STATE OF WISCONSIN COURT OF APPEALS
DISTRICT III

UNITY BAYER,
by her guardian ad litem,
Vincent R. Petrucelli,
LEAH BAYER and
ANDREW BAYER,
Plaintiffs-Respondents,
and
JOHN ALDEN LIFE INSURANCE COMPANY,
Involuntary Plaintiff,

vs.
BRIAN D. DOBBINS, M.D.,
MMIC INSURANCE, INC.,
PREVEA CLINIC, LLC, and
DEF INSURANCE COMPANY,
Defendants-Appellants,
and
INJURED PATIENTS AND FAMILIES
COMPENSATION FUND,
Defendant-Co-Appellant.

Appeal No. 2015-AP-1470
Case No. 13-CV-271

APPEAL FROM THE CIRCUIT COURT FOR MARINETTE COUNTY
HONORABLE DAVID G. MIRON PRESIDING
MARINETTE COUNTY CIRCUIT COURT CASE NO. 13-CV-271

REPLY BRIEF OF DEFENDANT-CO-APPELLANT INJURED PATIENTS AND FAMILES COMPENSATION FUND

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ARGUMENT

A. The Trial Court Abused Its Discretion In Deciding That Evidence Supporting the Maternal Forces of Labor Was Inadmissible

This is a case where there is conflicting evidence and expert testimony as to the cause of a permanent brachial plexus injury. The plaintiffs propound a theory that the only way to sustain a permanent brachial plexus injury is through physician applied traction. The defense disagrees as the maternal forces of labor are sufficient to cause such a theory per peer reviewed literature, biomedical computerized studies and the testimony of experts in the field of medicine and biomedicine.

The Trial Court determined that the maternal forces of labor theory would be inadmissible under Wis. Stat. § 907.02. Defendants posit that the Circuit Court's decision was error as no *Daubert* analysis was performed[1], and as the *Daubert* analysis[2] of § 907.02 is new in Wisconsin for shoulder dystocia cases, there is a substantial body of case law from other jurisdictions which support that this evidence is admissible when a proper *Daubert* analysis is performed.

B. The Trial Court Did Not Apply *Daubert* Appropriately

The plaintiffs' argument that the Trial Court appropriately applied the *Daubert* standard is not supported by the record or their own brief. Conspicuous by its absence is any specific reference to statements made by the Trial Court

[1] Rather, the Trial Court's rationale was that the plaintiff's theory was in place over a hundred years and the defense theory had been created by the "defense bar" over the last 20 years. (R.100, 147:9-148:2, A-App 381-382). It also seemed to adopt the plaintiff's inaccurate argument that the expansive literature determined only temporary, and not permanent brachial plexus injuries could result from maternal forces.

[2] As outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct 2786, 125 L.Ed.2d 469 (1993) and progeny.

demonstrating his application of the *Daubert* standards to the maternal forces of labor evidence in this case. Plaintiffs do not cite such reference because it would be impossible to do so since there were no references made by the Trial Court. Attempting to sidestep such error, plaintiffs offer only conclusory arguments such as that when Judge Miron's order is read in its totality, it is sufficiently clear that he relied on *Daubert*. (Plaintiffs' brief, page 25).

The plaintiffs then attempt to justify the Court's dismissal of the broad body of peer reviewed literature and expert evidence supporting the maternal forces of labor theory by citing to *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). In *Joiner,* the trial court appropriately found that expert testimony was inadmissible because it did not support a link between PCB exposure and developing small cell lung cancer. The *Joiner* court came to that conclusion because 1) the animal studies cited were significantly dissimilar to the facts of the Joiner case (adult male, small cell lung cancer, small exposure to PCB), in that the studies discussed the development of alveologenic adenomas (different cancer entirely) after high doses of PCB were injected directly into the animals; 2) four epidemiology studies were not sufficient as a basis for the experts since two were unwilling to link increases in PCB to lung cancer, one involved only exposure to mineral oil (not PCB), and the fourth involved exposure to numerous cancer causing agents. As the studies were obviously irrelevant, the *Joiner* court found it was not an abuse of discretion to have rejected the experts' reliance on those studies. *Joiner*, 522 U.S. at 137-38.

