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STATE OF WISCONSIN
IN SUPREME COURT
Appeal No. 14-AP-195

BRAYLON SEIFERT, by his Guardian ad litem, PAUL J. SCOPTUR, KIMBERLY SEIFERT and DAVID SEIFERT,

Plaintiffs-Respondents,

DEAN HEALTH INSURANCE and BADGERCARE PLUS,

Involuntary-Plaintiffs,

v.

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

Defendants-Appellants-Petitioners.

BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS

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

Counsel for Defendants-Appellants-Petitioners 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

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STATEMENT OF ISSUES

I. Are an expert witness' qualifications and personal preferences alone sufficient to meet Wis. Stat. § 907.02(1)'s new reliability standard?

Answer by the Court of Appeals: Yes.

II. Do the prejudicial comments made by Plaintiffs' counsel during closing argument require a new trial?

Answer by the Court of Appeals: No.

III. Under all of the circumstances, do the interests of justice require a new trial under Wis. Stat. § 751.06?

To Be Answered By The Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are both warranted. This case presents complex issues of Wisconsin law which justify an oral presentation by the parties. Additionally, published case law pertaining to the novel and important issues raised in this appeal would benefit Wisconsin litigants.

STATEMENT OF THE CASE

A. Nature of the Case

On July 29, 2011, the Plaintiffs initiated this medical malpractice lawsuit against Dr. Kay Balink, a family practice physician. The allegations underlying the Plaintiffs' complaint arose from Dr. Balink's prenatal care of Kimberly Seifert and the delivery of her child, Braylon Seifert, on May 28 and May 29, 2009. Plaintiffs alleged that Dr. Balink provided them negligent care, causing Braylon to encounter a shoulder dystocia and suffer a brachial plexus injury during delivery. Additionally, Plaintiffs alleged that Dr. Balink failed to acquire informed consent while caring for Kimberly Seifert.

B. Undisputed Background Facts

The undisputed facts adduced at trial pertain to (1) Dr. Balink's prenatal care of Kimberly Seifert, (2) Dr. Balink's delivery of Braylon Seifert on May 28 and May 29, 2009, and (3) the brachial plexus injury suffered by Braylon Seifert.

1. *Dr. Balink's Prenatal Care of Kimberly Seifert*

Dr. Balink assumed Kimberly Seifert's prenatal care on December 5, 2008. (R.116: Ex. 236 at RICH 283.) Between December 5, 2008 and the date of delivery, May 29, 2009, Ms. Seifert attended regular prenatal visits with Dr. Balink on approximately 10 occasions. (R.116: Ex. 237A at KB 8-14.) During these prenatal visits, Dr. Balink monitored, among other things, the approximate duration of Ms. Seifert's pregnancy, her weight, the glucose content of her urine,

and the approximate fundal height of her child. (Id.) Dr. Balink documented the results of each prenatal assessment in the medical records. (Id.)

Ms. Seifert's pregnancy lasted approximately 39½ weeks. (R.145: pp. 70-71.) During her pregnancy, she gained approximately 30 pounds. (Id. at p. 65.) At no time during the pregnancy did Ms. Seifert's urine contain significant amounts of glucose. (R.141: pp. 157-58.) The presence of glucose in the urine may alert the physician that the mother has gestational diabetes. (Id.) By the end of the prenatal period, Dr. Balink measured the fundal height of Ms. Seifert's child to be 39 cm. (R.145: p. 80.) Fundal height is one way in which a physician may determine the approximate size of the fetus. (R.146: pp. 155-57.)

In addition to these regular visits, Ms. Seifert underwent two other relevant prenatal activities to monitor her health and the health of her child. First, Ms. Seifert underwent ultrasonic imaging on five (5) occasions during the prenatal period. (Id. at p. 159.) Ultrasound is another tool available to physicians to determine the approximate size of the unborn child in addition to measuring the fundal height. (Id. at p. 215.) Dr. Balink did not order that Ms. Seifert undergo ultrasonic imaging immediately prior to induction of labor.

Second, Dr. Balink had Ms. Seifert undergo a one-hour glucose tolerance test on March 19, 2009. (R.116: Ex. 236 at RICH 226.) Physicians use the one-hour glucose tolerance test to screen for gestational diabetes in expectant mothers. (R.141: p. 63.) If the expectant mother's blood glucose exceeds a certain level, the

physician would then order the patient to undergo a three-hour glucose tolerance test. (Id.) The three-hour form of the glucose tolerance test is a diagnostic tool rather than merely a screening tool. (Id. at pp. 63-64.) Dr. Balink determined that Ms. Seifert need not undergo the three-hour diagnostic test because her blood glucose level on the one-hour screening test was below 140 mg/dL. (R.145: pp. 46-47.) Ms. Seifert's blood glucose level was 131 mg/dL. (Id.) Ms. Seifert was never diagnosed with gestational diabetes during her pregnancy. (R.142: p. 137.)

On May 26, 2009, Dr. Balink recommended induced labor for Ms. Seifert based on her elevated blood pressure (hypertension). (R.145: p. 74.) Hypertension is a warning sign of pre-eclampsia, a potentially life-threatening condition of pregnancy. (Id.) In Dr. Balink's induction order, she stated that Ms. Seifert's unborn child was "possibly LGA," or "large for gestational age." (Id.) Dr. Balink estimated the child's fetal weight at 3,856 grams (8.5 lbs). (Id. at pp. 80-81.)

2. *Dr. Balink's Delivery of Braylon Seifert on May 28 and May 29, 2009*

Ms. Seifert arrived at the hospital for induction on May 28, 2009. (R.145: p. 74.) Most of her stay awaiting delivery passed uneventfully. At around 2300, Ms. Seifert's cervix was fully dilated and effaced, meaning that she was anatomically ready for childbirth. (R.116: Ex. 236 at RICH 547.) After pushing for one hour, Ms. Seifert had not made significant progress in delivering Braylon and was exhausted. (R.145: pp. 117-19.) Based on maternal fatigue, Dr. Balink decided to

apply vacuum to coincide with Ms. Seifert's contractions to assist Braylon's descent through the birth canal. (R.116: Ex. 236 at RICH 547.)

At approximately 0021 on May 29, the crown of Braylon's head delivered. (R.116: Ex. 236 at RICH 501.) The delivery of the crown, however, was immediately followed by the retraction of the head back toward the womb. (R.145: p. 131.) This retraction is colloquially termed "the turtle sign." (Id.) The turtle sign informs the physician that the infant's shoulder is stuck on the mother's pubic symphysis, a part of the pelvis. (Id.) This event is called a "shoulder dystocia," and it is a life-threatening medical emergency. (Id.) If the physician is unable to dislodge the infant's shoulder from the pubic symphysis, the baby will die from hypoxia. (R.142: p. 42.)

Dr. Balink immediately recognized the turtle sign and diagnosed the shoulder dystocia. (R.145: p. 131-32.) She then undertook a sequence of recognized obstetrical maneuvers to release Braylon's shoulder from the pelvis, including the McRobert's maneuver, suprapubic pressure, an episiotomy, and a corkscrew maneuver. (R.116: Ex. 236 at RICH 501.) Fortunately, Dr. Balink managed to dislodge Braylon's shoulder. Dr. Balink testified that, during the process, she used nothing other than gentle traction on Braylon's head during this emergency. (R.145: pp. 133-34.) Braylon was born approximately three (3) minutes after Dr. Balink diagnosed the shoulder dystocia, or about 0024. (R.116: Ex. 236 at RICH 501.)

3. *The Brachial Plexus Injury Suffered by Braylon Seifert*

After Braylon was born, physicians diagnosed him with a permanent brachial plexus injury. The brachial plexus is a system of nerves that run from the base of the spine down the length of the arms. Because of Braylon's injury, his left arm has permanently impaired function and growth.

