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WISCONSIN COURT OF APPEALS
DISTRICT IV

BRAYLON SEIFERT, BY HIS GUARDIAN AD LITEM, PAUL J. SCOPTUR, KIMBERLY SEIFERT and DAVID SEIFERT,

Plaintiffs-Respondents,

Appeal No. 14-AP-195

DEAN HEALTH INSURANCE and BADGERCARE PLUS,

Grant County Circuit Court
Case No. 11-CV-588

Involuntary Plaintiffs,

v.

KAY M. BALINK, M.D. and PROASSURANCE WISCONSIN INSURANCE COMPANY,

Defendants-Appellants.

BRIEF OF PLAINTIFFS-RESPONDENTS

CIRCUIT COURT FOR GRANT COUNTY
HONORABLE CRAIG R. DAY, PRESIDING
Circuit Court Case No. 11-CV-588

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INTRODUCTION

The verdict of this case was the product of a fair and just trial over the course of eight days. The circuit court properly interpreted and applied Wis. Stat. § 907.02(1) in admitting Plaintiffs' expert Dr. Wener's testimony. Dr. Wener's expert opinion in this case was both relevant, reliable and assisted the trier of fact. Dr. Wener's testimony was the product of reliable principles and methods, which he then reliably applied to the facts of the case. The circuit court analyzed the reliability of Dr. Wener's testimony pursuant to Wis. Stat. § 907.02(1) on three separate and independent occasions: pre-trial, during trial, and post-trial. With each review of Dr. Wener's opinion testimony, the circuit court properly applied the Wis. Stat. § 907.02(1) and dictated on record the basis for his decision.

Secondly, the circuit court properly denied Defendants' motion for new trial as the Plaintiffs' counsel's statements during closing argument were not prejudicial nor did they violate court orders to result in an unfair trial and improper verdict. Plaintiffs' counsel's statements did not cross the well-established lines with inflammatory rhetoric, personal attacks, or blatant pleas to jurors' sympathies. Plaintiffs' counsel statements did not rise to the level of reversible error.

Finally, the Defendant Dr. Balink received a fair and just trial. No circumstances of this case justify a new trial in the interests of justice under Wis. Stat. §752.35. Credible evidence presented at trial supports the jury's verdict. As each argument is discussed within this brief, the applicable law, principles of justice, and fairness to the severely injured minor plaintiff demand that this jury verdict be affirmed.

STATEMENT OF ISSUES

I. Did the testimony of the Plaintiffs' standard of care expert, Dr. Wener, on the issue of prenatal care or informed consent, meet Wis. Stat. § 907.02(1)'s reliability standard?

Answer by circuit court: Yes.

II. Were the comments made by Plaintiffs' counsel during closing argument so prejudicial to warrant a new trial?

Answer by circuit court: No.

III. Did the interests of justice require a new trial under § 805.15(1)?

Answer by circuit court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Respondents request oral arguments by the parties given the complex issues of law and fact surrounding the case. Publication is warranted pertaining to the application of the newly amended Wis. Stat. §907.02(1) and would benefit Wisconsin litigants.

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND LEADING TO APPEAL

1. Nature of the Case

On July 29th, 2011, the Plaintiffs, Braylon Seifert, by his Guardian Ad Litem, Paul Scoptur, Kimberly Seifert and David Seifert (hereinafter "the Plaintiffs", and as individuals referred to as "the minor plaintiff, Braylon Seifert", "Mrs. Seifert" and "Mr. Seifert" respectively) brought a civil action against the Defendants, Dr. Kay M. Balink and ProAssurance Wisconsin Insurance Company (hereinafter the "Defendants" and individually referred to as "Dr. Balink" and "the Fund" respectively) for medical negligence and lack of informed consent.

The Plaintiffs' complaint alleged that:

(1) Dr. Balink was negligent in applying too much force and traction during her delivery of the minor Plaintiff, Braylon Seifert, after she diagnosed a shoulder dystocia, resulting in the severe and permanent brachial plexus injury to Braylon Seifert's left arm, hand and shoulder; and

(2) Dr. Balink should have counseled Mrs. Seifert on the prenatal risks of shoulder dystocia prior to delivery and, specifically, that she breached the standard of care when she failed to obtain informed consent from Mrs. Seifert for delivery via cesarean section to avoid the risks of shoulder dystocia and fetal injury.

Defendants' recitation of the Nature of the Case grossly overstated and misleads the Court as to what it is that the "plaintiff alleged" caused the severe and permanent injury suffered by the minor child, Braylon Seifert. The Defendants'

recitation is an inaccurate account of the medicine. Their description of what "plaintiff alleged" fails to account for plaintiffs' allegations that Dr. Balink was negligent during delivery when she breached the standard of care by using excessive traction after diagnosis of shoulder dystocia and that the excessive traction caused the minor child's injury. This allegation was never challenged during any of the Defendants' motions, pretrial or during trial after Dr. Wener testified.

2. Relevant Procedural Background and Case Disposition in the Circuit Court

i. Relevant Pre-Trial and Post-Verdict Motions

Both parties filed numerous pretrial motions in limine relative to testimony to be presented during trial and argued in post-verdict motions.

Specifically,

a. Defendants sought a pretrial order excluding opinion testimony, pursuant to recently amended Wis. Stat. 907.02(1), to be offered by Plaintiffs' obstetrical expert, Dr. Jeffrey Wener, concerning *only* prenatal care. The Defendants did not challenge Dr. Wener's opinion that the use of excessive traction during delivery by Dr. Balink caused the minor child's injury, nor did they challenge the testimony of Dr. Grossman and Dr. Adler that excessive traction was the cause of the minor plaintiff, Braylon Seifert's injury.

The plaintiff opposed the defendants' motions in limine, incorporated herein. After hearing, the motion to exclude opinions of Dr. Wener was denied.

The Defendants renewed their motion after Dr. Wener testified seeking only to exclude Dr. Wener's testimony concerning *only* prenatal care. This motion was denied.

Defendants then sought a directed verdict at the conclusion of the Plaintiffs'

case. Again, the Defendant sought to exclude *only* opinions concerning prenatal care. This motion was also denied.

b. Dr. Balink sought an order to preclude plaintiffs' counsel from commenting that this case is analogous to any case in which negligence is compared to the duty of an average person. (R. 57: pp. 12-13) This motion was granted. (R. 138: pp. 20).

c. Dr. Balink sought an order to preclude Plaintiff's counsel from arguing to the jury that they can determine medical negligence using their own experience, common sense or without expert testimony. (R. 57: pp. 13-14) Here, the circuit court determined that jurors may use their common sense when they assess witness credibility and are instructed not to use their ordinary sense and logic in determining whether a doctor is or is not applying a standard of care. (R. 138: pp. 21).

d. The Fund sought an order to preclude Plaintiffs' counsel from using an analogy between a healthcare provider's negligence and the average driver who carelessly fails to observe the Rules of the Road. (R. 67: No 2) This motion was granted. (R. 138: pp. 30).

ii. Trial and Jury Verdict

This case was tried before a jury over eight days. On August 20th, 2013 the jury was provided with a Special Verdict form containing five questions. (R.115:1-3). Questions 1 and 2 concerned negligence. (Id) Questions 3, 4 and 5 concerned informed consent. (Id.)

The jury returned a verdict in favor of the Plaintiff on Questions 1 and Question 2 (R. 115: 1-3) as follows:

Question No. 1: Was Dr. Kay Balink negligent in the prenatal and delivery care of Kimberly Seifert/Braylon Seifert?

Answer: Yes.

Question No. 2: If you answered Question 1 "yes" then answer this question: Was such negligence a cause of injury to Braylon Seifert?

Answer: Yes.

The jury did not return a verdict for the Plaintiff on Question No. 3 (R.115: 1-3) as follows:

Question No. 3: Did Dr. Kay Balink fail to provide Kimberly Seifert with information necessary to enable her to make an informed decision about her delivery choices?

Answer: No.

