STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 2014AP195

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.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AND FROM A JUDGMENT OF THE CIRCUIT COURT OF GRANT COUNTY, THE HONORABLE CRAIG R. DAY, PRESIDING, GRANT COUNTY CIRCUIT COURT CASE NO. 11-CV-588

AMICUS CURIAE BRIEF ON BEHALF OF THE WISCONSIN ASSOCIATION FOR JUSTICE

Submitted this 15th Day of March, 2016

WISCONSIN ASSOCIATION FOR JUSTICE

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INTRODUCTION[1]

In this Brief Amicus Curiae, the Wisconsin Association for Justice (WAJ) addresses a specific issue raised by the facts of this appeal. Did the Trial Court properly exercise its "gatekeeper" power under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny when it admitted Dr. Wener's opinions in the Trial of this case?

WAJ begins by emphasizing that in interpreting Wis. Stat. §907.02 our appellate courts look to federal gloss of Federal Rule of Evidence (FRE) 702 in interpreting §907.02. *State v. Poly-America, Inc.*, 164 Wis. 2d 238, 246, 474 N.W.2d 770 (Ct. App. 1991). *See also State v. Shillcutt*, 116 Wis. 2d 227, 341 N.W.2d 716 (Ct. App. 1983); *Cf. State v. Kandutsch*, 2011 WI 78, ¶26, fn. 7, 336 Wis. 2d 478, 799 N.W.2d 865.

In this Amicus Brief, WAJ will focus on the specific purpose of *Daubert*. According to the 2000 Official Advisory Committee Notes of FRE 702: "*Daubert* set forth a **non-exclusive checklist** for trial courts to use in assessing the reliability of scientific expert testimony [Emphasis supplied]." In fact, the real focus of *Daubert* was to eliminate "junk" science that was generated by "experts for hire" who might be expected to reach conclusions based on who hired them rather than on scientific principles. According to the U.S. Supreme Court in *GE v. Joiner*, 522 U.S. 136 (1997): "An example of 'junk science' that should be excluded under *Daubert* as too unreliable would be the testimony of a phrenologist who would purport to prove a defendant's future dangerousness based on the con-

[1] Amicus Counsel wish to acknowledge the research and assistance of PKSD law clerks John Wilson and Colin Stephenson in preparing this Brief.

tours of the defendant's skull." *Id.* at 154, fn. 6.

RESTATEMENT OF FACTS

A fundamental premise of the arguments advanced by both Dr. Balink (Defendants-Appellants' Brief at pp. 21 – 23) and Amici American Medical Association and the Medical Society of Wisconsin (Amici Brief at pp. 11 – 12) is that Dr. Wener's criticisms of Dr. Balink were impermissibly based on his "personal preference." However, consistent with Respondents' Brief (pp. 5-7), all of Dr. Wener's opinions were based upon his understanding of what the "standard of care" required of the reasonable or "average" family practitioner under the circumstances presented to Dr. Balink. This is the precise standard against which Dr. Balink's care was to be measured as set forth in Wis JI-Civil 1023.

Dr. Wener's extensive credentials demonstrating his knowledge of the applicable standard of care are outlined in Respondents' Brief at p. 21. Dr. Wener served as Chair of a Hospital's Department of Obstetrics and Gynecology for twenty years, delivered 7500 to 8000 babies in thirty-six years and encountered shoulder dystocia 40 times. Far from being a phrenologist, Dr. Wener is a practicing physician with an abundance of knowledge and experience.

A further fundamental criticism of Dr. Wener's testimony by Dr. Balink is that he "refused" to rely on literature as a basis for his opinions (Defendants-Appellants' Brief, pp. 23-24). Similarly, Amici American Medical Association and Wisconsin Medical Society urge this Court to require that all medical opinion testimony be based on "accepted medical consensus," presumably reflected by the application "of medical literature to a given case or set of facts" (Amici

Brief, p. 10). However, as noted in Respondents' Brief (at pp. 23-25), Dr. Wener did not ignore the medical literature. Rather, he demonstrated that the applicable medical literature did not reflect a "medical consensus" concerning the prenatal care issues presented by this case. Further, as pointed out by Respondents Brief (at p. 25), the single item of medical literature referenced by Defendants-Appellants – the ACOG Practice Bulletin – expressly disavows any status as "dictating an exclusive course of treatment or procedure."

