RECEIVED
02-29-2016
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
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 PLAINTIFFS-RESPONDENTS

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

Counsel for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert:

Kenneth M. Levine & Associates, LLC
Kenneth M. Levine
Admitted *Pro Hac Vice*
32 Kent Street
Brookline, MA 02445
(p) (617) 566 – 2700
(f) (617) 566 – 6144

Aiken & Scoptur, S.C
Paul J. Scoptur
State Bar No. 1018326
Local counsel
2600 N. Mayfair Rd.#1030
Milwaukee, WI 53226
(p) (414) 225 - 0260

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Wisconsin Statutes **Page(s)**

Federal Rules **Page(s)**

STATEMENT ON ORAL ARGUMENT AND PUBLICAITON

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

STATEMENT OF THE CASE

A. Nature of The Case

The Defendant, Dr. Balink, appeals from a jury verdict which found Dr. Balink negligent for the care and treatment during delivery of the minor child, Braylon Seifert, who suffered a severe and permanent brachial plexus injury. At issue in this appeal is the Circuit Court's ruling admitting portions of the Plaintiffs' expert's opinion to Dr. Balink's prenatal care and statements made by Plaintiffs' counsel's during closing arguments.

On July 29th, 2011, the Plaintiffs, Braylon Seifert, by his Guardian Ad Litem, Paul Scoptur, Kimberly Seifert and David Seifert (hereinafter "the Plaintiffs", and as individuals referred to as "the minor plaintiff, Braylon Seifert" and "Mrs. Seifert" respectively) brought a civil action against the Defendants, Dr. Kay M. Balink and ProAssurance Wisconsin Insurance Company (hereinafter the "Defendants" and individually referred to as "Dr. Balink" and "the Fund" respectively) for medical negligence and lack of informed consent[1].

[1] Contrary to Dr. Balink's assertion in her brief that the Plaintiffs alleged that her negligent care of Mrs. Seifert "*caus[ed]* Braylon to encounter a shoulder dystocia," (Def. Brief at pg. 1), Plaintiffs' Complaint alleged that Dr. Balink was negligent in 1.) applying excessive traction during the delivery of Braylon *after* she diagnosed a shoulder dystocia, which resulted in a severe and permanent brachial plexus injury; and 2.) Dr. Balink failed to obtain informed consent for delivery via cesarean section to avoid shoulder dystocia and fetal injury.

B. Undisputed Background Facts

1. Kimberly Seifert's Prenatal Care

Mrs. Seifert began prenatal care with Dr. Balink on December 5, 2008. (R. 116: Ex. 236 at RICH 283.) Mrs. Seifert weighed 269 pounds at the time she first became pregnant. (R. 141: p. 81 [R-App.43].) Mrs. Seifert attended approximately 10 prenatal visits with Dr. Balink between her first visit and delivery on May 29, 2009. (R. 116: Ex. 237A at KB8-14.) Ms. Seifert gained approximately 36 pounds during her pregnancy, weighing 305 pounds at time of induction. (R. 141: p. 81 [R-App. 43].)

On March 19, 2009, Dr. Balink had Mrs. Seifert undergo a one-hour glucose tolerance test, which is administered to screen for gestational diabetes. (R. 116: Ex 236 at RICH 226.) If the one-hour glucose screen is abnormal, a three-hour glucose test is required to diagnose gestational diabetes. (R. 141: p. 63 [R-App.39].) Mrs. Seifert's blood glucose level on the one-hour glucose test was 131 mg/dL. (Id. at p. 82 [R-App.44].) Dr. Balink never administered a three-hour glucose test for Mrs. Seifert. (Id. at p. 83 [R-App. 45].) In addition, Ms. Seifert underwent ultrasound imaging during her prenatal care. An Ultrasound is the most accurate tool in estimating the fetal size of the unborn child. (Id. at p. 101 [R-App. 57].) Dr. Balink did not order an ultrasound prior to induction of labor. (Id.)

Mrs. Seifert was recommended for labor induction on May 26, 2009. Dr. Balink noted indications of high blood pressure, early preeclampsia and large of gestational age, or "LGA." (R 141: p. 86 [R-App. 48]; R: 116: Ex. 260). "LGA" is

an ultrasound term used when the baby is above the 90th percentile and above. (R. 141: pp. 86-87 [R-App.48-49].) Dr. Balink estimated fetal weight was 8 ½ pounds. (Id. at p. 100 [R-App.56]; R. 116: Ex. 260). Braylon Seifert weighed 9 pounds 12 ounces at birth. (Id. at p. 100 [R-App.56].)

2. Kimberly Seifert's Labor and Delivery of Braylon Seifert

Mrs. Seifert arrived at the hospital for induction on May 28, 2009. At 2300 hrs, Mrs. Seifert was completely dilated and ready to push. (R.141: pp. 88-89 [R-App. 50-51].) She had adequate pushing with downward descent of the head. After about an hour of pushing she was noted to be tiring. A vacuum was then placed on the fetal head, which was at +2/+3 station. (R. 116: Ex. 236 at RICH 547.) Over four contractions and approximately 13 minutes, the head was brought to the perineum by the vacuum. There is no indication in the medical records that Dr. Balink informed Ms. Seifert of risks prior to the use of a vacuum.

Braylon Seifert's head delivered at approximately 0021 hrs. (R. 116: Ex. 236 at RICH 501.) Almost immediately after delivery of the head, there was retraction of the head. Retraction of the head indicates a shoulder dystocia, i.e. the infant's shoulder is stuck behind the mother's pubic bone prohibiting the infant's body from being delivered. (R. 141: p. 43 [R-App.33].) Dr. Balink diagnosed shoulder dystocia at this time and undertook a sequence of maneuvers to resolve the dystocia, including McRoberts, suprapubic pressure, an episiotomy and a corkscrew maneuver. (R. 116: Ex. 236 at RICH 501.) Dr. Balink then delivered the posterior shoulder with facture of the right humerous before the anterior

shoulder dislodged. (Id.; R. 141: p.104 [R-App.60].) Braylon Seifert was delivered at 0024, approximately three minutes after the diagnosis of shoulder dystocia. (Id.) Braylon was initially admitted to the Special Care nursery at Richland Medical Center and then transferred to Meriter in Madison due to lack of function is his left upper arm.

3. Braylon Seifert's Brachial Plexus Injury

Braylon was monitored in the neonatal intensive care unit for nine days. Braylon was diagnosed with a permanent brachial plexus injury. The brachial plexus is a system of nerves running from the cervical spine to the upper extremity. Braylon's permanent brachial plexus injury severely limited the growth and function of his left arm requiring surgical intervention and extensive therapy to assist in ameliorating the damage. No amount of medical intervention will restore Braylon's arm to normal function and/or appearance.

C. Dr. Jeffery Wener's Opinions and Rulings on Admissibility

Plaintiffs offered the testimony of Dr. Jeffery Wener as their obstetrical expert to opine on the allegations of lack of informed consent and negligence. Dr. Wener testified that he was familiar with the standard of care of the average family practice physician, specifically as it relates to issues of pre-natal care, labor and delivery.[2] Dr. Wener offered the opinions that Dr. Balink breached of standard of care by: failing to order a 3-hour glucose test; failing to perform ultrasound prior

[2] Dr. Wener's qualifications and relevant experience are outlined in Section I(B)(1) of this brief.

to delivery; using vacuum extraction during Braylon's delivery; applying excessive traction in the presence of shoulder dystocia.

Dr. Balink sought a pretrial order excluding Dr. Wener's opinion testimony concerning informed consent, i.e. failure to order a 3-hour glucose test, failure to order ultrasound, and use of vacuum, pursuant to the recently amended Wis. Stat. 907.02(1). (R:64.) The Defendants *did not* challenge Dr. Wener's opinion on the application of excessive traction during labor delivery as the cause of Braylon's permanent brachial plexus injury. Moreover, although Dr. Balink addresses each of Dr. Wener's opinions on these issues individually, she fails to recognize that it was the prenatal care *in totality* – including, the failure to order a 3-hour glucose test, paired with the failure to perform an ultrasound – that formed Dr. Wener's opinion that informed consent for delivery via cesarean section was necessary to avoid the risk of shoulder dystocia and fetal injury. For these reasons, Dr. Wener's opinions concerning prenatal care, and his opinions concerning the labor and delivery of Braylon, with the evidentiary challenges and Circuit Court's rulings, are addressed in turn below.