The jury was not requested to answer question 4 and 5 after having answered "no" to Question 3. (Id.) Question 4 asked the jury to determine whether, if a reasonable person, placed in Kimberly Seifert's position, after having been provided necessary information about her condition, the risk of natural delivery given her condition, and vacuum extraction, would that person have refused the procedure offered? (Id.) Question 5 asked the jury to determine whether the failure of Dr. Balink to disclose necessary information to Kimberly Seifert was a cause of injury to Braylon Seifert. (Id.)

Post-Verdict motions were heard on November 15th, 2013. Judgment entered on December 23rd, 2013. The Defendant's Notice of Appeal was filed on January 15th, 2014.

B. STATEMENT OF FACTS RELEVANT TO THE ISSUES RAISED FOR REVIEW

1. Testimony of Dr. Wener

i. Kimberly Seifert's Prenatal Care

Mrs. Seifert weighed 269 pounds when she became pregnant. (R. 141, p. 81). At the end of her pregnancy, Mrs. Seifert weighed 306 pounds, gaining approximately 36 pounds. (Id.) It was Dr. Wener's testimony that a 35 pound weight gain was a little too much for Mrs. Seifert. (R. 141, p. 82).

Dr. Balink had Mrs. Seifert undergo a one-hour glucose tolerance test on March 19, 2009. (R. 141, p. 82; R.116: Ex 236 at RICH 226). It was Dr. Wener's testimony that the results of the test were abnormal and that Mrs. Seifert required a three-hour glucose tolerance test. (R. 141: pp. 82-83). Dr. Wener testified that Mrs. Seifert was never diagnosed as a gestational diabetic because the correct testing was not done. (R.141: p. 137).

On May 26, 2009, Mrs. Seifert underwent induction of labor for indications of high blood pressure, early preeclampsia and large for gestational age, or "LGA." (R 141: p. 86; R: 116, Ex. 260). "LGA" is an ultrasound term used when the baby is above the 90th percentile and above. (R. 141: pp. 86-87). The estimated fetal weight, or "EFW" was 8 ½ pounds. (R: 141: p. 100; R. 116, Ex. 260). The birth weight was 9 pounds 12 ounces. (R. 141: p. 100).

ii. Dr. Wener's Opinions Concerning Prenatal Care

It was Dr. Wener's opinion that Dr. Balink fell below the accepted standard of care when she failed to use a one-hour glucose tolerance value of 130 and failed to

require Mrs. Seifert to undergo a three-hour glucose tolerance test to diagnose gestational diabetes. (R. 141: p. 83). It was Dr. Wener's opinion that Mrs. Seifert was a gestational diabetic. (Id., pp. 85-86).

It was Dr. Wener's opinion Dr. Balink anticipated a large baby and that her reference "LGA" was reference to a large baby. (R. 141, p. 87). It was Dr. Wener's opinion that gestational diabetes, obesity and large baby are all risk factors that Dr. Balink should have been aware at the time. (Id.).

It was Dr. Wener's opinion that, despite the inaccuracies of ultrasound, it is the best means of evaluating the size of the baby and has a 10 to 15 percent acceptable range for accuracy. (Id. at 100-101). Considering the 10 to 15 percent range, it was Dr. Wener's opinion that ultrasound should have been done to estimate fetal weight and that Dr. Balink fell below the accepted standard of care when she failed to order an ultrasound to evaluate fetal weight. (Id.) Dr. Wener based his opinion on Mrs. Seifert's obesity, diabetes and diagnosis of large for gestational age, or "LGA." (Id.) Dr. Balink knew Mrs. Seifert's baby was large, but she did not know how large. (Id.)

iii. Kimberly Seifert's Labor

Mrs. Seifert was completely dilated and ready to push at 11:00 p.m. (R.141: pp. 88-89). Dr. Wener testified that it was important to know how long Mrs. Seifert had been pushing because it's a large baby and there is more of a risk of shoulder dystocia. (R. 141: 89-90). It was an hour and thirteen minutes before the suction cup of the vacuum was applied. (Id. at 90). With the application of the vacuum, you are not able to know how long the second stage of labor would have been because the labor is cut short by the vacuum. (Id). The vacuum was applied four times over a

period of 13 minutes to assist in delivering the baby. (Id., R:116, Ex. 259-260). There is no mention in the medical record as to why the vacuum was applied. (R.141: p. 110).

iv. Dr. Wener's Opinion Concerning Labor and Use of the Vacuum

It was Dr. Wener's opinion that the vacuum is the largest risk factor for causing shoulder dystocia. (Id.). It was Dr. Wener's opinion that Dr. Balink should not have applied the vacuum on this child because of the risk factors already established for shoulder dystocia and knowing that a vacuum assisted delivery is the largest of the risk factors. (R. 141, p. 112). It is Dr. Wener's opinion that Dr. Balink should have opted for a cesarean section or simply allowed the mother to continue to push to avoid the severe brachial plexus injury. (R: 141, p. 113).

v. Kimberly Seifert's Delivery of Braylon Seifert

After the head delivered, Dr. Balink diagnosed shoulder dystocia. (R.145: p 131-132). She undertook a sequence of recognized obstetrical maneuvers to release the infant's shoulders from the pelvis, including McRoberts suprapubic pressure and a corkscrew (Woods) maneuvers. (R. 145:pp. 133-134; R:141, p. 103). Dr. Balink then delivered the posterior shoulder with fracture of the right humerus before the anterior shoulder dislodged. (R. 141: p. 104; R:116, Ex. 259-260). It was appropriate for Dr. Balink to perform the shoulder dystocia release techniques; however, the fact that maneuvers are done does not indicate whether they are performed correctly. (R.141: p. 103-104).

vi. Dr. Wener's Opinion Testimony Concerning Delivery

It was Dr. Wener's opinion that Dr. Balink applied excessive traction to the baby's head at the time of delivery. (R.141, p. 113). Dr. Wener's opinion was based upon the fact that the injury was to all of the nerves, and required graphs, and to see a significant injury in a situation like that implies force. (R.141: p. 114). Further, Dr. Balink testified that when traction is applied it has to be reasonably and not gentle traction. (Id.) It was Dr. Wener's opinion that "any traction that is applied to the baby's head has to be gentle traction." (Id.) It was Dr. Wener's opinion that Dr. Balink breached the standard of care and caused the baby's brachial plexus injury. (Id.). Dr. Wener's opinion was based upon the severity of the injury that is documented throughout the record and Dr. Balink's notes that this was a severe shoulder dystocia. (Id.). It was Dr. Wener's opinion that "in order to get all the nerve roots to be involved, there's got to be a lot of pressure." (R:141: p. 115).

vii. Defendants' Experts' Testimony

Defendants' expert, Dr. Rouse, agreed with at least some of Dr. Weiner's opinion when he testified that, "[a]ll other things being equal, these women have bigger babies," and when asked if an obstetrician takes into account that obese women tend to have bigger babies. (R. 146: pp. 216). Dr. Rouse also testified that big babies are more likely to have shoulder dystocia. (R. 146: pp. 206-207). He further testified that "the problem in gestational diabetes is that blood sugars tend to be too high." (Id. at p. 186) And that problem "can lead to an overgrown baby" (Id.) And, further that it can also "lead to should dystocia." (Id.) Additionally Dr. Rouse agreed that medicine is individualized. (R. 146: pp. 194, 197).

The defendant's own expert Dr. Rouse said it best himself when discussing the American College of Obstetricians and Gynecologist literature (hereinafter "ACOG"), "...back to your individualization, we wouldn't need doctors; we could just have robots if we didn't have to individualize care. (R. 146: pp. 193-194.) Further, Dr. Rouse answered "in general, sure" when asked by Plaintiffs' counsel "I'm talking about how you treat patients, you try to consider all the information, how those different pieces of information affect each other, correct?" (Id. at p. 197.) Again, Dr. Rouse answered in the affirmative when asked "If a patient came into your office, and was small and very thin, hadn't gained a lot [of] weight, and if a patent came into your office who was heavy and had gained more weight, you might look at them differently into what issues might affect either one?" (Id.)

