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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

REPLY 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

ARGUMENT

The Circuit Court committed reversible error when it failed to properly analyze whether defense experts' principles and methods were sufficiently reliable so as to render their opinions admissible. These errors precipitated an untenable sanction: the wholesale exclusion of Dr. Dobbins' entire defense to liability. Absent from the Circuit Court's oral decision was a semblance of *Daubert* structure. There was no discussion of reliability factors that the Circuit Court believed particularly important or unimportant. The Circuit Court did not attempt to summarize the expert's opinions or describe the substance of articles and studies upon which those experts relied, including articles and studies which contradicted its ruling. In other words, while its ruling insisted in conclusory fashion that there was a disconnect between the science and the defense experts' opinions, the Circuit Court scarcely addressed the science, the opinions, *or* the supposed disconnect.

The plaintiffs fail in their response to distinguish between the deficiencies in the process by which the Circuit Court arrived at its ruling and their belief that the ruling itself was correct. The plaintiffs spend only a few pages describing the Circuit Court's scant reasoning or arguing that it complied with the *Daubert* framework. They devote the remaining

portions of their brief to doing what the Circuit Court never did, i.e., laying out the reasons why they believe the defense experts' opinions were unreliable. While none of the plaintiffs' arguments are persuasive, worse still, they are utterly irrelevant to sustaining the Circuit Court's ruling.[1]

The defects in the Circuit Court's *Daubert* analysis are critical. They constitute errors of law, underscoring the axiom that a misguided analysis begets a misguided conclusion. This reply will focus on why the plaintiffs have not rebutted Dr. Dobbins' arguments that the Circuit Court failed to correctly interpret or adequately apply *Daubert*, leading it to a ruling which paid no regard to the great weight of medical literature or relevant case law. On those grounds, Dr. Dobbins respectfully asks that the Court reverse the Circuit Court's decision.

THE CIRCUIT COURT MISINTERPRETED AND MISAPPLIED WIS. STAT. § 907.02(1) AND *DAUBERT*

The Circuit Court excluded all four of Dr. Dobbins' liability expert witnesses for a single reason: it believed that the literature regarding maternal forces did "not distinguish[] between permanent brachial plexus

[1] Dr. Dobbins is reluctant to allocate its limited words to rebutting the multitude of undeveloped arguments presented in the plaintiffs' statement of the case. (Pls.' Resp. Br. at pp. 9-22; see also id. at pp. 28-30.) Some of the arguments are being presented for the first time on appeal, while others were addressed in briefing before the Circuit Court. *See* A. App. 46-100. In any event, and not surprisingly, the Circuit Court did not rely on any of them in its ruling.

injuries and temporary brachial plexus injuries." A. App. 168. To be clear, this was the *only* reason the Circuit Court provided. The plaintiffs state, incorrectly, that the Circuit Court "characterized the defense experts' maternal forces causation evidence as guesswork." (Pls.' Resp. Br. at p. 24.) Similarly, the plaintiffs incorrectly suggest that the Circuit Court's ruling somehow involved a discussion of general versus specific causation. (Id. at pp. 28-30.) There is *nothing* in the record to support either of these assertions. To the extent the plaintiffs attempt to manufacture new reasons to prop up the Circuit Court's ruling, those efforts should be disregarded.

Dr. Dobbins' opening brief presented several arguments intended to show that the Circuit Court's *Daubert* analysis was deficient and overlooked certain bedrock *Daubert* principles. (Dr. Dobbin's Br. at pp. 23-28.) These arguments expounded on the requirements (1) that trial courts should avoid conclusory rulings and should instead provide a reasoned analysis on the record (id. at pp. 23-24, 25-26); (2) that trial courts should focus their reliability analyses on the experts' methodology rather than on appraising underlying scientific data (id. at pp. 24, 26); (3) that trial courts should consider all materials submitted to them by the parties (id. at pp. 26-27); and (4) that trial courts, when faced with opinions they believe to

be shaky, should allow those opinions to be tested by the adversarial process, including cross-examination (id. at pp. 24-25, 27-28).[2]

While the plaintiffs do not dispute that these are fundamental *Daubert* principles, they nonetheless insist that the Circuit Court did not contravene any of them in striking Dr. Dobbins' entire defense to liability. (Pls.' Resp. Br. at pp. 25-28.) They further argue that the Circuit Court was not bound to agree with the panoply of cases Dr. Dobbins brought to its attention. (Id. at pp. 30-31.) Finally, the plaintiffs disagree with the legal principle that defendants may offer possibility evidence on causation. (Id. at pp. 31-34.) Dr. Dobbins will address these arguments in turn.