C. Opinions of Jeffrey Wener, M.D. and Rulings on Admissibility

Dr. Wener, the Plaintiffs' standard of care expert, rendered four opinions critical of Dr. Balink. First, Dr. Wener testified that Dr. Balink breached the standard of care by failing to order a three-hour glucose tolerance test for Ms. Seifert. (R.142: p. 83.) The three-hour glucose tolerance test is used to diagnose gestational diabetes, a condition which Dr. Wener associated with an increased risk of shoulder dystocia. (Id. at pp. 40-41.) Fundamental to his opinion, Dr. Wener stated that the standard of care required Dr. Balink to order the three-hour glucose tolerance test if Ms. Seifert's blood glucose level exceeded 130 mg/dL on the one-hour glucose tolerance screen (as opposed to Dr. Balink's 140 mg/dL threshold). (Id. at pp. 82-83.) Ms. Seifert's blood glucose level was 131 mg/dL. (Id.) Therefore, Dr. Wener concluded, Dr. Balink violated the standard of care by failing to administer the three-hour diagnostic test, which he believes would have shown that Ms. Seifert was a gestational diabetic.

Second, Dr. Wener opined that Dr. Balink breached the standard of care by failing to perform an ultrasound on Ms. Seifert immediately prior to delivery. (Id.

at pp. 101-02.) The ultrasound, Dr. Wener argued, would have given Dr. Balink a better estimate of Braylon's fetal weight. (Id. at pp. 100-01.) Braylon's actual birth weight was 4,370 grams. (Id. at p. 160 [A-App. 67].) Despite Dr. Wener's opinion that a physician may choose either 4,000 grams or 4,500 grams as the threshold for diagnosing macrosomia, Dr. Wener refused to opine that it would be reasonable for a physician to conclude that Braylon was not macrosomic. (Id. at pp. 59, 158-62 [A-App. 48, 65-69].) Macrosomia is a condition which Dr. Wener associated with an increased risk of shoulder dystocia. (Id. at pp. 40-41.) Therefore, Dr. Wener concluded, had Dr. Balink performed ultrasound immediately before the delivery, she would have known that Braylon was macrosomic and was, thus, at a greater risk of shoulder dystocia.

Third, Dr. Wener criticized Dr. Balink for using vacuum assistance during the birthing process. (Id. at pp. 112-13.) He opined that the use of vacuum during delivery increased the risk that a shoulder dystocia would occur. (Id. at pp. 40-41, 79-80, 110.) Therefore, Dr. Wener concluded that Dr. Balink breached the standard of care by using vacuum assistance.

Finally, Dr. Wener testified that Dr. Balink breached the standard of care by applying excessive traction in attempting to resolve the shoulder dystocia. (Id. at pp. 113-14.) At trial, Dr. Wener testified that he believed Dr. Balink used excessive traction by virtue of the degree of injury and the fact that, in Dr. Balink's deposition, she used the words "reasonable traction" rather than "gentle

traction." (Id.) Dr. Balink denied that she applied excessive traction. (R.145: pp. 133-34.)

Prior to trial, Dr. Balink moved the Circuit Court to exclude Dr. Wener's opinions that Dr. Balink breached the standard of care (1) by failing to order an ultrasound immediately prior to delivery to estimate fetal weight; (2) by failing to order a three-hour glucose tolerance diagnostic test for gestational diabetes; and (3) by using vacuum assistance during delivery. (R.64: pp. 15-27.) Dr. Balink argued that these opinions were unreliable under Wis. Stat. § 907.02(1) because Dr. Wener provided no support for his opinions other than his qualifications and personal preferences. (Id.) He did not rely on medical literature or other sources containing indicia of reliability. (Id.) Additionally, there were many flaws in the way Dr. Wener applied his opinions to the facts of the case. (Id.)

At the pretrial hearing, the Circuit Court ruled: "Dr. Wener's opinions are shaky due to their generality, but I conclude that they are sufficiently reliable to be admitted." (R.138: p. 108 [A-App. 14].) The Circuit Court characterized Dr. Wener's opinions as "holistic" in that they prescribe a certain standard of care when various factual elements converge. (Id. at pp. 108-09 [A-App. 14-15].) With respect to Dr. Balink's arguments that Dr. Wener relied on no medical literature, the Circuit Court stated that Dr. Wener's holistic approach is "not something that's been peer reviewed or published 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. (Id. at p. 109 [A-App. 15].) The Circuit Court stated that the way in which Dr. Wener "adds [the factors] up is debatable, but that's not the same as saying the way that Dr. Wener adds them up is not reliable." (Id.) The Circuit Court concluded that, although "[i]t'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." (Id. at pp. 110-11 [A-App. 16-17].)

Dr. Wener provided no further medical support for his opinions at trial. Dr. Wener did, however, encounter several additional problems applying his opinions to the facts of the case.[1] Following Dr. Wener's trial testimony, the Circuit Court denied Dr. Balink's renewed motion to strike Dr. Wener's testimony in its entirety under Wis. Stat. § 907.02(1). (R.142: pp. 191-94.) Later, Dr. Balink argued that the Circuit Court should grant a directed verdict in her favor because Dr. Wener's testimony was unreliable and should have been stricken. (R.147 at p. 6.) The Circuit Court denied this motion. (Id. at pp. 21-22.)

D. Orders in Limine and Plaintiffs' Counsel's Statements During Closing Arguments

Prior to trial, Dr. Balink and the Injured Patients & Families Compensation Fund (hereinafter "the Fund") filed pretrial motions in limine. The following motions in limine and rulings thereon are relevant to the present appeal:

[1] *See, infra*, Section I.B.

Dr. Balink's Motion No. 8. Dr. Balink moved for an order precluding Plaintiffs' counsel from commenting that this case is analogous to any case in which the Defendants' negligence is compared to the duty of the average person. (R.57: pp. 12-13 [A-App. 84-85].) The Circuit Court granted this motion at the pretrial conference. (R.138: p. 20 [A-App. 29].)

Dr. Balink's Motion No. 9. Dr. Balink moved for an order precluding Plaintiffs' counsel from arguing or making any statements to the jurors that they can determine medical negligence using their own experience, common sense, or based on what they "'want' or 'deserve.'" (R.57: pp. 13-14 [A-App. 85-86].) The Circuit Court granted this motion at the pretrial conference. (R.138: pp. 20-21 [A-App. 29-30].)

The Fund's Motion No. 2. The Fund moved for an order precluding Plaintiffs' counsel from employing an analogy between purported negligence of a health care provider rendering medical services to a patient and the average auto driver who carelessly fails to observe the Rules of the Road. (R.67: p. 5 [A-App. 88].) The Circuit Court granted this motion at the pretrial conference at Plaintiffs' counsel's request. (R.138: p. 30 [A-App. 31].)

During closing arguments, Plaintiffs' counsel made the following statements which prejudiced Dr. Balink's defense:

<u>Comparison to the Rules of the Road</u>

> [MR. LEVINE:] Here's the reason why: and we talked about this a little with the witnesses, Speed limit on the highways in this country can be 65

miles an hour, because it's been determined at 65 miles an hour more accidents are going to happen, okay?

> MR. LEIB: Your Honor, I have to object. This is improper argument.
>
> MR. LEVINE: It's not.
>
> THE COURT: It is argument, continue.

MR. LEVINE: Thank you. Okay, well, on a nice, beautiful sunny day, clear skies, 65 miles an hour is probably fine. But there may be factors that you have to consider that would make that not fine. That would make you question whether that's the speed you should be going. Let's say it's pouring rain, let's say it's snowing. You're not going to look at that number the same. And Dr. Wener, who I'll talk about in a moment, explained that to you. And this is the issue in this case about gestational diabetes. No one is denying that they're throwing these two numbers out; 130 and 140. But what he tried to explain to you was when you have a big mom, who has an increased risk of gestational diabetes because of her weight, and an increased risk of a big baby because of her weight, you've got to consider which of these numbers you're going to use. His point was what's safe at one speed might not be at another. And that you have to consider those issues. So Dr. Wener's point --

> MR. LEIB: Your Honor, I have to object. This is improper argument and there's a motion in limine on this.
> . . .
> THE COURT: The objection is overruled.