Dr. Rouse agrees with Dr. Wener. Dr. Wener stated that "you have to look at the patient as a whole and look at all of the risk factors as they are applicable to that patient." (R:144 p. 66.) Dr. Wener took each individual risk factor alone, i.e. diabetes, large for gestational age, and macrosomia, and obesity and opined that one single risk does not in and of itself mean that the delivery will be complicated by shoulder dystocia. (R:141 p. 65). He then stated that there is meaning or importance to the number of risk factors present when assessing someone for shoulder dystocia because "you have to look at the patient as a whole and look at all of the risk factors as they are applicable to the patient." (R:141 p. 66).

Finally, Dr. Rouse confirms that ACOG's literature states that it should not be considered the standard of care that it is a guideline in stating "they're not the law, they're reasonable set of guidelines." (R. 146: pp. 193-194).

Dr. Rouse also supports Dr. Wener's opinion concerning traction. (R.146, pp. 224-225). Dr. Rouse testified that he would not allow a resident who was delivering an infant to use excessive traction because it can cause a permanent brachial plexus injury. (R: 146: p. 225). Dr. Rouse testified that when he is teaching residents how to handle shoulder dystocia, he does not allow them to use excessive traction. (R: 146, pp. 224-225) The Defendants are unable to deny that the use of excessive traction is below the standard of care because it is well known within the medical community that excessive traction will cause a brachial plexus injury. (Id.)

Further, the Defendant's pediatric neurologist Dr. Mark Scher testified that in general excessive traction applied by a physician in the delivery of a baby and the presence of shoulder dystocia can cause a permanent brachial plexus injury. (R: 146 pp. 71). Dr. Scher agreed with Plaintiff's counsel that a child who suffers an avulsion at birth in the presence of shoulder dystocia, that can be cause by excessive lateral traction applied by a physician. (R:146 p. 75).

2. Circuit Court Ruling on Admissibility

The circuit court in its analysis of Dr. Wener's testimony differentiates *Daubert*'s applicability to product liability, engineering type analysis and medical testimony. (R. 138: p. 42.) The court acknowledged that *Daubert* is the standard applied to medical cases, "although it doesn't lend itself nicely, analytically, to medical type analysis." (Id.) The circuit court acknowledge that "human analysis of the human body which is not as predicable as a certain metal that can be tested for its metallurgical properties, for example." (Id.) The circuit recognized that Dr. Wener's methodology was "classic medical methodology." (R:138, p. 53). The circuit court

also recognized that discrepancies in Dr. Wener's testimony, which the Defendant isolates from the treatment of the Plaintiff as a whole may make Dr. Werner wrong, but does that make his opinion inadmissible. (Id. at 54.)

The Plaintiffs emphasize that the trial court's determination was not without considerable analysis against the applicable standard of the amended Wis. Stat. § 907.02(1). (R.138 at pp. 107-111). The circuit court spent considerable time conducting the *Daubert* analysis as set out in the federal court's colloquy in an unreported United States District Court for the District of Massachusetts entitled *McGovern v. Brigham and Women's Hospital, Docket* No. 1:07-CV-10643 (Young, J.).[1] As recognized by the circuit court, "[w]hat distinguishes Wener's opinion from the opinion in McGovern, was that the doctor in McGovern, Dr. Englebert, took a leap in his logic on a causation issue...He didn't connect the dots. And it's subtly different here with Dr. Wener. He made some extrapolations, but his ultimate opinion used recognized factors subject to cross-examination...It's a close call in my book, as is probably obvious from my ruling, but as I look at the vagaries of medical treatment and diagnosis, Dr. Wener's opinion is an opinion, reliably based on a reliable medical methodology looking at recognized factors of the standard of care. And it may come in, what's it worth is for the jury to decide." (R: 138 pp. 109-111.)

The circuit court appropriately applied the *Daubert* standard, and placed importance on certain factors within the Court's discretion to determine Dr. Wener's

[1] The challenge in *McGovern* case, however, is distinctly different from the challenge in the instant matter because in *McGovern,* there was no causation expert presented to support the expert's opinion concerning negligence. In the instant care plaintiffs presented two experts on causation.

admissibility. Upon renewal of this motion during trial, the Court found that Daubert required that opinions can be tested. (R. 141, pp. 193). And, not by quantification but by cross examination, which revealed that the reliance the expert had was subject to debate. (Id.) Medicine is a science, it is not a quantified science. It is not measurement, in many respects. It is not engineering. (Id.) The Court denied the motion without further comment on the Court's prior *Daubert* ruling. (Id.)

The Court also denied the motion for directed verdict concerning Dr. Wener's testimony. (R.147: pp. 18) And, finally, the motions after verdict concerning Dr. Wener were denied, (R. 151: pp 2-9), as was the motion after verdict concerning closing arguments. The Judge made a very clear record upon which he based his decisions. (R. 151: pp. 2-18)

3. Plaintiff's Counsel's Statements to the Jury

i. Levine's Risk Assessment Example

During closing, Levine discussed consideration of testing results as follows, "[h]ere's the reason why: and we talked about this a little with the witness, Speed limit on the highways in this country can be 65 miles per hour, because it's been determined that 65 miles per hour more accidents are going to happen, okay?" (R. 150, pp. 22-23) "[O]n a nice, beautiful sunny day, clear skies, 65 miles per hour is probably fine. But there may be factors that you have to consider that make that not fine. That would make you question whether that's the speed you are gong. Let's say it's pouring rain, let's say it's snowing. You're not going to look at that number the same." (Id.)

The Court ruled the statements were argument and overruled the objection. (Id.)

ii. Levine's Golden Rule Statement

Levine asked the jury "Is this how you want your doctor to care?" (R. 150, 25). And, later in his closing, he asked "do you want your doctor to think about you?" (R.150, p. 123).

Levine withdrew the first statement after objection. The Court sustained the second objection.

iii. Levine's Statements in Rebuttal

Levine made the following statements in rebuttal argument to compliment the jury's ability to analyze evidence:

"I didn't tell you you're not smart" (Id.) "I have a little more respect for you than Mr. Leib does" (Id.) "I've got a little more faith in you than he does." (Id.) "You have common sense and you can analyze the expert testimony and you are smart enough to do it." (Id. at p. 137). "1 have a lot of faith in your smarts." (Id.) "I think you are experts, *in a sense " (ld.) (emphasis supplied)* "I think you have learned quite a bit and 1 think you can make good decisions." (Id.) "Again, unlike Mr. Leib, I think you are smart people and I think you have learned the medicine and 1 think you are experts *in a sense."* (Id. at p. 138) (*emphasis supplied*). "You are *in that sense* certainly people who have learned quite a bit in the past several days." (Id.) (*emphasis supplied*). He is basically stating that they are now in a position to make the decision to define for the jury what he meant by "*in a sense.*"

Levine never suggested that they could disregard the expert testimony.

STANDARDS OF REVIEW

The circuit court's evidentiary ruling is reviewed for erroneous exercise of discretion. *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698. When making evidentiary determinations, the trial court "has broad discretion." *Id.* If a circuit court applied the proper legal standard and reached a reasonable conclusion, an appellate court will uphold that decision. *Id. see also Filppula-McArthur v. Halloin,* 234 Wis.2d 245, 257-258, (2000). The decision to admit expert testimony is reviewed under the standard of erroneous exercise of discretion has been the long standing standard. *260 N. 12th St., LLC v. State DOT,* 2011 WI 103, ¶ 40, 33; citing *Hoekstra v. Guardian Pipeline, LLC*, 2006 WI App 245, ¶14, 298 Wis. 2d 165, 726 N.W.2d 648.

The law grants a lower court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. *Kumho Tire Co. Ltd v. Carmichael,* 526 U.S. 137, 142 (1999).