1. Dr. Wener's Opinions Concerning Prenatal Care

Dr. Wener opined that Dr. Balink failed to identify risk factors for shoulder dystocia during Ms. Seifert's prenatal care and thus, never gained the information necessary to inform her on the risks and alternatives for delivery. Dr. Wener opined that Mrs. Seifert presented prenatally obese, with a weight gain of 36 pounds, carrying a large for gestational age infant. (R. 141: pp. 81, 86 [R-App.43,

48].) Dr. Wener opined that the average qualified family practitioner in 2009 knew or should have known that maternal obesity, excessive weight gain, gestational diabetes and a large baby were all risk factors of shoulder dystocia. (R. 141: p. 65 – 66 [R-App.41-42].)

Dr. Wener's opinion that Dr. Balink breached the standard of care prenatally is twofold. First, that Dr. Balink failed to administer a three-hour glucose tolerance test to rule-out or diagnose Ms. Seifert with gestational diabetes. (R. 141: p. 83 [R-App.45].) Second, that Dr. Balink failed to order an ultrasound prior to labor induction to evaluate Braylon's fetal weight. (R. 141: p. 101 [R-App.57].) Dr. Wener opined that the standard required Dr. Balink to administer these two tests based on Mrs. Seifert's presentation. Further, Dr. Wener opined that an average qualified family practitioner in 2009 would have gained this information in order to properly inform the patient of the risks and alternatives. (R. 141: pp. 41, 58 [R-App.32, 34].) The Circuit Court found that Dr. Wener's opinions were well known and accepted medical information concerning gestational diabetes, obesity, maternal weight gain, large for gestational age and their relationship to shoulder dystocia. (R. 138: p. 109 [R-App.21].)

Dr. Wener opined that Dr. Balink breached the standard of care by failing to administer a three-hour glucose tolerance test, which would have diagnosed gestational diabetes. (R. 141: p. 83 [R-App. 45].) Dr. Wener opined that gestational diabetes was an accepted risk factor of shoulder dystocia by the average qualified family practitioner in 2009 and more common in obese woman.

(R. 141: p.64, 66 [R-App. 40, 42].) Dr. Wener opined that Mrs. Seifert's results of her one-hour glucose test, 131 mg/dL, was abnormal. (R. 141: p. 82 – 86 [R-App. 44-48].) Further, Dr. Wener opined that the standard of care requires the administration of a three-hour glucose test to diagnose or rule out gestational diabetes when the one-hour glucose test is abnormal. (Id.) By failing to order the 3-hour glucose test, Dr. Wener opined that Dr. Balink breached the standard of care and that if Mrs. Seifert had undergone the test she would have been diagnosed with gestational diabetes and assessed at a greater risk for shoulder dystocia. (Id.)

Dr. Wener further opined that Dr. Balink fell below the standard of care by failing to perform an ultrasound prior to induction. (R. 141: p. 101 [R-App.57].) Dr. Wener testified that ultrasound imaging is the best means of evaluating the size of the baby with a ten to fifteen percent acceptable range for accuracy. (R.141: pp. 100-101 [R-App.56-57].) Dr. Wener opined that Dr. Balink anticipated a large baby, as referenced in her medical notation recommending labor induction. (R. 141: p. 87 [R-App. 49].) Dr. Wener opined that the average qualified family practitioner knew or should have known larger infants are at more of a risk of shoulder dystocia. (R. 141: pp. 66, 87 [R-App.42, 49].) Dr. Wener further opined that maternal obesity yields larger babies. (R. 141: p.110 [R-App. 61].) Dr. Wener opined that given the risk factors, maternal obesity and large for gestational age, Dr. Balink fell below the standard of care by failing to order an ultrasound to determine the estimated fetal weight of Braylon Seifert prior to delivery. (R.141 pp. 101 – 102 [R-App.57-58].)

2. Dr. Wener's Opinions Concerning Application of the Vacuum

Dr. Wener opined that applying a vacuum during delivery is a significant risk in causing shoulder dystocia. (R.141: p. 110 [R-App.61].) Dr. Wener opined that prior to the use of the vacuum, Dr. Balink knew or should have known the risk factors for shoulder dystocia present in the delivery of Braylon Seifert. (R. 141, p. 89-90, 112 – 113 [R-App.51-52, 63-64].) Dr. Wener opined that with the risks for shoulder dystocia, as stated above, Dr. Balink fell below the standard of care by applying the vacuum during the delivery of Braylon. (Id.) Dr. Wener opined that, instead of applying a vacuum, Dr. Balink should have offered a cesarean section or should have simply allowed Mrs. Seifert to continue to push, thus avoiding shoulder dystocia and ultimately the severe brachial plexus injury that resulted from excessive traction. (Id.)

3. Dr. Wener's Opinion Concerning the Delivery of Braylon Seifert

After application of the vacuum, Braylon Seifert's head delivered and immediately retracted. Dr. Balink diagnosed shoulder dystocia. Dr. Wener opined that Dr. Balink fell below the standard of care by applying excessive traction to the Braylon's head at the time of delivery. (R.141: p. 113 [R-App.64].) Dr. Wener testified that Braylon's injury permanently affected each nerve branch of the brachial plexus, requiring surgical graphs. Dr. Wener opined that an injury like Braylon's does not occur absent excessive traction. (R. 141: p. 114 [R-App.65].)

Dr. Wener opined that any traction used during delivery must be gentle.[3] (Id.) Dr. Wener's opinion was based upon the severity of the injury and the medical records (Id.) Dr. Wener opined that substantial pressure would have been placed on the nerves in order to get this severe of an injury. (R.141: p. 115 [R-App.66].) Again, the Defendants *did not* challenge Dr. Wener's opinion concerning excessive traction. The very issue the jury found in favor of the Plaintiff on. (R. 151: p. 4, 8 [R-App.120, 124].)

4. The Circuit Court Rulings on Admissibility

Prior to trial, Dr. Balink sought *only* to exclude Dr. Wener's testimony regarding the 3-hour glucose test, ultrasound, and vacuum assistance. (R. 64.) Dr. Balink argued that these opinions were unreliable under Wis. Stat. §907.02(1). The Plaintiff opposed Dr. Balink's motion arguing Dr. Balink misapplied and misinterpreted the reliability requirements of Wis. Stat. §907.02(1). (R. 85.)

After a lengthy analysis, the Circuit Court denied Dr. Balink's motion ruling that Dr. Wener's methodology was "classic medical methodology" (R.138: p. 53 [R-App.17].) and that "clinical medicine is less susceptible to precise definition and there is no set standard of care established from either side." (Id. at 109 [R-App.21].) The Circuit Court found that Dr. Wener's opinion was based on known and generally accepted factors: size of fetus, estimated size of fetus, mother's size, elevated to some extent, and glucose tests. (Id.) The Circuit Court

[3] Each of the Defendant's experts, Dr. Scher, Dr. Rouse and Dr. Grimm, testified that excessive traction applied to the infants head and neck in the presence of shoulder dystocia will cause a permanent brachial plexus injury. (R. 146: p. 71, 225; R. 151: p. 5)

ruled that Dr. Wener's opinion was reliably based on a medical methodology looking at recognized factors of standard of care. (R. 138: pp. 109-111 [R-App.21-23].) Further, the Circuit Court noted that Dr. Wener's opinion would be subject to cross-examination and was for the *jury* to decide. (Id. at 111 [R-App.23].)

Dr. Balink renewed her motion to exclude portions of Dr. Wener's opinions during trial. The Circuit Court denied Dr. Balink's renewed motion holding that Dr. Wener's opinion was science, insofar as he relied on known medical indicators and tested by cross-examination. (R. 141: p. 96, 193 [R-App.55, 80].) Further, that "Medicine is a science; it is not a quantified science. It is not measurement, in many respects. It is not engineering." (Id. at 193.)

