

As detailed in Petitioner's brief, the Petitioner's child reported to her on multiple occasions that she had been abused by her father.³ These disclosures were coupled with observations by Ms. McClanahan that her child was suffering physical symptoms in her genital area that could indicate sexual abuse. Ms. McClanahan is not a medical professional, psychologist, nor social worker. But as a mother entrusted with her daughter's care, she was concerned and sought medical advice.

According to DSS, this apparently was the wrong thing for Petitioner to do. The lower court, however, did not describe what she should have done instead. Should she have ignored her child's complaints? Instructed concerned medical personnel not to call the police? Unless reversed, the ruling by the Court of Special Appeals does not protect children, but rather creates a horrific "Catch-22" for parents who observe signs of abuse but lack the scientific, investigative, or psychological tools to determine whether the abuse actually occurred.

³ The child's father has a history of psychosis, alcohol abuse, and domestic violence. E. 296-97.

Parents should not be forced to engage in expert psychological analysis to decide whether to believe or disclose suspected abuse.

The decision by the Court of Special Appeals does not highlight what parents should do (or not do) in order to avoid liability: there is no instruction regarding what factors parents should consider in deciding whether their child displays psychological symptoms indicating sexual abuse or mental injury, nor should there be. This is because, for years, the standard has been one of erring on the side of disclosure. *See, e.g.*, Md. Code Ann., Fam. Law §§ 5–705, 5–702(2). The protective bar was that if a parent acted with a bad intent or invented allegations the parent might face additional penalty. The finding below changes that.

B. Reporting Suspected Child Abuse is Mandated by Statute

Md. Code Ann., Fam. Law § 5–705(a)(1) requires any person “who has reason to believe that a child has been subjected to abuse or neglect” to notify social services or the police. This is “an affirmative and unqualified obligation to report child abuse,” with no exceptions other than those for attorneys or clergy. 80 Md. Op. Att’y Gen. 130, 1995 WL 479804, at *4 (Md. Aug. 4, 1995).

By enacting mandatory reporting laws, the State of Maryland has indicated that it wants the safety of children to be valued above all else. However, the decision below has created risk for parents. Parents risk liability if they report the disclosures of their children and are then accused of “unconsciously” creating a “positive feedback” loop; parents additionally risk violating state law if they are aware of potential abuse of their children and do nothing about it.

C. Absent Bad Intent, Parents Should Never Be Punished For Reporting Suspected Abuse of a Disclosing Child Exhibiting Physical Signs

Punishing parents for reporting suspected sexual abuse, where those parents do not evidence bad intent, harms Maryland’s children and is contrary to law and policy.

1. Parents Who Act in Good Faith in Reporting Suspected Abuse Are Immune from Liability

The lower decision is contrary to Maryland law, which recognizes immunity for any individual who reports, in good faith, a suspected incident of abuse or neglect. *See* Md. Code Ann., Fam. Law § 5–702(2); *id.* at § 5–708 (conveying immunity “from civil liability or criminal penalty” on those who report abuse); *Hanke v. Hanke*, 94 Md. App. 65 (1992) (distinguishing between a parent who has no basis to suspect

abuse and a parent who mistakenly believes in good faith that a child has been abused). This is an absolute immunity that is integral to the discovery and prosecution of abuse. The decision by the Court of Special Appeals (not to mention the original persecution of Petitioner by DSS) is contrary to this statutory protection and the reasoning behind it.

Here, Petitioner did everything she was supposed to do: her child complained of pain and stated she had been abused; Petitioner saw evidence of abuse, including genital swelling and urinary tract infections; and the reports of abuse coincided with the child's return from visits with her father. However, Petitioner has been saddled with a destructive and unconscionable label: that of a child abuser.

In addition to what the Court did find regarding Petitioner's conduct, it is important to recognize what the Court did not find. The Court did not find that Petitioner encouraged her child to lie or believed her child was lying. The Court did not find that the child was coached to report abuse. The Court did not find that Petitioner spoke for her daughter to authorities. The Court did not find that Petitioner intentionally harmed her child or intended for the child to make false

reports. The Court also did not find that the medical professionals who examined the child and called the police or DSS acted unjustifiably.