Whether the district court applied the proper standard and performed its gatekeeper role in the first instance is reviewed de novo. *Dodge v. Cotter Corp.* 328 F.3d 1212, 1223 (10th Cir. 2003). If the proper standard is applied, the trial court's actual application of the standard in deciding whether to admit or exclude an expert's testimony will be reviewed for abuse of discretion. *Id, see also Lees v. Carthage College*, 714 F.3d 516, 520 (7th Cir. 2013) (regarding the Daubert standard), "[w]hether the district court applied the appropriate legal framework for evaluating expert testimony is reviewed de novo, but the court's choice of relevant factors within

the framework and its ultimate conclusion as to admissibility are reviewed for abuse of discretion."

A circuit court's decision whether to order a new trial in the interest of justice "will not be disturbed unless the court clearly abused its discretion." *Sievert v. Am. Family Mut. Ins. Co.*, 180 Wis. 2d 426, 431, 509 N.W. 2d 75 (Ct. App. 1993). Similarly, this Court may order a new trial in the interest of justice "only in exception circumstances." *Vollmer v. Luety*, 156 Wis. 2d. 1, 11, 456 N.W. 2d 797 (1990).

ARGUMENT

The verdict of this case was the product of a fair and just trial over the course of eight days. The circuit court properly interpreted and applied Wis. Stat. § 907.02(1) in admitting Dr. Wener's testimony. The circuit court reviewed and analyzed Dr. Wener's testimony pursuant to Wis. Stat. § 907.02(1) on three separate and independent occasions: pre-trial, during trial, and post-trial. With each review of Dr. Wener's opinion testimony, the circuit court properly applied the Wis. Stat. § 907.02(1) and dictated on record the basis for his decision.

Further, the circuit court properly denied Defendants' motion for new trial as the Plaintiffs' counsel's statements during closing argument were not prejudicial nor did they violate court orders to result in an unfair trial and improper verdict. Finally, the Defendant Dr. Balink received a fair and just trial. Credible evidence presented at trial supports the jury's verdict. As each argument is discussed below, the applicable law, principles of justice and fairness demand that this jury verdict be affirmed.

I. WIS.STAT. §907.02, AS A CODIFICATION OF DAUBERT, 509 U.S. 579 (1993), AND ITS PROGENY, WAS THE APPROPRIATE LEGAL STANDARD APPLIED BY THE CIRCUIT COURT TO DETERMINE THE ADMISSIBILITY OF DR. WENER'S EXPERT OPINIONS REGARDING MRS. SEIFERT'S PRENATAL CARE.

Effective February 1st, 2011, the Wisconsin legislature amended § 907.02(1) to adopt the widely used *Daubert* reliability standard as stated in the Federal Rules of Evidence 702.02. *Wis. Stat. §907.02(1),* 2011 Wis. Act 2, §34m, 45(5). Under the amended statute, the admissibility of an expert's opinion is conditioned upon the proposed testimony being: (1) based upon sufficient facts or data; (2) the product of reliable principles and methods, and (3) the expert witness must have applied the principles and methods reliably to the facts of the case. *Id., see also Daubert v. Merrell Dow Parm. Inc.,* 509 U.S. 579, 592 (1993); *General Electric Co v. Joiner,* 522 U.S. 136 (1997); *Kumho Tire Co. Ltd* v. *Carmichael,* 526 U.S. 137 (1999).

In determining the admissibility of an expert's testimony the *Daubert* Court identified four factors that *might* assist a trial court: (1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the technique's known or potential rate of error; and (4) the level of the theory or technique's acceptance within the relevant discipline. *United States v. Mooney*, 315 F. 3d 54, 62 (1st Cir. 2002)(emphasis added) (citing *Daubert*, 509 U.S. at 593-94).

However, the *Daubert* court makes it clear that the factors mentioned do not constitute a "definitive checklist or test." *Daubert,* 509 U.S. at 593. *See also, Kumho Tire,* 526 U.S. at 150. "The trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's

reliability. But, as the Court stated in *Daubert*, the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire,* 526 U.S. at 141-42.

The Court in *Kumho* Court discusses that specific circumstances of the particular case at issue will dictate how the *Daubert* standard is applied. *Id.* at 150. For example, the reliability of engineering testimony is at issue in some cases as it rests upon scientific foundations. In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. *Id.*

The trial court is in the best position to consider the applicable factors in applying the *Daubert* standard and the given weight of each factor. If an expert's testimony is within the range where experts might reasonably differ, *the jury, not the trial court*, should be the one to decide amount the conflicting views of different experts. *Kumho Tire,* 526 U.S. at 153. (emphasis added). The credibility of each witness with conflicting but nevertheless admissible testimony is under attack on cross-examination. *Fuesiing v. Zimmer, Inc.,* 421 F.3d 528 (7th Cir. 2005), discussed by the Defendant to support its argument, actually explains that the trial court's analysis must be flexible because "the particular factors identified in *Daubert* may not always be pertinent in assessing the reliability of [every] expert testimony." 421 F.3d at 535. *See also Bielskis* v. *Louisville Ladder, Inc.,* 663 F.3d 887, 894 (7th Cir. 201 1) (trial "court's admissibility determination is not intended to supplant the adversarial process...[the courts] have recognized that 'shaky' expert testimony may be

admissible, subject to attack on cross-examination," and finding that the un-tested expert opinion there, un-supported by literature and anything more than "talking off the cuff" was, while appropriately excluded, 'borderline").

Dr. Wener's testimony concerning the prenatal care was appropriately admitted pursuant to *Daubert.* The Defendant's repeated assertion - that Dr. Wener's expert opinion at trial was unreliable because he did not cite to any authoritative literature or publications - unduly focuses on only one *Daubert* factor, and misstates current case law. "Publication is not a *sine qua non* of expert testimony." *United States* v. *Mikos,* 539 F.3d 706, 711 (7th Cir. 2008) (citing *Daubert,* 509 U.S. at 593).

There were no flaws in the way Dr. Weiner applied his opinions to the facts of the case. In fact, the defendants' own expert, Dr. Rouse, agreed with at least some of Dr. Weiner's opinion when he testified that, "[a]ll other things being equal, these women have bigger babies," and when asked if an obstetrician takes into account that obese women tend to have bigger babies. (R. 146: pp. 216). Dr. Rouse also testified that big babies are more likely to have shoulder dystocia. (R. 146: pp. 206-207). Additionally Dr. Rouse agreed that medicine is individualized. (R. 146: pp. 194, 197). The circuit court also agreed with Dr. Wener and Dr. Rouse that medicine is individualized in stating that while Dr. Wener's holistic approach is "not something that has been peer reviewed because it's an individualized determination based upon the facts of this case, and in using known factors" such as estimated fetal weight, maternal weight, glucose levels, etc. (R.138, p. 109).

The Court's analysis and denial of defendant's motions was appropriate. The trial court is in the best position to consider the applicable factors in applying the

Daubert standard and the given weight of each factor as they are presented at trial. If an expert's testimony is within the range where experts might reasonably differ, *the jury, not the trial court*, should be the one to decide amount the conflicting views of different experts. *Kumho Tire,* 526 U.S. at 153. (emphasis added).

