WISCONSIN COURT OF APPEALS
DISTRICT III

UNITY BAYER, by her Guardian ad Litem Vincent R. Petrucelli, LEAH BAYER, and ANDREW BAYER,

Plaintiffs-Respondents,

JOHN ALDEN LIFE INSURANCE COMPANY,

Involuntary-Plaintiff,

BRIAN D. DOBBINS, M.D., MMIC INSURANCE, INC., PREVEA CLINIC, INC., and DEF INSURANCE COMPANY,

Defendants-Appellants,

INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

Defendant-Co-Appellant.

Appeal No. 15-AP-1470

Marinette County Case No. 13-CV-271

BRIEF OF DEFENDANTS-APPELLANTS BRIAN D. DOBBINS, M.D., PREVEA CLINIC, INC., AND MMIC INSURANCE COMPANY

CIRCUIT COURT FOR MARINETTE COUNTY
HONORABLE DAVID G. MIRON, PRESIDING
Circuit Court Case No. 13-CV-271

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

STATEMENT OF THE ISSUES

1. Did the Circuit Court err in excluding all expert evidence and testimony supporting Dr. Dobbins' defense on liability—that is, all expert evidence and testimony relating to what is known in the medical literature as the maternal forces theory—pursuant to Wis. Stat. § 907.02(1)?

ANSWERED BY THE CIRCUIT COURT: The Circuit Court granted plaintiffs' motion *in limine* no. 12 and excluded all evidence and testimony regarding the maternal forces theory of causation at trial pursuant to Wis. Stat. § 907.02(1).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE

This background section is separated into the following subsections: (A) nature of the case; (B) the background facts; (C) the procedural posture; (D) the plaintiffs' *Daubert* motion and supporting brief; (E) Dr. Dobbins'

response to plaintiffs' *Daubert* motion; and (F) the Circuit Court's ruling. Each of these subsections will be addressed in turn.

A. Nature of the Case

This medical negligence action arose from the labor of Leah Bayer and the delivery of Unity Bayer by Dr. Dobbins, a Board-Certified Obstetrician and Gynecologist, on December 28, 2006. There is no dispute that Unity Bayer suffered an injury to her right arm during delivery. The parties, however, disagree on whether the injury was caused by the maternal forces of labor, such as contractions and expulsive forces, or by physician-applied forces, both of which are recognized etiologies in the medical community. Dr. Dobbins appeals from the Circuit Court's determination that the maternal forces theory fails to satisfy the *Daubert* admissibility standard.

B. The Background Facts

Leah Bayer's course of labor on December 28, 2006 proceeded without initial complication. R.46 Ex. 4. During the second stage of labor, and after 75 minutes of pushing, Leah Bayer exhibited signs of exhaustion and the progress of the delivery slowed. Id. Dr. Dobbins gave her two options: proceed with a cesarean section or, given the low position of the

baby's head, use a vacuum to assist in the delivery. Id. Dr. Dobbins explained the risks and benefits of each option. Id. Leah Bayer chose to proceed with the vaginal delivery with the assistance of vacuum. Id.

Dr. Dobbins used the vacuum to advance Unity Bayer down the birth canal. Id. At some point shortly after the vacuum was used, Dr. Dobbins identified and diagnosed shoulder dystocia, a condition whereby the fetal shoulder becomes lodged on the maternal pelvis. Id. A shoulder dystocia is considered an obstetrical emergency because, if the obstetrician is unable to quickly dislodge the shoulder from the obstruction, the loss of oxygenation to the child can result in fetal demise. E.g., R.56 Ex. 3 at 43:18-44:16. In this case, Unity Bayer's right shoulder impacted the maternal pubic symphysis. R.46 Ex. 3 at 122:14-122:17. In accordance with the standard of care, Dr. Dobbins utilized two obstetrical maneuvers to try and release the fetal shoulder: the McRoberts' maneuver (hyperflexing the mother's legs) and the Woods' corkscrew maneuver (rotating the shoulders of the baby). E.g., R.56 Ex.3 at 56:20-57:15, 61:4-62:3. These maneuvers are designed to resolve the shoulder dystocia without any undue traction to the baby's head. E.g., R.56 Ex.4 at 127:21-128:10. By virtue of these obstetrical maneuvers, Dr. Dobbins succeeded in delivering

Unity Bayer's posterior shoulder within approximately two minutes of the shoulder dystocia diagnosis. E.g., R.56 Ex.3 at 103:11-103:15. She did not suffer any brain-related injuries as a result of the shoulder dystocia.

Following the delivery, Unity Bayer was diagnosed with a permanent right brachial plexus injury. A brachial plexus injury is an injury which incapacitates the network of nerves that send signals from the neck and spine to the shoulder, arm, and hand. The plaintiffs contend that the injury was caused by excessive, physician-applied traction to Unity Bayer's head during the shoulder dystocia event. Dr. Dobbins' delivery note and deposition testimony reflect that at no point during the delivery did he use anything more than gentle traction. R.46 Ex. 3 at 140:21-140:25, Ex. 4. Dr. Dobbins posits that Unity's injury was caused by the maternal forces of labor, including the forces associated with contractions and pushing. Both etiologies are recognized by the medical community.

C. The Procedural Posture

On September 17, 2013, the plaintiffs filed the present lawsuit. In their amended complaint, the plaintiffs alleged that Dr. Dobbins was negligent in his care and delivery of Unity Bayer and failed to impart necessary information to Leah Bayer about the alternative of a cesarean

section. R.20. In anticipation of the impending trial, the parties submitted motions *in limine*, *Daubert* motions, and other pretrial materials. In light of the complex legal issues presented in pretrial motions, the Circuit Court adjourned the trial, originally scheduled to begin on June 2, 2015, to begin on January 12, 2016.

D. The Plaintiffs' *Daubert* Motion and Supporting Brief

One pretrial motion filed by the plaintiffs, motion *in limine* no. 12, requested that the Court exclude any and all evidence and testimony relating to the maternal forces theory of causation at trial under Wis. Stat. § 907.02(1) and the *Daubert* standard. R.52, 53 (A. App. 9-45). Generally, the plaintiffs argued that the medical literature upon which the defense experts rely is unreliable and does not support the proposition that the maternal forces of labor can cause a permanent brachial plexus injury. They further argued that the defense experts were unable to describe the precise manner in which the maternal forces caused the injury.