After close of the Plaintiff's case, the Circuit Court denied Dr. Balink's motion for directed verdict concerning Dr. Wener. (R.147: p. 18 [R-App.103].) Notably, the Circuit Court found the testimony of Dr. Wener that Dr. Balink sought to exclude, i.e. failure to perform a 3-hour glucose test, failure to perform an ultrasound prior to induction, and the use of vacuum, all went to the issue of informed consent which *the jury did not find in the Plaintiff's favor.* (R. 151: pp. 2-9 [R-App.118-125].) The motions after verdict concerning Dr. Wener's opinions were denied. (Id.) The Circuit Court made a clear record upon which he based his decisions. (R. 151: pp. 2-18 [R-App.118-134].)

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

Both parties filed pretrial motions in limine. The following are relevant to the present appeal:

Duty of Average Person & Rules of the Road: Dr. Balink's Motion No. 8 & The Fund's Motion No. 2. Dr. Balink sought an order to preclude Plaintiffs' counsel from commenting that this case is analogous to any case in which negligence is compared to the duty of an average person. (R. 57: pp. 12-13.) This motion was granted. (R. 138: p. 20 [R-App.13].) The Fund sought an order to preclude Plaintiffs' counsel from analogizing between a healthcare provider's negligence and the average driver who carelessly fails to observe the rules of the road. (R. 67: No. 2.) Both motions were granted. (R. 138: p. 30 [R-App.15].) During closing, Plaintiffs' Counsel argued how risks accumulate, analogizing speed-limits on a sunny day to the risks when it is snowing, or raining. (R. 150: pp. 22-23 [R-App.105].) Defense' Counsel objected. The Court ruled the statements were argument and overruled the objection. (Id.)

Jurors' Common Experience: Dr. Balink's Motion No. 9. Dr. Balink sought an order to preclude Plaintiffs' counsel from arguing to the jury that they can determine medical negligence using their own experience and, common sense, or without expert testimony. (R. 57: pp. 13-14.) The Circuit Court ruled that jurors may use their common sense when they assess witness credibility and were not permitted to use their ordinary sense in determining the standard of care. (R. 138:

pp. 21 [R-App.14].) During closing statements Plaintiffs' counsel asked the jury "Is this how you want your doctor to care?" and "do you want your doctor to think about you?" (R.150: p. 25, 123 [R-App.107,114].) Plaintiffs' counsel withdrew the first statement after objection. The Court sustained the second objection. During rebuttal argument Plaintiffs' counsel argued that the jurors had common sense and could analyze the expert testimony, being experts *in a sense* after listening to the evidence. (R. 150: p. 137-138 [R-App.115-116].) At no time did Plaintiffs' counsel suggest that the jurors could disregard expert testimony.

E. Verdict and Post-Verdict Motions

On August 20th, 2013 the jury was provided with a Special Verdict form containing five questions. (R.115: 1-3 [R-App.9-11].) The jury returned a verdict in favor of the Plaintiff on Questions 1 and Question 2 (R. 115: 1-3 [R-App.9-11].) as follows:

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

Answer: Yes.

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

Answer: Yes.

The jury *did not find* for the Plaintiff on the issue of *informed consent*, Question No. 3. (emphasis added) (R.115: 1-3 [R-App.9-11].) Having answered "no" to Question 3 the Jury did not go on to answer Questions 4 and 5. (Id.)

Dr. Balink filed motions after verdict seeking a new trial. Post-verdict motions were heard on November 15, 2013. The Circuit Court denied the post-verdict motions ruling that a new trial was not warranted in the interests of justice. Judgment entered on December 23, 2013. The Defendant's Notice of Appeal was filed on January 15, 2014.

STANDARDS OF REVIEW

This Court reviews both an evidentiary ruling and a lower court's ruling concerning expert testimony for erroneous exercise of discretion. *See Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698; *260 N. 12th St., LLC v. State DOT,* 2011 WI 103, ¶¶ 38-39, 338 Wis. 2d 34, 808 N. W.2d 372. When making evidentiary determinations, the trial court "has broad discretion." *Id.* If a court applied the proper legal standard and reached a reasonable conclusion, an appellate court will uphold that decision. *Id. see also Filppula-McArthur v. Halloin,* 234 Wis. 2d 245, 257-258, (2000).

Whether the district court applied the proper standard and performed its gatekeeper role in the first instance, however, is reviewed de novo. *Dodge v. Cotter Corp.* 328 F.3d 1212, 1223 (10th Cir. 2003); *see also Lees v. Carthage College*, 714 F.3d 516, 520 ((7th Cir. 2013) (regarding the *Daubert* standard) ("[w]hether the district court applied the appropriate legal framework for evaluating expert testimony is reviewed de novo, but the court's choice of relevant factors within the framework and its ultimate conclusion as to admissibility are reviewed for abuse of discretion"). The law grants a lower court the same broad

latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. *Kumho Tire Co. Ltd v. Carmichael,* 526 U.S. 137, 142 (1999).

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

ARGUMENT

The verdict of this case was the product of a fair and just trial over the course of eight days. The Court of Appeals properly affirmed the Circuit Court's analysis of Dr. Wener's testimony pursuant to Wis. Stat. § 907.02(1) on three independent occasions: pre-trial, during trial, and post-trial. With each review of Dr. Wener's opinion testimony, the Circuit Court properly applied the Wis. Stat. § 907.02(1) and dictated on record the basis for its decision. Dr. Balink misstates and mischaracterizes the *Daubert* standard as exacting a singular tested methodology to support an expert opinion. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993). *Daubert* and its progeny do little to help Dr. Balink's position. In attempts to confuse the issues, Dr. Balink exaggerates the scientific complexity of Dr. Wener's testimony. As discussed below, Dr. Wener relied on known, accepted medical risk factors as a basis for his opinions in this matter;

Factors that Dr. Balink's expert, Dr. Dwight Rouse, agreed with in part as described in Subsection I.B.(1) of this brief, *factors that Dr. Balink did not dispute.* Dr. Wener has not extrapolated conclusions from novel scientific principles or methodologies; rather, he employed the same methodology used by obstetricians every day under similar circumstances.

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

I. DR. WENER'S EXPERT OPINIONS WERE RELIABLE AND ADMISSIBLE, UNDER WIS. STAT. § 907.02(1).

A. Wis. Stat. § 907.02(1)'s Admissibility Standard as a Codification of *Daubert*, and its Progeny.

Effective February 1st, 2011, the Wisconsin legislature amended § 907.02(1) to adopt the widely used *Daubert* reliability standard as adopted in the Federal Rules of Evidence 702. Under the amended statute, the admissibility of an expert's opinion is conditioned upon the proposed testimony being: (1) based upon sufficient facts or data; (2) the product of reliable principles and methods, and (3) the expert witness must have applied the principles and methods reliably to the facts of the case. *Daubert,* 509 U.S. at 592; *see also General Electric Co v. Joiner,* 522 U.S. 136 (1997); *Kumho Tire Co. Ltd* v. *Carmichael,* 526 U.S. 137 (1999). As

Wis. Stat. § 947.02(1) was modeled after Federal Rule 702, courts look to the federal interpretation of that rule for guidance. *State v. Poly-America, Inc.*, 164 Wis. 2d 238, 246, 474 N.W. 2d 770 (Wis. Ct. App. 1991).