II. THE CIRCUIT COURT APPLICATION OF WIS.STAT. §907.02, AS A CODIFICATION OF DAUBERT, 509 U.S. 579 (1993), AND ITS PROGENY, WAS NOT AN ABUSE OF DISCRETION

A. Dr. Wener's Testimony Was the Product or Reliable Principles and Methods

The circuit court properly assessed Dr. Wener's method in generating his opinion testimony for reliability pursuant to Wis. Stat. § 907.02(1) on three independent occasions: the pretrial, during the trial, and post trial. The defendants argue that a portion Dr. Wener's opinion, the testimony regarding informed consent, is not based on medical literature; thus it must be based arbitrarily on Dr. Wener's personal preference. Firstly, to claim that a Doctor who has delivered over 7,000 babies based his medical opinion on mere assumptions or his own *ipse dixit* is entirely misleading and unfounded. (Def. Brief page 17,19). Secondly, the Defendant couches his entire brief and argument on one factor in a non-exhaustive and non-exclusive list, warranting Dr. Wener's testimony unreliable. Not only is Dr. Wener's testimony relevant, reliable, and assists the trier of fact, the Defendant's interpretation and application of *Daubert* is incorrect. Publication is not a *sin qua non* of admissibility; it does not necessarily correlate with reliability. *Daubert* at 593. See also, *United States* v. *Mikos,* 539 F.3d 706, 711 (7th Cir. 2008). *Daubert* recognized the utility of

expert testimony even without literature to point to, and gave " 'the trial court broad latitude to determine' 'whether *Daubert's* specific factors are, or not, reasonable measures of reliability in a particular case.'" *Loeffel Steel Prods,* v. *Delta Brands,* 372 F. Supp. 2d 1 104, 1117-18 (N.D. III. 2005) (citing *Kumho Tire,* 526 U.S. at 153). Further, where there are other factors that demonstrate the reliability of the expert's methodology, as there is with Dr. Wener's testimony, an expert opinion should not be excluded simply because there is no literature on point. *Schneider Ex Rel. Estate of Schneider v. Fried*, 320 F. 3d 396, 406 (3d Cir. 2003).

Therefore, the Defendant's objections to Dr. Wener's testimony address the weight and credibility that should be given his testimony, not its ultimate admissibility, and was appropriately challenged upon cross-examination.

B. The Circuit Court Properly Analyzed and Admitted Dr. Wener's Testimony Pre-Trial.

Prior to trial, defendants asserted Dr. Wener's testimony failed to meet the *Daubert* standard and sought to exclude *certain* opinions rendered by Dr. Wener, i.e. Dr. Wener's criticism of Dr. Balink's failure to identify risk factors for shoulder dystocia and provide informed consent during prenatal care. (R. 64). The Defendants fail to address the fact that at no time prior to or during the trial did defendants seek to limit Dr. Wener's testimony that use of excessive traction is a breach of the standard of care as it can cause, and did cause, the child's severe permanent injury. (R. 64: 1-30, R. 127: 1-29)

Despite the recent arguments of the Defendants concerning traction, Dr. Wener's opinion concerning informed consent was not dependent upon, nor relevant

to, his opinion concerning the standard of care during delivery and the use of excessive force or traction as the cause the minor child's injury. The factual basis for these opinions demonstrate that these opinion are mutually exclusive such that they simply cannot occur at the same time, i.e. if Mrs. Seifert needed to be informed of her risks of shoulder dystocia and the availability of cesarean section, then the events of the vaginal delivery never occur and the injury is avoided. In contrast, as in the events of this case as determined by the jury's verdict, if informed consent was not required and vaginal delivery occurs, excessive traction at the time of delivery by Dr. Balink, as based upon the opinion of Dr. Wener was a breach of the standard of care, that caused this child's permanent injury. The Defendant's theory that maternal forces caused the injury was, in the end, not supported by the jury's verdict. This theory was refuted by Plaintiffs' experts, Dr. Wener, Dr. Adler and Dr. Grossman, and poorly supported by the Defendants' own experts.

Dr. Wener's opinions concerning prenatal care were properly admitted. However, even if the circuit court precluded Dr. Wener's testimony concerning prenatal risk factors for shoulder dystocia, the jury's decision would not be altered and, as such, a new trial should be denied and judgment should be affirmed.

The trial court's first interpretation and application of Wis. Stat. § 907(1) occurred in ruling on Defendant's pretrial motion, which again asserted that Dr. Wener's expert opinion at trial is unreliable because it does not rely on any authoritative literature or publication. As discussed above, the Defendant's assertions unduly focuses on only on *Daubert* factor, and overstates the current case law. Literature can be helpful in weighing the reliability of an expert but is not

determinative of the expert's admissibility. The *Daubert* court made it clear that the list of factors is meant to be helpful, not definitive. *Kumho,* 526 US at 151. "Factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged." *Id.*

C. Dr. Wener's Testimony at Trial Was Properly Admitted as Relevant, Reliable, and Reliably Applied to the Facts of the Case.

The Court's *Daubert* ruling was properly based on Daubert, and its progeny, and properly admitted. The Court made a thorough analysis and made very clear statements regarding why the testimony was to be admitted based upon Dr. Wener's deposition testimony. Once admitted, Dr. Wener's testimony at trial became even more clearly defined and further supported its admissibility pursuant to *Daubert.*

Defendants' objections to Dr. Wener's testimony address the weight and credibility that should be given his testimony, not its ultimate admissibility, and was appropriately challenged upon cross-examination. Dr. Wener's expert opinion and testimony is admissible, despite any reliance on literature or studies, precisely because it involves his firsthand knowledge and "personal ... observations," *Cummings* v. *Lyle Indus,* 93 F.3d 362, 369 (7th Cir. 1996) (quoting *Porlei* v. *Whitehall Labs. Inc., 9* F.3d 607, 614 n.6 (7th Cir. 1993)), because in addition to being scientific it is "both 'technical' and 'specialized'" and will assist the trier of fact. *Mikos,* 539 F.3d at 71 1 (quoting Fed. R. Evid. 702).

Dr. Wener did testify at trial about scientific studies upon which he could have based his opinions are available in the literature. Specifically, he testified, "We know the risks, we know that many, many studies have been done. The literature is replete -

you look at one piece of literature and they'll say that there's a risk factor for shoulder dystocia of 35 percent. You look at another article that says 15 percent." (R:141 p. 188.) It was Dr. Wener's application of those standards to this particular patient that the Court found acceptable. At no time was defense precluded from offering any literature available within the relevant medical community to challenge Dr. Wener.

Defendants' suggestion that Dr. Wener did not consult any medical literature to determine if his opinion was consistent with the state of medical science as of 2009 and therefore had to concede that he could not quantify the risks of shoulder dystocia is a misrepresentation of the testimony. Dr. Wener stated at trial that at his deposition he was not asked to review medical literature, rather he was asked to review the records and provide an opinion based upon his education, training and 36 years of experience. (R:141 p. 135-36).

Further, Dr. Wener testified that he could not quantify by numbers or percentages because every individual is different and as stated above one piece of literature will say 35 percent the other 15 percent. (R:141 at p. 188). This requires that when a treating physician identifies risk factors, it is also their responsibility to take action. *Id.* *Daubert* does not require medical experts to quantify well-known risks as they present themselves in a particular patient. *Daubert* recognizes that medicine is science, it is not always quantifiable like other sciences, as it is dependent upon the individual patient.

Dr. Wener's opined that Mrs. Seifert displayed several risk factors for shoulder dystocia leading up to the delivery of the minor Plaintiff that Dr. Balink

should have identified and thus, informed Mrs. Seifert of. Such risk factors include: maternal obesity, gestational diabetes, macrosomia or large for gestational age.

1. Dr. Wener Reliably Applied His Opinions to the Facts to the Facts of the Case.

i. Dr. Wener's Testimony Concerning Maternal Obesity and Weight Gain as a Risk Factor for Shoulder Dystocia.

When assessing Mrs. Seifert's weight and weight gain, Dr. Wener testified about Mrs. Seifert pre-pregnancy weight and her weight at time of delivery and that "it's a little too much weight for her to have gained during the pregnancy. (R: 141 p. 81.). Dr. Wener testified "we prefer 30 pounds in ladies that are normal size...[i]t's not healthy for mom, it's not healthy for the baby for an obese mom to gain too much weight." *Id.* It was not Mrs. Seifert's obesity alone that concerned Dr. Wener. It was the expectation that this mom was going to deliver a baby that measured large for gestational age, that she herself was obese and that she likely had undiagnosed and untreated gestational diabetes.

Lastly, Wener explained in detail why being a big mom is a risk factor for shoulder dystocia because of "the extra soft tissue, mom's extra soft tissue...[W]e only have so much room that this baby can fit. And when mom has extra soft tissue, that takes away from some of that room" (R:141 p. 59). He also testified that prior to delivery a doctor can suspect macrosomia, because "there are reasons, risk factors that mom will have that predispose her to large babies. If mom is obese, if mom is a diabetic, those are risk factors for having a big baby. So that is something that needs to be identified by the doctor." (*Id.* at p. 60).