A. The Plaintiffs Fail to Rebut Dr. Dobbins' Arguments that the Circuit Court's Ruling Violated Fundamental *Daubert* Principles.

The chief problem with plaintiffs' response is that it relies so little on what the Circuit Court actually stated during its oral decision. In addressing each of Dr. Dobbins' arguments that the Circuit Court committed legal error, the plaintiffs advance conclusory arguments that do not find support in the record:

[2] To be clear, Dr. Dobbins argues that the Circuit Court erred *as a matter of law* in interpreting and applying the *Daubert* standard. The plaintiffs mischaracterize these arguments as relating to a mere "abuse of discretion." (Pls.' Resp. Br. at p. 25.) While the Circuit Court's ultimate decision to exclude the defense experts was an erroneous exercise of discretion, Dr. Dobbins raises the aforementioned arguments to demonstrate legal errors, not errors in the use of discretion.

1. *Daubert* Analysis on the Record. The plaintiffs argue that, given that there are no magic words that satisfy the *Daubert* framework, "Judge Miron's order must be read in its totality, and when done so, it is sufficiently clear that he relied on the *Daubert* standard when he rendered his oral ruling." (Pls.' Resp. Br. at p. 25.) The plaintiffs neither provide citations to the record nor explain what comprised the "totality" of the Circuit Court's *Daubert* framework. In reality, the Circuit Court did not perform a *Daubert* analysis on the record. There was no systematic application of law to fact. There was no mention of "reliability," "methods," "principles," or "factors"—words one might reasonably expect to hear during a *Daubert* analysis. The only explanation of any sort was the Circuit Court's belief that the medical literature did not support the defense experts' opinions that maternal forces can cause a permanent brachial plexus injury.

2. Assessment of Medical Literature. Without any citations to or foundation in the record, the plaintiffs contend that the Circuit Court "conducted a thorough review of the scientific literature submitted by the parties. . . ." (Pls.' Resp. Br. at p. 25.) The plaintiffs have no basis for this assertion, and the record reflects just the opposite. The Circuit Court did not address ACOG's 2014 Compendium which directly supports the

defense experts' opinions that maternal forces can cause a permanent brachial plexus injury. (Dr. Dobbins' Br. at pp. 8-10.) Similarly, the Circuit Court did not address the three other peer-reviewed articles that stand directly for the proposition that maternal forces may cause a permanent brachial plexus injury. (Id. at pp. 10-11.) The Circuit Court did not address the equally-supportive computer modeling studies and peer-reviewed articles authored by Dr. Dobbins' biomedical engineer, Michele Grimm, Ph.D. (Id. at pp. 11-13.)[3] Even had the Circuit Court properly addressed those publications, and even had the Circuit Court somehow found a legitimate way to discount them, it still failed to explain why Dr. Dobbins' esteemed experts would not have been permitted to make extrapolations from the dozens of other peer-reviewed articles that, while still supporting the maternal forces theory of causation, simply do not differentiate between transient and permanent brachial plexus injuries.

Just as the record does not support plaintiffs' contention that the Circuit Court thoroughly reviewed the medical literature, it also does not support their assertion that Dr. Dobbins "postulates that since [his] experts

[3] For an in-depth breakdown of Dr. Grimm's research, its relation to the etiology of permanent brachial plexus injuries, and its admissibility, see the court's analysis in *Ruffin v. Boler*, 890 N.E.2d 1174, 1180-89 (Ill. App. Ct. 2008). Since *Ruffin*, Dr. Grimm has expanded her research on the subject, releasing three more peer-reviewed articles. A. App. 102 ¶¶ 15-17.