Our case is easily distinguishable from *Joiner*. In our case, the studies of Dr. Grimm, the peer reviewed articles and other learned treatises were directly on point in dealing with shoulder dystocia and brachial plexus injuries. That evidence was relevant to this case and admissible. *Daubert* does not permit the trial court to weigh which theory it believes or which theory has been propounded longer or more frequently in the literature and then disallow evidence supporting the other theory. That is not the gatekeeper role. When competing or conflicting expert testimony is presented, the jury must be given the opportunity to weigh such testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). It was an abuse of discretion to preclude the defense experts from relying on that evidence. The Trial Court should be reversed.

C. The New York Cases Are Not Persuasive

As there are only two cases in Wisconsin discussing the amended Wis. Stat. § 907.02 with the *Daubert* standard, *State v. Giese*, 2014 WI App 92 and *Seifert ex* rel. *Scoptur v. Balink*, 2015 App 59, and neither of those cases are on point, the defendants brought forth a substantial body of persuasive law from other jurisdictions which previously addressed this same issue under the *Daubert* analysis.

Plaintiffs' response does not address the substantive holdings or reasoning of the many jurisdictions which found that evidence of the maternal forces of labor theory was admissible, and the plaintiffs' criticism of that broad body of law is not that it is unreasoned, lacking in basis or inapplicable. They complain that defendants did not cite *Muhammad v. Fitzpatrick*, 91 A.D.3d 1353 (2012) and

Nobre ex rel. Ferraro v. Shanahan, 42 Misc. 3d 909, 920-21, 976 N.Y.S.2d 841, 850 (Sup. Ct. 2013) characterizing those cases as "the most thorough and recent." (Plaintiffs' Brief, p. 30). While plaintiffs cite those cases, they fail to analyze them and their applicability to this case, probably for the same reason the defendants did not cite them at all. Unlike all of the cases cited by the defendants, *Muhammad* and *Nobre* are New York cases and New York does not follow *Daubert*, it follows the rule of *Frye v. United States*, 293 F. 1013. *See generally Muhammad v. Fitzpatrick*, 91 A.D.3d 1353 and *Nobre v. Shannahan*, 42 Misc. 3d 909. All of the jurisdictions which follow *Daubert*, have found the maternal forces of labor theory admissible when analyzing it in shoulder dystocia cases.

While the plaintiffs taunt that the law is nonbinding, it must be recognized that it is proper for Wisconsin courts to look to other jurisdictions for persuasive authority when deciding issues of first impression. *Russ ex rel. Schwartz v. Ross*, 2007 WI 83, 302 Wis.2d 264, 734 N.W.2d 874. The reasoning of those other courts can be persuasive, particularly in a case such as this where those courts previously examined the testimony of some of the same witnesses, reviewed the same or similar literature and analyzed the exact competing theories based upon the works of Dr. Grimm versus Dr. Allen.

In our case, the trial court found as inadmissible the same or similar evidence reviewed by these multiple other courts and found admissible. The trial court did so by failing to perform an appropriate *Daubert* analysis. Defendants are not arguing the trial court needed to "march in lockstep" as suggested by the plaintiffs.

(Plaintiffs' Brief, p. 30). Defendants are arguing that if the trial court had performed an appropriate well-considered review of the evidence under *Daubert* and availed himself of the persuasive authority available, a different result would have been reached. This court should reverse the trial court and allow the defense to offer evidence of the maternal forces of labor.

CONCLUSION

The Trial Court abused its discretion and erred in finding inadmissible evidence supporting the maternal forces of labor theory. The Trial Court failed to appropriately perform the required analysis under *Daubert*, and it should be reversed to allow the defense to offer evidence of the maternal forces of labor theory at trial.

Dated this 11th day of February, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,178 words and 5 pages.

I also certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 11th day of February, 2016.

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CERTIFICATION COMPLIANCE
WITH WIS. STAT. § 809.19(12)

I certify that I have submitted an electronic copy of this brief on February 11, 2016. 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 11th day of February, 2016.

NASH, SPINDLER, GRIMSTAD & McCRACKEN LLP

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