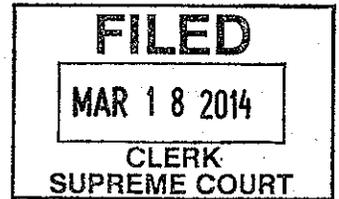


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE NO. 2013-SC-000059-D



**RICHARD C. OLIPHANT, M.D.  
AND LOUISVILLE PHYSICIANS FOR  
WOMEN, PLLC**

**APPELLANTS**

vs.

**BILLIE JO RIES, INDIVIDUALLY AND AS  
NEXT FRIEND OF INFANT CHILD, LAUREN  
ELIZABETH RIES; AND KEVIN RIES,  
INDIVIDUALLY AND AS NEXT FRIEND OF  
INFANT CHILD, LAUREN ELIZABETH RIES**

**APPELLEES**

**APPEAL FROM COURT OF APPEALS NO. 2011-CA-000100-MR  
JEFFERSON CIRCUIT COURT CIVIL ACTION NO. 05-CI-002925**

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**BRIEF OF APPELLEES**

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Child, Lauren Elizabeth Ries; and Kevin  
Ries, Individually and as Next Friend of  
Infant Child, Lauren Elizabeth Ries*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via first class United States Mail, on this 17th day of March, 2014, upon Gerald R. Toner, Katherine Kerns Vesely, Whitney R. Kramer, O'BRYAN, BROWN & TONER, 455 S. Fourth Street, 1500 Starks Building, Louisville, KY 40202, Counsel for Appellants; Hon. Barry Willett, Judge, Jefferson Circuit Court, Division One, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; and Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

  
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## COUNTERSTATEMENT OF THE CASE

The Rieses do not accept Dr. Oliphant's statement of the case, CR 76(4)(d)(iii), and submit the following which they deem essential to a fair and adequate understanding of the issues.<sup>1</sup>

### Summary

Billie Jo Ries gave birth to her daughter, Lauren Ries, on January 20, 1997. Billie Jo and her husband, Kevin Ries, sought compensation for the injuries Lauren suffered during her birth. Lauren has profound cerebral palsy with significant developmental impairments. She "suffered multiple organ failure and brain damage." *Ries v. Oliphant*, No. 2011-CA-000100-MR (Ky. App. 12/21/12) ("CA Op.") at 3, Appendix, TAB 1. Her injuries left her "unable to speak, . . . care for herself . . . feed herself . . . control her bowel or bladder, and . . . control her behavior resulting in emotional outbursts." *Id.* (summarizing the Rieses' testimony). As Lauren aged, and with no help to care for her when Kevin was at work, Billie Jo could no longer manage Lauren's care at home. Lauren's impairments, and the fact that she now out-weighs Billie Jo, meant that the

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<sup>1</sup> Dr. Oliphant gives but a cursory review of the medical care at issue and the role that Dr. Goldstein's challenged testimony played in assessing that care. See Brief for Appellant ("Oliphant Br.") at 1-3. But Dr. Oliphant then chastises the Court of Appeals for overstating the importance of Dr. Goldstein's testimony (and deeming its wrongful admission reversible error). Instead of citing to the record, Dr. Oliphant makes sweeping and unsupported statements throughout his Brief, e.g., that "Robinson went through a lengthy process in order to have Goldsmith approved as a witness," Oliphant Br. at 2, that the Rieses' neonatology expert Carolyn Crawford, M.D., was deposed by Robinson about mathematical calculations, *id.*, that the "trial court, in using its discretion as a gatekeeper, determined that this evidence was reliable under *Daubert*," *id.* at 3, and that the claim that the Goldsmith opinion was "corroborated by, but not dependent upon animal studies," *id.* at 5, to name just the first several examples. The Rieses take issue generally with conclusory statements not supported by a record reference, particularly when purporting to reflect some kind of concession or agreement by the Rieses.