That Petitioner was found to have acted *without conscious intent* to mentally abuse her daughter exacts a harsher standard on her than on those suspected of sexual abuse. Imposing liability based on unconscious motivations, without physical manifestations of intent, is contrary to accepted standards of criminal, civil, and family law. *Amici* need not take a position on whether it appears that the child was actually abused, even though statistically the best evidence of sexual abuse is disclosure by the child.⁴ Maryland should encourage parents to disclose suspected abuse: if you see something, say something.

2. Child Disclosures Are Often the Best Evidence in Support of Abuse

Disclosures—when a child tells a parent or other adult of abuse without prompting or coaching—are considered the most reliable evidence indicating child sexual abuse. Here, the child told numerous adults, without prompting, that she was being abused by her father. She conveyed the information in different ways, including that her

⁴ Whether DSS botched the investigation into the potential abuse of the child is not at issue in this appeal.

father “had to sew up my front bottom and back bottom”; that a “monster came from a cave and touched her”; that she was penetrated with small objects; that her father “poked me with a needle in my front bottom”; that her father had applied a “clear liquid” on her privates; and others. In upholding the ALJ’s finding, the Court of Special Appeals noted that these disclosures did not include the “elaborative detail” often associated with statements about sexual abuse revealed by three- to five-year old children. However, young children, such as the child here, do not possess the cognitive skills or vocabulary to describe sexual abuse. Children may describe the trauma of abuse in non-literal or even fantastical terms.⁵ This decision instructs parents to ignore disclosures.

Further, the holding at issue is contrary to well-accepted research establishing that children rarely lie about instances of sexual abuse.⁶

⁵ See Anne Lukas Miller, *Bizarre & Fantastic Elements: A Forensic Interviewer’s Response, Part III*, Nat’l District Att’ys Ass’n, Nat’l Ctr. for Prosecution of Child Abuse, Vol. 21, No. 4, at 9, 10 (2008), *available at* http://www.ndaa.org/pdf/update_vol_21_no_4_2008.pdf (“Seemingly bizarre or fantastic elements cannot and should not be viewed as justification for the dismissal of a child’s disclosure.”).

⁶ See D. P. H. Jones & J. M. McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 Journal of Interpersonal Violence 27 (1987); R. K. Oates et al., *Erroneous Concerns about Child Sexual Abuse*, 24 Child Abuse & Neglect 149 (2000); E. J. Mikkelsen et al., *False Sexual-Abuse Allegations by Children and Adolescents: Contextual*

One prominent study concluded that intentionally false reports of sexual abuse by children comprise *less than 1% of all unsubstantiated reports of child abuse*.⁷ Thus, the benefit of the doubt should always be given to the child who discloses that she was abused, particularly when it comes to the decision to notify authorities. Parents should not be encouraged to ignore voluntary disclosures of their children regarding sexual abuse, nor should DSS be so quick to discount them either.

3. Physical Evidence, Even Where Ultimately Inconclusive, Should be Reported to Authorities

Few criminal cases of child sexual abuse involve conclusive physical evidence. Even where physical examinations of a child reporting sexual abuse cannot definitively establish abuse, parents should still be encouraged to report suspected abuse to authorities.⁸ As Dr. Dwyer, one physician who examined the child, reported, a “normal

Factors and Clinical Subtypes, 46 Am. Journal of Psychotherapy 556 (1992).

⁷ See U.S. Department of Health and Human Services, Administration for Children and Families, Children’s Bureau, *Child Maltreatment 1997: Reports from the States to the National Child Abuse and Neglect Data System* (1997), available at archive.acf.hhs.gov/programs/cb/pubs/ncands97/index.htm.

⁸ Here, the child exhibited signs typically associated with sexual abuse, including urinary tract infections and genital redness and swelling.

exam does not exclude a history of sexual abuse.” Indeed, “[a]bnormal genital findings are not common in sexually abused girls More emphasis should be placed on documenting the child’s description of the molestation, and educating prosecutors that, for children alleging abuse, ‘It’s normal to be normal.’”⁹ This is also consistent with the definition of abuse in COMAR: child abuse includes “[s]exual abuse of a child, *regardless of whether the child has physical injuries*” (emphasis added). COMAR 07.02.07.02(7)(b).¹⁰

4. Parents Always Should Err on the Side of Reporting Potential Abuse

Sexual abuse of children is underreported. This is due to several factors, including the secrecy and shame surrounding sexual abuse, a victim’s fear of retaliation, and the dependent status of the victim.¹¹

⁹ Joyce A. Adams, MD et al., *Examination Findings in Legally Confirmed Child Sexual Abuse: It’s Normal to be Normal*, 94 *Pediatrics* 310 (Sept. 1994); see also N.D. Kellogg, et al., *Genital Anatomy in Pregnant Adolescents: ‘Normal’ Does Not Mean ‘Nothing Happened’*, 113 *Pediatrics* 67 (2004).

