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.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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

Counsel for Defendants-Appellants, Kay M. Balink, M.D. and ProAssurance Wisconsin Insurance Company:

Wilson Elser Moskowitz Edelman & Dicker, LLP
Samuel J. Leib
State Bar No. 1003889
Brent A. Simerson
State Bar No. 1079280
River Bank Plaza, Suite 600
740 N. Plankinton Avenue
Milwaukee, WI 53203
(414) 276-8816
(414) 276 8819

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

ARGUMENT

I. THE PLAINTIFFS CANNOT, BASED ON THE RECORD, ARTICULATE A BASIS FOR THIS COURT TO CONCLUDE THAT DR. WENER FOUNDED HIS OPINIONS ON A RELIABLE METHODOLOGY OR RELIABLY APPLIED THOSE OPINIONS TO THE FACTS OF THE CASE.

The Plaintiffs' response brief is devoid of any application of the *Daubert* standard to Dr. Wener's opinions. As the Plaintiffs acknowledge, Dr. Wener's opinions must be based on "reliable principles and methods," and he must apply "the principles and methods reliably to the facts of the case." (Pls.' Resp. Br. at 16.) However, in supposedly applying the *Daubert* standard, the Plaintiffs fail to mention any "principles and methods" whatsoever. (Id. at 19-20.) Instead, the Plaintiffs simply summarize Dr. Wener's baseless opinions, (id. at 24-28), and regurgitate the false premise that medicine is an "individualized" puzzle and is divorced from scientific inquiry, (id. at 28-31). Moreover, the Plaintiffs ignore entirely Dr. Balink's argument that Dr. Wener made numerous mistakes in applying his opinions to the facts of the case. (See Defs.' Br. at 25-30.)

The dearth of any application of the *Daubert* standard is consistent with the record. It is clear from the pretrial hearing transcript that the trial court struggled with its decision. Neither the trial court nor the Plaintiffs applied any recognized *Daubert* factors or cited any *Daubert* case law in blessing Dr. Wener's so-called "holistic approach." Dr. Balink submits that such an approach makes Dr. Wener's opinions indistinguishable from his personal preferences and, if accepted at face

value, risks eviscerating the *Daubert* requirement in medical malpractice cases in Wisconsin.

Dr. Wener's opinions do not survive straightforward scrutiny under *Daubert*. And rather than focus on applying the *Daubert* standard, the Plaintiffs spend considerable time raising secondary arguments. Dr. Balink will reluctantly respond to those arguments in the ensuing subsections: (A) the opinions of Dwight J. Rouse, M.D., the defense's obstetrical and maternal-fetal expert, in no way support Dr. Wener's opinions and do not, in any event, obviate the requirement that Dr. Wener's opinions be based on a reliable methodology; (B) Dr. Balink does not argue that literature is required to pass muster under *Daubert*; (C) Dr. Wener's opinions were not supported by medical literature; and (D) the erroneous admission of unreliable opinions on gestational diabetes, macrosomia, ultrasound, and use of vacuum warrants a new trial.

A. Dr. Rouse's Opinions in No Way Support Dr. Wener's Opinions and Do Not, in Any Event, Obviate the Requirement that Dr. Wener's Opinions Must be Based on Reliable Principles or Methodology.

The Plaintiffs attempt to substantiate Dr. Wener's opinions by contending that Dr. Rouse agreed with them. This contention is patently false and is, in any event, irrelevant. As background, Dr. Rouse, unlike Dr. Wener, easily supported his opinions with reliable principles and methodology. In addition to his qualifications, like education, training, and experience, Dr. Rouse testified that he

kept abreast of medical sciences through academia by, for example, training residents and fellows, supervising prenatal and delivery care, performing clinical research, and publishing and peer-reviewing literature (including on the topics of shoulder dystocia or brachial plexus injuries). (R. 146: pp. 132-34, 139-42.) He is on the American College of Obstetrics and Gynecology's ("ACOG") practice bulletin committee which publishes guidelines on gestational diabetes, macrosomia, and shoulder dystocia, (id. at pp. 134-37), and he was an author and chief editor of *Williams' Obstetrics*, the worldwide authoritative textbook on obstetrics, including its section on operative delivery and brachial plexus injuries, (id. at pp. 122, 142-43).

