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

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

Plaintiffs-Respondents,

DEAN HEALTH INSURANCE and BADGERCARE PLUS,

Involuntary-Plaintiffs,

v.

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

Defendants-Appellants-Petitioners.

REPLY BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS

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

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ARGUMENT

I. DR. WENER DID NOT BASE HIS OPINIONS ON A RELIABLE METHODOLOGY AND DID NOT RELIABLY APPLY THEM TO THE FACTS OF THE CASE.

The Circuit Court committed errors of law when it admitted Dr. Wener's expert opinions. The Plaintiffs and the Court of Appeals incorrectly conclude that an expert's qualifications and personal preferences are alone sufficient to show that his or her opinions are based on reliable principles or methods under Wis. Stat. § 907.02(1). Furthermore, they erroneously rely on Dr. Wener's so-called "holistic" approach, a concept that neither the Plaintiffs nor the lower courts have been able to analyze with any clarity. Dr. Wener's unreliable opinions and his flawed application of those opinions warrant a new trial in this matter.

A. Dr. Wener's Personal Preference Opinions Were Not Based on Reliable Principle or Methods.

1. *Qualifications and Personal Preferences Are Insufficient to Show Reliability*

Like the Court of Appeals, the Plaintiffs insist that an expert's qualifications may satisfy Wis. Stat. § 907.02(1)'s reliability standard. (Pls.' Resp. Br. at p. 21.) Case law on *Daubert* rejects this argument. *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535 (7th Cir. 2005) (stating that the methodology inquiry is separate from the qualifications inquiry and that the latter inquiry does not satisfy the former); *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999) (same). Indeed, the Legislature amended Wis. Stat. § 907.02(1), which already had a qualifications requirement, to *add* the *Daubert* reliability requirement. Under the

Plaintiffs' interpretation of Wis. Stat. § 907.02(1), the reliability requirement would be superfluous.

The Plaintiffs also argue that there is some meaningful distinction between Dr. Wener's experience and his personal preferences. (Pls.' Resp. Br. at pp. 21-23.) To be clear, they are one and the same. Dr. Wener's experience is a product of anecdotal patient interactions during which he has made his own personal choices on patient care. These choices are his preferences because, as he admitted, his opinions are not informed by any identifiable medical sources.

An expert's personal preferences are insufficient to satisfy the *Daubert* reliability standard. They are subjective beliefs, unmoored from any systematic verification on which evidence-based medicine is based, and depend on the expert's *ipse dixit*. *Daubert* was specifically designed to protect parties against these kinds of opinions. *See, e.g., State v. Giese*, 2014 WI App 92, ¶ 19, 356 Wis. 2d 796, 854 N.W.2d 687 (citing, *inter alia*, Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, Wisconsin Lawyer, March 2011, at 60 & Ralph Adam Fine, *Fine's Wisconsin Evidence* 34 (Supp. 2012)).

Contrary to the arguments advanced by both the Plaintiffs and the Court of Appeals, case law has never departed from the rule that personal preferences may not be used to satisfy the *Daubert* reliability requirement. *Kumho Tire*, for instance, actually weighs *against* the admissibility of Dr. Wener's opinions, not in favor of it. 526 U.S.137 (1999). In *Kumho Tire*, the plaintiffs' expert performed his own version of a tire failure analysis and concluded from that analysis that a

manufacturing defect had caused a tire to fail. *Id.* at 142-45. Based on *Daubert*, the district court ruled that the method the expert used to perform his tire failure analysis and generate opinions was unreliable. *Id.* at 145-46. The district court explained that, *despite* the expert's qualifications and experience in tire failure engineering, his personal approach to performing a tire inspection and drawing causation opinions therefrom was unreliable. *Id.* at 153-56.

The United States Supreme Court *agreed* with the district court's analysis, and it rejected the plaintiffs' argument that their expert's tire inspection was reliable merely because he had performed it for many years as a tire engineer. *Id.* at 156-57. The plaintiffs had the burden to show that the expert's inspection method, as well as the way he drew conclusions from that inspection method, was reliable. The plaintiffs failed to do so. *Id.*

Despite the fact that *Kumho Tire* clearly weighs against admitting Dr. Wener's opinions, the Plaintiffs and the Court of Appeals take the following quote from *Kumho Tire* out of context: "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Id.* at 156. The *Kumho Tire* Court was specifically referencing the expert's method for performing a tire inspection. A tire inspection, like any other kind of scientific method, seeks to systematically produce data which the expert can then use to generate opinions. Dr. Wener did not use a scientific method *at all*, much less one that might allow the opposing party to challenge its assumptions, controls, error rates, or general acceptance (like the defendants successfully did in

Kumho Tire). Instead, he used his personal preferences in practicing obstetrics.[1] Those personal preferences cannot be challenged in any objective sense, hence their disfavored place in a *Daubert* reliability analysis.