In substance, however, the plaintiffs' brief was a mishmash of lay commentary about scientific principles and attacks on medical publications. The plaintiffs argued that their own expert, biomedical engineer Robert Allen, Ph.D., "disproved" the maternal forces theory years

ago, apparently invalidating all of the literature that disagrees with him.[1] A. App. 11, 16-17, 38. The plaintiffs contended, without providing any context, that a seemingly-random selection of medical publications relating to the maternal forces theory is fraught with errors, false assumptions, and deception. A. App. 17-34, 37-38, 39-40. They alleged that one medical case report is fraudulent and is the product of a conspiracy among a Harvard Medical School Professor, the American Journal of Obstetrics and Gynecology, and the American College of Obstetricians and Gynecologists.[2] A. App. 34-36. They argued that the authors of the entire body of medical literature supporting the maternal forces theory have hidden motives, using sneer quotes to refer to them sarcastically as "experts." A. App. 36-37. Finally, the plaintiffs asserted that the defense experts are unable to state the precise time the injury occurred or the specific magnitude and direction of force exerted by the maternal forces,

[1] Dr. Allen performed a series of studies based on physical models he constructed to measure the forces involved in a shoulder dystocia. As this brief will explore *infra* pp. 11-13, Dr. Allen's physical modelling has yielded results that are contradicted by the computer modelling performed by Dr. Dobbins' biomedical engineering expert, Michele J. Grimm, Ph.D., and the two have engaged in a spirited "battle of the experts" over the years.

[2] The Circuit Court granted a separate motion *in limine* to exclude the article on this basis.

A. App. 39-40, despite the fact that their own experts are also unable to do so with respect to alleged physician-applied forces.

E. Dr. Dobbins' Response to Plaintiffs' *Daubert* Motion

Dr. Dobbins filed a brief in response to the plaintiffs' *Daubert* motion. R.77 (A. App. 46-100). The brief explored four topics relevant to this brief: (1) an overview of the medical literature relating to the maternal forces theory, A. App. 57-67; (2) the opinions and scholarly contributions of Dr. Dobbins' biomedical engineer, Michele J. Grimm, Ph.D., A. App. 86-99; (3) a description of other defense experts' opinions, A. App. 76-80; and (4) a summary of the case law consensus supporting the admissibility of the maternal forces theory, A. App. 81-85. These sections are described in greater detail below.

1. Overview of the Medical Literature

Dr. Dobbins' brief cited 27 medical publications, all of which were subjected to peer-review scrutiny, and counsel provided excerpt copies from most of these publications to the Circuit Court. See R.73 ¶¶ 3-15, 35-44. A list of those citations is set forth at A. App. 101-03. Each of these publications provides a piece of evidentiary support to the broader hypothesis colloquially known as the maternal forces theory.

For purposes of this appeal, Dr. Dobbins will focus primarily on one of the texts cited in the response brief: the American College of Obstetricians and Gynecologists' ("ACOG") 2014 Task Force compendium "Neonatal Brachial Plexus Palsy." ACOG, a non-profit entity, is the leading physician organization in the United States on issues of obstetrics, gynecology, and women's health. It boasts 55,000 voluntary members and, according to its website, "advocates for quality health care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of the changing issues facing women's health care."[3]

The 2014 compendium sought to pool the body of medical literature on brachial plexus palsy for reference by obstetricians nationwide, stating its purpose thus:

> To review and summarize the current state of the scientific knowledge, as set forth in the peer-reviewed and relevant historical literature, about the mechanisms which may result in neonatal brachial plexus palsy. The purpose of conducting such review is to produce a report which will succinctly summarize the relevant research on the pathophysiology of neonatal brachial plexus palsy.

[3] Quotation found at http://www.acog.org/About-ACOG/Who-We-Are.

A. App. 15. The 2014 compendium contains citations to no fewer than 200 peer-reviewed publications and was itself peer-reviewed by a team of ten distinguished physicians.

Dr. Dobbins' brief is replete with quotations from the 2014 compendium. A. App. 59-63. Because the plaintiffs took the position in their moving brief that all permanent brachial plexus injuries are caused by physician-applied traction, Dr. Dobbins placed this compendium quotation first:

> Clinician-applied traction and lateral bending of the fetal neck have been implicated as causative factors in some cases of brachial plexus palsy. However, brachial plexus palsy also has been shown to occur entirely unrelated to traction, with studies demonstrating cases of both transient and persistent brachial plexus palsy in fetuses delivered vaginally without clinically evident shoulder dystocia or fetuses delivered by cesarean without shoulder dystocia.

A. App. 61. As the 2014 compendium explains, other causes of injury recognized by the literature include the maternal forces of labor:

> Stretch in the brachial plexus occurs during the birth process itself, as shown by both computer and physical models.
>
> * * *
>
> If a shoulder is restrained, maternal forces will continue to move the head and neck forward, widening the angle between the neck and shoulder and causing traction on the brachial plexus.
>
> * * *
>
> Studies have found that contact force at the base of the fetal neck against the maternal symphysis pubis was more than two times higher because of maternal endogenous forces when compared with exogenous forces.
>
> * * *

> Findings have shown that maternal forces from the mere development of shoulder dystocia may, in and of itself, induce a similar amount of stretch in the brachial plexus as lateral bending of the fetus' neck.
>
> * * *
>
> The clinical and biomedical engineering evidence supports the assertion that when a shoulder is restrained either transiently or during a more significant impaction, both maternal forces and clinician forces, if applied, will stretch the brachial plexus.
>
> * * *
>
> The pediatric neurologic community also has reviewed the literature on causation and has similarly concluded that "[t]he obstetrician's efforts to relieve shoulder dystocia are not the whole explanation for brachial plexus birth injuries. Expulsive forces (i.e., endogenous forces) generated by the uterus and the abdominal wall….may be contributory in many cases."
>
> * * *
>
> Brachial plexus palsy is a complex event, dependent not only on the forces applied at the moment of delivery, but also on the constellation of forces (e.g., vector and rate of application) that have been acting on the fetus during the labor and delivery process.