As to his substantive opinions on the case, Dr. Rouse disagreed with Dr. Wener on every point. He opined that Ms. Seifert was not a gestational diabetic (id. at pp. 148-55); he opined that Braylon Seifert was not macrosomic (id. at pp. 168-70); he opined that pre-delivery ultrasound was not needed (id. at pp. 157-59, 169-70); and he opined that the use of vacuum was not contraindicated (id. at pp. 161-62). However, the most important difference between Dr. Rouse and Dr. Wener was *how* Dr. Rouse supported his opinions. Dr. Rouse repeatedly referenced recognized guidelines which, at the very least, provided a reliable basis for his opinions. He never resorted to the nebulous "holistic approach" championed, without any basis in medical sciences, by Dr. Wener.

The Plaintiffs repeatedly refer to four quotes by Dr. Rouse:

- "Defendants' own expert, Dr. Rouse, agreed with at least some of Dr. Wener's opinion when he testified that, '[a]ll other things being equal, [obese] women have bigger babies,'" (Pls.' Resp. Br. at 8, 18, 25, 27);

- "Dr. Rouse also testified that big babies are more likely to have shoulder dystocia," (id.);

- Gestational diabetes "can lead to an overgrown baby" and "lead to shoulder dystocia," (id. at 8, 31); and

- "Additionally Dr. Rouse agreed that medicine is individualized," (id. at 8-9, 18, 31).

Each of these quotations is exceedingly general and is excised from the broader context of Dr. Rouse's testimony. The first three quotes refer generally to the size of the baby and the size of the baby's relationship to shoulder dystocia. As mentioned above, Dr. Rouse specifically opined that Braylon Seifert was not macrosomic and that Ms. Seifert was not a gestational diabetic. Dr. Rouse's opinions in no way support Dr. Wener's opinions.

The fourth reference to Dr. Rouse's testimony—that medicine is "individualized"—was accompanied by Dr. Rouse's statement that "[physicians] can't have a free for all where everyone does anything he wants; we need some guidelines." (R. 146: p. 194.) Indeed, at that point in the examination, Plaintiffs' counsel was referring Dr. Rouse to the ACOG practice bulletins, which Dr. Rouse relied upon as a source of guidance for physicians. Dr. Wener relied on no such source of guidance, insisting instead upon a "holistic approach" composed of his own personal preferences.

B. Dr. Balink Does Not Argue that An Expert Must Rely on Literature to be Admissible Under *Daubert*.

The Plaintiffs devote a significant amount of their brief alleging that Dr. Balink is asking this Court to adopt a literature requirement in medical malpractice cases. (Pls.' Resp. Br. at 18-22, 28, 30.) This is certainly not so. While medical literature is a profound source of information in the medical sciences, it is not the only means by which a qualified expert may support his or her opinions. Dr. Rouse embodies several examples. His academic experience required him to train residents and fellows in the latest advancements in obstetrics, including issues relating to fetal size, gestational diabetes, and shoulder dystocia. He was a member of a committee charged with disseminating guidelines on obstetrics, including macrosomia, gestational diabetes, and shoulder dystocia. He published and peer-reviewed literature on obstetrical issues, including issues of shoulder dystocia and gestational diabetes.

Dr. Balink is unconcerned about *which* reliable principle or method the expert relies upon. For instance, Dr. Balink does not ask that this Court endorse the ACOG guidelines. Rather, Dr. Balink asks this Court to reaffirm the basic *Daubert* principle that an expert must rely upon *some* reliable principle or method. This, Dr. Wener failed to do.

As a final note on point, the Plaintiffs did not address, let alone rebut, the testimony of Dr. Wener's colleague and practice partner, Dr. Duboe. (Defs.' Br. at

22 n.3.) Dr. Duboe undercut Dr. Wener by stating under oath that everyone in Dr. Wener's practice group, including Dr. Wener, follows the ACOG guidelines and uses 135 mg/dL as the threshold for ordering the diagnostic glucose tolerance test. In other words, according to Dr. Duboe, Dr. Wener misrepresented his own standard of practice to the jury on an issue vital to the case. Dr. Balink asks that this Court construe *Daubert* in a manner which will curtail this kind of gamesmanship.