(R.150: pp. 23-24 [A-App. 90-91].)

First "Golden Rule" Violation

[MR. LEVINE:] Now, you heard some testimony from the defense experts, and I'll talk about them as I go along in this case as well and their bias, where they're coming from. You heard somebody actually get up on the witness stand and say -- Dr. Rouse,[2] I think it was -- if it was 139, I wouldn't have done anything. Really? If it was 139, I would have done nothing different. Is that reasonable to you? Is that reasonable medicine to you? **Is that how you want your doctor to care?**

> MR. LEIB: Objection, Your Honor.
>
> THE COURT: Mr. Levine, that is --

[2] Dwight J. Rouse, M.D., an obstetrician and maternal-fetal specialist, served as one of Dr. Balink's standard of care experts.

MR. LEVINE: I'll withdraw that.

(R.150: p. 25 [A-App. 92] (emphasis added).)

Second "Golden Rule" Violation

[MR. LEVINE:] **Is that what you want? You want a doctor to treat you, or you want a doctor to say, well, you're at 139. You're not at 140. No test for you. Or do you want a doctor to think about you?**

MR. LEIB: Your Honor. The Golden Rule.

MR.LEVINE: I'll move on.

THE COURT: Sustained.

MR. LEVINE: Would a patient, excuse me, what would a patient want the doctor to do? Not you. What would a patient want? . . .

(R.150: p. 123 [A-App. 98] (emphasis added).)

Derogation of Defense Counsel, Insinuation that Jurors are Experts

I spoke to you in my closing argument and I addressed issues. I didn't tell you what to do. I didn't tell you you're not experts. I didn't tell you you're not that smart. I didn't tell you don't know the law. Apparently I have a little more respect for you than Mr. Leib does. (A-App. 93.)

. . .

I've got a little more faith in you than he does, because he spent the last hour and a half telling you what to do, telling you what you can't do, telling you what you don't know and that you're not going to be experts -- you're not going to know the information. I disagree. (A-App. 93-94.)

. . .

These are the kind of arguments you make to juries if you think they're not to 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 you own decisions about this case. Not be told what to do. (A-App. 100.)

. . .

This shell game, you know, this game that they're trying to play with you. You know, it's that game, you know, when you go to the fair? Where's the ball? Whoa, whoa, whoa, where's the ball? That's what they tried to do to you. It's a matter of respect. I don't do it to you. I'm giving you the information, you'll figure it out. I'm not telling you what to do. You're smart. (A-App. 105.)

. . .

> So when Mr. Leib comes before you and makes his big grandstand move. Where's this one, where's that one? Where's this one? Well, you know, it's just not true. It's a matter, again, of respect. It's a matter of respecting you as a group and trying to fool you. You're not going to get fooled. You're pretty damn smart. You're not going to get fooled. I don't think you'll get fooled. (A-App. 108.)
>
> . . .
>
> You have common sense and you can analyze the expert testimony and you're smart enough to do it. I'm like, again, I'm like Mr. Leib. I have a lot of faith in your smarts. I think you are experts in a sense. I think you've learned quite a bit and I think you can make good decisions. I don't have to tell you what to do or how to do it. I'm not going to do that. But think it through, ladies and gentlemen. (A-App. 112.)
>
> . . .
>
> Unlike Mr. Leib, I think you're smart people and I think you've learned the medicine and I think you are experts in a sense. (A-App. 113.)

(R.150: pp. 118-38.)

E. Verdict and Post-Verdict Motions

The jury returned a verdict in favor of the Plaintiffs on their negligence claim. (R.115 [A-App. 9-11].) The jury did not find that Dr. Balink violated informed consent. (Id.) Dr. Balink brought motions after verdict asking the Circuit Court to, among other things, order a new trial. (R.127.) Dr. Balink argued that the Circuit Court should order a new trial based on the erroneous admission of Dr. Wener's expert opinions, Plaintiffs' counsel's prejudicial statements during closing argument, and in the interests of justice. (Id.) The Circuit Court denied each of Dr. Balink's requests for a new trial.

F. The Court of Appeals' Opinion

The Court of Appeals affirmed the Circuit Court's rulings on July 30, 2015.[3] On the *Daubert* issue, the Court of Appeals explained that Wis. Stat. § 907.02(1) conferred unfettered discretion on trial courts to determine what factors they wish to consider in determining whether an expert opinion is founded on a reliable methodology. (A-App. 136-59, ¶¶ 17-18.) An expert's qualifications, knowledge, and experience, the Court of Appeals noted, could provide an appropriate basis to find that the methodology that the expert employed was reliable. (Id., ¶¶ 19-20.) Furthermore, the Court of Appeals endorsed a special *Daubert* exception for medical malpractice cases, citing two Ninth Circuit federal court decisions for the proposition that the uncertainty and complexity of medicine distinguishes it from the larger body of scientific inquiry. (Id., ¶ 19.)

In applying its own interpretation of Wis. Stat. § 907.02(1), the Court of Appeals easily found that the Circuit Court properly admitted Dr. Wener's opinions. First, it concluded that Dr. Wener's qualifications and personal preferences were sufficient to satisfy *Daubert*'s reliability inquiry. (Id., ¶ 29.) Second, the Court of Appeals found it appropriate that Dr. Wener rested his opinions solely on his own personal interactions with patients "rather than on literature, studies, or science." (Id., ¶ 30.) Remarkably, while explaining that trial

[3] The Court of Appeals issued an original and corrected version of its opinion, both of which are contained in the appendix. (A-App. 114-59.) As the Court may notice, the Court of Appeals made several substantive changes to its opinion between the two versions.

courts are afforded flexibility in choosing the reliability factors they find important, the Court of Appeals undertook no analysis whatsoever of the supposed factors the Circuit Court chose in this case. (*Compare* id., ¶ 31 *with* id., ¶¶ 23-26.) Finally, the Court of Appeals forgave Dr. Wener for the numerous errors he made in applying his "holistic" approach to the facts of the case, stating that it is opposing counsel's responsibility to ferret out these deficiencies on cross-examination. (Id., ¶ 33.)

With respect to prejudicial statements made by Plaintiffs' counsel, the Court of Appeals concluded that the statements were not so prejudicial as to warrant a new trial. (Id., ¶ 37.) First, the Court of Appeals concluded that comparing speed limits to medical standards of care "did not suggest that medical negligence and ordinary negligence are comparable." (Id., ¶ 40.) In any event, the Court of Appeals explained, the analogy pertained to only one of the Plaintiffs' theories of liability, and the Circuit Court's general instruction that the jury base its verdict on the evidence was sufficient to cure any prejudice. (Id., ¶ 41.) Second, the Court of Appeals concluded that the Circuit Court's non-contemporaneous curative instruction about a different objectionable statement by Plaintiffs' counsel was sufficient to cure the prejudice caused by two separate Golden Rule violations. (Id., ¶¶ 44, 46.) Finally, the Court of Appeals found that the laundry list of disparaging statements made by Plaintiffs' counsel in rebuttal was simply not prejudicial enough, even going so far as to say that they "empower[ed] the jury to

weigh the conflicting expert testimony and make the required credibility determinations." (Id., ¶ 48.)

STANDARDS OF REVIEW

While the Court reviews for an erroneous exercise of discretion a trial court's decision to admit evidence, it reviews *de novo* the trial court's interpretation and application of Wis. Stat. § 907.02(1). *260 N. 12th St., LLC v. State DOT*, 2011 WI 103, ¶¶ 38-39, 338 Wis. 2d 34, 808 N.W.2d 372; *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 that framework and its ultimate conclusion as to admissibility are reviewed for abuse of discretion.").