In determining the admissibility of an expert's testimony, *Daubert* identified four factors that might assist a trial court: whether the theory or technique can be and has been tested; whether the technique has been subject to peer review and publication; the technique's known or potential rate of error; and the level of the theory or technique's acceptance within the relevant discipline. *United States v. Mooney*, 315 F.3d 54, 62 (1st Cir. 2002)(citing *Daubert*, 509 U.S. at 593-94). Contrary to Dr. Balink's treatment of *Daubert* in her brief, the Supreme Court made clear that these factors do not constitute a "definitive checklist or test." *Daubert,* 509 U.S. at 593. *See also, Kumho Tire,* 526 U.S. at 150. "The trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is 'flexible,' and *Daubert*'s list of factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire,* 526 U.S. at 141-42. *Kumho* held that specific circumstances of the particular case at issue will dictate how the *Daubert* standard is applied. *Id.* at 150. The reliability of engineering testimony is at issue

in some cases as it rests upon scientific foundations and in other cases, the relevant reliability concerns may focus upon personal knowledge or experience. *Id.*

The trial court is in the best position to consider the applicable factors in applying the *Daubert* standard and the given weight of each factor. If an expert's testimony is within the range where experts might reasonably differ, *the jury, not the trial court*, should be the one to decide amount the conflicting views of different experts. *Kumbo Tire,* 526 U.S. at 153. (emphasis added). The credibility of each witness with conflicting but nevertheless admissible testimony is under attack on cross-examination. *Bielskis* v. *Louisville Ladder, Inc.,* 663 F.3d 887, 894 (7th Cir. 2011) (trial "court's admissibility determination is not intended to supplant the adversarial process...'shaky' expert testimony may be admissible, subject to attack on cross-examination"). The advisory committee 2000 amendment notes to Fed. R. Evid. 702 makes it clear that "rejection of expert testimony is the exception and not the rule."

Daubert's list of factors is neither dispositive nor exhaustive, but is illustrative, the factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. *Kumho Tire*, 526 U.S. at 119. Rather, the reliability requirement of *Daubert* is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.*

Although Dr. Balink suggests that Dr. Wener's opinions were based on personal preference and unsupported by medical literature, publication is not a *sin qua non* of admissibility; it does not necessarily correlate with reliability. *Daubert* at 593. *See also*, *United States* v. *Mikos,* 539 F.3d 706, 711 (7th Cir. 2008). *Daubert* recognized the utility of expert testimony even without literature to which an expert can point, and gave "the trial court broad latitude to determine whether *Daubert's* specific factors are, or not, reasonable measures of reliability in a particular case." *Loejfel Steel Prods,* v. *Delta Brands,* 372 F. Supp. 2d 1104, 1117-18 (N.D. III. 2005.) Further, where there are other factors that demonstrate the reliability of the expert's methodology, as there were with Dr. Wener's testimony, an expert opinion should not be excluded simply because there is no literature on point. *Schneider Ex Rel. Estate of Schneider v. Fried*, 320 F.3d 396, 406 (3rd Cir. 2003).

Moreover, Dr. Balink ignores case law recognizing that the degree to which the expert testifying is qualified also implicates the reliability of the testimony. *Schneider Ex Rel. Estate of Schneider v. Fried*, 320 F.3d 396, 406 (3rd Cir. 2003) (concluding that a medical expert's opinion about the standard of care had a reliable basis based on the expert's qualifications and experience);*Cheryl A. Ellison as Guardian of The Estate v. United States.,* 753 F.Supp.2d 468 (E.D. Pa., 2010)(finding that the medical expert formulated an opinion as to the general—as opposed to simply his own, personal—standard of care and that, based on his experience, he had a reliable basis); *Dickenson v. Cardiac & Thoracic Surgery Tn,*

388 F.3d 976, 982 (6th Cir. 2004)(holding *Daubert's* role of preventing junk science in the courtroom is not served by excluding testimony a medical expert opinion that is supported by extensive relevant experience. Such exclusion is rarely justified in cases involving medical experts as opposed to supposed experts in the area of product liability); *Kudabeck v. Kroger Co.,* 338 F. 3d 856, 862 (8th Cir. 2003)(finding that experience with hundreds of patients, discussions with peers, attendance at conferences and seminars are tools of the trade, and should suffice for the making of a differential diagnosis even in those cases in which peer-reviewed studies do not exist to confirm the diagnosis of the physician); and *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247 (5th Cir., 2002)(finding that the Advisory Committee note to Rule 702: nothing in this amendment is intended to suggest that experience alone or experience in conjunction with other knowledge, skill, training or education-may not provide sufficient foundation for expert testimony, specifically contemplates *reliability*, not just qualifications, when determining admissibility of expert testimony).

Courts have determined that medical knowledge is often uncertain, given the complexity of the human body. *Primiano v. Cook,* 598 F.3d 558, 566 (9th Cir. 2010). *See also United States v. Sandoval-Mendoza,* 472 F.3d 645, 655 (9th Cir. 1995). The *Primiano* court cites classic medical texts stating that medicine is rooted in a number of sciences and charged with the obligation to apply them for man's benefit. "Evidence-based medicine is the conscientious, explicit and judicious use of current best evidence in making decisions about the care of

individual patients." *Primiano* 598 F.3d at 565 citing *Harrison's Principles of Internal Medicine* 3 (Dennis L Kasper et al. eds., 16th ed. 2005). The Defendant's argument suggests that all medical treatment is defined precisely within medicine text and literature taking into account all case-by-case factors. This is not reality.

Moreover, Dr. Balink's objections to Dr. Wener's testimony address the weight and credibility that should be given his testimony, not its ultimate admissibility, and was appropriately challenged upon cross-examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Milward v. Acuity Specialty Products Group Inc.*, 639 F.3d 11, 15 (1st Cir. 2011).

B. The Circuit Court Properly Ruled that Dr. Wener's Testimony Was Based on Reliable Principles, Methods, and Accepted Medical Factors.

Dr. Balink's assertion that Dr. Wener's opinions concerning prenatal care, i.e. informed consent, is not based on medical literature, and arbitrarily based on his personal preference is without merit. Dr. Balink claims that Dr. Wener, with extensive obstetrical experience directly related to the issues at bar, based his opinion on mere assumptions or *ipse dixit* is entirely unfounded and contradicts any understanding of clinical medicine. Dr. Wener's testimony was relevant, reliable, and assisted the trier of fact, and properly admitted pursuant to *Daubert.*

1. The Circuit Court Properly Considered Dr. Wener's Extensive Obstetrical Experience and Qualifications in Determining the Reliability of his Challenged Testimony.

Dr. Wener's testimony was based on his extensive experience, education, training and knowledge of the relevant medical literature – experience, education, training and knowledge which Dr. Balink did not challenge – and not on his personal preferences. Dr. Wener is board certified in obstetrics and gynecologist, who at the time of trial had been delivering babies for over thirty-six years. (R. 141: p.20 [R-App.27].) In addition to this private practice, Dr. Wener taught medical students and residents clinically for four years at the University of California San Diego. (R. 141: p. 21 [R-App.28].) Most importantly, Dr. Wener served as the Chairman of the Department of Obstetrics and Gynecology at St. Alexius Hospital in Chicago for twenty years. (R. 141: p. 27 [R-App.29].) As Chairman, he was responsible for the quality of care rendered to patients and sat on the medical executive committee. (R. 141: p. 28 [R-App.30].) Dr. Wener estimated that he delivered somewhere between 7,500 and 8,000 babies in his career. (R. 141: p. 21 [R-App.28].) Out of his deliveries, Dr. Wener testified that he encountered shoulder dystocia thirty-seven to forty times. (R. 141: p. 39 [R-App.31].) Each criticism upon which Dr. Wener opined are medical situations he has been repeatedly confronted with in treating women over the course of thirty-six years.

Dr. Balink misleads the Court in arguing that Dr. Wener testified to his "personal preferences" as a practicing obstetrician. Dr. Balink, alone, generates the

phrase "personal preferences" in attacking Dr. Wener's opinions. Review of Dr. Wener's testimony reveals that *all* of his opinions at dispute were that of an average qualified family practitioner in 2009 (R:141 at passim.) As outlined in Section C (1) – (3), Dr. Wener criticized Dr. Balink for failing to estimate the fetal weight by ultrasound; failing to order a three-hour glucose tolerance diagnostic test for gestational diabetes; and using a vacuum extraction for the minor Plaintiff's delivery. All three criticisms pertain to the risk of shoulder dystocia, which Dr. Wener has encountered numerous times in his daily practice and in review of other obstetricians when acting as Department Chairman.