C. Dr. Wener's Opinions Were Neither Based on Nor Supported by the Medical Literature.

Incredibly, the Plaintiffs argue that Dr. Wener relied on literature and that the literature supports his opinions. (Pls.' Resp. Br. at 22-23, 28-29.) Dr. Wener clearly disavowed any reliance on medical literature. (R. 66: Ex. 3 at pp. 13:4-13:17, 18:9-18:19, 23:2-24:5, 43:14-44:2, 59:15-60:7, 84:9-85:2, 95:13-96:9, 97:24-98:18, 100:9-100:17, 176:9-177:14, 185:8-186:16; R. 142: pp. 135-36).

As mentioned in Dr. Balink's opening brief, Dr. Wener testified at trial that, although he knew that there was medical literature on topic, he declined to consult or rely upon any of it. (R. 142: p. 188.) It is obvious from this testimony that Dr. Wener's opinions are not based on medical literature. Furthermore, they are not supported by the medical literature. (Defs.' Br. at 23-25.) The Plaintiffs' suggestion to the contrary must be disregarded.

D. The Erroneous Admission of Unreliable Opinions on Gestational Diabetes, Glucose Tolerance Testing, Macrosomia, Use of Ultrasound, and Use of Vacuum Undermines Confidence in the Jury's Verdict and Justifies a New Trial.

Finally, the Plaintiffs attempt to skirt Dr. Wener's obligation to provide a reliable basis for his opinions by arguing that the jurors did not rely upon those opinions in rendering their verdict. (Pls.' Resp. Br. at 32-34.) Instead, the Plaintiffs insist that the jurors must have reached their verdict by concluding that Dr. Balink applied an inappropriate amount of traction in delivering Braylon Seifert. (Id.) They argue that all other issues pertained to informed consent. (Id.) In advancing this argument, the Plaintiffs ignore (1) the plain language of the special verdict form; (2) Dr. Wener's opinions that Dr. Balink was *negligent* for failing to perform a three-hour glucose tolerance test and a pre-delivery ultrasound; and (3) the numerous scenarios in which the jury's negligence verdict could have been predicated on something other than inappropriate traction. (Defs.' Br. at 30-32.)

Most importantly, the Plaintiffs commit the same error that the trial court committed by not referencing the legal standard governing the erroneous admission of evidence. The standard is not whether there is *any* evidence which might support the jury's verdict; rather, the standard is whether there exists a "reasonable probability" that the erroneously-admitted evidence "contributed to the outcome of the action or proceeding at issue." *Evelyn C.R. v. Tykila S. (in Re Jayton S.)*, 2001 WI 110, ¶ 28, 246 Wis. 2d 1, 629 N.W.2d 768 (citations omitted).

The Plaintiffs do not dispute in their brief that the traction issue played a minor role at trial, comprising very little of the total time. Gestational diabetes, glucose tolerance testing, macrosomia, ultrasonic fetal measurements, and vacuum use were the dominant issues disputed by the experts. For that reason, the Court should conclude that Dr. Wener's unreliable opinions on these issues, erroneously admitted, are cause to order a new trial in this matter.

II. PLAINTIFFS' COUNSEL'S STATEMENTS DURING CLOSING ARGUMENT WERE PLAINLY PREJUDICIAL TO DR. BALINK.

The primary thrust of the Plaintiffs' arguments is that, while counsel's statements may have been inappropriate, they were not so prejudicial as to warrant a new trial. Dr. Balink disagrees. Each category of statements, explored at length below, hindered the jurors' ability to accomplish their role as finders-of-fact under the law. Cumulatively, the comments were so egregious as to entitle Dr. Balink to a new trial.