ARGUMENT

I. THE APPELANTS HAVE MISSTATED THE *DAUBERT* METHODOLOGY IN SEVERAL RESPECTS.

A. *Daubert* Rulings should be reviewed for an "Abuse of Discretion."

It is first important to place the role of an appellate court in reviewing a *Daubert* ruling in a proper context. As very recently noted by the Seventh Circuit Court of Appeals in *Brown v. Burlington Northern Santa Fe Ry*., 765 F.3d 765 (7th Cir. 2014): "In reviewing the district court's decision [concerning] expert testimony, this court 'first undertakes a *de novo* review of whether the district court properly followed the framework set forth in *Daubert* ...' [W]e then review its ultimate decision … for an abuse of discretion. This deference is in keeping with the district court's vital 'gatekeeping' role in ensuring that only helpful, legitimate expert testimony reaches the jury." *Id.* at 772.

B. The Trial Court Correctly Employed the *Daubert* Framework when it evaluated the Testimony of Dr. Wener.

i. Appellants Misunderstand *Daubert* Methodology.

The Appellants give lip service to the *Daubert* standard of review (stating

that "[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." *See* Appellants' Brief, p. 15). However, the Appellants proceed to argue the opposite by stating that an appellate court should review *de novo* the trial court's "interpretation *and application*" of *Daubert. Id.* The "application" is in effect the decision itself. As the Seventh Circuit said in *Brown supra*: "[the appellate court reviews the trial court's] ultimate decision … for an abuse of discretion."

ii. In Wisconsin, there is a High Bar to Overturning a Discretionary Act of a Circuit Court.

When it comes to issues of trial court discretion, there is no need to consult federal authority. Wisconsin appellate decisions set a very high bar for overturning a discretionary decision of a circuit court. According to *Dakter v. Cavallino*, 2014 WI App 112, 358 Wis. 2d 434, 856 N.W.2d 523:

> Whether to admit proffered 'expert' testimony rests in the circuit court's discretion. **The circuit court's exercise of discretion will not be overturned if the decision had a 'reasonable basis,' Furthermore, a reviewing court may search the record for reasons to sustain the circuit court's exercise of discretion** [Emphasis supplied].

Id. at ¶68.

iii. *Daubert* has not affected a Sea Change of any Kind.

Appellants argue that *Daubert* has effected a "sea change" to the admissibility of expert testimony. *See* Appellants' Brief, p. 16. The Official Commentary to FRE 702 states exactly the opposite:

> A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. ***Daubert* did not work a 'seachange**

> **over federal evidence law**' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'… **'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**.' … [T]he trial judge has the discretion… to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted…' [Emphasis supplied].

2000 Advisory Committee Note, ¶¶5&6.

The foregoing Advisory Note further sets forth several alternatives to excluding an expert opinion which an opponent can employ, including vigorous cross-examination. We have no doubt the Appellants employed vigorous cross-examination, and the record is clear that they presented contrary evidence. They also did a commendable job during the charging conference to insure the Jury was properly instructed.

II. UNDER *DAUBERT*, THE EVALUATION OF A DOCTOR'S EXPERTISE IS *SUI GENERIS*.

Medicine differs significantly from other "hard sciences." *See Moore v. Ashland Chem*., 126 F.3d 679 (5th Cir. 1997) ("Although clinical medicine utilizes parts of some hard sciences, clinical medicine and many of its subsidiary fields are not hard sciences. The purposes, criteria, values and methods of hard or Newtonian science and clinical medicine are far from identical" *Id.* at 689).

Consequently, the testimony of a doctor, particularly when addressing a clinical standard of care, must be evaluated by different standards than those which might apply to the "hard sciences." According to *Moore, supra*:

> [C]linical medicine is not a hard science discipline … [T]**he '*Daubert* factors,' which are techniques derived from hard science methodology, are, as a general rule, inappropriate for use in making the reliability assessment of expert clinical medical testimony** [Emphasis supplied].

Id. at 682.

While medicine strives to provide "evidence based" criteria for the management of clinical problems confronting physicians, such criteria have simply not been developed to address every clinical situation. This is understandable since, as recognized by the ACOG Guideline at issue in this case, there are variations in presentations which make it inappropriate to point to such a Guideline as "dictating an exclusive course of treatment or procedure." Clinical judgment and experience are consequently necessary to the application of the Guideline to the particular presentation and in the context of other relevant factors.