say the science and the medical literature proved the maternal forces of labor can and did cause Unity Bayer's permanent injury, the court is prevented from questioning the conclusions their experts reached." (Pls.' Resp. Br. at pp. 25-26.) This mischaracterizes the argument altogether. Courts are not powerless to probe the methods and principles supporting an expert's opinions; indeed, *Daubert* demands precisely that. In this case, Dr. Dobbins' experts relied on a body of medical literature that, *as a matter of fact*, directly and indirectly supports the proposition that maternal forces can cause permanent brachial plexus injuries. Dr. Dobbins submitted copies of those peer-reviewed articles to the Circuit Court so that it could confirm that their opinions were founded on reliable principles and methods. However, not only did the Circuit Court seemingly ignore some of the articles, it further did what it was prohibited from doing under *Daubert*: it refused to take the underlying medical literature at face value, instead rendering its own conclusory opinion that the literature was *medically insignificant* because it (supposedly) failed to distinguish between transient and permanent injuries.

3. The Role of the Adversarial Process. Confusingly, the plaintiffs ask the Court to diminish the role the adversarial process should play in a *Daubert* analysis because it would comport with the will of the

Wisconsin Legislature. (Pls.' Resp. Br. at pp. 26-27.) Undoubtedly, the Legislature amended Wis. Stat. § 907.02(1) to adopt the federal *Daubert* standard. However, the *Daubert* standard itself is a species of case law, originating in 1993 by the United States Supreme Court. Its rules have been crafted over time by judicial will. Case law, not legislative intent, guides a trial court's *Daubert* analysis.

One essential principle that has existed since *Daubert*'s inception is that the gatekeeping function should not displace the adversarial process in close cases. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596 (1993); *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 894 (7th Cir. 2011); *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010). Even assuming *arguendo* that the medical literature did not distinguish between transient and permanent brachial plexus injuries, there is no reason to believe that jurors would be incapable of considering this concern in gauging the credibility of the defense experts' opinions. The Circuit Court should have recognized the jury's role in determining issues of credibility rather than striking the entire liability defense.

B. The Plaintiffs Do Not Rebut Dr. Dobbins' Argument that the Circuit Court Failed to Acknowledge Adverse Case Law.

Dr. Dobbins has steadfastly recognized that the Circuit Court was not bound by any of the thirteen (13) cases in which courts admitted expert

opinions that maternal forces caused the permanent brachial plexus injuries at issue. (E.g., Dr. Dobbins' Br. at p. 35.) However, it does not follow that the Circuit Court was at liberty to *ignore* all of them, particularly when they represent a near-universal consensus in the case law. As stated in the opening brief, the Circuit Court should have used the previous cases to guide its analysis or, if it had some reason to disagree with those cases, explain why it found them to be unpersuasive. The Circuit Court did neither.

The plaintiffs seek refuge in the only case that has ruled against the maternal forces theory, *Muhammad v. Fitzpatrick*, 91 A.D.3d 1353 (N.Y. App. Div. 2012), although it too was not mentioned by the Circuit Court. Despite plaintiffs' statement to the contrary, Dr. Dobbins addressed *Muhammad* in his opening brief. (Dr. Dobbins' Br. at p. 29 n.7.) *Muhammad* is of little persuasive value because it is based on an application of the *Frye* standard of expert admissibility. *Id.* at 1354 (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). The *Frye* standard, unlike the *Daubert* standard, requires that expert opinions be "'generally accepted' as reliable in the relevant scientific community" to be admissible. *Daubert*, 509 U.S. at 585. The United States Supreme Court in *Daubert* rejected the *Frye* standard, holding that "a rigid 'general acceptance' requirement would be at odds

with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." *Id.* at 588 (citations and internal quotation marks omitted).

Not only does *Daubert* undermine *Muhammad*'s relevance to the present case, the *Muhammad* court concluded only that the trial court did not abuse its discretion in barring the maternal forces theory under the *Frye* standard. 91 A.D.3d at 1354. For this reason, courts have subsequently marginalized the import of *Muhammad*, including in an unpublished summary order from the United States Court of Appeals for the Second Circuit. *Kawache v. United States*, 471 Fed. Appx. 10, 13 n.2 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 230 (2012).