A. App. 61-63.

In addition to ACOG's 2014 compendium, the Circuit Court received copies of other publications which stand for the proposition that maternal forces can cause permanent brachial plexus injuries. For example: Ouzounian JG, et al., *Permanent Erb's Palsy: A Traction-Related Injury?*, Obstet. Gynecol, 1997, 89(l):139-41; Lerner, Henry, et al., *Permanent brachial plexus injury following vaginal delivery without physician traction or shoulder dystocia*, Am J Obstet Gynecol, 198 (2008) e7-8; Grimm, Michele J., et al., *The Pathomechanics of Tissue Injury and Disease, and the Mechanophysiology of*

Healing, Ch. 4: The biomechanics of birth-related brachial plexus injury, p. 93-141, 2009.

2. The Opinions and Work of Defense Expert Dr. Grimm

Michele J. Grimm, Ph.D., like the plaintiffs' expert Dr. Allen, is a biomedical engineer who has developed models to simulate the forces involved during shoulder dystocia. Dr. Grimm is an Associate Professor in the Department of Biomedical Engineering at Wayne State University. She, together with obstetrician Bernard Gonik, M.D., has authored a series of peer-reviewed articles on computer modelling the forces of labor. A. App. 102, ¶¶ 15-22. Dr. Grimm's articles, like the ones published by Dr. Allen, appear in the American Journal of Obstetrics and Gynecology. However, unlike the physical models constructed by Dr. Allen, Dr. Grimm's computer modelling reveals that the maternal forces of labor can cause a permanent brachial plexus injury.

In its simplest form, Dr. Grimm's computer model predicts the magnitude and direction of forces necessary to deliver an infant, including one encountering shoulder dystocia, and the resulting stretch to the infant's brachial plexus. A brief summation of her modeling was explained by ACOG's 2014 compendium:

> A sophisticated three-dimensional computer model (MADYMO) was developed to investigate both endogenous and exogenous delivery forces in one system and their effects on the fetus. . . . The study found that contact force at the base of the fetal neck against the maternal symphysis pubis was more than two times higher because of maternal endogenous forces when compared with exogenous forces.
>
> . . .
>
> The same investigators further developed the MADYMO computer model to look more specifically at brachial plexus response. The maternal pelvic model was unchanged, but the fetal model was modified on the basis of animal models to include shoulder and neck structures that more closely represented a human fetus.

A. App. 89-90. Upon developing more advanced models which incorporated the capacity of fetal nerves to withstand the predicted forces, Dr. Grimm determined that the neural stretch generated by maternal forces may exceed the nerves' elastic limit and produce injury, including permanent injury.

As explained to the Circuit Court, Dr. Grimm has brought her expertise to bear on this case. A. App. 79-80. She would testify that, once Dr. Dobbins diagnosed the shoulder dystocia, he initiated a series of obstetrical maneuvers, namely the McRoberts' and Woods' maneuvers, which sought to resolve, and did resolve, the shoulder dystocia without increasing the stretch to Unity Bayer's brachial plexus. A. App. 80. This conclusion is supported by Dr. Grimm's article, "Effect of Clinician-Applied Maneuvers on Brachial Plexus Stretch during a Shoulder Dystocia

Event: Assessment through Computer Modeling." She would further testify that there is no evidence in this case that Dr. Dobbins contorted the child's head or applied excessive traction, a point on which even the plaintiffs' experts agree.[4] Id. Given the state of the evidence—that the child's shoulder collided with the maternal pelvis, that Dr. Dobbins performed and resolved the dystocia with harmless maneuvers, and that the record is silent as to clinician-applied traction—and in light of her computer modelling studies, Dr. Grimm would opine to a reasonable degree of engineering certainty that maternal forces probably caused Unity Bayer's injury. Id.

3. A Description of Other Defense Experts' Opinions

In addition to Dr. Grimm, Dr. Dobbins disclosed three expert witnesses who together assert that Unity Bayer's injuries were caused by the maternal forces of labor rather than physician-applied traction: (1) Dwight J. Rouse, M.D.; (2) Robert K. DeMott, M.D.; and (3) Mark Scher, M.D. Dr. Dobbins provided the Circuit Court with a description of both their qualifications and their expert opinions. A. App. 76-79.

[4] The plaintiffs' experts all agree that maternal forces can cause a temporary, although not permanent, brachial plexus injury. Because the injury in this case is permanent, the plaintiffs' experts conclude that the injury must have been caused by the clinician, even in the absence of any direct evidence.

(1) Dwight J. Rouse, M.D. Dr. Rouse, Board-Certified in both Maternal-Fetal Medicine and Obstetrics, is a Professor of Obstetrics and Gynecology at The Warren Alpert Medical School of Brown University. Dr. Rouse has published over 175 peer-reviewed articles in various medical journals on obstetrical issues and is currently an Associate Editor of the American Journal of Obstetrics and Gynecology. Perhaps most notably, Dr. Rouse was the Editor of the 23rd Edition of Williams Obstetrics (2009), the leading reference textbook in the world on obstetrics. With respect to shoulder dystocia and brachial plexus palsy, Dr. Rouse was a Reviewer for ACOG's 2014 compendium. *See supra* pp. 8-10. Dr. Rouse holds the following opinions:

> Dr. Rouse will also testify that Dr. Dobbins did not cause the brachial plexus injury suffered by Unity Bayer. Dr. Rouse will disagree with the opinions offered by Drs. Gurewitsch and Holden as well as the aspects of Dr. Adler and Dr. Allen's testimony pertaining to causation. Dr. Rouse will opine that Dr. Dobbins utilized the appropriate, standard of care maneuvers in delivering Unity Bayer, offered appropriate informed consent and did not apply excessive traction to the head/neck of Unity during the delivery process. . . . Brachial plexus injuries are known to occur in cases in which there is an absence of clinician applied force or traction. The presence of a brachial plexus injury does not equate to a finding that Dr. Dobbins applied excessive fraction during delivery. During all deliveries, there are various maternal forces that come to bear on the fetus and it is well reported and acknowledged in the medical literature that these maternal forces alone can cause brachial plexus injuries as well as other factors such as the fetuses' own ability to withstand the normal forces of delivery and gentle traction.