The Court reviews for an erroneous exercise of discretion a trial court's decision not to grant a new trial based on counsel's prejudicial statements. *Wagner v. Am. Family Mut Ins. Co.*, 65 Wis. 2d 243, 249, 222 N.W.2d 652 (1974).

The Court has the authority, in its discretion, to order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried . . . ." Wis. Stat. § 751.06.

ARGUMENT

This appeal presents errors which deprived Dr. Balink of a fair and just day in court. First, the Court of Appeals should have concluded that the Circuit

Court misinterpreted Wis. Stat. § 907.02(1) and erroneously admitted Dr. Wener's expert opinions. Second, the Court of Appeals should have concluded that the Circuit Court erred in failing to order a new trial based on Plaintiffs' counsel's prejudicial statements during closing argument. Finally, the Court should exercise its discretion to order a new trial in the interests of justice. Dr. Balink will address each of these arguments in turn below.

I. DR. WENER'S EXPERT OPINIONS WERE UNRELIABLE, AND THUS INADMISSIBLE, UNDER WIS. STAT. § 907.02(1).

The 2011 amendments to Wis. Stat. § 907.02(1) ushered in a sea change to the admissibility test for expert testimony. No longer are experts permitted to testify on matters merely because the testimony relates to the facts of the case. The expert's testimony must satisfy the now-prominent *Daubert* standard. The *Daubert* standard charges trial courts with "the responsibility of acting as gatekeepers to exclude unreliable expert testimony." Fed. R. Evid. 702 advisory committee note (2000 amendment). Specifically, Wis. Stat. § 907.02(1) states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, **the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case**.

(Emphasis added). The reliability portion of the statute reflects Wisconsin's codification of Federal Rule of Evidence § 702 and the landmark United States Supreme Court case *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

The *Daubert* reliability requirement applies not only to testimony based on scientific principles but also to all testimony predicated on technical or other specialized knowledge. *Kumho Tire v. Carmichael*, 526 U.S. 137, 141 (1999). The broad application of the reliability requirement in *Kumho Tire* made clear that expert testimony in medical malpractice cases was now subject to greater scrutiny. In determining whether to admit expert testimony, the trial court must be satisfied that the testimony is reliable by a preponderance of the evidence. *Daubert*, 509 U.S. at 593; *State v. Williams*, 220 Wis. 2d 458, 463-64, 583 N.W.2d 845 (Ct. App. 1998).

The opinions of Plaintiffs' standard of care expert, Dr. Wener, were unsupported by the medical literature and were based solely on how Dr. Wener prefers to practice medicine. As Dr. Wener was aware, the relevant medical literature—including the evidence-based findings of the American College of Obstetrics and Gynecology, an authoritative obstetrical organization to which Dr. Wener is a Fellow—does not lend any support to his opinions. If the new amendment to Wis. Stat. § 907.02(1) is to have any meaning, it must bar the opinions of Dr. Wener in this case.

The Circuit Court's decision to admit the testimony of Dr. Wener implicates two requirements set forth in Wis. Stat. § 907.02(1). First, Dr. Wener did not derive his opinions on any reliable principle or method as required by *Daubert*. Second, Dr. Wener contravened *Daubert*'s requirement that an expert

must reliably apply his or her principles and methods to the facts of the case. Because Dr. Wener's opinions were unreliable, and because the Circuit Court's assessment of such reliability was inadequate, the Court should order a new trial.

A. Dr. Wener's Testimony Was Based on His Own Personal Preferences as a Practitioner Rather than on Some Principle or Method Evidencing Reliability.

Rather than rely on evidence-based medicine, Dr. Wener asked the jury to evaluate Dr. Balink's conduct against the way that he, as a clinician, prefers to practice obstetrics. Dr. Wener openly admitted that he did not review or rely on any medical literature. (R.142: pp. 135-36 [A-App. 61-62].) More troubling still, Dr. Wener testified at trial that the scientific studies upon which he **could** have based his opinions were available in the literature: "We know what 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." (Id. at pp. 187-88 [A-App. 76].) However, rather than rely on the literature, Dr. Wener relied solely on his personal biases and assumptions, neither of which can be tested or verified.

The Circuit Court erred as a matter of law by not interpreting *Daubert*'s reliability requirement to demand more than mere qualifications and personal preferences. In light of established law, Dr. Wener's preferences on the use of ultrasound in estimating fetal weight, glucose tolerance testing, and use of vacuum are alone inadequate to satisfy *Daubert*. Additionally, Dr. Wener's refusal to rely

on literature which he acknowledged existed undermined the reliability of his opinions.

1. *The Law on Reliable Principles and Methods*

The new requirement that expert opinions must be the product of reliable principles and methods signifies a substantial departure from the relaxed "relevancy" standard used by Wisconsin courts prior to the 2011 amendments. Trial courts may assess the experts' principles and methods using the following recognized but non-exhaustive list of factors:

> 1. Whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
>
> 2. Whether the technique or theory has been subject to peer review and publication;
>
> 3. The known or potential rate of error of the technique or theory when applied;
>
> 4. The existence and maintenance of standards and controls; and
>
> 5. Whether the technique or theory has been generally accepted in the scientific community.

Fed. R. Evid. 702 advisory committee note (2000 amendment); *see also Daubert*, 509 U.S. at 593-94. None of the factors set forth in Fed. R. Evid. 702's advisory committee notes are necessarily dispositive, and trial courts have discretion as to which factors they consider important under the facts of the case. *Id.* The goal of this review is to avoid admitting opinions based on the expert's own *ipse dixit* or

personal preference. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also State v. Giese*, 2014 WI App 92, ¶ 19, 356 Wis. 2d 796, 854 N.W.2d 687.

Importantly, federal courts have warned that "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are reliable and relevant under the test set forth by the Supreme Court in *Daubert*." *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999). In other words, trial courts should not unduly focus their reliability analyses on the witnesses' qualifications. *Fuesting v. Zimmer Inc.*, 421 F.3d 528, 535 (7th Cir. 2005). This principle is implicit in the very language of Wis. Stat. § 907.02(1), which distinguishes between the qualification and reliability inquiries.

While failing to support expert opinions with literature or studies is not dispositive, it is an important reliability consideration in medical malpractice cases. *E.g.*, *McDowell v. Brown*, 392 F.3d 1283, 1299-1301 (11th Cir. 2004) (citation to only one article, which was distinguishable, was not sufficient to show reliability of methodology); *Sullivan v. U.S. Dept. of Navy*, 365 F.3d 827, 834 (9th Cir. 2004) (citations to four relevant, accepted textbooks was a sufficiently reliable basis for opinions); *McGovern ex rel. McGovern v. Brigham & Women's Hosp.*, 584 F. Supp. 2d 418, 424-26 (D. Mass. 2008); *Berk v. St. Vincent's Hosp. and Medical Center*, 380 F. Supp. 2d 334, 354-355 (S.D.N.Y. 2005) (the *ipse dixit* of the expert, without any supporting literature, did not satisfy the *Daubert* reliability requirement).

2. *Dr. Wener's Opinions Are Impermissible Personal Preferences and Are Not Sufficiently Reliable*.

Dr. Wener's opinions on ultrasound, glucose tolerance testing, and use of vacuum are not based on reliable principles or methods. They reflect Dr. Wener's personal preferences in practicing medicine. As a consequence, no court could ever analyze how Dr. Wener arrived at those opinions or scrutinize the principles upon which they are based. The jury, presented with Dr. Wener's opinions, was forced to evaluate his opinions without the benefit of meaningful cross-examination on underlying data or reasoning. This is precisely what the Legislature sought to avoid when it passed the newly-amended Wis. Stat. § 907.02(1).