Dr. Wener then explained why and how to obtain an estimate of the size of the baby, by stating "Doctors measure the size of the baby during the pregnancy to get an idea of whether the baby is growing appropriately." (R. 141 at pp. 58-60). "But at term if you're trying to decide on whether this is a macrosomic baby, there's only really two ways that we know that can help to determine that." *Id.* "Number one is physically examining the mom's abdomen, feeling the baby [t]hat is called a Leopold " *Id.* "The other is ultrasound." (*Id.* at p. 61). And that given all these, "that is how we would know if there's a chance for a macrosomic baby." *Id.* He explained that having maternal obesity, big mom, "are definitely more difficult if the mom is heavy." (*Id.* at p. 62). And "because there is—between mom and the baby is mom's abdominal wall and the uterus. And the bigger the mom's abdominal wall is, the more difficult it is to evaluate the size of the baby." *Id.*

In assessing this testimony, it is important to recall that defendants expert witness, Dr. Rouse, as outlined in section B(1)(vii), essentially agrees with Dr. Wener's position on obesity and shoulder dystocia. Based upon the testimony in this case, a reasonable juror could readily surmise based upon testimony of both Dr. Wener and Dr. Rouse that if you have an obese mom, you are at risk for having a big baby and, if you have a big baby, you may not know until after delivery, because prenatal measurements are made difficult by the obesity.

ii. Gestational Diabetes as a Risk Factor for Shoulder Dystocia.

Dr. Wener opined generally that gestational diabetes is diabetes that occurs in pregnancy, which is diagnosed after the mother performs the "one hour glucose

challenge." (R:141 p.63). If the mother's one hour glucose test is abnormal, she then undergoes a three hour test to determine whether she had gestational diabetes. (Id.). It is well accepted that infants of gestational diabetic mother tend to become bigger and thus are more of a fetal risk for delivery complications. (Id. at 64.) With respect to his opinion that Dr. Balink should have ordered a three-hour glucose tolerance diagnostic test for gestational diabetes, Dr. Wener testified that Ms. Seifert had an abnormal one hour glucose screen above 130 and the fact that she had a macrosomic infant informed his opinion that she more likely than not, to a reasonable medical probability, had gestational diabetes, for which Dr. Balink failed to test. (Id. at pp. 82-85).

Dr. Wener explained that Ms. Seifert's one-hour glucose screen was 131. When questioned directly about ACOG Practice Bulletin No. 30, Dr. Wener explained that the accuracy of a 130 standard for determining whether to administer a three-hour glucose tolerance diagnostic test was recognized as superior:

> "As of 2009 the standard of care was 130." referring to ACOG No. 30]... "First of all that was 2001. Second of all if you read that guideline it'll tell you that even in 2001 they were discussing the 130. The 130 was used more often even at that point then 140. They also brought up the point that at 130, 25 percent more gestational diabetics are identified using the 130 numbers. So even then – this was eight years later, when 2009 came about and even if you were still a believer in the 140, you have a patient here that's obese and a patient that has a higher risk for gestational diabetes. The standard of care required a three hour GTT." (Id. at p. 133.)

He explained that the factors evaluated together – not each in isolation – led to his opinion that the Plaintiff suffered from gestational diabetes. (Id. at pp. 85, 86, 134, 136, 142-43). Dr. Wener opined that had Mrs. Seifert been properly administered a three hour glucose test she would have been diagnosed a gestational diabetic, a

known risk of shoulder dystocia. At that point Dr. Balink would have an obese mother with gestational diabetes and a potentially large fetal weight all three risk factors of shoulder dystocia, that together, requiring that she inform Mrs. Seifert of the risks and alternatives to having a vaginal delivery.

iii. Macrosomia or LGA as a Risk Factor for Shoulder Dystocia.

It is clear from Dr. Wener's testimony that Dr. Balink should have *suspected* that the infant was macrosomic. Mrs. Seifert was obese and obese women tend to have bigger babies and Mrs. Seifert was at increased risk of having a bigger baby because she was a gestational diabetic. Defendants' expert, Dr. Rouse agreed that obese woman have bigger babies. (R:146 p. 216). He also testified that big babies are more likely to have shoulder dystocia. (Id. at 207).

Dr. Wener's testimony was that Dr. Balink should have suspected macrosomia because of the other factors present during prenatal care, i.e. obesity, gestational diabetes. Dr. Wener's testified that the infant fell within the range of macrosomia, i.e. above 4,000 grams and within less than 200 grams of 4,500 grams. Dr. Balink should have suspected macrosomia because, as Dr. Wener opined, Mrs. Seifert had the two most important risk factors for macrosomia, obesity and gestational diabetes. (R: 141 p. 165).

At trial, during cross-examination, Dr. Wener testified when asked whether "even at 9 pounds, 12 ounces, at 4,370, under the 4,500 gram cutoff, that's not macrosomia?" Dr. Wener testified, "...we're talking about a person. And when you're talking about 4,500 grams compared to 4,370 ... you're talking about 130

grams. That's, that's a tiny amount of weight.'" (R:141 p.160). Contrary to defendants' representations, Dr. Wener did not testify that estimating fetal weight by way of fundal heights and maternal factors was unacceptable nor did he testify inconsistently with testimony at deposition.

Again, all of Dr. Wener's testimony concerning macrosomia and the risk for shoulder dystocia, in this regard goes *to weight and credibility*. Dr. Wener referred to accepted principles of medical science and applied them to Mrs. Seifert to arrive at his opinion, exactly what *Daubert* requires him to do.

2. Dr. Wener's Individualized Approach to Treating Patients is Supported by Medical Literature and the Defendants' Own Experts

The reliability of Dr. Wener's testimony is strengthened by the medical literature, which offers no exclusive standard of care. The Defendants claim that Dr. Wener's refusal to rely on literature, which he acknowledged existed, undermines his reliability. Defendant's argument assumes that if medical literature exists on a certain topic it is authoritative and correct. Dr. Wener did not refuse to rely on such literature; rather, Dr. Wener considers the conflicting medical literature and analyzed such literature to his hands-on, proven experience.

The Defendants argue that Dr. Wener's testimony is unreliable yet cite to a single ACOG Bulletin that *is not the standard of care but is a guideline*. Dr. Wener explained that ACOG recommendations do not apply or predict all clinical events and do not necessarily conform to relevant standards of care. (R:141 pp. 133-35.) Dr. Wener testified that ACOG Practice Bulletin published in 2001 did not create the

standard of care. (R. 142: p. 134). "The ACOG bulletin is and has never been the standard of care." (Id.)

The Court need only look to page one of the ACOG Practice Bulletin where it states "[t]hese guidelines should not be construed as dictating an exclusive course of treatment or procedure." (R.128: p. 759 (cover page)). Variations in practice may be warranted based on the needs of the individual patient, resources, and the limitations unique to the institution or type of practice. (Id.) The ACOG bulletin is actually supportive of Dr. Wener's opinion that patients care will vary patient-to-patient. (Id.)

Dr. Wener articulated why he does not rely solely on literature and how he bases his decision on each individual patient. Literature sought by defense counsel that would address all risk factors cumulatively simply does not exist. Relying on one factor in one article would fail to take into account considerations individual to each patient.

The circuit court explained at sidebar that "the fact that testimony can be undermined with conflicting medical literature does not mean that it cannot be given. The testimony was based on factors, sufficient, though minimal, for the Doctor to give it. All of that can be fleshed out during cross examination and I concluded it was sufficient foundation and that it was sufficiently reliable to be admitted." (R: 141 pp. 94 – 96.) "It is based on science, its science that you disagree with, its science that is arguable. But it is scientific insofar as there are known indicators upon which Dr. Wener says he relied on." (Id.) Defendant's counsel renews his motion to exclude Dr. Wener's opinion regarding prenatal care again at the completion of his testimony. (Id.

at 191.) Defendant's counsel did not attack Dr. Wener's testimony regarding delivery of the minor plaintiff.