A. App. 77-78.

(2) Robert K. DeMott, M.D. Dr. DeMott, Board-Certified in Obstetrics, is a private clinician at OB-GYN Associates of Green Bay, LTD. He has published numerous peer-reviewed articles regarding shoulder dystocia and brachial plexus palsy in journals such as the American Journal of Obstetrics and Gynecology. *See*, *e.g.*, A. App. 101, ¶¶ 6-8. Dr. DeMott holds the following opinions:

> Dr. DeMott will also testify that Dr. Dobbins did not cause the brachial plexus injury suffered by Unity Bayer. Dr. DeMott will dispute the opinions offered by Dr. Gurewitsch and Holden and disagree with the causation testimony offered by Drs. Adler and Allen. . . . The maneuvers applied by Dr. Dobbins are endorsed by ACOG and are designed to lessen the amount of physician applied fraction placed on the baby during delivery in a shoulder dystocia event. Dr. Dobbins utilized his clinical judgment, which is required in all shoulder dystocia scenarios. There is no evidence that Dr. Dobbins applied excessive traction during the delivery and the development of a brachial plexus injury in Unity is not evidence that excessive traction was used. In fact, as stated by ACOG, there is no published clinical or experimental data that exists to support the contention that the presence of persistent neonatal brachial plexus palsy implies the application of excessive force by the birth attending. During all deliveries, maternal forces come to bear on the baby. These forces alone can be sufficient to cause a brachial plexus injury. Further, certain babies are unable to sustain even the normal forces of the delivery process and can develop injuries, including brachial plexus palsy. The injuries sustained by Unity Bayer were not the result of excessive traction applied by Dr. Dobbins during labor and delivery.

A. App. 76-77.

(3) Mark Scher, M.D. Dr. Scher, Board-Certified in Pediatric Neurology, is the Chief of Pediatric Neurology at Rainbow Babies and

Children's Hospital in Cleveland, Ohio. Dr. Scher holds the following opinions:

> Dr. Scher will testify that Unity Bayer's injuries are not the result of excessive traction applied by Dr. Dobbins during the labor and delivery process. Maternal forces of labor and in utero processes are sufficient to cause a brachial plexus injury. Further, the amount of force a baby can endure varies. In other words, certain babies cannot withstand normal traction and normal maternal forces while others can. The evidence available in this case is consistent with an injury that was not the result of excessive traction.

A. App. 78-79.

4. A Summary of the Case Law

Dr. Dobbins alerted the Circuit Court that there is a consensus in the case law that the maternal forces theory is admissible in permanent brachial plexus injury cases. A. App. 49 (citing *Estate of Ford v. Eicher*, 250 P.3d 262 (Colo. 2011); *Taber v. Nguyen Roush*, 316 S.W.3d 139 (Tex. App. 2010); *Ruffin v. Boler*, 890 N.E.2d 1174 (Ill. App. Ct. 2008); *D'Amore v. Cardwell*, 2008 Ohio 1559 (Ct. App.); *Regions Bank v. Hagaman*, 84 S.W.3d 66 (Ark. Ct. App. 2002); *Lawrey v. Kearney Clinic, P.C.*, 2012 U.S. Dist. LEXIS 116741 (D. Neb.); *Silong v. United States*, 2007 U.S. Dist. LEXIS 67498 (E.D. Cal.); *Potter v. Bowman*, 2006 U.S. Dist. LEXIS 91042 (D. Col.); *Krebsbach v. Injured Patients and Families Compensation Fund*, Sheboygan County, WI Case No. 12-CV-618; *Seifert v. Balink, M.D.*, Grant County, WI Case No. 11-

CV-588; *Seiber v. Antkowiak, D.O.*, Milwaukee County, WI Case No. 11-CV-942); *see also Salvant v. State*, 935 So. 2d 646, 656-58 (La. 2006); *Rieker v. Kaiser Found. Hosps.*, 96 P.3d 833 (Ore. Ct. App. 2004). Most notably, the Circuits Courts of Sheboygan County, Grant County, and Milwaukee County have all come down on the side of admissibility. Dr. Dobbins quoted extensively from and filed copies of those opinions and rulings with its response brief, including the hearing transcripts from aforementioned circuit court proceedings. See R.73 ¶¶ 16-26.

F. The Circuit Court's Ruling

The Circuit Court granted the plaintiffs' motion *in limine* no. 12 to preclude defense experts from testifying that the maternal forces of labor caused Unity Bayer's injury. A. App. 1, 3-4. The Circuit Court's ruling, which it set forth orally on June 11, 2015, R.100 (A. App. 104-273), did not acknowledge or even mention the *Daubert* legal standard or the recognized *Daubert* factors. The ruling did not discuss the Circuit Court's role in administering *Daubert* or the limitations placed on that role by the case law. Similarly, nowhere in its ruling did the Circuit Court explain why the *Daubert* standard, when applied to the facts of the case, should bar the admissibility of expert testimony on the maternal forces theory.

Instead, the Circuit Court simply rendered its own interpretation of the medical literature. The Circuit Court started by siding with the plaintiffs that one article published by the American Journal of Obstetrics and Gynecology was "disingenuous" and should be "withdrawn." A. App. 167. The Circuit Court then discarded the remaining body of medical literature in one broad stroke, stating that "these articles are not distinguishing between permanent brachial plexus injuries and temporary brachial plexus injuries." Id. at 168. At no time did the Circuit Court identify the specific articles to which it referred or acknowledge the literature that *does* recognize the connection between maternal forces and permanent brachial plexus injuries.[5] The Circuit Court did not even disclose its basis for believing that there is a meaningful distinction, either in medicine or biomechanics, between permanent and temporary brachial plexus injuries.