Clearly, the five-factor test courts often use to review the reliability of an expert's methodology under Fed. R. Evid. 702 do not weigh in favor of admissibility. Dr. Wener's experiences cannot be "challenged in some objective sense." Fed. R. Evid. 702 advisory committee note (2000 amendment); *see also Daubert*, 509 U.S. at 593-94. They have not been "subject[ed] to peer review and publication." *Id.* They have no "known or potential rate of error," *id.*, nor were there any "standards and controls," *id.* Finally, there can be no way of know whether his experiences have "been generally accepted in the scientific community." *Id.*

An opposing party cannot "test" an expert's experiences in the scientific sense. The party may obtain superficial information from the expert's curriculum

vitae and deposition testimony, but there is no way to test whether that expert's experiences justify to any medical probability that, for example, the threshold glucose level for ordering the three-hour diagnostic testing is 130 mg/dL.[4] Medical literature, on the other hand, speaks to topics such as this one and is not beyond scrutiny in the scientific sense.

In reality, Dr. Wener's method relies on his preferences and assumptions, none of which may be scientifically challenged by opposing counsel. For example, he opined that Dr. Balink should not have used vacuum during delivery only because he would not have used vacuum. His opinion does not constitute a standard of care. It reflects what he would have done. Personal preference is not an appropriate basis for an expert opinion.

This Court should prohibit testimony based on a rationale tantamount to saying, "Because I said so." *Daubert* demands more. As federal case law on *Daubert* instructs, trial courts should not conflate reliability with qualifications. Dr. Wener, although qualified, should not be permitted to "waltz into the courtroom and render opinions unless those opinions are reliable and relevant under the test set forth by the Supreme Court in *Daubert*." *Clark*, 192 F.3d at 759

[4] As presented to the Circuit Court during motions after verdict, Fred J. Duboe, M.D., an obstetrician and leading partner with Dr. Wener at Northwest Associates for Women's Healthcare, testified at a deposition two months after the trial that the members of their group follow the ACOG guidelines and that they, including Dr. Wener, use 135 mg/dL as the threshold for ordering the diagnostic test. (R.132: Ex. 2 at pp. 83-87.) Dr. Duboe's fortuitous testimony underscores the very problem *Daubert* seeks to address, i.e., that experts should not be permitted to advance baseless, self-serving opinions.

n.5. The reliability requirement would be superfluous if it did not require experts, such as Dr. Wener, to justify their opinions with sound methodology.

3. *Dr. Wener's Refusal to Rely on Literature Which He Acknowledged Existed Undermined the Reliability of His Methodology*.

Dr. Wener further undermined the reliability of his opinions when he acknowledged, then dismissed, medical literature pertaining to the subjects of his opinions. When questioned about the risk factors for shoulder dystocia at trial, Dr. Wener stated:

> A: We know what 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. **You can't, you can't -- the numbers -- I'm a Doctor taking care of patients. I have to be aware of what the risks factors are. If they're major risk factors, they're minor risk factors. How much of what I do impacts upon those risk factors and upon the well being of this baby that I'm going to be delivering; or mom that I'm taking care of.**
>
> Q: And as --
>
> A: **I can't quote statistics**.

(R.142: p. 188 [A-App. 76] (emphases added).)

Dr. Wener did not refer to the medical literature to bolster his opinions; rather, he referred to it as a means to declare that medical literature is useless. On another occasion, Dr. Wener was confronted with medical literature from ACOG. (Id. at pp. 132-35.) Unlike Dr. Wener, ACOG considers the threshold screening level for ordering a three-hour glucose tolerance diagnostic test to be either 130 mg/dL **or** 140 mg/dL. Dr. Wener dismissed the "130 or 140" thresholds set forth

by ACOG, stating that the Practice Bulletin on Gestational Diabetes was published in 2001 and was, therefore, outdated by 2009. (Id. at pp. 132-35.) The Bulletin itself states that it was reaffirmed in 2008. (R.128: Ex. 6 at p. 759.) Again, Dr. Wener quickly dismissed literature which disagreed with his opinions but was unable to reference any literature which supported them.

Dr. Wener made clear that his opinions do not require literature, studies, or science because, unlike the scientific method, Dr. Wener's method relies only on "a Doctor taking care of patients." Indeed, when pressed to defend his opinions, Dr. Wener often fell back on vacuous generalities such as "I'm caring for patients" (R.142: p. 29 [A-App. 42]); "a doctor has to take care of every patient individually" and "you have to look at the patient as a whole" (Id. at p. 66 [A-App. 50]); "we're not talking statistics, we're talking about a person" (Id. at p. 160 [A-App. 67]); and "[y]ou can't, you can't – the numbers – I'm a Doctor taking care of patients" (Id. at p. 188 [A-App. 76]). Dr. Wener understood that the literature and studies do not support his opinions. While such literature and studies may make valuable cross-examination fodder, they do not replace the requirement that all experts must employ *some* reliable methodology in arriving at their opinions under *Daubert*.

B. Dr. Wener Did Not Reliably Apply His Opinions to the Facts of the Case.

In addition to utilizing reliable principles and methods, the expert also must show that he or she properly applied those principles and methods to the facts of

the case. Wis. Stat. § 907.02(1); *see also Masters v. Hesston Corp.*, 291 F.3d 985, 992 (7th Cir. 2002) (striking standard of care expert testimony for unreliable application to the facts). An expert's methodology and conclusions are not entirely distinct considerations. Fed. R. Evid. 702 advisory committee note (2000 amendment) (citing *Joiner*, 522 U.S. at 146). "[A]ny step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Id.* (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)) (emphases omitted).

Dr. Wener's opinions cannot be reconciled with the facts of the case. Nonetheless, the Circuit Court did not strike his testimony. This Court should conclude that the Circuit Court exceeded its discretion in not striking Dr. Wener's inept application of his opinions. Additionally, the Court should conclude as a matter of law that, like Dr. Wener's other individual opinions, Dr. Wener's unsupportable "holistic" approach is inconsistent with Wis. Stat. § 907.02(1). Each of these arguments will be addressed in turn.

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

Dr. Wener rendered several opinions that, given the facts of the case, could not reliably constitute criticisms of Dr. Balink. Those opinions, instead, were confusing and further undermined the reliability of Dr. Wener's testimony. The following are instances of such unreliable applications:

- During his first deposition on January 15, 2013, Dr. Wener testified that he would not use a vacuum "[i]f the mother has had an estimated fetal weight of greater than 4,500 grams by ultrasound . . . ." (R.66: Ex. 3 at p. 139 [A-App. 82].) However, Braylon Seifert's actual birth weight was only 4,370 grams.

- Also during his January 15, 2013 deposition, Dr. Wener stated that fetal weight exceeding 4,500 grams was associated with an increased risk of shoulder dystocia. However, again, Braylon Seifert's actual birth weight was only 4,370 grams. (R.66: Ex. 3 at pp. 107-08, 112, 127 [A-App. 78-81].)

- At trial, Dr. Wener provided confusing testimony regarding his criticisms of Dr. Balink's estimation of fetal weight. Dr. Wener admitted that a birth weight of either 4,000 or 4,500 grams is an acceptable threshold for diagnosing macrosomia. (R.142: pp. 158-59 [A-App. 65-66].) Dr. Wener agreed that Dr. Balink's fetal weight estimate (3,856 grams) fell below the threshold for macrosomia. (Id. at p. 159 [A-App. 66].) However, Dr. Wener's opinion lost all validity when he testified that Braylon's actual birth weight (4,370 grams) was macrosomic under either the 4,000- or 4,500-gram threshold. (Id. at p. 159-61 [A-App. 66-68].) When counsel pointed out that 4,370 is less than 4,500, Dr. Wener tried to justify this invalid opinion by stating that Dr. Balink should have considered *actual birth weight* in determining the prenatal course of care.[5] (Id. at p. 160-62 [A-App. 67-69].) This portion of Dr. Wener's testimony does not make

[5] All experts at trial conceded that actual birth weight cannot be accurately determined until birth. (See, e.g., R.142: p. 59 [A-App. 48].)

any sense. Additionally, Dr. Wener would not admit that Braylon's actual fetal weight was not macrosomic under the 4,500-gram threshold.