2. *Dr. Rouse's Opinions Do Not Support Dr. Wener's Opinions*

The Plaintiffs attempt to substantiate Dr. Wener's opinions by contending that Dr. Rouse, Dr. Balink's obstetrics expert, agreed with them. (Pls.' Resp. Br. at pp. 14-15, 22, 26-27, 29-32.) This contention is patently false. Dr. Rouse disagreed with Dr. Wener on every point. He opined that Ms. Seifert was not a gestational diabetic (R.146 at pp. 148-55); that Braylon Seifert was not macrosomic (id. at pp. 168-70); that pre-delivery ultrasound was not needed (id. at pp. 157-59, 169-70); and that the use of vacuum was not contraindicated (id. at pp. 161-62). However, the paramount difference between Dr. Rouse and Dr. Wener was *how* Dr. Rouse supported his opinions. Dr. Rouse repeatedly referenced recognized guidelines which provided a reliable basis for his opinions.

Nevertheless, the Plaintiffs point to testimony by Dr. Rouse that obese women generally have bigger babies; that large babies are generally more likely to encounter shoulder dystocia; and that medicine is individualized. These references are excised from the broader context of Dr. Rouse's specific opinions. Dr. Rouse specifically opined that Braylon Seifert was *not* macrosomic and that Ms. Seifert

[1] As explained in Dr. Balink's opening brief, Dr. Wener mischaracterized his personal preferences with respect to glucose tolerance testing to help the Plaintiffs' case. (Dr. Balink Br. at p. 22 n.4) While the Plaintiffs now object to this argument, they did not object when Dr. Balink brought the same to the attention of both the Circuit Court and the Court of Appeals. Dr. Duboe's testimony demonstrates that, if experts are allowed to rely on their own personal preferences, there is little ability to independently verify those opinions.

was *not* a gestational diabetic. With respect to individualized medicine, Dr. Rouse immediately followed up this statement by noting that **"[physicians] can't have a free for all where everyone does anything he wants; we need some guidelines."** (R.146: p. 194.) Indeed, at that point in the examination, Plaintiffs' counsel was examining Dr. Rouse regarding the ACOG practice bulletins on which he based his opinions. Dr. Wener relied on no such source of guidance.

3. *An Expert Need Not Rely on Literature to be Admissible*

Contrary to the Plaintiffs' assertions, Dr. Balink does not ask this Court to adopt a literature requirement in medical malpractice cases or endorse the ACOG guidelines. While medical literature is a profound source of information in the medical sciences, Dr. Balink is unconcerned about *which* reliable basis the expert chooses. Rather, Dr. Balink asks this Court to reaffirm the basic *Daubert* principle that an expert must rely upon *some* reliable basis.

4. *Dr. Wener's Opinions Were Not Informed by Supportive Medical Literature*

Incredibly, the Plaintiffs imply that Dr. Wener relied on supportive literature. Dr. Wener clearly disavowed any reliance on medical literature. (R.66: Ex. 3 at pp. 13:4-13:17, 18:9-18:19, 23:2-24:5, 43:14-44:2, 59:15-60:7, 84:9-85:2, 95:13-96:9, 97:24-98:18, 100:9-100:17, 176:9-177:14, 185:8-186:16; A-App. 61-62.) He testified that, although he knew that there was medical literature on topic, he declined to consult or rely on any of it. (A-App. 76.)

B. Dr. Wener's So-Called "Holistic" Approach is Itself an Unreliable Expert Opinion and Cannot be Used to Support the Reliability of His Personal Preferences.