Initially, the breadth of the Circuit Court's ruling was confusing. *See* A. App. 166-184. On the one hand, the Circuit Court concluded that defense experts *could* testify about the maternal forces theory if it was

[5] As to the battle of the biomedical engineering experts, the Circuit Court ignored Dr. Grimm's computer modelling research altogether. However, at the same time, it gave significant weight to the research of Dr. Allen. A. App. 202.

founded on appropriate medical literature. On the other hand, however, the Circuit Court found that the medical literature was inappropriate because, under its interpretation, the literature did not adequately differentiate between permanent and temporary brachial plexus injuries. As such, the Circuit Court explained, the defense experts could not rely on it to support their opinions. When defense counsel sought to clarify this circuitous reasoning, the Circuit Court offered only cryptic answers:

> **Page 77**
>
> THE COURT: That's my ruling. And if it guts your witnesses, well, then, so be it. And if you want to appeal it, well then, so be that.
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> **Page 77**
>
> THE COURT: I--frankly, I don't know what [the defense experts] have left that they can testify based on.
>
> **Page 78**
>
> MR. LEIB: Okay. But it sounds like what the Court is saying is, with the things that have been excluded, under the Court's Daubert analysis there is no . . . [b]asis for [defense experts] to be testifying.
>
> THE COURT: All right. Well, then, fine.

A. App. 180, 181.

Eventually, the Circuit Court conceded that it was granting the motion outright. A. App. 185. It took the position that its ruling precluded the defendants from presenting any alternative cause for Unity Bayer's

injury and was "tantamount to a directed verdict . . . on the causation issue."[6] A. App. 251. Remarkably, the Circuit Court even went one step further by stating on several occasions that this case warranted a *res ipsa loquitur* instruction. A. App. 201, 222, 248-49. Dr. Dobbins now respectfully asks that the Court reverse the Circuit Court's ruling.

STANDARD FOR REVIEWING RULINGS ON THE ADMISSIBILITY OF EVIDENCE UNDER WIS. STAT. § 907.02(1)

While the Court reviews for an erroneous exercise of discretion a trial court's decision to admit evidence, it reviews *de novo* a trial court's interpretation and application of Wis. Stat. § 907.02(1). *260 N. 12th St., LLC v. State DOT*, 2011 WI 103, ¶¶ 38-39, 338 Wis. 2d 34, 808 N.W.2d 372; *see also Lees v. Carthage College*, 714 F.3d 516, 520 (7th Cir. 2013) (regarding the *Daubert* standard, "[w]hether the district court applied the appropriate legal framework for evaluating expert testimony is reviewed de novo, but the court's choice of relevant factors within that framework and its ultimate conclusion as to admissibility are reviewed for abuse of discretion.").

[6] The Circuit Court also implied that the defense bar was responsible for creating the maternal forces theory: "And then, within the last 20 years, the defense bar has been coming up with this other theory that it could be the maternal forces of labor [causing permanent brachial plexus injuries]." A. App. 250.

ARGUMENT

THE CIRCUIT COURT ERRED IN INTERPRETING AND APPLYING THE *DAUBERT* STANDARD

Peer-reviewed publications may unquestionably provide a reliable basis upon which an expert may found his or her opinions. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 593-94 (1993). The Circuit Court committed reversible error when, instead of following the *Daubert* framework and simply analyzing whether the defense experts employed a reliable methodology, it substituted its own medical opinions for those of the medical community. In doing so, the Circuit Court disregarded a staggering volume of medical literature as well as a substantial body of case law blessing the admissibility of the maternal forces theory. The Circuit Court failed to employ, let alone follow, the *Daubert* framework. Its order barring Dr. Dobbins' defense on liability should be reversed.

A. Wis. Stat. § 907.02(1) and the *Daubert* Standard

The 2011 amendment to Wis. Stat. § 907.02(1) ushered in changes to the admissibility test for expert testimony in Wisconsin. Specifically, Wis. Stat. § 907.02(1) now states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form

> of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

The legislative purpose behind the amendment was to codify the now-prominent *Daubert* standard of admissibility as reflected in Federal Rule of Evidence § 702 and the progeny of United States Supreme Court cases beginning with *Daubert v. Merrell Dow Pharm. Inc. See State v. Giese*, 2014 WI App 92, ¶ 17, 356 Wis. 2d 796, 854 N.W.2d 687.

The *Daubert* test consists of three parts, only one of which the Circuit Court ostensibly relied on in its ruling. A trial court "must determine whether the witness is qualified; whether the expert's methodology is scientifically reliable; and whether the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 644 (7th Cir. 2010). The Circuit Court's analysis focused on the reliability prong, i.e., whether the expert's methodology is scientifically reliable.

In carrying out their gatekeeping function, trial courts may assess the reliability of an expert's principles and methods using the following recognized but non-exhaustive list of factors:

> 1. Whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged

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

Fed. R. Evid. 702 advisory committee note (2000 amendment) (emphasis added); *see also Daubert*, 509 U.S. at 593-94.

A trial court's audit of the reliability of an expert's methodology is guided by three general principles. First, the trial court should undertake a reasoned analysis of the expert's methodology on the record. While the reliability prong is a flexible one, "it is nonetheless crucial that a *Daubert* analysis of some form in fact be performed." *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535 (7th Cir. 2005). To that end, "conclusory statements by the district court were not sufficient to show that a *Daubert* analysis was performed adequately." *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir. 2006). Furthermore, if a trial court believes that certain testimony is unreliable, then it should "articulate with reasonable specificity the reasons why it believes the testimony is insufficiently reliable to qualify for

admission under Rule 702." *Mihailovich v. Laatsch*, 359 F.3d 892, 919 (7th Cir. 2004).

Second, the focus of the trial court's reliability review should be on the methodology itself, not the quality of the underlying data or the perceived accuracy of the expert's conclusions. *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013). "The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). A trial court "usurps the role of the jury, and therefore abuses its discretion, if it unduly scrutinizes the quality of the expert's data and conclusions rather than the reliability of the methodology the expert employed." *Manpower, Inc.*, 732 F.3d at 806 (citations omitted).

Finally, the ultimate goal of the reliability prong is simply to avoid admitting opinions based on the expert's own *ipse dixit*, conjecture, or personal preference. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Giese*, 2014 WI App 92, ¶ 19. Indeed, the reliability inquiry "is not intended to supplant the adversarial process." *Bielskis v. Louisville Ladder, Inc.*, 663

F.3d 887, 894 (7th Cir. 2011). Trial courts may even admit expert testimony if it is founded on a weak methodology because "[v]igorous 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." *Daubert*, 509 U.S. at 596; *see also Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010).