Dr. Balink does not dispute Dr. Wener's relevant experience; rather, misapplies the *Daubert* standard arguing that Dr. Wener's experience is not a factor to be considered in determining the *reliability* of his testimony. Extensive experience can implicate reliability. *See Schneider*, 320 F.3d at 406; *Pipitone*, 288 F.3d at 247; *Dickenson,* 388 F.3d at 982; *Kudabeck,* 338 F. 3d at 862 and Fed. R. Evid. 702 advisory committee's note to 2000 amendments.

Dr. Wener relied on accepted medical knowledge concerning gestational diabetes, obesity, maternal weight gain, large for gestational age fetus and their relationship to shoulder dystocia to formulate his opinion. *See* Subsection I(C). Defendant's expert Dr. Rouse agreed, in part, with Dr. Wener that these factors were known and accepted by family practitioners in 2009. (R. 146: pp. 193, 194, 197, 206, 207, 216 [R-App.93-98].) Further, Dr. Balink's own ACOG literature regarding the threshold level of glucose screening supported Dr. Wener's

testimony as being reliable and accepted. (R. 128: p. 759 (cover page) [R-App.135].) Dr. Balink may disagree with Dr. Wener's ultimate conclusions based on his analysis of the medical information presented to him in this case; however, this does not make his opinions inadmissible. Moreover, Dr. Balink cannot argue that Dr. Wener's underlying principles were unreliable when his own experts used the same principles, but came to a different conclusion.

Dr. Wener's opinion was based upon recognized risk factors of shoulder dystocia, risk factors Dr. Balink *does not* dispute, from which he concluded the standard of care was breached and was subject to vigorous cross-examination. Dr. Wener's testimony was, in fact, based upon medical knowledge at the time in 2009 that was known or should have been known to a family practitioner such as Dr. Balink.

2. The Circuit Court Properly Found Medical Literature is Not Determinative of Reliability Under *Daubert*.

As discussed in Section I (A.) above, Dr. Balink unduly focuses on only one *Daubert* factor, and overstates the current case law. Again, "publication is not a *sine qua non* of expert testimony." *Mikos,* 539 F.3d at 711. Literature can be helpful in weighing the reliability of an expert but is not determinative of the expert's admissibility.

Dr. Balink argues that Dr. Wener's refusal to rely on literature undermines his reliability. Conversely, Dr. Wener's testimony is strengthened by the inconsistent medical literature, which offers no exclusive standard of care. Firstly,

Dr. Balink mischaracterizes Dr. Wener's testimony. Dr. Wener does not refuse to rely on such literature; rather, Dr. Wener considers the conflicting medical literature analyzing it against his proven experience. Secondly, Dr. Balink's argument is flawed assuming that the mere existence of medical literature on a certain topic makes it authoritative and correct. The suggestion that all medical treatment is defined precisely within medical literature is not reality. Further, Dr. Wener was not asked to review medical literature, rather he was asked to review the records and provide an opinion based upon his education, training and 36 years of experience. (R:141 p. 135-136 [R-App.71-72].)

Dr. Wener explained why the medical literature did not fit the particulars facts of this case. He testified he could not quantify by numbers because each patient is different and that "the literature is replete - - you look at one piece of literature and they'll say that there's risk factor for shoulder dystocia of 35%. You look at another article that says 15%." (R:141 at p. 188 [R-App.78].) Further, that "[b]efore Dr. Balink delivered this baby, she didn't go to the literature to look up articles." (R: 141 p.136 [R-App.72].) *Daubert* requires that Dr. Wener's testimony be based on "good grounds" not scientific certainty. *Milward,* 639 F.3d at 15. *Daubert* and its progeny recognizes that medicine is science, it is not always quantifiable like other sciences, as it is dependent upon the individual patient. It was Dr. Wener's application of those standards to Ms. Seifert that the Circuit Court found admissible.

Dr. Balink asserts that Dr. Wener's testimony is based on *ipse dixit* yet cites to only one piece of literature herself, an ACOG Bulletin literature that *is not the standard of care but is a guideline*, to rebut his opinion. Dr. Balink was not precluded from challenging Dr. Wener with other literature available within the relevant medical community. Dr. Wener addressed and discredited the alleged literature raised by the defense, explaining that ACOG recommendations do not predict all clinical events and do not necessarily conform to relevant standards of care. (R:141 pp. 133-35 [R-App.69-71].)

In support of Dr. Wener's position, the Court need only look to page one of the ACOG Practice Bulletin, stating that '[t]hese guidelines should not be construed as dictating an exclusive course of treatment or procedure." (R.128: p. 759 (cover page) [R-App.135].) Variations in practice may be warranted based on the needs of the individual patient, resources, and the limitations unique to the institution or type of practice. (Id.) Contrary to Dr. Balink's assertion, the ACOG bulletin actually supports Dr. Wener's methodology that patients need to be considered individually when proscribing care, varying patient-to-patient. (Id.) Literature sought by defense counsel that would address all risk factors cumulatively simply does not exist and relying on just one factor in one article would fail to take into account particular considerations for each patient.

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

Dr. Balink argues Dr. Wener's application of his opinions to the facts of this case was 'confusing' and thus, unreliable, isolating five excerpts of his

testimony. (Deft-App. Br. at 25.) Dr. Balink's argument is another misapplication of the *Daubert* standard; so long as an expert's scientific testimony rests upon "'good grounds,' based on what is known," *Daubert*, 509 U.S. at 590, it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities. *Milward,* 639 F. 3d at 15. Any 'flaws' in Dr. Wener's testimony goes to weight and credibility, not admissibility.

1. Maternal Obesity and Weight Gain as a Risk Factor for Shoulder Dystocia.

Dr. Wener applied his knowledge of maternal obesity to Mrs. Seifert pre-pregnancy weight and her weight at time of delivery. He opined that 36 pounds is "too much weight for her to have gained." (R: 141 p. 81 [R-App.43].) Dr. Wener testified that escalated weight gain in obese women is not healthy for the mother or baby. (Id.) Further, maternal obesity is a risk factor for shoulder dystocia because mother's extra soft tissue decreases the space available for the baby to fit during delivery. (R:141 p. 59 [R-App.35].) He also testified that prior to delivery a doctor can suspect macrosomia if maternal obesity and gestational diabetes are present, requiring identification by the doctor. (Id. at p. 60 [R-App.36].) Dr. Rouse confirms these principles testifying that obese women tend to have bigger babies and that larger babies are more at risk for shoulder dystocia. (R: 146 p. 216 [R-App.98].)

Dr. Wener further explained the importance of obtaining an accurate estimate of the size of the baby. (R. 141 at pp. 58-60 [R-App.34-36].) He testified

that a doctor can perform an ultrasound or a Leopold's maneuver to determine whether the infant has the potential of being macrosomic. (Id.) Leopold's maneuver is the doctor's physical examination of the mother's abdomen. (Id.) A Leopold's maneuver is more difficult if the mother is obese; the bigger the mom's abdominal wall is, the more difficult it is to evaluate the size of the baby. (Id. at 62.) However, he explained that a mother's obesity has less effect on the accuracy of an ultrasound. (Id.) Again, Dr. Rouse agrees with Dr. Wener's position on obesity and shoulder dystocia. (R. 146: pp. 206-207 [R-App. 96-97].)

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

Dr. Wener opined generally that gestational diabetes is diabetes that occurs in pregnancy. (R:141 p.62-63 [R-App.38-39].) If the mother's one-hour glucose test is abnormal, she then undergoes a three-hour test to diagnose or rule-out gestational diabetes. (Id.) It is well accepted that infants of gestational diabetic mother tend to become bigger and are more of a fetal risk for delivery complications. (Id. at 64 [R-App.40].) Dr. Wener testified that Ms. Seifert had an abnormal one-hour glucose screen at 130 mg/dL.[4] Coupled with her her already increased risks of diabetes, a three-hour glucose screen was necessary. (Id. at 82 – 85 [R-App.44-47].) Dr. Wener testified that in his opinion Ms. Seifert was more

[4] Dr. Balink, at Deft. App. Br. p. 22, inappropriately references testimony of Dr. Fred Duboe taken *two months after trial* in this matter. In no way should this *after the fact* evidence be considered in determining Dr. Wener's reliability under *Daubert* or whether Circuit Court abused its discretion.

likely than not a gestational diabetic when looking at her obesity, one-hour glucose screen, and macrosomic infant. (Id.)