Although the *de facto* basis for Dr. Wener's opinions was his personal preferences, the Circuit Court did not explicitly refer to Dr. Wener's qualifications and personal preferences in admitting his opinions. (A-App. 12-17.) The Circuit Court instead concluded that Dr. Wener's so-called "holistic" approach evidenced reliability under *Daubert*. In practice, however, Dr. Wener's holistic approach was nothing more than his artful defense of his personal preferences when challenged by the medical literature. Because the medical literature did not support his personal beliefs regarding gestational diabetes, macrosomia, ultrasound, and vacuum use, Dr. Wener attempted to support those opinions by listing off general risk factors (regardless of whether those risk factors were actually present). Rather than constituting evidence of reliability under *Daubert*, Dr. Wener's holistic approach was simply one more unsupportable expert opinion.

Neither the Plaintiffs nor the lower courts have been able to explain why Dr. Wener's holistic approach is reliable. Most strikingly, the Court of Appeals undertook no reliability analysis of the holistic approach at all. The Plaintiffs have never provided anything to support its reliability, and Dr. Wener admitted that no support exists in the medical literature. (A-App. 70.) Instead of explaining why the holistic approach might somehow survive a *Daubert* analysis, the Plaintiffs claim that Dr. Wener's holistic approach is tantamount to individualized patient care. (Pls.' Resp. Br. at pp. 31-33.) However, there is no difference between vague

notions of individualized patient care and personal preferences. As a consequence, Dr. Balink respectfully requests that the Court conclude as a matter of law that Dr. Wener's opinions constituted impermissible personal preferences and that the Circuit Court erred when it treated Dr. Wener's holistic approach as a *Daubert* reliability factor rather than as an unsupported opinion.

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

Even had Dr. Wener supported his opinions with reliable principles or methods, he made numerous errors in applying them to the facts of the case. Because the Plaintiffs' response brief does not attempt to account for those errors, Dr. Balink stands on the assertions in her opening brief that Dr. Wener's misapplication of his opinions contravened Wis. Stat. § 907.02(1).

D. Dr. Wener's Unreliable Opinions Warrant a New Trial.

The Plaintiffs seem to imply that, even if Dr. Wener's opinions were erroneously admitted, the error was harmless because the jury still might have concluded that Dr. Balink used excessive traction. Although this argument has been waived, Dr. Balink will briefly address the implication. An error warrants a new trial if there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *Evelyn C.R. v. Tykila S. (in Re Jayton S.)*, 2001 WI 110, ¶ 28, 246 Wis. 2d 1, 629 N.W.2d 768 (citations omitted). Such a "reasonable possibility" exists if the error "undermine[s] confidence in the outcome." *Id.*

The verdict questions read as follows regarding negligence and cause:

> **QUESTION NO. 1:** Was Dr. Kay Balink negligent in the prenatal and delivery care of Kimberly Seifert / Braylon Seifert?
>
> **QUESTION NO.2:** If you answered Question 1 "yes," then answer this question: Was such negligence a cause of injury to Braylon Seifert?

(A-App. 9.) Both questions involve prenatal care and are not confined to traction. The jury could have relied upon Dr. Wener's opinions that Dr. Balink breached the standard of care by not ordering a pre-birth ultrasound or a three-hour diagnostic glucose tolerance test to get a sense of the baby's size. The jury could have believed that such negligence precluded consideration of a c-section notwithstanding the risk that Braylon Seifert was a large baby.[2] Accordingly, the jury could have concluded that Dr. Balink's failure to consider a c-section, which would have avoided a vaginal delivery altogether, was a cause of Braylon's injury. Additionally, the jurors may have inferred that, if Dr. Balink made mistakes during the prenatal period, she likely made mistakes during delivery.

Not only is it probable that the jury relied upon Dr. Wener's unsupported opinions, a majority of the trial time related to them. Dr. Wener's testimony, and the testimony of Dr. Balink's experts in response, related almost exclusively to issues other than excessive traction. For each opinion, Dr. Wener told the jury that Dr. Balink breached the standard of care (which bears on claims for negligence,

[2] Dr. Wener provided testimony to the jury as to why the size of the baby can affect the ease by which the mother can deliver, (A-App. 43-45, 54-55), how delivery difficulties and maternal fatigue are an indication for a c-section, (A-App. 56-57, 71-72), how a c-section would have prevented the brachial plexus injury, (A-App. 58-59), and the minimal risk that c-sections pose to the fetus, (A-App. 73-75).

not informed consent). Dr. Balink respectfully requests that the Court order a new trial in this matter.