A. The Physician's Clinical Experience and Professional Training are a Basis for Determining that Standard of Care Opinions are Reliable.

A number of federal courts have made it clear that experience is as much an indicator of reliability as familiarity with accepted medical literature or published standards when it comes to qualifications to express standard of care opinions. In *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn.,* 388 F.3d 976 (6th Cir. 2004), the Sixth Circuit reversed a magistrate judge's grant of summary judgment in a medical negligence case based upon a determination that the plaintiff's expert was not qualified to express an opinion on the standard of care applicable to the defendant physician. In reversing, the Court of Appeals observed:

> The district court appears to have relied most heavily upon its supposition that a 'purported expert must demonstrate a familiarity with accepted medical literature or published standards… in order for his testimony to be reliable in the sense contemplated by Federal Rule of Evidence 702.' This is an erroneous statement of the law… **[T]he text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience**…. There is no requirement that a medical expert must … cite published studies … in order to reliably conclude that a particular object caused a particular illness [Emphasis supplied].

Id. at 980.

In *Sullivan v. U.S. Navy*, 365 F.3d 827 (9th Cir. 2004) the Ninth Circuit reversed a grant of summary judgment in favor of the defendant, stating that the District Court had applied "an inappropriately rigid Daubert standard to medical expert testimony" in requiring "standard of care" opinion testimony to be supported by specific literature. *Id.* at 833. Noting that the medical literature emphasized the importance of the skill and experience of the surgeon in minimizing the risk of infection, the Court stated:

> The textbooks cannot say what increase in the risk of infection is probable in the case; that estimate may be made by the expert putting the principles to work. Therefore, the district court abused its discretion and invaded the province of the expert by requiring the texts to state the precise type of harm explained by the specialized testimony of a medical expert.

Id. at 834.

Similarly, in *Schneider v. Fried*, 320 F.3d 396 (3rd Cir. 2003), the Third Circuit reversed a magistrate judge's determination that the plaintiff's expert was not qualified to express an opinion that the defendant surgeon had violated the standard of care because the literature cited by him did not address the specific standard of care applicable at the time of the surgery. The Court first observed that "expert testimony does not have to obtain general acceptance or be subject to peer review to be admitted under Rule 702… [I]nstead, general acceptance and peer review are only two of the factors that a district court should consider when acting as a gatekeeper." *Id.*, at 406. The Court noted that plaintiff's expert "stated that he based his opinion not only upon the literature, but also upon his own experience as a cardiologist" and concluded that the expert's "experience renders his testimony reliable, demonstrates that his testimony is based on 'good

grounds,' and that the Magistrate Judge abused his discretion by excluding it." *Id.*

It is significant that neither the Defendants-Respondents nor their Amici have cited a single case supporting the proposition that reversal is required in this case because Dr. Wener failed to reference specific literature which defined the standard of care applicable to Dr. Balink or supported his opinion that she violated that standard of care. It is further significant that neither challenge Dr. Wener's qualifications, by reason of his training and experience, to express such an opinion. As a consequence, neither have identified relevant authority which would support reversal of the trial judge's exercise of discretion in finding that Dr. Wener had demonstrated a reliable basis for his opinions.

B. Requiring Specific Supportive Medical Literature to Support a Standard of Care Opinion is Contrary to Established Wisconsin Law.

In asserting that specifically supportive medical literature should be required to render a "standard of care" criticism reliable, the Medical Society and AMA in their amici brief effectively seek to render profession-defined custom and practice as the exclusive basis for determining whether a physician provided reasonable care. This is contrary to established Wisconsin law.