- Dr. Wener also testified at trial that ultrasonic estimations of fetal weight may deviate above or below actual fetal weight by 10-15%. (Id. at p. 159 [A-App. 66].) Although the difference between Dr. Balink's estimated fetal weight (3,856 grams) and the actual fetal weight (4,370 grams) was within the error rate of ultrasound (her estimate was 11.7% under), Dr. Wener insisted incorrectly that the lower end of the ultrasound's error rate for Braylon was above 4,000 grams. (Id. at 159-60 [A-App. 66-67].) Therefore, notwithstanding Dr. Wener's attempt to apply statistics, Dr. Wener incorrectly concluded that Dr. Balink's estimation was less accurate than an ultrasonic estimate.

- Dr. Wener conceded that "[t]he way to diagnose gestational diabetes, the only way, is a three hour glucose tolerance test. It's the only accepted way." (Id. at pp. 142-43 [A-App. 63-64].) Nonetheless, Dr. Wener rendered the opinion at trial that Ms. Seifert was, in fact, a gestational diabetic. He testified that he could come to this conclusion because of the abnormal one-hour glucose screen, maternal obesity, and actual fetal weight. (Id. at p. 142 [A-App 63].) Of course, Dr. Wener had no way to know what the three-hour glucose tolerance test would have shown because it was never done.

2. *Dr. Wener's "Holistic" Approach Is Not Reliable and Contravenes the Purpose of the Reliability Requirement.*

Throughout Dr. Wener's testimony, he often sought to cure deficiencies in his opinions by advancing what the Circuit Court called a "holistic" approach. (R.142: pp. 65-67 [A-App. 49-51].) This approach allowed Dr. Wener to state that a "constellation" of risk factors may be simply "add[ed]" up to adduce an opinion. (Id.) In other words, even though Dr. Wener had no legitimate way to support his opinions that certain risk factors were present (e.g. gestational diabetes and macrosomia), he insisted that they *were* present by virtue of still other risk factors (e.g. maternal obesity, actual birth weight, one-hour glucose tolerance test). Dr. Wener justified this approach by repeatedly stating that a physician must consider "the patient as a whole." (Id. at pp. 29, 66, 160, 188 [A-App. 41, 50, 67, 76].)

Dr. Wener admitted that he knew of no medical literature to support his so-called holistic approach or his assertion that one can "add" up risk factors. (Id. at p. 173 [A-App. 70].) In reality, Dr. Wener's holistic approach allowed him to skirt criticism when the medical literature did not support his opinions. For example, Dr. Wener conceded that a standard of care threshold for diagnosing macrosomia was 4,500 grams (as stated by ACOG and other sources). Nevertheless, he insisted that Braylon's birth weight of 4,370 grams was macrosomic. This is a clear contradiction. However, Dr. Wener explained that Braylon's birth weight was only short of macrosomia "[b]y 130 grams. But that's -- that's within the ballpark of

macro -- 4,500 grams. You're not talking about, counselor, we're not talking statistics, we're talking about a person." (Id. at pp. 160-61 [A-App. 67-68].)

Additionally, at times, Dr. Wener used unsupportable opinions to "support" other unsupportable opinions. For example, Dr. Wener admitted that a three-hour glucose tolerance test was *the only way* to diagnose gestational diabetes, and he admitted that a three-hour glucose tolerance test was never performed on Ms. Seifert. Yet, Dr. Wener claimed that Ms. Seifert had gestational diabetes. (Id. at pp. 85-86 [A-App. 52-53].) Dr. Wener explained that he could diagnose her with gestational diabetes "based on the fact that she had an abnormal screening test. Based on the fact that she was obese. And based upon the fact that she delivered **a macrosomic infant**. That [he] had a shoulder dystocia. Again, based on all those factors." (Id. at p. 86 [A-App. 53] (emphasis added).)

Each time Dr. Wener realized that his opinions did not square with the facts of the case, he reverted to his "holistic" approach and supported the sham opinion by listing as many risk factors as he could muster. In terms of *Daubert*, Dr. Wener's holistic approach is unreliable for three reasons. First, the holistic approach has no basis in medicine and merely reflects an expert's personal preferences in practicing medicine. Second, the holistic approach, abstract and limitless in application, should not be used as a ruse to cure opinions that are inconsistent with the underlying facts of the case. Lastly, as the holistic approach was applied by Dr. Wener, unsupported opinions should not be permitted to justify

other unsupported opinions. The holistic approach completely undermines the reliability requirements in Wis. Stat. § 907.02(1).

C. The Court of Appeals' Decision Will Negate Newly-Amended Wis. Stat. § 907.02(1) in Medical Malpractice Cases.

Despite the foregoing flaws in the manner in which Dr. Wener derived and applied his opinions, the Court of Appeals affirmed the Circuit Court's ruling under Wis. Stat. § 907.02(1). In reaching its result, the Court of Appeals expounded four legal principles that will, in practice, eviscerate the *Daubert* standard in Wisconsin medical malpractice cases: (1) that expert opinions in medical malpractice cases are held to a lower standard under Wis. Stat. § 907.02(1) because medicine is "complex," "uncertain," and "complicated," (A-App. 136-59, ¶ 19); (2) that a medical expert's qualifications and personal preferences are alone sufficient to meet the reliability standard under § 907.02(1), (id., ¶¶ 18-20, 28-29); (3) that any *Daubert* factors relied upon by trial courts, regardless of their foundation or logic, will survive appellate review and be affirmed without question; and (4) that an expert's unreliable application of his or her opinions to the facts of the case is not a question of reliability under § 907.02(1) but is, rather, an issue that can be addressed only by cross-examination, (id., ¶¶ 32-33).

First, the case law does not exempt medical malpractice cases from *Daubert*'s constraints. As the Court of Appeals itself conceded, the *Daubert* standard applies to *all* areas of expert inquiry. (Id., ¶ 18 (citing *Kumho Tire*, 526

U.S. at 149).) The Court of Appeals found its sole support for the proposition that medical malpractice cases should be treated differently in two Ninth Circuit cases, *Primiano v. Cook* and *United State v. Sandoval-Mendoza*. (Id., ¶ 19.) Aside from the fact that both cases are easily distinguished from the present case,[6] there is no logical reason to segregate medicine from the broader arena of scientific disciplines. Uncertainty and complexity exist in all scientific endeavors; indeed, the scientific method seeks to reduce that uncertainty and complexity through systematic, controlled study. More than perhaps any other field of science, the medical sciences rely heavily on the rigors of study, testing, and peer-review. Although a specific publication or study is not required to comply with *Daubert*, there is nothing special or unique about the medical sciences that should alter the admissibility thresholds under *Daubert*.

The second principle relied upon by the Court of Appeals—that qualifications and experience are alone sufficient to meet *Daubert*'s reliability standard—is contrary to the statute and case law. Qualifications, as the plain language of § 907.02(1) suggests, should not infect the reliability inquiry. *See*, *supra*, *Fuesting*, 421 F.3d at 535; *Clark*, 192 F.3d at 759 n.5.[7] With respect to

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[6] Most importantly, neither *Primiano* nor *Sandoval-Mendoza* was a medical malpractice case. Neither addressed, even tangentially, how *Daubert* should apply to medical standard-of-care opinions. Rather, they addressed causation opinions in the context of a products liability case and a criminal prosecution, respectively. This appeal focuses on what basis a physician expert may tell jurors that the medical community requires a physician defendant to conform to certain standards. *Primiano* and *Sandoval-Mendoza* lend no insight into this issue.