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

The primary thrust of the Plaintiffs' arguments is that, while counsel's statements may have been inappropriate, they were not so prejudicial as to warrant a new trial. Dr. Balink disagrees. Each category of statements hindered the jurors' role as finders-of-fact under the law. Cumulatively, the comments were so egregious as to entitle Dr. Balink to a new trial.[3]

A. Statements Regarding Risk Factors and Driving

Dr. Balink was prejudiced when Plaintiffs' counsel made a lengthy comparison between pregnancy risk factors and driving risk factors. The Plaintiffs aver that this comparison could not have confused the jury's understanding of the standard of care. However, counsel's analogy violated an order in limine and the law on expert testimony. The clear implication is that a driver's negligence in ignoring speed limits and hazardous weather conditions is comparable to a physician's negligence in rendering obstetrical care. The argument frustrated the purpose underlying the legal requirement that physicians be judged upon expert testimony rather than common knowledge.

[3] The Plaintiffs argue for the first time that defense counsel's failure to request a mistrial should render counsel's prejudicial statements harmless. However, both the Circuit Court and the Court of Appeals reviewed the same. *See Pophal v. Siverhus*, 168 Wis. 2d 533, 544, 484 N.W.2d 555 (Ct. App. 1992).

B. "Golden Rule"-Type Statements

As to counsel's "golden rule"-type arguments, the Plaintiffs refer the Court to the test set forth in *Rodriguez v. Slattery*, 54 Wis. 2d 165, 170, 194 N.W.2d 817 (1972): the Court may order a new trial in response to such "golden rule" arguments after considering factors such as the "nature of the case, the emphasis upon the improper measuring stick, the reference in relation to the entire argument, the likely impact or effect upon the jury." The Plaintiffs contend that a new trial should not be granted because the Court provided a curative instruction, the argument was not the emphasis of counsel's closing, and the argument did not have an effect on the jury's verdict.

Contrary to the Plaintiffs' brief, the Court *did not* impart a curative instruction on the jury with respect to these statements. (A-App. 92, 98.) This case involved a permanently injured child. Consequently, the jurors were vulnerable to statements intended to inflame their emotions. Plaintiffs cannot downplay their counsel's emphasis on these arguments when he made the same comment *twice*. Finally, the issues testified to by Dr. Rouse, like gestational diabetes, dominated the content of the trial from beginning to end. As a consequence, counsel's statements inciting fear in the minds of jurors as to the care advised by Drs. Rouse and Balink were prejudicial to the defense's case.

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

Numerous statements made by counsel disparaged defense counsel and muddied the jury's duty to rely on expert testimony. The Plaintiffs deny that such statements were overly inflammatory because they did not target any specific expert or request that the jury make any specific finding. (Pls.' Resp. Br. at pp. 39-40.) Rather, the Plaintiffs contend that the statements simply conveyed "that the jurors knew exactly how to perform their task as jurors, that they were in the position to make decisions, analyze evidence as it was presented [sic]." (Id.) This explanation ignores the very words spoken by Plaintiffs' counsel.

Counsel's statements were not reaffirming the jury's duty but rather sought to convince the jury that defense counsel believed that the jurors were not smart enough to understand the evidence or their responsibilities. (E.g., A-App. 100.) There is no way to interpret these statements other than as direct attacks on defense counsel. Plaintiffs' counsel also tried to convince the jurors that they were experts in the medicine. (E.g., A-App. 93-94, 113.) These statements intended to persuade the jurors to believe that, just because they had sat through seven days of trial, they were experts in the issues of medicine. This is not an explanation of the jury's duty; it is an explanation of precisely what a jury *may not do*.

Furthermore, counsel made all of these statements during rebuttal and at a time when defense counsel would have no opportunity to respond. The last thing that the jury heard before considering the evidence was invectives directed at

defense counsel and suggestions that the jurors had the capacity to arrive at their own opinions about the medicine. A new trial is required to permit the issues to be tried without the taint of counsel's inflammatory sideshow.

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals and remand the case for a new trial.

Dated this 22nd day of March, 2016.

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FORM AND LENGTH CERTIFICATE

I hereby certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b) and (c) as modified by the court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this brief is **2,922 words**.

Dated this 22nd day of March, 2016.

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

Dated this 22nd day of March, 2016.

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