Muhammad is at best an aberration, at worst a *non sequitur*. All courts that have applied the *Daubert* standard to the maternal forces theory have ruled it admissible. The federal judiciary, from which the *Daubert* standard was born, has unanimously ruled it admissible. State high courts have all ruled it admissible. Wisconsin Circuit Courts, other than the one in Marinette County, are unified in ruling that the maternal forces theory is admissible. To borrow the tidal metaphor, the gravity of *Muhammad* amidst the sea of case law is simply insufficient to reverse the tides of admissibility.

C. The Plaintiffs Are Wrong that Defendants May Not Rely on Causation Opinions Based on a Reasonable Medical Possibility.

Although Dr. Dobbins' appeal by no means succeeds or fails on this point, the plaintiffs misstate the law in asserting that defendants may not submit causation opinions based on a reasonable medical possibility. The case law unequivocally states that "[a] defendant may attempt to weaken the claim of injuries with medical proof which is couched in terms of possibilities." *Hernke v. Northern Ins. Co.*, 20 Wis. 2d 352, 360, 122 N.W.2d 395 (1963) (citations omitted); *see also Peil v. Kohnke*, 50 Wis. 2d 168, 183, 184 N.W.2d 433 (1971). The plaintiffs do not even acknowledge the Court's recent authority which is consistent with both *Hernke* and *Peil*. *See L.D.-M. v. Injured Patients*, 2015 WI App 68, ¶¶ 16-18, 364 Wis. 2d 758, 869 N.W.2d 170 [Cir. Ct. App. 22].

The plaintiffs predicate their response on the mistaken belief that defendants bear some burden of proof in medical malpractice cases. They do not:

> 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.

Hernke, 20 Wis. 2d at 360 (citations omitted); *see also Peil*, 50 Wis. 2d at 183. As a consequence, the plaintiffs' reliance on *Schwalbach v. Antigo Elec. & Gas. Inc.*, 27 Wis. 2d 651, 135 N.W.2d 263 (1965), *McGarrity v. Welch Plumbing Co.*, 104 Wis. 2d 414, 312 N.W.2d 37 (1981), and *Pucci v. Rausch*, 51 Wis. 2d 513, 187 N.W.2d 138 (1971) is misplaced.

Likewise, the plaintiffs misconstrue this Court's opinion in *Estate of Hegarty* in arguing that it supports their position. *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, 297 Wis. 2d 70, 727 N.W.2d 857. The plaintiffs cite to the following portion of *Estate of Hegarty*:

> While it is true that a party need not rise to a level of medical probability when cross-examining an opposing party's expert witness regarding matters on which the opposing party bears the burden of proof, that is not what Beauchaine/OHIC sought to do at trial and not what they are challenging on appeal. Rather, they sought to prove that other physicians were causally negligent. Putting other physicians who treated Sarah after 7:00 a.m. on the special verdict, based on a mere possibility that they might have been negligent, would have invited speculation by the jury and would have been inconsistent with the proper standard; that is, that the jury must be satisfied "by the greater weight of the credible evidence, to a reasonable certainty, that 'yes' should be [the] answer to the verdict questions." WIS JI--CIVIL 200.

Id. at ¶ 160 (citations omitted). This paragraph reflects two rules, neither of which supports the plaintiffs' argument. The first rule is that a party may rely on medical possibilities when cross-examining experts for *a party bearing the burden of proof*, like the plaintiffs in this case. This rule directly supports Dr. Dobbins' position. The second rule is that, in order for a party

to show that *another party is causally negligent* (and should therefore be on the verdict), that party bears the burden to prove such negligence and, as such, its experts must testify to a medical probability. Obviously, this rule is not implicated in the present appeal. *Estate of Hegarty* does nothing to support, and in fact contradicts, the plaintiffs' position.

CONCLUSION

For the foregoing reasons, as well as the ones set forth in his opening brief, Dr. Dobbins respectfully requests that the Court reverse the Circuit Court's ruling and conclude that the maternal forces theory is admissible in this case.

Dated this 11th day of February, 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)(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 **2,998 words**.

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

I hereby certify that I have submitted an electronic copy of this brief which complies with 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 FILING IN COMPLIANCE WITH WIS. STAT. § 809.80(3)(b)

I hereby certify that on February 11, 2016, I caused this brief to be deposited in the United States mail for delivery to the clerk by first-class mail pursuant to Wis. Stat. § 809(3)(b)1.

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