Further, Defendant's argument concerning *Daubert* in trial is legally incorrect. *Daubert* does not require that each and every scientific testimony be testable but assumes that all science is testable. The ability to test the theory is but one aspect of the *Daubert* factors. "Shaky but admissible evidence is to be attached by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook*, 598 F. 3D 558, 564 (9th Cir. 2010) citing *Daubert*, 509 U.S. at 596.

The *Primiano* court cites classic medical texts stating that medicine is deeply rooted in a number of sciences and charged with the obligation to apply them for man's benefit. "Evidence-based medicine is the conscientious, explicit and judicious use of current best evidence in making decisions about the care of individual patients." *Primiano,* 598 F. 3d at 565 citing *Harrison's Principles of Internal Medicine* 3 (Dennis L Kasper et al. eds., 16th ed. 2005). The Defendant's argument suggests that all medical treatment is defined precisely within medicine text and literature taking into account all case-by-case factors. This is not reality.

Dr. Wener with 36 years' experience testified that, "[b]efore Dr. Balink delivered this baby, she didn't go to the literature to look up articles. And that's one of the reasons when I'm asked to review medical records, I don't go to literature to review medical records. I tried to look at the medical records as I would if I were Dr. Balink and if I were trying to deliver this baby." (R: 141 p. 136).

Medical decision-making relies on judgment, a process that is difficult to quantify of even to assess qualitatively. *Primiano,* 598 F. 3d at 565. Those in the

medical profession must use their knowledge and experience to weigh known factors with inevitable uncertainties to make sound decisions. *Id.* This is the methodology that Dr. Wener employed and the circuit court recognized.

Courts have determined that medical knowledge is often uncertain, given the complexity of the human body. *Primiano,* 598 F. 3d at 566. *See also United States v. Sandoval-Mendoza,* 472 F. 3d 645, 655 (9th Cir. 1995). The circuit court agrees after eight days of trial, stating at the motions after verdict hearing that medical opinion "is not in the nature of engineering or other more hard science. It is not a mathematical calculation wherein one plus one plus one always yields three. Sometimes it yields 3.2 and sometimes it yields 2.8" (R: 151 p. 3.)

3. Dr. Wener's Testimony was Validated By Defendants Own Expert Dr. Rouse at Trial.

As outlined in Section B(1)(vii), above, the Defendant's own expert Dr. Rouse supports portions of Dr. Wener's testimony, which they argue is unreliable and thus inadmissible. Dr. Rouse supports Dr. Wener's testimony regarding the relationship regarding gestational diabetic women and large babies, that ACOG literature is a guideline and not a standard of care, and that a patient must be treated as a whole. Dr. Rouse testified that literature is not always the way to do and "we would not need doctors, we could just have robots if we didn't have individualized care." (R. 146: pp. 193) Dr. Rouse also supported Dr. Wener's opinion concerning traction, as did Defendant's expert, Dr. Scher.

It is disingenuous for the defendants to suggest that Dr. Wener's testimony was unreliable when it is based on the same science as their own expert. Dr. Wener's

testimony was based on well-known and well-established medicine and that is why the matter was submitted to a jury.

4. Dr. Wener's Opinions Were Appropriately Admitted and Therefore Do Not Warrant a New Trial

Dr. Wener's testimony was admissible, competent and credible on both prenatal care, labor, and delivery. If the portion of Dr. Wener's testimony regarding the risk factors of shoulder dystocia, i.e. failure to determine Mrs. Seifert as a gestational diabetic, failure to obtain estimated fetal weight, use of the vacuum, was shaky at best the testimony would go to credibility and not admissibility.

Further, even without Dr. Wener's testimony regarding the risk factors of shoulder dystocia and informed consent the jury could, and did, find that Dr. Balink was negligent during the delivery of Braylon Seifert. Contrary to the defendants' assertion, the jury's determination relative to the negligence in this case had nothing to do with the glucose tolerance test, the results of the screening, or the threshold for macrosomia. All these factors had everything to do with the occurrence of shoulder dystocia but, once the shoulder dystocia occurred, the standard of care required Dr. Balink to relieve the dystocia without excessive traction to avoid a permanent brachial plexus injury.

Dr. Wener's criticisms and opinions regarding Dr. Balink's prenatal care all speak to the issue of informed consent. The jury specifically found that Dr. Balink did not fail to provide Kimberly Seifert with information necessary to make an informed decision. (R. 115). The Defendant attempts to separate the Dr. Wener's

testimony regarding the risk factors of shoulder dystocia and informed consent to overturn the jury's verdict is unfounded.

The jury's verdict was based upon overwhelming evidence that Dr. Balink was negligent in the delivery of Braylon Seifert by applying excessive traction upon his head and neck in the presence of shoulder dystocia causing Braylon's injury. While Dr. Balink contended that she did not use excessive traction, it was up the jury to decide whether Dr. Balink's testimony was more likely or not true. There was overwhelming evidence on which the jury could base their decision that the injury occurred because excessive traction was applied at the time of delivery upon the nerve. This evidence was put forth by both Dr. Grossman and Dr. Adler.[2] It was Dr. Wener's testimony that it was below the standard of care to apply excessive traction by a delivery physician. Dr. Wener opined "My opinion is that excessive traction was applied and the reason for that is, number one this was a significant injury involving all the nerves, requiring graphs. And to see significant injury in a situation like that, that implies force." (R: 141, pp. 113 – 114)

This testimony by Dr. Wener was not challenged at the pretrial, nor was it challenged at any point during trial. In fact, the Defendant's own obstetrical expert, Dr. Rouse testified that when he is teaching residents how to handle shoulder dystocia, he does not allow them to use excessive traction. (R:146 p. 224-225) Dr. Rouse testified that he would not allow a resident who was delivering an infant to use excessive traction because it can cause a permanent brachial plexus injury. *Id.*

[2] Trial testimony of Dr. Daniel Adler (R. 141) and video testimony of Dr. John Grossman (R. 140) are incorporated herein.

Further, the Defendant's pediatric neurologist Dr. Mark Scher testified that in general excessive traction applied by a physician in the delivery of a baby and the presence of shoulder dystocia can cause a permanent brachial plexus injury. (R: 146 p. 71). Dr. Scher agreed with Plaintiff's counsel that a child who suffers an avulsion at birth in the presence of shoulder dystocia, that can be cause by excessive lateral traction applied by a physician. (R:146 p. 75).

The judgment in this case should be affirmed.

III. PLAINTIFFS' COUNSEL'S CLOSING ARGUMENTS WERE NOT IMPROPER, DID NOT PREVENT THE TRUE ISSUES OF THE CASE FROM BEING TRIED, AND WERE NOT PREJUDICIAL TO THE DEFENSE

A. Law on Improper Statements of Counsel

In 1984, in *Lobermeier v. General Tel. Co., 119 Wis.2 129, 136, 349 N.W.2d 466, 470 (1984),* the court said failure to demand a mistrial is tantamount to an acknowledgement that the error is harmless. A new trial is granted only if the statements are "plainly unwarranted and clearly injurious" and "cause prejudice to the opposing party and unfairly influence a jury's verdict." Id.

There has been a longstanding history prohibiting counsel from inflaming the passions and prejudices of the jury. *See United States* v. *Young,* 470 U.S. 1, 9 (1985) (an attorney cannot 'make unfounded and inflammatory attacks on the opposing advocate"), *Brown v. Swineford.* 44Wis. 282, 293 (1878), see also *Sanders-El v. Wencewicz.* 987 F.2d 483, 484-85 (8th Cir. 1 993); *Rickabus v. Gott.* 16 N.W. 384, 385 (Mich. 1883) ("The duty of the trial judge to repress needless scandal and

gratuitous attacks on character. . . and good care should be taken to discharge it fully and faithfully.").