A. Statements Regarding Risk Factors and Driving

Dr. Balink was prejudiced when Plaintiffs' counsel made a lengthy comparison between the risk factors allegedly present in Ms. Seifert's situation and risk factors present while driving. The Plaintiffs aver that this comparison could not have confused the jury's understanding of the standard of care applicable to Dr. Balink. However, counsel's analogy inexcusably impressed upon the jury that Dr. Balink's inattentiveness to accumulating risk factors while caring

for Ms. Seifert was comparable to a driver ignoring accumulating risk factors while driving. The clear implication is that a driver who ignores speed limits and hazardous weather conditions is more likely to get into an accident. The impression that the jury is left with is that medical malpractice is comparable to automobile negligence. It is not. The jury instructions have far different standards and rules as compared to automobile liability.

Counsel's statements prejudiced the defense by relaxing the standard of care applicable to physicians. Jurors can relate to driving because they do it every day. Counsel's statements suggest, for example, that gestational diabetes is like exceeding the speed limit. All jurors are aware that exceeding the speed limit is both unlawful and dangerous. Gestational diabetes, on the other hand, has standards of care relative to its diagnosis and treatment. By counsel stating that speeding is a risk factor like gestational diabetes is a risk factor, he implored the jurors to believe that Dr. Balink's care regarding gestational diabetes was tantamount to breaking the speed limit on the highway. This is an unacceptable perversion of the standards of care in medicine. The analogy had a likelihood of misleading the jury and preventing Dr. Balink's case from being assessed within the proper legal framework.

B. "Golden Rule"-Type Statements

As to counsel's "golden rule"-type arguments, the Plaintiffs refer the Court to the test set forth in *Rodriguez v. Slattery*, 54 Wis. 2d 165, 170, 194 N.W.2d 817

(1972): the Court may order a new trial in response to such "golden rule" arguments after considering factors such as 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." The Plaintiffs contend that a new trial should not be granted because the Court provided a curative instruction, the argument was not the emphasis of counsel's closing, and the argument did not have an effect on the jury's verdict.

The Plaintiffs' reasoning is misguided. This case involved a permanently injured child and was undisputedly emotional. Under such circumstances, the jurors are particularly vulnerable to statements intended to inflame those emotions. The Plaintiffs cannot downplay counsel's emphasis on these arguments when counsel made the same comment *twice* during closing argument—once during the primary closing and another during rebuttal. Contrary to the Plaintiffs' brief, the Court *did not* impart a curative instruction on the jury with respect to these statements. (R. 150: pp. 25, 123.) Finally, no one knows what the jury relied upon in reaching its verdict, see *supra* Section I.D, and the issues testified to by Dr. Rouse, like gestational diabetes, dominated the content of the trial from beginning to end. It is likely that the jury contemplated issues like gestational diabetes in arriving at its verdict. As a consequence, counsel's statements inciting fear in the minds of jurors as to the care advised by Drs. Rouse and Balink were highly prejudicial to the defense's case.

C. Numerous Statements Accusing Defense Counsel of Calling the Jurors Dumb While Simultaneously Characterizing the Jurors as Experts

The numerous statements made by counsel that both disparaged defense counsel and muddied the jury's duty to rely on expert testimony also warrants a new trial. The Plaintiffs deny that such statements were "somehow so inflammatory" as to justify a new trial because they did not target any specific expert or request that the jury make any specific finding. (Pls.' Resp. Br. at 38.) Rather, the Plaintiffs contend that the statements simply conveyed "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 [sic]." (*Id.*) This explanation ignores the very words spoken by Plaintiffs' counsel.

Counsel's statements were not reaffirming the jury's duty as set forth in the jury instructions. The statements sought to convince the jury that Attorney Leib believed that the jurors were not smart enough to understand the evidence or their responsibilities. For example, counsel stated that "[t]hese are the kind of arguments you make to juries if you think they're not too smart. Fool you, scare you, you know? You people are from Lancaster. How smart could you be, right? I think you're pretty smart. I think you get it. I think you see through all this nonsense. I think you should be respected, not told what to do or fooled. You should be talked to like adults, make your own decisions about this case. Not be

told what to do." (R. 150: p. 125.) There is no way to interpret this statement other than as a direct attack on defense counsel.