[7] Notably, the Court of Appeals, in holding otherwise, mistakenly relied upon a portion of the advisory committee notes to Fed. R. Evid. 702 pertaining to *Daubert*'s qualification requirement

personal preferences, the Court of Appeals has in the past warned that "[c]oursing through *Daubert* lore is a palpable fear of ipse dixit ('because I said so') testimony." *Giese*, 2014 WI App 92, ¶ 19 (quoting Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, Wisconsin Lawyer, March 2011, at 60). Similarly, the Court of Appeals has instructed trial courts that the basis on which an expert rests his or her opinions must be "more than subjective belief." *Id.* (quoting Ralph Adam Fine, *Fine's Wisconsin Evidence* 34 (Supp. 2012)). A medical expert must found his or her opinions on something more than how he or she believes medicine should be practiced.

Perhaps most troubling, the Court of Appeals failed to undertake any analysis of the Circuit Court's reasons for admitting Dr. Wener's testimony. (*Compare* A-App. 136-59, ¶ 31 *with* id., ¶¶ 23-26.) By doing so, the Court of Appeals implicitly held that such reasoning is beyond appellate review, left instead to the unfettered discretion of the trial court. This cannot be a valid interpretation of § 907.02(1). To be clear, the Circuit Court *did not* rely on Dr. Wener's qualifications and personal preferences as factors in its *Daubert* analysis (despite them being the *de facto* basis for Dr. Wener's opinions). Instead, the Circuit Court relied on what it called the "holistic" approach to medicine, whereby medical opinions as to a particular patient could simply be stacked atop one another to substantiate separate, otherwise-unsupportable opinions. This is not, and cannot

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(as opposed to the reliability requirement, which is the subject of this appeal). (A-App. 136-59, ¶ 20.)

be, a legitimate *Daubert* factor. Rather, it is itself *an expert opinion*, subject to the same *Daubert* scrutiny that would apply to any other expert opinion. Dr. Wener admitted that his "holistic" approach, like the other opinions he boasted, was without any support in the medical sciences.

Finally, the Court of Appeals erred when it held that the mistakes Dr. Wener made in applying his opinions to the facts of the case "speak[] not to the reliability of [his] opinions, but to their weight." (A-App. 136-59, ¶ 33.) This holding is inconsistent with the plain language of the statute and the case law on *Daubert*. Wis. Stat. § 907.02(1) (distinguishing the requirement that "the testimony [be] the product of reliable principles and methods" from the requirement that "the witness [apply] the principles and methods reliably to the facts of the case"). While "shaky" opinions may still be admissible under *Daubert*, "the court must scrutinize not only the principles used by the expert, but also whether those principles have been properly applied to the facts of the case." *Masters*, 291 F.3d at 991-92 (internal ellipses and quotation marks omitted). In the present case, Dr. Wener's opinions were not merely "shaky." They reflected both a misrepresentation of the underlying facts and a misapplication of his opinions to those facts. *See*, *supra*, Section I.B.1.

Collectively, these flaws in the Court of Appeals' opinion lay waste to the Legislature's intent that *Daubert* apply in Wisconsin courtrooms. A medical expert, if qualified, can now render any standard-of-care opinion he or she desires

without fear that the gatekeeper will slam the door, so long as he or she says the magic words: "I care for patients. This is how I practice medicine. Because the defendant did not practice medicine in the manner I do, she was negligent." In practice, this will be the tactical approach litigants will take in medical malpractice cases in Wisconsin. It both erodes the ideals of *Daubert* and offends the notion of evidence-based medicine. Dr. Balink respectfully requests that the Court reverse the Court of Appeals' decision on Wis. Stat. § 907.02(1).

II. PLAINTIFFS' COUNSEL'S COMMENTS DURING CLOSING WERE PREJUDICIAL TO DR. BALINK AND PREVENTED THE TRUE ISSUES OF THE CASE FROM BEING TRIED.

A. Law on Improper Statements of Counsel

An order for a new trial based on improper statements of counsel is appropriate if it "'affirmatively appear[s]' that the remarks prejudiced the complaining party." *Wausau Underwriters Ins. Co. v. Dane County*, 142 Wis. 2d 315, 329-30, 417 N.W.2d 914 (Ct. App. 1987) (quoting *Wagner*, 65 Wis. 2d at 249-50). This standard is satisfied upon a showing that "the verdict reflects a result which in all probability would have been more favorable to [the movants] but for the improper conduct." *Id.*

An attorney's inability to follow court orders is inexcusable. Supreme Court Rule 20:3.4(c) states that an attorney shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." Additionally, Wisconsin courts have

expressed their increasing dismay and sensitivity to prejudicial comments made by counsel in violation of court orders. *See State v. Sigarroa*, 2004 WI App 16, ¶¶ 28-29, 269 Wis. 2d 234, 674 N.W.2d 894; *State v. Seefeldt*, 2002 WI App 149, ¶ 27, 256 Wis. 2d 410, 647 N.W.2d 894; *Gainer v. Koewler*, 200 Wis. 2d 113, 122-24, 546 N.W.2d 474 (Ct. App. 1996).

B. Plaintiffs' Counsel's Statements During Closing Arguments, Which Violated Numerous Orders in Limine, Prejudiced Dr. Balink.

During the course of closing argument, Plaintiffs' counsel made prejudicial statements in contravention of the Circuit Court's pretrial rulings in limine. Indeed, Plaintiffs' counsel conceded during motions after verdict that his statements *were* improper, although not sufficiently prejudicial to warrant a new trial. (R.129: pp. 32-33.) Dr. Balink sets forth below a section excerpting each of Plaintiffs' counsel's statements and describing why each statement is prejudicial and violative of the Circuit Court's pretrial orders.

1. *Plaintiffs' Counsel's Reference to the Rules of the Road*

Plaintiffs' counsel's breach of the Circuit Court's order prohibiting counsel from making analogies to the Rules of the Road warrants a new trial. The Circuit Court ordered prior to trial that counsel may not "suggest to the jury that the issues in this case are anything like holding a negligent driver liable for injuries in a motor vehicle case." (R.67: p. 2.) Plaintiffs' counsel stated to the jury that a doctor who ignores accumulating risk factors, such as an abnormal glucose screen and

maternal obesity, is analogous to a driver ignoring accumulating risk factors, like exceeding the speed limit and hazardous weather conditions.

The order in limine precluded this type of analogy. The defense requested the order because such analogies subvert the need for expert testimony and imply that, like motor vehicle standards of care, medical standards of care are something within the common knowledge of laypersons. *See* Wis JI-Civil 1023. Plaintiffs' counsel even acquiesced to the order before trial. Nonetheless, this is precisely the analogy that Plaintiffs' counsel made. The Circuit Court should have sustained defense counsel's objection and enforced its pretrial order. Instead, the jury was left with the impression that Dr. Wener's opinions regarding standards of care could be equated to speed limits and weather hazards on the roadway. This is clearly impermissible.

2. *Plaintiffs' Counsel's "Is that how you want your doctor to care?" Statements*

Plaintiffs' counsel violated the Circuit Court's orders in limine when he *twice* stated that jurors should place themselves into the shoes of a patient receiving the care advised by Dr. Rouse, Dr. Balink's standard of care expert. To be clear, the care advised by Dr. Rouse was the *same* as the care actually rendered by Dr. Balink. Plaintiffs' counsel addressed the jurors directly: "**Is that how you want your doctor to care?**" on the first occasion and "**Is that what you want? You want a doctor to treat you, or you want a doctor to say, well, you're at 139. You're not at 140. No test for you. Or do you want a doctor to think**

about you?" on the second occasion. The court order which he breached *twice* stated that counsel was prohibited from appealing to "what a juror would 'want' or 'deserve'." (R.57: pp. 13-14 [A-App. 85-86].) The order was clear, but Plaintiffs' counsel made the statements anyway.