B. The Circuit Court Failed to Use the *Daubert* Framework, Evaluate the Experts' Methodology, Consider the Breadth of Medical Literature, and Recognize the Value of the Adversarial Process.

The Circuit Court committed at least four errors in precluding defense experts from testifying about the maternal forces theory. Because the reasons relate to the Circuit Court's interpretation of *Daubert*, each reason alone justifies reversal as a matter of law. In other words, while Dr. Dobbins disagrees with the Circuit Court's criticisms of the medical literature, it was *how* the Circuit Court undertook its admissibility analysis that constitutes reversible error.

First, the Circuit Court did not describe or refer to the *Daubert* test in any way. It did not explain the applicable *Daubert* standard, i.e., that experts must employ a reliable methodology in arriving at their opinions. It did not identify what *Daubert* factors it considered in determining

whether the expert used a reliable methodology. The only indication in the record that the Circuit Court was undertaking a *Daubert* review at all was the use of the word "*Daubert*." Simply put, a trial court must do more to withstand appellate scrutiny. A conclusory ruling, divorced from any identifiable *Daubert* analysis or framework, must be reversed.

Second, the Circuit Court performed its own assessment of the peer-reviewed literature underlying the experts' opinions rather than simply determining whether reliance on peer-reviewed literature evidences a reliable methodology. *Daubert* demands the latter, not the former. As the case law recognizes, a trial court's role under *Daubert* is not to draw its own opinions regarding the underlying data (in this case, the medical literature). The trial court is to focus only on whether the expert has a sound methodology in place. In this case, the defense experts' primary methodology was to consult peer-reviewed literature. As the *Daubert* case long ago settled, peer-reviewed publications may provide a reliable basis upon which an expert may found his or her opinions. *Daubert*, 509 U.S. at 593-94.

Third, the Circuit Court did not consider the breadth of evidence before it. Its broad criticisms of the underlying medical literature reveal

not only a misunderstanding of how *Daubert* works; they also show that the Circuit Court either misinterpreted or simply disregarded large portions of the medical literature. The Circuit Court appeared to take at face value the plaintiffs' argument that permanent brachial plexus injuries can only be caused by clinician-applied traction. The Circuit Court gave no weight to ACOG's 2014 compendium on brachial plexus palsy or to the computer modelling by Dr. Grimm. A trial court must consider all evidence submitted to it by the parties.

Lastly, and perhaps most importantly, the Circuit Court did not account for the role the adversarial process should have in a *Daubert* analysis. Any shortcomings that the Circuit Court perceived in the research relied upon by the defense experts should be addressed through cross-examination. The Circuit Court's belief that certain articles are irrelevant simply because they discuss brachial plexus injuries generally or temporary brachial plexus injuries specifically is not a basis for excluding those experts altogether. Rather, the appropriate response would be to permit opposing counsel to explore the issue with the witnesses at trial. In that way, the jury rather than the judge can determine how much weight

to assign the opinions. The Circuit Court erred in failing to consider alternatives to exclusion.

C. The Circuit Court's Ruling is Inconsistent with the Consensus in the Case Law, Including in Wisconsin, Which Concludes that Evidence of the Maternal Forces Theory is Admissible.

The Circuit Court was aware at the time it rendered its ruling that the case law reflected near-universal acceptance of the maternal forces theory as an admissible theory of causation in permanent brachial plexus cases. A. App. 49 (citing *Estate of Ford v. Eicher*, 250 P.3d 262 (Colo. 2011); *Taber v. Nguyen Roush*, 316 S.W.3d 139 (Tex. App. Ct. 2010); *Ruffin v. Boler*, 890 N.E.2d 1174 (Ill. App. Ct. 2008); *D'Amore v. Cardwell*, 2008 Ohio 1559 (Ct. App.); *Regions Bank v. Hagaman*, 84 S.W.3d 66 (Ark. Ct. App. 2002); *Lawrey v. Kearney Clinic, P.C.*, 2012 U.S. Dist. LEXIS 116741 (D. Neb.); *Silong v. United States*, 2007 U.S. Dist. LEXIS 67498 (E.D. Cal.); *Potter v. Bowman*, 2006 U.S. Dist. LEXIS 91042 (D. Col.); *Krebsbach v. Injured Patients and Families Compensation Fund*, Sheboygan County, WI Case No. 12-CV-618; *Seifert v. Balink, M.D.,* Grant County, WI Case No. 11-CV-588; *Seiber v. Antkowiak, D.O.,* Milwaukee County, WI Case No. 11-CV-942); *see also Salvant v. State*, 935 So. 2d 646, 656-58 (La. 2006); *Rieker v. Kaiser Found.*

Hosps., 96 P.3d 833 (Ore. Ct. App. 2004).[7] The Circuit Court did not raise, let alone account for, the volume of authority weighing against its ruling.

1. The State Supreme Courts of Colorado and Louisiana Have Concluded that the Maternal Forces Theory is Admissible.

The state supreme courts of both Colorado and Louisiana agree with the defendants that evidence of the maternal forces theory is admissible. *Eicher*, 250 P.3d 262 (Colorado); *Salvant*, 935 So. 2d 646 (Louisiana). Because the Colorado opinion focused squarely on the *Daubert* standard, a summary of that opinion is instructive. In *Eicher*, the delivery of baby gave rise to a shoulder dystocia. The defendant, Dr. Eicher, applied downward traction and attempted emergency maneuvers to dislodge the baby's shoulder, including the McRobert's maneuver and application of suprapubic pressure. The baby suffered two ruptures and an avulsion to her right brachial plexus resulting in permanent injury. Dr. Eicher's two experts opined that the infant's permanent injury "was caused by maternal intrauterine forces. This theory . . . posits that, in some circumstances, the internal forces of labor and delivery cause brachial plexus injuries." *Id.* at

[7] The only jurisdiction to have ruled against the maternal forces theory is New York. *See Muhammad v. Fitzpatrick*, 91 A.D.3d 1353 (N.Y. App. Div. 2012). However, New York does not use the *Daubert* standard. Instead, it adheres to the more antiquated *Frye* standard which the United States Supreme Court abandoned in *Daubert*. As such, it is no surprise that no other jurisdiction has followed New York's lead.