Plaintiffs' counsel also tried to convince the jurors that they were experts in the medicine. For example, he stated that "I've got a little more faith in you than [Attorney Leib] does, because he spent the last hour and a half telling you . . . that you're not going to be experts -- you're not going to know the information. I disagree." (*Id.* at pp. 118-19.) As another example, he stated that "I think you've learned the medicine and I think you are experts in a sense." (*Id.* at p. 138.) These statements clearly intended to persuade the jurors to believe that, just because they had sat through seven days of trial, they were experts in the issues of medicine that this case presented. This is not an explanation of the jury's duty; it is an explanation of precisely what a jury *may not do*.

Furthermore, counsel made all of these statements during rebuttal and at a time when defense counsel would have no opportunity to respond. The last thing that the jury would hear before considering the evidence was invectives directed at defense counsel and compliments which implied that the jurors had the capacity or responsibility to arrive at their own opinions about the medicine. Additionally, the comments distracted the jury from the evidence adduced at trial. A new trial is required to permit the issues to be tried without the taint of counsel's inflammatory sideshow.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment of the circuit court and remand the case for a new trial.

Dated this 13th day of August, 2014.

WILSON ELSER MOSKOWITZ EDELMAN
& DICKER, LLP
Attorneys for Defendants-Appellants, Kay M. Balink, M.D. and ProAssurance Wisconsin Insurance Company

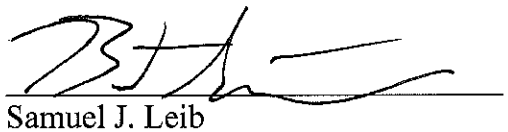
Samuel J. Leib
State Bar No. 1003889
Brent A. Simerson
State Bar No. 1079280

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, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this brief is **2,990 words**.

Dated this 13th day of August, 2014.

WILSON ELSER MOSKOWITZ EDELMAN
& DICKER, LLP
Attorneys for Defendants-Appellants, Kay M. Balink, M.D. and ProAssurance Wisconsin Insurance Company



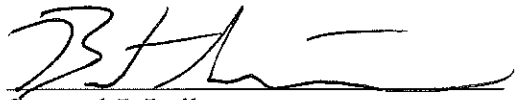
Samuel J. Leib
State Bar No. 1003889
Brent A. Simerson
State Bar No. 1079280

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 the 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 has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 13th day of August, 2014.

WILSON ELSER MOSKOWITZ EDELMAN
& DICKER, LLP
Attorneys for Defendants-Appellants, Kay M. Balink, M.D. and ProAssurance Wisconsin Insurance Company



Samuel J. Leib
State Bar No. 1003889
Brent A. Simerson
State Bar No. 1079280

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 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:

Paul J. Scoptur, Esq.
Aiken & Scoptur, S.C.
2600 North Mayfair Road, Suite 1030
Milwaukee, Wisconsin 53226

Kenneth M. Levine, Esq.
Kenneth M. Levine & Associates
32 Kent Street
Brookline, Massachusetts 02445

Jamie Stock-Retzloff, Esq.
Dean Health Plan, Inc.
1277 Deming Way
Madison, Wisconsin 53717

Chad R. Gendreau, Esq.
Wisconsin Department of Justice
P. O. Box 7857
Madison, Wisconsin 53707

Dated this 13th day of August, 2014.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Attorneys for Defendants-Appellants, Kay M. Balink, M.D. and ProAssurance Wisconsin Insurance Company

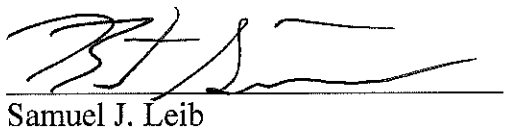
Samuel J. Leib
State Bar No. 1003889
Brent A. Simerson
State Bar No. 1079280

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

I hereby certify that on August 13, 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.

Dated this 13th day of August, 2014.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Attorneys for Defendants-Appellants, Kay M. Balink, M.D. and ProAssurance Wisconsin Insurance Company



Samuel J. Leib
State Bar No. 1003889
Brent A. Simerson
State Bar No. 1079280