¹⁰ As discussed *infra*, § II.A, any purported absence of physical evidence of abuse is partially an issue of State creation. DSS ordered the destruction of evidence, namely, a black coarse hair discovered on the child’s genitals, without further testing or examination.

¹¹ Lucy Berliner & J. R. Conte, *The Process of Victimization: The Victims’ Perspective*, 14 *Child Abuse & Neglect* 29 (1990).

When children overcome their fear to disclose abuse they are most likely to tell their mother—especially if they have a close relationship with her.¹² Victims who report sexual abuse must be supported.

In addition to the mandatory obligation to disclose potential abuse, experts always advise parents to err on the side of disclosure when it comes to the potential abuse of their children.¹³ Indeed, “[p]otential reporters are not expected to determine the truth of a child’s statements. As a general rule, therefore, all doubts should be resolved in favor of making a report.”¹⁴ Maryland follows this same advice: “*You should report suspected abuse or neglect to the local department of social services or to a local law enforcement agency.*”¹⁵

Notably, however, the State does not provide, on its website or elsewhere, guidance to parents regarding how to distinguish between

¹² Joyanna Silberg, Ph.D et al., *Crisis in Family Court: Lessons From Turned Around Cases, Final Report Submitted to the Office of Violence Against Women, Department of Justice* (Sept. 30, 2013).

¹³ The statutory protection of immunity for persons who report sexual abuse is a reflection of this policy.

¹⁴ Douglas J. Besharov, *Responding to Child Sexual Abuse: The Need for a Balanced Approach*, 4 *The Future of Children* 135, 148 (Summer/Fall 1994).

¹⁵ See Md. Dep’t of Human Resources, Reporting Suspected Child Abuse or Neglect, http://www.dhr.state.md.us/blog/?page_id=3973.

actual reports and possible false or “positive feedback” reports. This recognizes that typically there is no hard and fast rule or bright line to apply to conclude whether a child has been abused. A parent can just act on their best instinct and best evidence.

II. The Ruling by the Lower Court Will Deter Others from Reporting Suspected Child Abuse

The record evidence of what “actual harm” was caused to the child by Petitioner and what “bad acts” were committed by Petitioner is woefully undeveloped. Because the Court could not even articulate the harm or bad acts, there has been a vague and risky precedent set for others who work with, live with, or interact with children.

Rather than support those who disclose and report suspected child abuse, the opinion below lays out a roadmap for potential abusers on how to wield power over their victims and persecute those who challenge them. The opinion also willfully turns a blind eye to the misconduct of DSS, who instructed the Washington County Hospital not to process or keep a “black coarse hair” discovered during a physical genital exam of the child. Instead, the Court of Special Appeals holds *the Petitioner* accountable for the supposed lack of evidence supporting the child’s claims of abuse.

A. The Lower Court Opinion Validates DSS's Failure to Investigate Evidence

This case reveals a troubling trend in the investigation of suspected child abuse. The record indicates that upon a hospital visit by Petitioner and her child complaining of potential sexual abuse, a medical professional discovered a coarse black hair on the child's genital region. The medical professional observed that the hair did not appear to come from a head and suspected sexual abuse: she notified authorities and advised Petitioner to take the child to a hospital for a SAFE exam to preserve the evidence.

Curiously, however, the Department of Social Services *instructed the Washington County Hospital not to investigate or examine the hair*. Hospital personnel told Petitioner that "DSS told them not to do a SAFE exam because [she] was mentally injuring [her] child." The hair was discarded and not tested.