264-65. The trial court, upon motion by the plaintiff, excluded the maternal forces opinions on the grounds that one expert "did not hold his causation opinion to the required degree of reasonable medical probability" and that "the scientific principles underlying the intrauterine contraction theory were not reasonably reliable." *Id.* at 265.

The Colorado Supreme Court affirmed the court of appeals' reversal of the trial court's ruling. Applying the Colorado version of the *Daubert* standard, the supreme court sharply criticized the trial court for relying on the fact that the maternal forces theory was not tested and had no accepted error rate:

> Here, ethics prevent testing the intrauterine contraction theory. Such testing would subject mothers and their infants to potential injury. Instead, the theory is supported by research, clinical study, and a body of peer-reviewed literature spanning almost twenty years. It is accepted in the scientific community as illustrated by the fact that it has been adopted in authoritative texts and in the medical practice guidelines.

Id. at 269. Indeed, the supreme court pointed out that the plaintiff's causation theory of physician-applied traction could not be tested either. *Id.* The supreme court further concluded that any concerns that the plaintiff had about the theory could be resolved with "addressed by vigorous cross-examination, presentation of contrary evidence, and careful

instruction on the burden of proof." *Id.* (citing, *inter alia*, *Daubert*, 509 U.S. at 596).

2. The State Courts of Appeals of Texas, Illinois, Ohio, Oregon, and Arkansas Have Also Concluded that the Maternal Forces Theory is Admissible.

In addition to the high courts of Colorado and Louisiana, at least five state courts of appeals—Texas, Illinois, Ohio, Oregon, and Arkansas—have all agreed that evidence of the maternal forces theory is admissible. *Taber*, 316 S.W.3d 139 (Texas); *Ruffin*, 890 N.E.2d 1174 (Illinois); *D'Amore*, 2008 Ohio 1559 (Ohio); *Rieker*, 96 P.3d 833 (Oregon); *Regions Bank*, 84 S.W.3d 66 (Arkansas). Of those five state courts of appeals, four of them—Texas, Illinois, Ohio, and Arkansas—blessed the theory's admissibility based directly on the *Daubert* standard.

3. Federal District Courts in Nebraska, California, and Colorado Have Also Concluded that the Maternal Forces Theory is Admissible.

Aside from numerous state courts, at least three federal district courts have agreed that evidence of the maternal forces theory is admissible. *Lawrey*, 2012 U.S. Dist. LEXIS 116741 (Nebraska); *Silong*, 2007 U.S. Dist. LEXIS 67498 (California); *Potter*, 2006 U.S. Dist. LEXIS 91042 (Colorado). Each of those federal district courts applied the *Daubert*

standard in arriving at its decision. Notably, federal district courts, having frequently encountered the *Daubert* standard since its inception in 1993, are undoubtedly the most seasoned judiciaries in the country in interpreting and applying *Daubert*. On the admissibility of the maternal forces theory, they have ruled in harmony: evidence of the maternal forces theory is admissible at trial and, to the extent an opposing party wishes to challenge its foundation, counsel is free to do so during cross-examination. Their rulings should have carried significant weight with the Circuit Court's decision-making in the present case.

4. Perhaps Most Importantly, the Wisconsin Circuit Courts of Grant, Milwaukee, and Sheboygan Counties Concluded that the Maternal Forces Theory is Admissible.

Last, but certainly not of least legal import, the Circuit Courts of Grant, Milwaukee, and Sheboygan all agreed that evidence of the maternal forces theory is admissible. Cir. Ct. App. 1-18. Two of those rulings—in Grant and Sheboygan Counties—required the Circuit Courts to apply the *Daubert* standard. Although the other case, venued in Milwaukee County before the Honorable Christopher R. Foley, involved the predecessor "relevancy" standard, the circuit court noted in dicta that it would have admitted evidence of the maternal forces theory even had the *Daubert*

standard applied. Cir. Ct. App. 10. Despite the three Wisconsin rulings in Dr. Dobbins' favor, the Circuit Court did not address them or suggest that the lawsuit before it was distinguishable in some manner.

In the Grant County case *Seifert v. Balink*, case no. 11-CV-588, the Honorable Craig R. Day denied the very same motion *in limine* brought by the plaintiffs in the present appeal. The circuit court there ruled:

> Whether or not brachial plexus, to be more specific, permanent brachial plexus injury can be caused by the maternal forces of labor is a disputed point. But the fact that it is a disputed point does not meant that opinions that it exists ought not be admitted. It does not mean that those opinions are not the result of a reliable methodology properly applied to the facts of this case.
>
> How exactly this brachial plexus injury occurred is not known in the sense that we can—it's not like an automobile accident, where you didn't have a broken arm and now you do. There are a number of theories, plausible theories, supportable theories, about how it could happen.
>
> One plausible, supported theory specifically paying note to footnote one on page two of the Defendant's brief in opposition, filed July 25, 2013, lists a series of articles which can support the theory that maternal forces of labor may be the cause of a brachial plexus injury. And medical evidence just isn't like the hard sciences.
>
> Every human body is different. The factors both in the mother and in the fetus are nearly innumerable. And an opinion needs to do its best to take into account those known factors and make some educated hypotheses about the unknown factors, and then maybe have an opinion about how it happened.
>
> The other thing, I think, that is significant to the maternal forces of labor issue is the standard of proof for the opinion from the defensive side, by what we already discussed earlier in the general motions *in limine*. And that is that the defense is in the position of being able to assert possibilities.