Additionally, allowance of motion for new trial based on improper closing argument is only warranted where there is more than one inappropriate reference or statement and where there is a contemporaneous curative instruction. *Rodrick v. Walmart Stores East, L.P.*, 666 F. 3d 1093, 1099 (8th Cir. 2012); see also *Dole v. USA Waste Services, Inc.*, 100 F.3d 1384, 1388 (8th Cir. 1996).

An instruction to the jury stating that the arguments of counsel are not evidence can mitigate the harm potentially caused by improper statements made by counsel during closing. *Valbert v Pass,* 866 F.2d 237, 241 (7th Cir. 1989). Since we "assume that the jury followed the court's cautionary instructions, we have no reason to believe that the jury impermissibly relied on counsel's argument, or any improper inference to be drawn therefore, in reaching its verdict. See, e.g., *United States v. Rose*, 12 F.3d 1414, 1426-26 (7th Cir. 1994). The Seventh Circuit has repeatedly recognized that "improper comment during closing argument rarely rise to the level of reversible error" *Probus v. K-Mart, Inc.,* 7984 F.2d 1207, 1210 (7th Cir. 1986).

1. Closing Arguments by Plaintiffs' Counsel Levine Did Not Influence the Jury and/or Prejudice Dr. Balink

Levine's closing argument did not cross these well-established lines with inflammatory rhetoric, personal character attacks, and blatant pleas to jurors' sympathies, prejudices and negative emotions. Like most medical malpractice cases, the medicine is complex, the arguments lengthy and contentious. In this case, there were two theories of liability. The jury found for the defendant on one theory and

found for the plaintiff on another. The jury clearly made a very thoughtful and thorough analysis of expert testimony and, in one instance, chose to accept the testimony of defendants' experts and, in the other instance, chose to accept the testimony of plaintiffs' experts. The Defendant either does not understand the medicine or are simply misconstruing the medicine to explain how it is possible that Levine influenced the jury's analysis if they actually found for both plaintiff and defendant. It is more likely that the jury followed the Court's instructions and believed some testimony and made their own determination on liability based upon the evidence.

2. Plaintiffs' Counsel Levine did not refer to Rules of the Road And Did Not Influence the Jury or Prejudice Dr. Balink

Defense counsel objected during closing arguments to Levine's example of how risks may accumulate as an example of the difference between an analysis of how risk may accumulate as opposed to considering each risk individually. At no time did Levine suggests that standard of care was being equated negligent operation of a motor vehicle, violation of speed limits and rules concerning weather hazards. At no time did Levine mention violations of any rules or rules of the road. (R. 150: pp 23-24). Moreover, this argument by Levine concerned the allegations of informed consent. The jury found for against the Plaintiff on this allegation. Surely then, Levine's argument on risk did not influence the Jury nor did it prejudice Dr. Balink in any way. Dr. Balink prevailed on the highly contested issue of informed consent. She cannot now say that this rhetoric negatively influenced the jury against her.

It was the Court impression that Levine had suggested to the jury to consider

all the facts and circumstances and that there is not a cookie cutter approach. (Id.) The circuit court found that the standard of care is a constellation that is supported by Dr. Wener's testimony. (Id. at 68). Levine did not mention this example again.

3. Plaintiffs' Counsel Levine's Statements to the Jury "Is that how you want your doctor to care?" was not so egregious as to warrant a new trial.

Defense counsel objected during closing arguments when Attorney Levine was asking the jurors whether defense expert, Dr. Rouse's care was the care they want from their doctor. This was found by the Court to be a "golden rule" type argument.

Whether this warrants a new trial involves a variety of factors including the nature of the case, the emphasis upon the improper measuring stick, the reference in relation to the entire argument the likely impact or effect upon the jury. *Rodriguez* v. *Slaitery,* 54 Wis. 2d 165, 166 (1972) (trial court is in a particularly good "on-the-spot" position to evaluate these factors).

In this case, the circuit court did provide a curative instruction out of an abundance of caution and at one point sustained an objection. (Id. at 35-36; 137-138). This surely was not the emphasis of Levine's entire argument. The particular argument pertained to gestational diabetes testing which was an issue of informed consent. This particular argument did touch upon the ultimate issue that was decided by the jury in this case, i.e. that negligence at delivery caused this injury. (R.115: p. 1-3)

The circuit court properly considered this objection during trial, provided a curative instruction, and properly denied a new trial. For the foregoing reasons, this is not now a proper basis for a new trial.

4. Other Statements by Plaintiff's Counsel During Rebuttal Closing Argument

Defendants assert that closing remarks by Levine relative to his feelings about the jury, comments about the closing argument of defense counsel was somehow so inflammatory that the jury's verdict should be overturned. At no time during Levine's argument did he suggest what he believed about a particular expert or his/her testimony, or what he believed the jury's findings should be. Rather, it was Levine's position that, in stark contrast to defendants' counsel, that the jurors knew exactly how to perform their task as jurors, that they were in the position to make decisions, analyze evidence as it was presented. (R. 150: pp. 118-119). At no time did Levine suggest or argue that the jurors were free to speculate or guess what the standard of care, skill and judgment is in deciding a case, or that they were to disregard any of the expert testimony.

Levine never suggested that they could disregard the expert testimony. He simply told them that they had common sense to analyze the expert testimony and that they were smart enough to do so. It is highly unlikely that the jurors were confused over this benign statement to them.

Levine's arguments simply are not sufficiently egregious to warrant a new trial, nor do they offend any pretrial rulings of the Court.

IV. A NEW TRIAL IS NOT WARRANTED IN THE INTEREST OF JUSTICE AS ALL GENUINE ISSUES OF THE CASE WERE TRIED.

Here, there were no errors in the trial and the jury's verdict is adequately supported by credible evidence and was not contrary to law or the weight of evidence.

The circuit court analyzed each challenge to admissibility of evidence and testimony, as well as scope and content of closing arguments after applying the appropriate legal standard and did not abuse its discretion in admitting any of the challenged evidence or argument. As such, there were no errors in the trial.

More so, no evidence that was subject to challenge was so overwhelming that it caused substantial prejudice to the defendants. Plaintiffs' counsel, Levine's argument regarding risk was disregarded by the jury. The jury decided that Dr. Balink provided sufficient information, e.g. she did not have to discuss or obtain informed consent.

The verdict was not contrary to law nor the weight of the evidence. There was significant evidence, appropriate charge to the jury, and evidence submitted by both sides. Nothing that was challenged and then admitted by a party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice.

As evidenced in the arguments above, this case did not present exceptional circumstances to order a new trial in the interests of justice. The Defendants received a fair day in court. The applicable law, principles of justices, and fairness to the injury plaintiff demand that this jury verdict be affirmed.

CONCLUSION

For the foregoing reasons the Court should affirm the Judgment of the circuit court.

Dated this 14th day of July, 2014

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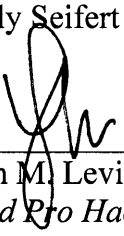

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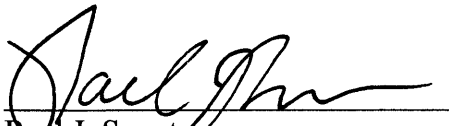

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FORM AND LENGTH CERTIFICATE

I hereby certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b) and (c) as modified by the court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, leading of minimum 2-point and maximum 60-character lines. The length of this brief is 10,897 words.

Dated this 8th day of July, 2014

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate had been served with the paper copies of this brief filed with the Court and served on all opposing parties.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(2)(a)

I hereby certify that separately filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) A table of contents;

(2) The findings or opinion of the circuit court; and

(3) Portions of the record essential to an understanding of this issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATE OF SERVICE

I hereby certify that on July 14th, 2014 I caused copies of the foregoing brief to be deposited in the United States Mail for delivery to counsel for the parties by first-class mail at the following addresses:

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CERTIFICATE OF FILING IN COMPLIANCE WITH WIS. STAT. § 809.80(3)(b)

I hereby certify that on July 14th 2014 I caused this brief to be deposited in the United States mail for delivery to the clerk by first-class mail pursuant to Wis. Stat. § 809(3)(b)1.

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