DSS's failure to investigate the coarse hair recovered from the child, as well as its instructions to the Washington County Hospital not to investigate further, violates Maryland law. Md. Code Ann., Fam. Law § 5-706(b) *requires* authorities, upon receipt of a report of suspected abuse, to "make a thorough investigation or a report of suspected abuse

or neglect to protect the health, safety, and welfare of the child.” *See also Horridge v. St. Mary’s Cnty. Dep’t of Soc. Servs.*, 382 Md. 170, 187 (2004) (DSS owes a civil duty to children subject of a report of abuse). DSS flouted its obligations under the law and instead used its resources to move against the disclosing parent, whose suspicions were shared by the medical professional examining the child.

The decision below, which does not condemn or criticize DSS’s statutory violations, is contrary to the purpose of Maryland Family Law statutes, which “is to protect children – not to protect persons alleged to have neglected or abused children.” *Owens v. Prince George’s Cnty. Dep’t of Soc. Servs.*, 182 Md. App. 31, 50 (2008); *see also* Md. Code Ann., Fam. Law § 5-702; *David N. v. St. Mary’s Cnty. Dep’t of Soc. Servs.*, 198 Md. App. 173, 181 (2011). DSS sided with a potential sexual abuser when it instructed the hospital to leave valuable evidence uncollected.

Keeping the ruling by the Court of Special Appeals intact sends a strong message to parents who suspect sexual abuse: DSS can arbitrarily decide to abandon an investigation of physical evidence indicating abuse and can instead hold the accusing parent liable. This does not reflect the best interests of a child, for whom physical evidence

of abuse was discovered and then disregarded. If DSS can operate in this manner unchecked, it will discourage parents from coming forward, even where there is physical evidence to be tested.

B. The Lower Court Ruling Creates Perverse Incentives for Parents in Custody Proceedings

The standing opinion sends a strong message to abusive parents or parents engaged in a custody dispute: the non-abusing parent now has just as much to lose as the abusing parent. As a result, a parent who suspects a co-parent of abuse has an incentive to cover that up or fail to report. Further, under the opinion by the Court of Special Appeals, an abusing parent has supportive precedent to argue that the reporting parent has “subconsciously” caused a “mental injury” to the child. Because no level of culpability is required by the Court of Special Appeals for such a finding, the abusive parent can expose the non-abusing parent to liability, risk, or even lost custody.

Through the decision below, the state has given a new and powerful weapon to abusive parents. A batterer or other abuser may, as part of an abusive cycle, threaten the victim to take away the victim’s children or otherwise interfere with the victim’s custodial arrangement. *See Ford v. Douglas*, 144 Md. App. 620, 626 (2002); *Magness v. Magness*,

79 Md. App. 668, 680 (1989); Richard A. DuBose III, *Katsenelenbogen v. Katsenelenbogen: Through the Eyes of the Victim - Maryland's Civil Protection Order and the Role of the Court*, 32 U. Balt. L. Rev. 237, 250 (2003). Experts also believe that courts have inherent, patriarchal biases through which mothers are more likely to be “punished”¹⁶ for reporting abuse or subjected to an unattainable standard of providing proof.¹⁷ Where once the State acted to discourage or punish such threats of abuse, now the State has tacitly encouraged sexual abusers to point fingers at the non-abusing parents.

If adults are afraid to report suspected abuse, lest they be accused of abuse themselves, the true victims are the children. The opinion by the lower court is contrary to Maryland’s long-standing intent to protect victims of abuse rather than empower the abusers.

¹⁶ In fact, fathers are far more likely than mothers to make intentionally false accusations of sexual abuse. See Bala & Schuman, *Allegations of Sexual Abuse When Parents Have Separated*, 17 Canadian Family Law Quarterly 191 (2000).

¹⁷ Joyanna Silberg, Ph.D et al., *Crisis in Family Court: Lessons From Turned Around Cases, Final Report Submitted to the Office of Violence Against Women, Department of Justice* (Sept. 30, 2013).

C. The Lower Court Ruling Creates Perverse Incentives for Doctors and Other Professionals

The opinion of the Court of Special Appeals creates a backwards incentive for doctors and other professionals who suspect abuse. Those professionals are now incentivized to *stay quiet* regarding potential sexual abuse in order to protect a reporting parent—the professional’s paying client—who acted in good faith in seeking medical attention.

Here, the doctors who treated the child did exactly the same thing as Petitioner: they reported the suspicion of abuse. Although professionals undoubtedly believe that reporting a child’s disclosure is in the best interests of the child and the reporting parent, here the reports by medical professionals were used *against* Petitioner as evidence that Petitioner “was mentally injuring [her] child.” Thus, these professionals unwittingly became witnesses against their own clients.