ACOG bulletin No. 30, used by Dr. Balink at trial, states that the cutoff threshold in screening for gestational diabetes is 130 mg/dL up to 140 mg/dL. (R. 141: p. 132[R-App.68].) Dr. Balink argues that Dr. Wener's use of 130 mg/dL as the threshold screening level warrants his testimony unreliable, arguing that Dr. Wener picked this level arbitrarily, out of thin air. Ironically, Dr. Balink's own medical literature states that the use of 130 mg/dL as the screening threshold was the standard of care in 2009. (Id.) At trial, Dr. Balink's expert Dr. Rouse gave his opinion that 140 mg/dL was the cutoff for one-hour glucose screening. Dr. Rouse offers no explanation as to why he chose 140 mg/dL in this matter, other than that is the level Dr. Balink used. Conversely, as stated above Dr. Wener offers a fact specific explanation in opining that 130 mg/dL was the standard of care threshold in this matter given Ms. Seifert's risk factors and presentation.

Dr. Wener explained that Ms. Seifert's one-hour glucose screen was abnormal testifying that:

> "131 is abnormal, by 2009, those providing obstetrical care were using 130. For many, many years prior to that it had been 140. And then probably around the turn of the Century it became evident that more patients were being identified with gestational diabetes when the screening was changed to 130. And by 2009 most everyone was using 130. Especially though in a patient that's this obese you have to be concerned about diabetes" (Id. at p. 83 [R-App.45].) He opined further that, "if it's above 130 that requires a three-hour glucose tolerance test." (Id. at p. 84 [R-App.46].)

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

> "As of 2009 the standard of care was 130." referring to ACOG No. 30]... "First of all that was 2001. Second of all if you read that guideline it'll tell you that even in 2001 they were discussing the 130. The 130 was used more often even at that point then 140. They also brought up the point that at 130, 25 percent more gestational diabetics are identified using the 130 numbers. So even then – this was eight years later, when 2009 came about and even if you were still a believer in the 140, you have a patient here that's obese and a patient that has a higher risk for gestational diabetes. The standard of care required a three-hour GTT." (Id. at p. 133 [R-App.69].)

He explained that all of the factors evaluated together – not each in isolation – led to his opinion that Ms. Seifert more likely than not suffered from gestational diabetes. (Id. at pp. 85, 86, 134, 136, 142-43 [R-App.47-48, 70, 72, 74-75].) Thus, Dr. Wener opined that Dr. Balink breached the standard of care in failing to administer a three-hour glucose test. (Id.) Had Dr. Balink administered the test she would be presented with a gestational diabetic obese mother carrying a large fetal weight, all three risk factors of shoulder dystocia, together; not in isolation, requiring that she inform Mrs. Seifert of the risks and alternatives to having a vaginal delivery.

Again, Dr. Balink's expert agreed that gestational diabetes is a problem for expectant mothers because high blood sugar levels lead to overgrown babies, which in turn can lead to shoulder dystocia. (R: 146 p. 186 [R-App.92].) Dr.

Balink's attacks on Dr. Wener cannot be reconciled with her own expert's agreement.

3. Macrosomia or LGA as A Risk Factor for Shoulder Dystocia.

As outlined above, Dr. Wener testified that Dr. Balink should have *suspected* that the infant was macrosomic because of the other factors present during prenatal care, i.e. obesity, weight gain, gestational diabetes. (R: 141 p. 165 [R-App.77].) Again, Dr. Rouse agrees that obese woman have bigger babies and big babies are more likely to have shoulder dystocia. (R:146 p. 207, 206 [R-App.97-98].) Dr. Wener's testified that the infant fell within the range of macrosomia; above 4,000 grams and less than 200 grams of 4,500 grams.

During cross-examination, Dr. Wener was challenged on whether Braylon was actually macrosomic weighing 9 lbs. 12 oz. or 4,370 grams. (R:141 p.160 [R-App.76].) Dr. Wener testified, "By 130 grams...we're [sic] not taking statistics, we're talking about a person. And when you're talking about 4,500 grams compared to 4,370... you're talking about 130 grams. That's, that's a tiny amount of weight.'" (Id.) Contrary to Dr. Balink's representations, Dr. Wener did not testify that estimating fetal weight by way of fundal heights and maternal factors was unacceptable nor did he testify inconsistently with testimony at deposition.

Dr. Balink fails to acknowledge that on cross-examination, literature read to Dr. Rouse stated, "With estimated fetal weight greater than 4,500 grams, a long second stage of labor or arrest of descent in the second station for cesarean delivery because of the higher likelihood of shoulder dystocia, at a [sic] given

birth weight in pregnancy of women with diabetes, it may be best to apply the above recommendation to an estimated fetal weight greater than 4,000 for gestational diabetics." (R: 146 p.233 [R-App.101].)

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

D. Dr. Wener's Opinions Regarding Individualized Patient Care is Classic Medical Methodology Supported by Relevant Case Law and the Dr. Balink's Own Experts.

Dr. Wener's employed the same methodology all physicians use practicing clinical medicine. Clinical medicine requires that physicians view each patient in his or her entirety during their care and treatment, not symptoms or factors in isolation as Dr. Balink would suggest. Dr. Wener did not create a new medical practice as described by Dr. Balink's attack on his 'holistic' approach, nor did the Circuit Court in affirming his admissibility.

Dr. Rouse, the Defendant's expert, agreed that medicine is individualized. (R:146: pp. 194, 197 [R-App.94, 95].) Dr. Rouse, confirms Dr. Wener's testimony and the Circuit Court's holding, when discussing ACOG literature, "of course, back to your individualization, we wouldn't need doctors; *we could just have robots if we didn't have to individualize care.*" (emphasis added) (R. 146: pp. 193-194 [R-App.93-94].) Dr. Rouse answered in the affirmative when asked if he

considers patients as whole during treatment. (Id. at p. 197 [R-App.95].) Again, Dr. Rouse agreed that he would treat patients differently based on their individual presentation. (Id.) It is disingenuous for Dr. Balink to suggest that Dr. Wener's testimony is inadmissible when her own expert employs the same methods in patient care.

Medical decision-making relies on judgment, a process that is difficult to quantify of even to assess qualitatively. *Primiano* 598 F.3d at 565. Those in the medical profession must use their knowledge and experience to weigh known factors with inevitable uncertainties to make sound decisions. *Id.* Courts have determined that medical knowledge is often uncertain, given the complexity of the human body. *Primiano* 598 F.3d at 566. *See also Sandoval-Mendoza,* 472 F.3d at 655. The Circuit Court agrees that medical opinion is not in a hard science, "it is not a mathematical calculation wherein one plus one plus one always yields three. Sometimes it yields 3.2 and sometimes it yields 2.8" (R: 151 p. 3 [R-App.119].)

The Circuit Court's determination of Dr. Wener's individualized methodology was not without considerable analysis against *Daubert* and its progeny. (R 138: pp. 107-111[R-App.19-23].) Dr. Balink can certainly disagree with Dr. Wener's conclusions in assessing Ms. Seifert's risk factors collectively, and not in isolation, but disagreement in his conclusions will not warrant his testimony inadmissible under *Daubert.*

E. The Court of Appeals' Decision Conforms with Wis. Stat. § 907.02(1), *Daubert,* and its Progeny.

The Court of Appeals properly affirmed the Circuit Court's decision on both the issue of *Daubert*, as adopted by Wis. Stat. § 907.02(1), and prejudicial statements. The Court of Appeals, with a lengthy analysis of *Daubert* precedent, concluded that the Circuit Court did not erroneously exercise its discretion when admitting Dr. Wener's testimony. (R-App.136-159). The Court of Appeals concluded that Dr. Wener's opinions were reliable under the principles and standards of *Daubert, Kumho Tire,* and additional federal court decisions specifically addressing expert testimony of physicians. (R-App.152). Dr. Balink's statement that the Court of Appeals applied "its own interpretation" of Wis. Stat. §907.02(1) and "conferred unfettered discretion" on Circuit Court's in analyzing the admissibility of expert witness is entirely unfounded and inconsistent with the Court of Appeals decision.