Plaintiffs' counsel's decision to address the jurors directly and to ask them whether they would want their own doctor to take Dr. Rouse's position is exceedingly prejudicial. First, arguments relating to whether a juror would want his or her own doctor to take a certain position is irrelevant and simply appeals to the jurors' emotions. Plaintiffs' counsel asked the jurors how they would feel if they were in a position similar to Kimberly Seifert and were rendered the care advised by Dr. Rouse. In this way, it is similar to the "golden rule" which is clearly prohibited in Wisconsin. *See Rodriguez v. Slattery*, 54 Wis. 2d 165, 170, 194 N.W.2d 817 (1972).

Second, and perhaps even more prejudicial to Dr. Balink, jurors must determine the standard of care applicable to the physician *based on expert testimony*. Wis JI-Civil 1023 states:

> You have heard testimony during this trial from doctors who have testified as expert witnesses. The reason for this is because **the degree of care, skill, and judgment which a reasonable doctor would exercise is not a matter within the common knowledge of laypersons**. This standard is within the special knowledge of experts in the field of medicine and **can only be established by the testimony of experts**. You, therefore, may not speculate or guess what the standard of care, skill and judgment is in deciding this case, but rather must attempt to determine it from the expert testimony that you heard during this trial.

(Emphases added.) Plaintiffs' counsel's statement asked the jurors to do the exact opposite. Plaintiffs' counsel implored the jurors to consider their personal feelings about the standard of care that they would prefer to receive under a similar circumstance. Given the fact that the jurors knew the injury in this case, what were they likely to think? They were likely to want the most conservative care possible. This is not what the standard of care requires, and this is not what the jury instructions permit in medical malpractice cases. Plaintiffs' counsel was aware of it and made the statements anyway.

3. *Other Statements by Plaintiffs' Counsel During Rebuttal Closing Argument*

Despite defense counsel's previous objections and the Circuit Court's orders in limine, Plaintiffs' counsel continued to make comments which sought to demean defense counsel while simultaneously suggesting that the jurors were experts. Both implications violated the Circuit Court's orders in limine. The Circuit Court clearly stated at the pretrial hearing that "[w]e will not direct any comments about any counsel in any way. It is improper and jurors hate it." (R.138: p. 40 [A-App. 33].) The Circuit Court should have enforced its own orders.

The Circuit Court's directives were breached when Plaintiffs' counsel made statements like: "I didn't tell you **you're not that smart**"; "I have a little **more respect for you** than Mr. Leib does"; "I've got a little **more faith in you** than he does"; "[t]hese are the kind of arguments you make to juries **if you think they're not too smart**"; "**[f]ool you**, **scare you**, you know?"; "[y]ou people are from

Lancaster. **How smart could you be**, right?"; "**I think you should be respected**, not told what to do or **fooled**"; "[y]ou should be talked to **like adults**"; "[t]his **shell game**, you know, this game that they're trying to play with you"; "**[i]t's a matter of respect**. I don't do it to you"; "[s]o when Mr. Leib comes before you and makes **his big grandstand move**"; "**[i]t's a matter, again, of respect**. **It's a matter of respecting you as a group and trying to fool you**"; "**[u]nlike Mr. Leib, I think you're smart people** . . . ."

Additionally, the Circuit Court ordered that counsel could not make statements to the jurors that they may determine medical negligence using their own experience, common sense, or without expert testimony. (R.57: pp. 13-14 [A-App. 85-86].) This directive was breached when Plaintiffs' counsel made statements like: "**I didn't tell you you're not experts**"; "[opposing counsel] spent the last hour and a half . . . telling you what you don't know and **that you're not going to be experts** -- you're not going to know the information. **I disagree**"; "**I think you've learned the medicine and I think you are experts in a sense**."

C. These Prejudicial Statements, Together, Warrant a New Trial.

Medical malpractice cases are unique in that a substantial portion of the jurors' time is spent listening to expert witnesses explain what is expected of a reasonable physician and whether the physician in the case conformed to those expectations. This is because the jurors' duties are strictly limited by the jury instructions. The jurors are prohibited from evaluating the defendant's conduct

under any other standard than the ones described by the medical experts. The jurors are free to eschew one expert's opinions in favor of another expert's opinions, but they are not permitted to rely on their own conceptions of the standards of care applicable to physicians.

Plaintiffs' counsel's statements during closing argument intentionally confused the jurors' duties with respect to expert testimony. The first statement analogized the risk factors set forth in Dr. Wener's standard of care opinions to various traffic rules in violation of a court order. The second and third statements asked the jurors to put themselves in the patient's position and consider their lay opinions as to the degree of care they would like to receive, again in violation of a court order. In doing so, Plaintiffs' counsel not only mischaracterized both the standard of care and Dr. Wener's testimony; he also asked the jurors to ignore the standard of care in favor of their personal feelings.

There can be no dispute that this case involved emotional facts. Braylon Seifert suffered a permanent injury which will affect his body for the rest of his life. Under such circumstances, the rule of law and the duty of the jury are particularly important. To protect Dr. Balink against violations of the law by Plaintiffs' counsel, the defense brought numerous motions in limine. Most of these motions were granted because they plainly reflected the state of the law. Nevertheless, Plaintiffs' counsel broke the law and violated these orders just minutes before the jury retired to the jury room to deliberate this emotional case.

The defense submits that these comments had the probable result of influencing how the jurors deliberated in the jury room. A new trial should be granted to Dr. Balink.

III. DR. BALINK DESERVES A NEW TRIAL IN THE INTERESTS OF JUSTICE BECAUSE THE GENUINE ISSUES OF THE CASE WERE NOT TRIED.

This case presents exceptional circumstances. Although Dr. Balink is confident that the Court will find her arguments in the foregoing sections persuasive, the interplay between Dr. Wener's unreliable opinions and the prejudicial statements by Plaintiffs' counsel warrant special consideration. Both influenced the way in which the jurors perceived the standard of care applicable to Dr. Balink. On the one hand, Dr. Wener's opinions, and the dearth of reliability inherent in them, provided the jurors with the only expert evidentiary support for the Plaintiffs' theory of liability on standard of care. On the other hand, Plaintiffs' counsel's statements, which violated several orders in limine that went unenforced by the Circuit Court, obscured how the jurors should analyze expert evidence in arriving at a just verdict.

The standard of care, and whether that standard is breached, is the crux of most medical malpractice cases. In this case, it was the *only* genuine question on liability. Clearly, if the Court was to grant a new trial in the interests of justice, neither Plaintiffs nor Defendants would be deprived of their fair day in court. Yet, as the verdict currently stands, Dr. Balink was likely deprived of hers. She asks

that the Court exercise its discretionary authority under Wis. Stat. § 751.06 to order a new trial in the interests of justice.

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 28th day of December, 2015.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Attorneys for Defendants-Appellants-Petitioners, 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 **10,982 words**.

Dated this 28th day of December, 2015.

WILSON ELSER MOSKOWITZ EDELMAN
& DICKER, LLP
Attorneys for Defendants-Appellants-
Petitioners, 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 28th day of December, 2015.

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

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

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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 the 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.

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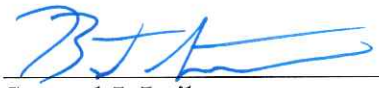
Dated this 28th day of December, 2015.

WILSON ELSER MOSKOWITZ EDELMAN
& DICKER, LLP
Attorneys for Defendants-Appellants-
Petitioners, 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 December 28, 2015, 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

Guy J. DuBeau, Esq.
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
P.O. Box 1767
Madison, WI 53701

Dated this 28th day of December, 2015.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Attorneys for Defendants-Appellants-Petitioners, 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 December 28, 2015, 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. § 809.80(3)(b)1.

Dated this 28th day of December, 2015.

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

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