If left standing, the decision below could deter doctors and other professionals from reporting child disclosures of abuse. That is because reporting professionals now risk damaging their own professional relationships by triggering adverse consequences against their clients who have acted in good faith. If the abuse reported by a parent and observed by a doctor is ultimately *not* confirmed—as is quite common—

could the reporting parent be accused of “mentally injuring” the child? Could the doctor’s well-intentioned client then lose custody of her child? Adding to the complexity of the situation, doctors who choose not to report could risk violating Maryland statute and losing their license.

III. The Decision by the Court of Special Appeals is Predicated on a Flawed Psychological Theory

Courts are not experts in child psychology, particularly when it comes to victims of abuse. Here, however, Ms. McClanahan has been labelled an “abuser” based on bad social science and unsupported expert testimony. Courts should not be permitted to base decisions on purely speculative conclusions offered by experts regarding what unconscious intent a parent possessed (particularly where that unconscious intent did not manifest itself in any bad acts). There is no reliable standard for Court use to impose liability based on a person’s unconscious thoughts, nor should there be. This is an unscientific and unreliable concept.

Amici, as experts in the field of child psychology and abuse, are struck by the fact that the opinion of the Court of Special Appeals, in providing psychological analysis and relying on the opinions of the so-called experts heard by the ALJ, makes several conclusions that are contrary to our common understanding of child behavior:

- Contrary to the conclusion of the Court, psychologists do not recognize “subconscious efforts” to establish closeness with a child or a “positive feedback loop” by which a well-intentioned parent “subconsciously” motivates a child to embellish tales of abuse.¹⁸
- Contrary to the conclusion of the Court, a child may still be “affectionate” with a parent who has sexually abused her.¹⁹
- Contrary to the conclusion of the Court, if a parent is emotionally abusive, then the abused child may evidence a distance from that parent.²⁰
- Contrary to the conclusion of the Court, a “normal” exam without evidence of injury does not rule out sexual abuse.²¹

¹⁸ Subconscious creation of a positive feedback loop is not a characterization or recognized disorder in the DSM.

¹⁹ Lucy Berliner & Jon R. Conte, *The Process of Victimization: The Victims’ Perspective*, 14 Child Abuse & Neglect 29 (1990).

²⁰ Md. Dep’t of Human Resources, Report Neglect and Abuse, http://www.dhr.state.md.us/blog/?page_id=4059 (“[a] child might be potentially showing the signs of mental injury if he or she . . . [d]oesn’t seem to be attached to the parent or caregiver”).

²¹ Joyce A. Adams, MD et al., *Examination Findings in Legally Confirmed Child Sexual Abuse: It’s Normal to be Normal*, 94 Pediatrics 310 (Sept. 1994); N.D. Kellogg, et al., *Genital Anatomy in Pregnant Adolescents: ‘Normal’ Does Not Mean ‘Nothing Happened’*, 113

- Contrary to the conclusion of the Court, child victims of sexual abuse commonly use “fantastical” terms to describe their experiences.²²

These factual predicates adopted by the court are incompatible with accepted psychological norms. Hypotheses such as that of the “positive feedback loop” can only be accepted into the body of scientific knowledge if they pass critical scrutiny, including testing.²³ That has not happened here. The decision below, if left standing with its fuzzy standard on liability, could also create a cottage industry of experts for whether a parent has “unconsciously” caused a mental injury. How could a person rebut such an expert conclusion, particularly where the expert is permitted to opine without any evidence? Based on unscientific expert testimony relied on by the ALJ, the Court of Special

Pediatrics 67 (2004). This conclusion also ignored the fact that physical evidence of abuse was discovered and then disregarded, primarily a “black coarse hair” found on the child’s genitals during an exam.

²² Anne Lukas Miller, *Bizarre & Fantastic Elements: A Forensic Interviewer’s Response, Part III*, Nat’l District Att’ys Ass’n, Nat’l Ctr. for Prosecution of Child Abuse, Vol. 21, No. 4, at 9, 10 (2008), *available at* http://www.ndaa.org/pdf/update_vol_21_no_4_2008.pdf (“Seemingly bizarre or fantastic elements cannot and should not be viewed as justification for the dismissal of a child’s disclosure.”).