Dr. Balink criticizes the Court of Appeals decision without citing one case contradictory to the holding. Certainly, if the Court of Appeals analysis in fact "eviscerate[s] the *Daubert* standard," as stated in Dr. Balink's brief she could have found one case since the inception of *Daubert* twenty years ago to support such a statement. Rather, Dr. Balink exaggerates and misinterprets the Court of Appeals decision to support her flawed argument. After independently considering the legal application of *Daubert,* the Court of Appeals upheld the Circuit Court's

discretionary decision as rationally based in accordance with accepted legal standards in light of the facts in the record. (R-App.144).

Dr. Balink's statement the Court of Appeals endorsed a special exception for medical malpractices cases further highlights her misunderstanding of *Daubert's* application. The Court of Appeals and the Circuit Court discusses the uncertainty of medicine and individualized care in conformity with *Daubert* case law, stating that factors may or may not be pertinent in assessing reliability, depending on the nature of the issue and subject of the testimony.

Consistent with case law cited throughout this brief, the Court of Appeals reasoned that the factors listed in *Daubert* are not a definitive checklist and the test of reliability is flexible dependent on the circumstances of each case. Further, that the trial court is in the best position to weigh the importance of each factor. The Court of Appeals acknowledged that the Circuit Court was within its discretion weighing Dr. Wener's extensive experience, knowledge, education and training in determining the *reliability* of his testimony. (R-App.149). Dr. Balink does not challenge Dr. Wener's qualifications, yet argues that the Court of Appeals, and the Circuit Court, placed unfettered importance on his thirty-six years experience as an obstetrician. Dr. Balink is confused with the Court of Appeals actual holding. (Defs. Appellant Br. at 13.) The Court of Appeals did not hold that *any* physician with extensive experience is automatically admissible, rather, that extensive experience is particularly useful in evaluating the expert's reliability. (R-App.149.) Further, the Court of Appeals' discussion that a trial judge may place greater

weight on the expert's extensive experience and knowledge in determining his/her reliability is supported by *Daubert, Kumho Tire,* and several other federal cases cited within the decision, and Fed. R. Evid. 702 advisory committee's notes.

Secondly, Dr. Balink's argument that Dr. Wener's testimony is unreliable because he did not reference any specific medical literature further emphasizes her misunderstanding of the application of *Daubert.* As discussed in Section I.(A), Federal case law is abundantly clear that literature is but one factor a court *may* consider under *Daubert.* The Court of Appeals correctly states that the Circuit Court was not strictly tied to whether Dr. Wener's opinions were reliably based on medical literature. (R-App.150.)

Finally, the Court of Appeals properly determined that Dr. Wener did reliably apply his theory to the specific facts of the case at hand. Conflicting arguments or testimony will be attacked by cross-examination. Merely, because Dr. Balink's experts disagree with Dr. Wener's testimony or certain methodology does not mean his opinions violate *Daubert.* (R-App.151.)

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

A. Law on Improper Statements of Counsel

In 1984, in *Lobermeier v. General Tel. Co.,* 119 Wis.2d 129, 136, 349 N.W.2d 466, 470 (1984), the court said failure to demand a mistrial is tantamount to an acknowledgement that the error is harmless. A new trial is granted only if the

statements are "plainly unwarranted and clearly injurious" and "cause prejudice to the opposing party and unfairly influence a jury's verdict." Id.

There has been a longstanding history prohibiting counsel from inflaming the passions and prejudices of the jury. *See United States* v. *Young,* 470 U.S. 1, 9 (1985)(an attorney cannot 'make unfounded and inflammatory attacks on the opposing advocate"), *Brown v. Swinelord.* 44Wis. 282, 293 (1878), *see also Sanders-El v. Wencewicz.* 987 F.2d 483, 484-85 (8th Cir. 1993); *Rickabus v. Gott.* 16 N.W. 384, 385 (Mich. 1883)("The duty of the trial judge to repress needless scandal and gratuitous attacks on character. . . and good care should be taken to discharge it fully and faithfully.")

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

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

Circuit has repeatedly recognized that "improper comment during closing argument rarely rise to the level of reversible error" *Probus v. K-Mart, Inc.*, 7984 F.2d 1207, 1210 (7th Cir. 1986).

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

Plaintiffs' counsel's closing argument did not cross these well-established lines with inflammatory rhetoric, personal character attacks, and blatant pleas to jurors' sympathies, prejudices and negative emotions. Like most medical malpractice cases, the medicine is complex, the arguments lengthy and contentious. In this case, there were two theories of liability. The jury found for the defendant on one theory and found for the plaintiff on another. The jury clearly made a very thoughtful and thorough analysis of expert testimony and, in one instance, chose to accept the testimony of defendants' experts and, in the other instance, chose to accept the testimony of plaintiffs' experts. The Defendant either does not understand the medicine or are simply misconstruing the medicine to explain how it is possible that Plaintiffs' counsel influenced the jury's analysis if they actually found for both plaintiff and defendant. It is more likely that the jury followed the Court's instructions and believed some testimony and made their own determination on liability based upon the evidence.

C. Plaintiffs' Counsel Plaintiffs' counsel Did Not Refer to Rules Of The Road And Did Not Influence The Jury Or Prejudice Dr. Balink

Defense counsel objected during closing arguments to Plaintiffs' counsel's example of how risks may accumulate as an example of the difference between an

analysis of how risk may accumulate as opposed to considering each risk individually. At no time did Plaintiffs' counsel suggests that standard of care was being equated negligent operation of a motor vehicle, violation of speed limits and rules concerning weather hazards. At no time did Plaintiffs' counsel mention violations of any rules or rules of the road. (R. 150: pp 23-24 [R-App.105-106].) Moreover, this argument by Plaintiffs' counsel concerned the allegations of informed consent. The jury found for against the Plaintiff on this allegation. Surely then, Plaintiffs' counsel's argument on risk did not influence the Jury nor did it prejudice Dr. Balink in any way. Dr. Balink prevailed on the highly contested issue of informed consent. She cannot now say that this rhetoric negatively influenced the jury against her.

It was the Court impression that Plaintiffs' counsel had suggested to the jury to consider all the facts and circumstances and that there is not a cookie cutter approach. (Id.) The circuit court found that the standard of care is a constellation that is supported by Dr. Wener's testimony. (Id. at 68 [R-App.111].) Plaintiffs' counsel did not mention this example again.

D. Plaintiffs' Counsel's "Golden Rule" Statement was not so egregious as to warrant a new trial.

Defense counsel objected during closing arguments when Plaintiffs' counsel was asking the jurors whether defense expert, Dr. Rouse's care was the care they want from their doctor. This was found by the Court to be a "golden rule" type argument. Whether this warrants a new trial involves a variety of factors

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

In this case, the circuit court did provide a curative instruction out of an abundance of caution and at one point sustained an objection. (Id. at 35-36; 137-138 [R-App.108-109, 115-116].) This surely was not the emphasis of Plaintiffs' counsel's entire argument. The particular argument pertained to gestational diabetes testing which was an issue of informed consent. This particular argument did touch upon the ultimate issue that was decided by the jury in this case, i.e. that negligence at delivery caused this injury. (R.115: pp. 1-3 [R-App.9-11].) The circuit court properly considered this objection during trial, provided a curative instruction, and properly denied a new trial. For the foregoing reasons, this is not now a proper basis for a new trial.