In *Nowatske v. Osterloh*, 198 Wis. 2d 419, 543 N.W.2d 265 (1996), the Supreme Court considered a challenge to the then-standard civil jury instruction which required the defendant physician to provide "that degree of care, skill, and judgment which is usually exercised in the same or similar circumstances by the *average*" physician of the same specialty. While holding that the instruction did

not require reversal, the Court concluded that the use of the term "average" could be "problematic" and concluded that it should be eliminated. *Id.* at 440. As a consequence, the term "average" has been replaced by the term "reasonable" in Wis JI-Civil 1023. In so holding, the Supreme Court expressly acknowledged the plaintiff's concern that the use of the term "average" would permit the medical profession to "set its own definition of reasonable behavior in accordance with the customs of the profession." *Id.* at 432. The Court noted that it had previously "explained its aversion to equating custom with reasonable care in abolishing the locality rule." *Id*. at 435. It then concluded:

> The standard of care applicable to physicians in this state cannot be conclusively established either by a reflection of what the majority of practitioners do or by a sum of the customs which those practitioners follow. It must instead be established by a determination of what it is reasonable to expect of a professional given the state of medical knowledge at the time of the treatment in issue.

Id. at 438-439.

It is significant that the State Medical Society of Wisconsin submitted an Amicus Brief in *Nowatske* which acknowledged that "the first paragraph of Wis JI-Civil 1023 requires that custom must be dynamic to be reasonable" and that "[p]laintiffs can always… present evidence regarding the 'state of medical science' to show that a professional custom is … unreasonable." *Id.*, at 437.

The position advanced by the Medical Society in its Amicus in this case would, if accepted, impermissibly permit the medical profession to define the standard of care by reference to "custom and practice" as established solely by medical literature. Such a result has serious implications for the safety of patients in this State. First, as is demonstrated by the circumstances of this case, it

is rare to find "evidence based," "peer reviewed" literature which comprehensively addresses the criteria by which practicing physicians may determine the appropriate course of management of the broad range of clinical situations encountered in everyday practice. To adopt such a requirement would be to say that in those situations which have not been the subject of such analysis and publication there is NO standard of care.

Second, such a rule could lead the medical profession to impermissibly establish the criteria by which its members' conduct should be evaluated in litigation. The dangers of this result are demonstrated by *Adams v. Laboratory Corp. of America*, 760 F.3d 1322 (11th Cir. 2014). In that case, the district court had precluded the opinion of the plaintiff's expert cytologist because she had failed to "satisfy the generally accepted standards in the area of pathology or cytotechnology." *Id.* at 1331. In reversing, the Eleventh Circuit observed that the "guidelines" were "not objective, scientific findings, and stated:

> The court decided that a blinded review was the standard set by the profession based on litigation guidelines created by the CAP and the ASC….That was an error of law because *Daubert* and *Kumho* do not allow courts to delegate to potential defendants decisions about when and how they may be held civilly liable for their mistakes.

Id. The Court further observed if the industry guidelines were to be held determinative, "there is no apparent reason why other groups whose members face lawsuits cannot do the same." *Id.* at 1334.

The danger of such litigation motivated "research" and publications is particularly demonstrated by the record in this case. The trial court granted the Plaintiffs-Respondents Motion in Limine precluding the defendants and their ex-

perts from referencing a "case report" which purported to report that permanent brachial plexus injury could occur without physician traction or shoulder dystocia. (R. 71, 72 and 112). The Plaintiffs-Respondents demonstrated that this case report, authored by a physician who was himself a defendant in such a case, misrepresented the actual facts of the delivery.

CONCLUSION

The Trial Court's decision to admit Dr. Wener's testimony comports with the standards set forth in *Daubert*, as amplified upon by subsequent case law, and thus WAJ respectfully submits that the decision of the Trial Court and the Court of Appeals should be affirmed.

Dated at Milwaukee, Wisconsin this 15th day of March, 2016.

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809.19(2) and § 809.19(8), (12) & (13) CERTIFICATIONS.

I hereby certify that the foregoing Brief conforms to the rules contained in § 809.19(8) (b) and (c), Wis. Stats., for a Brief produced using the following font: Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 70 characters per full line of body text. Exclusive of the Tables, Statement of Issues and the Statement on Oral Argument and Publication, the length of this Brief is 2,942 words.

I hereby further certify that I will today submit an electronic copy of this brief to the Clerk of the Supreme Court, which complies with the requirements of Wis. Stat. §§ 809.19(12) & (13). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed and served 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.

I hereby further certify that no separate appendix accompanies this Brief.

I hereby 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.

I hereby further certify that an original and twenty two copies of this brief were filed with the Clerk of the Supreme Court by hand delivery and three copies were simultaneously mailed to all counsel of record, properly addressed and postage was prepaid.

Dated this 15th day of March, 2016.

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