Cir. Ct. App. 11-18.[8]

Later, the Honorable Terence T. Bourke in the Sheboygan County case *Krebsbach v. Kostic*, case no. 12-CV-618, also found that evidence of the maternal forces theory was admissible. The circuit court there concluded:

> . . . So what I look for when I have a *Daubert* issue is some objective science of reliability. If I let something in, it's not because I think it is a wonderful theory, I don't think it is a winner many times, but I do look for reliability. Mr. Leib is right about the reliance on cross-examination and dealing with theories that may be shaky, that was the term as I recall by the *Daubert* Court.
>
> In this case, meaning in this particular litigation, I consider that the defense witnesses that were listed in the AGOG article that's marked as Exhibit number 2 and Mr. Leib's affidavit, they have impressive credentials. I also consider that there have been several medical publications that have endorsed the maternal forces theory and they are listed on page 16 of Mr. Leib's brief or Mr. Gaynor's brief I should say. I also considered the *Task Force On Neonatal Brachial Plexus Palsy*. Again, that's in Exhibit 2 of their report to ACOG.
>
> Going on to their summary on page 37 of Exhibit 2, the report, "Neither high-quality nor consistent data exist to suggest that NBPP can be caused only by a specific amount of applied force beyond that typically used by health care providers and experienced during a delivery without NBPP. Instead, much of the data has suggested that the occurrence of NBPP is a complex event, dependent not only on the forces applied at the moment of delivery, but also on the constellation of forces (vector and rate of application) that have been acting on the fetus during the labor

[8] It should be noted that *Seifert v. Balink* is currently pending before the Wisconsin Supreme Court on an unrelated *Daubert* issue. *See* Appeal No. 14-AP-195 (on review from District IV). The *Daubert* issue in *Seifert* relates to whether the circuit court should have stricken plaintiff's standard of care expert when it was shown that he rested his opinions on his personal preferences alone. The plaintiff did not appeal the circuit court's ruling on the maternal forces theory.

> and delivery process, as well as individual fetal tissue characteristics".
>
> I take this to mean that there are people who are knowledgeable, people who have credentials, people who have studied and who think that there is merit to the maternal forces theory. I'm looking in particular at the epidemiology issue. I would note that there are courts that have spoken highly of the epidemiology studies that were mentioned in the defense brief. I also note that the Texas Court in – I apologize, but I have to get that out – that was *Taber v. Ngugyen Roush*, R-O-U-S-H, that case is from the Texas Court of Appeals. They endorsed epidemiology studies as being reliable given that there is significant independent indicia and reliability for the epidemiology studies. I will deny [the motion *in limine*].

Cir. Ct. App. 1-8.

The Circuit Court in Marinette County should have sought guidance in the case law. Dr. Dobbins does not suggest that the Circuit Court was bound by any of the aforementioned rulings. It was not. However, when attempting to interpret complex legal schemes, particularly ones as new to Wisconsin as *Daubert*, and trying to understand how those schemes might apply to certain factual scenarios, it is helpful to inform one's decision by looking to others who have undertaken the same or similar analyses in the past. This, it appears, the Circuit Court did not do. Had it done so, Dr. Dobbins is confident that the Circuit Court would have concluded that evidence of maternal forces theory should be admissible at trial.

D. Even if the Circuit Court Doubted How the Defense Experts Applied the Maternal Forces Theory to the Facts of the Case, Wisconsin Law Holds that Defendants May Offer Possibility Evidence on Causation.

Although the Circuit Court did not clearly rule on whether it disagreed with how the defense experts applied the maternal forces theory to the delivery of Unity Bayer, long-established Wisconsin law permits defendants to offer possibility evidence on causation. A plaintiff, as the party who bears the burden of proof on his or her medical malpractice claim, must present expert proof to a reasonable medical probability, and not a mere medical possibility. *Peil v. Kohnke*, 50 Wis. 2d 168, 183, 184 N.W.2d 433 (1971); *Hernke v. Northern Ins. Co.*, 20 Wis. 2d 352, 360, 122 N.W.2d 395 (1963). Defendants, however, are not so restricted. As explained in *Hernke*:

> The burden of proof as to injuries is upon the plaintiff, and his medical testimony in meeting such burden cannot be based on mere possibilities. However, a defendant in resisting such claim of injuries is not required to confine himself to reasonable medical probabilities. A defendant may attempt to weaken the claim of injuries with medical proof which is couched in terms of possibilities. Thus, it is proper to cross-examine a plaintiff's medical witness on matters which do not rise to the dignity of "reasonable medical probability."

20 Wis. 2d at 360 (citations omitted).

In addition to being able to cross-examine a plaintiff's experts on possibilities, the case law reflects that direct examination of defense

experts on possibilities is appropriate where offered to counter an opinion expressed by the plaintiff's expert. *Peil*, 50 Wis. 2d at 183 ("Although the party with the burden of proof must produce testimony based upon reasonable medical probabilities, the opposing party is not restricted to this requirement and may attempt to weaken the claim for injuries with medical proof couched in terms of possibilities."). Indeed, this Court recently reaffirmed this rule in *L.D.-M. v. Injured Patients*, 2015 WI App 68, ¶ 18, 364 Wis. 2d 758, 869 N.W.2d 170 (unpublished but citable), wherein a defense expert witness, over the plaintiffs' objections, was permitted to opine as to possibilities.

During pretrial motion practice in the present case, Dr. Dobbins moved *in limine* for an order "allow[ing] the defendants to elicit 'possibility' testimony by direct or cross-examination." R.69 at ¶ 10. Not surprisingly, after reviewing briefing on the issue and considering oral arguments, the Circuit Court granted the motion. A. App. 5. By granting this motion, the Circuit Court implicitly recognized that defense experts may render opinions based on possibilities. This would have included any opinion by defense experts that it was reasonably medically possible that the maternal forces theory caused Unity Bayer's injury.

To be clear, Dr. Dobbins' experts all opined to a reasonable degree of medical *probability and certainty* that the maternal forces of labor caused Unity's injuries. Nevertheless, to the extent that the Circuit Court drew into question the defense experts' application of the maternal forces theory to this specific delivery, the defense experts had extensive leeway to do so. Under the prevailing law on causation opinions in Wisconsin, they need only have rendered their opinions to a reasonable medical possibility.

CONCLUSION

For the foregoing reasons, Dr. Dobbins respectfully requests that the Court reverse the Circuit Court's ruling.

Dated this 14th day of December, 2015.

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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)(d) 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 **8,680 words**.

Dated this 14th day of December, 2015.

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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.

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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 the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

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.

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

I hereby certify that on December 14, 2015, I caused this brief to be deposited in the United States mail for delivery to the clerk by first-class mail pursuant to Wis. Stat. § 809(3)(b)1.

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