²³ Carl G. Hempel, *Philosophy of Natural Science* 16 (1966).

Appeals upheld a logical fallacy: that the lack of evidence is, itself, a form of evidence.

Allowing experts to testify that a parent has a “subconscious” intent to commit an act is Orwellian. This permits the criminalization of presumed thoughts that cannot be proven through analysis. This is not in the best interest of children because it ties custodial victories to hired experts rather than the determination of facts and law.

CONCLUSION

For the reasons discussed above and in Petitioner’s opening brief, the decision of the Court of Special Appeals should be reversed.

Respectfully submitted,

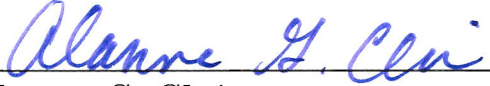


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STATEMENT OF FONT AND TYPE SIZE

The font used to prepare this brief is Century Schoolbook and the type size is 14 point.


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Text of Pertinent Statutes

Md. Code Ann., Fam. Law § 5-702

The purpose of this subtitle is to protect children who have been the subject of abuse or neglect by:

- (1) mandating the reporting of any suspected abuse or neglect;
- (2) giving immunity to any individual who reports, in good faith, a suspected incident of abuse or neglect;
- (3) requiring prompt investigation of each reported suspected incident of abuse or neglect;
- (4) causing immediate, cooperative efforts by the responsible agencies on behalf of children who have been the subject of reports of abuse or neglect; and
- (5) requiring each local department to give the appropriate service in the best interest of the abused or neglected child.

Md. Code Ann., Fam. Law § 5-705(a)

(a) In general. --

(1) Except as provided in paragraphs (2) and (3) of this subsection, notwithstanding any other provision of law, including a law on privileged communications, a person in this State other than a health practitioner, police officer, or educator or human service worker who has reason to believe that a child has been subjected to abuse or neglect shall notify the local department or the appropriate law enforcement agency.

(2) A person is not required to provide notice under paragraph (1) of this subsection:

(i) in violation of the privilege described under § 9-108 of the Courts Article;

(ii) if the notice would disclose matter communicated in confidence by a client to the client's attorney or other information relating to the representation of the client; or

(iii) in violation of any constitutional right to assistance of counsel.

(3) A minister of the gospel, clergyman, or priest of an established church of any denomination is not required to provide notice under paragraph (1) of this subsection if the notice would disclose matter in relation to any communication described in § 9-111 of the Courts Article and:

(i) the communication was made to the minister, clergyman, or priest in a professional character in the course of discipline enjoined by the church to which the minister, clergyman, or priest belongs; and

(ii) the minister, clergyman, or priest is bound to maintain the confidentiality of that communication under canon law, church doctrine, or practice.

Md. Code Ann., Fam. Law § 5-706(b)-(c)

(b) In general. -- Promptly after receiving a report of suspected abuse or neglect of a child who lives in this State that is alleged to have occurred in this State, the local department or the appropriate law enforcement agency, or both, if jointly agreed on, shall make a thorough investigation of a report of suspected abuse or neglect to protect the health, safety, and welfare of the child or children.

(c) Time for initiation; actions to be taken. -- Within 24 hours after receiving a report of suspected physical or sexual abuse of a child who lives in this State that is alleged to have occurred in this State, and within 5 days after receiving a report of suspected neglect or suspected mental injury of a child who lives in this State that is alleged to have occurred in this State, the local department or the appropriate law enforcement agency shall:

- (1) see the child;
- (2) attempt to have an on-site interview with the child's caretaker;
- (3) decide on the safety of the child, wherever the child is, and of other children in the household; and
- (4) decide on the safety of other children in the care or custody of the alleged abuser.

Md. Code Ann., Fam. Law § 5-708

Any person who makes or participates in making a report of abuse or neglect under § 5-704, § 5-705, or § 5-705.1 of this subtitle or a report of substantial risk of sexual abuse under § 5-704.1 of this subtitle or participates in an investigation or a resulting judicial proceeding shall have the immunity described under § 5-620 of the Courts and Judicial Proceedings Article from civil liability or criminal penalty.


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 2, 2015, two copies of the foregoing Brief of *Amici Curiae* were served via Federal Express Standard Overnight service to the parties listed below:

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