E. Other Statements by Plaintiffs' Counsel During Rebuttal Closing Argument

Defendants asserts that closing remarks by Plaintiffs' counsel relative to his feelings about the jury, comments about the closing argument of defense counsel was somehow so inflammatory that the jury's verdict should be overturned. At no time during Plaintiffs' counsel's argument did he suggest what he believed about a particular expert or his/her testimony, or what he believed the jury's findings should be. Rather, it was Plaintiffs' counsel's position that, in stark contrast to

defendants' counsel, that the jurors knew exactly how to perform their task as jurors, that they were in the position to make decisions, analyze evidence as it was presented. (R. 150: pp. 118-119 [R-App.112-113].) At no time did Plaintiffs' counsel suggest or argue that the jurors were free to speculate or guess what the standard of care, skill and judgment is in deciding a case, or that they were to disregard any of the expert testimony.

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

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

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

Dr. Wener's opinions were appropriately admitted and therefore do not warrant a new trial and any weakness in Dr. Wener's opinions does not undermine the confidence in the jury's verdict. For all reasons discussed within this brief, Dr. Wener's testimony was admissible, competent and credible on both prenatal care and labor and delivery. However, if Dr. Wener's testimony regarding the risk factors of shoulder dystocia and informed consent (i.e. failure to determine Mrs. Seifert as a gestational diabetic, failure to obtain estimated fetal weight, use of the vacuum) was inadmissible the jury could, and did, find that Dr. Balink was

negligent in the labor and delivery of Braylon Seifert. The Circuit Court's motion after verdict hearing is extremely helpful in summarizing the events at trial relative to this brief. (R. 151: pp. 2-9 [R-App.118-125].)

Contrary to the Dr. Balink's assertion, the jury's determination relative to the negligence in this case had nothing to do with the glucose tolerance test, the results of the screening, or the threshold for macrosomia. (Id. 3-4 [R-App.119-120].) Rather, Dr. Wener's criticisms of Dr. Balink's prenatal care *all speak to the issue of informed consent,* these issues as discussed by Dr. Wener are all risk factors of shoulder dystocia. (Id.) Had Dr. Balink recognized the risk factors, as Dr. Wener testifies were present, the likelihood of shoulder dystocia is heightened and Dr. Balink is required to inform Mrs. Seifert of the all the risks and alternatives available to her. Once the shoulder dystocia occurred, it was incumbent upon Dr. Balink to relieve the dystocia without excessive traction to avoid a permanent brachial plexus injury.

The jury specifically found that Dr. Balink did not fail to provide Kimberly Seifert with information necessary to make an informed decision. (R. 115 [R-App. 9-11].) The Defendant attempts to separate Dr. Wener's testimony regarding the risk factors of shoulder dystocia to attack the jury's verdict which was made on overwhelming evidence that Dr. Balink was negligent in the delivery of Braylon Seifert by applying excessive traction upon his head and neck in the presence of shoulder dystocia causing Braylon's injury. (R. 151: pp. 4-6 [R-App.120-122].)

While Dr. Balink contended that she did not use excessive traction, it is up the jury to decide whether Dr. Balink's testimony was more likely or not true.

In this case, the evidence presented to the jury suggested that more likely than not the injury occurred because Dr. Balink applied excessive traction at the time of delivery. A substantial portion of Dr. Wener's testimony concerned the standard of care relative to physician applied excessive traction during delivery.

Dr. Balink did not challenge Dr. Wener's testimony regarding excessive traction. Further, the jury received a substantial amount of evidence by the Defendant's own experts regarding excessive traction. Dr. Rouse testified that when he is teaching residents how to handle shoulder dystocia, he does not allow them to use excessive traction because it will cause a permanent brachial plexus injury. (R:146 p. 224-225 [R-App.99-100].) Further, the Defendant's pediatric neurologist Dr. Mark Scher testified that in general excessive traction applied by a physician in the delivery of a baby and the presence of shoulder dystocia can cause a permanent brachial plexus injury. (R: 146 pp. 71 [R-App.90].) Again, Dr. Scher agreed with Plaintiff's counsel that a child who suffers an avulsion at birth in the presence of shoulder dystocia, that can be cause by excessive lateral traction applied by a physician. (R:146 p. 75 [R-App.91].)

The jury's verdict is adequately supported by credible evidence and is not contrary to law or the weight of evidence. The Circuit Court analyzed, and the Court of Appeals affirmed, each challenge to admissibility of evidence and testimony, as well as scope and content of closing arguments after applying the

appropriate legal standard. The Circuit Court did not abuse its discretion in admitting any of the challenged evidence or argument. As such, there were no errors in the trial.

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

CONCLUSION

For the foregoing reasons the Court should affirm the Judgment of the Circuit Court.

Dated this 29th Day of February, 2016.

KENNETH M. LEVINE & ASSOCIATES, LLC
Attorneys for Plaintiffs-Respondents, Braylon Seifert,
by his guardian ad litem, Paul J. Scoptur,
Kimberly Seifert and David Seifert

Kenneth M. Levine
Admitted Pro Hac Vice

AIKEN & SCOPTUR, S.C.
Attorneys for Plaintiffs-Respondents, Braylon Seifert,
by his guardian ad litem, Paul J. Scoptur,
Kimberly Seifert and David Seifert

Paul J. Scoptur
State Bar NO. 1018326
Local counsel

FORM AND LENGTH CERTIFICATE

I hereby certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b) and (c) as modified by the court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, leading of minimum 2-point and maximum 60-character lines. The length of this brief is 10, 972 words.

Dated this 29th day of February, 2016

KENNETH M. LEVINE & ASSOCIATES, LLC
Attorneys for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert

Kenneth M. Levine
Admitted Pro Hac Vice

AIKEN & SCOPTUR, S.C.
Attorneys for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert

Paul J. Scoptur
State Bar NO. 1018326
Local counsel

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

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

Dated this 29th day of February, 2016

KENNETH M. LEVINE & ASSOCIATES, LLC
Attorneys for Plaintiffs-Respondents, Braylon Seifert,
by his guardian ad litem, Paul J. Scoptur,
Kimberly Seifert and David Seifert

Kenneth M. Levine
Admitted Pro Hac Vice

AIKEN & SCOPTUR, S.C.
Attorneys for Plaintiffs-Respondents, Braylon Seifert,
by his guardian ad litem, Paul J. Scoptur,
Kimberly Seifert and David Seifert

Paul J. Scoptur
State Bar NO. 1018326
Local counsel

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

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

(1) A table of contents;
(2) The findings or opinion of the circuit court; and
(3) Portions of the record essential to an understanding of this issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

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

Dated this 29th day of February, 2016

KENNETH M. LEVINE & ASSOCIATES, LLC
Attorneys for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert

Kenneth M. Levine
Admitted Pro Hac Vice

AIKEN & SCOPTUR, S.C.
Attorneys for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert

Paul J. Scoptur
State Bar NO. 1018326
Local counsel

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2016 I caused copies of the foregoing reply brief to be deposited in the United States Mail for delivery to counsel for the parties by first-class mail at the following addresses:

Samuel J. Leib, Esq.
Brent A. Simerson, Esq.
River Bank Plaza, Suite 600
740 N. Plankinton Avenue
Milqaukee, Wisconsin 53203

Guy J. DuBeau, Esq.
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
P.O. Box 1767
Madison, WI 53 701

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 29th day of February, 2016

KENNETH M. LEVINE & ASSOCIATES, LLC
Attorneys for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert

Kenneth M. Levine
Admitted Pro Hac Vice

AIKEN & SCOPTUR, S.C.
Attorneys for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert

Paul J. Scoptur
State Bar NO. 1018326
Local counsel

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

I hereby certify that on February 29, 2016, 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 29th day of February, 2016.

KENNETH M. LEVINE & ASSOCIATES, LLC
Attorneys for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert

Kenneth M. Levine
Admitted Pro Hac Vice

AIKEN & SCOPTUR, S.C.
Attorneys for Plaintiffs-Respondents, Braylon Seifert, by his guardian ad litem, Paul J. Scoptur, Kimberly Seifert and David Seifert

Paul J. Scoptur
State Bar NO. 1018326
Local counsel