Rieses were compelled, when Lauren was 12 years old, to make the difficult decision to place her in Louisville's Home of the Innocents.

The Rieses sued Billie Jo's obstetrician, Richard Oliphant, M.D. ("Dr. Oliphant"), and his medical group, Louisville Physicians for Women, PLLC, arguing that his breach of the standard of care caused Lauren's injuries.<sup>2</sup> The Rieses' claim was premised primarily upon Dr. Oliphant's failure to respond promptly to repeated emergency calls from Baptist Hospital East ("BHE"), asking that he attend to Billie Jo after her arrival at BHE at 5:30 a.m.

All defendants shared a common causation defense: Lauren was born with so little blood that no cord blood could be obtained. Pl. Tr. Ex. 5. All experts agreed that she had lost one-third to one-half of her fetal blood volume before birth,<sup>3</sup> but *the* central issue was *when* that fetal bleed occurred. The Rieses' evidence was that the bleed occurred after Billie Jo arrived at BHE at 5:30 a.m., and specifically, either right before birth or within the 20 minutes immediately before Lauren's birth.<sup>4</sup> Not only Dr. Oliphant, but all the defendants could have prevented Lauren's injuries with reasonable care either by a prompt delivery (Baptist East and Dr. Oliphant) or by an adequate resuscitation at her birth (Dr. Robinson).

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<sup>2</sup> The Rieses sued, but have since settled with, Baptist Hospital East and Lauren's neonatologist, Tonya Robinson, M.D., and her medical group, Neonatal Associates, P.S.C.

<sup>3</sup> Total fetal blood volume for a fetus of Lauren's size is about 180 ccs (or mLs). VR No. 149 4: 9/3/10; 03:30:50. This is the equivalent of six ounces, or about three-quarters of a cup.

<sup>4</sup> Inexplicably, Dr. Oliphant misstates the Rieses position on the timing throughout his Brief.

All defendants argued that the bleed occurred at home, so that all damage from the bleed had begun its inevitable course before Billie Jo's arrival at BHE (which defendants claimed was at 5:50 a.m.). The expert at issue here, Dr. Jay Goldsmith,<sup>5</sup> was the only one of the retained experts who claimed he could establish with mathematical and scientific certainty that the bleed had happened two hours before Lauren's birth, meaning while Billie Jo was still at home, sometime between 5:00 a.m. and 5:30 a.m. See CA Op., at 4-5 (summarizing causation evidence at trial).

The Rieses claimed, and the Court of Appeals agreed, that Dr. Goldsmith's opinion could not survive the reliability component of the *Daubert* analysis which trial courts are required to make on challenged scientific testimony. The only testimony before the trial court was that Dr. Goldsmith had never himself studied, nor could he cite any scientific basis for, the foundation assumptions on which his opinion was based.

Once Dr. Goldsmith's "scientific" opinion is deemed error, Dr. Oliphant can no longer support the verdict in his favor. That verdict was reached EITHER because the jury believed that Dr. Oliphant provided reasonable care, OR because the jury believed that Lauren's significant bleed occurred at home. Since the jury could have found for Dr. Oliphant under the Instruction (which Dr. Oliphant did not appeal) by using Dr. Goldsmith's flawed testimony, the error is not harmless. This is even more the case since courts recognize the heightened importance juries attach to "scientific" proof. The error in allowing the Goldsmith testimony permeates the proceedings below and a new trial is required.

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<sup>5</sup> Defendant Dr. Robinson retained Dr. Goldsmith, but his testimony about the time of Lauren's blood loss was integral to the causation analysis for Dr. Oliphant too.

Not only did all defendants share a common causation defense, defendants coordinated their trial arguments and strategies just as they had their pre-trial preparation. The trial court concluded in the early phases of the trial that defendants were not antagonistic for purposes of peremptory challenges.<sup>6</sup> Dr. Oliphant incorporated Dr. Goldsmith's closing by reference as it related to causation. VR No.166 2: 9/28/2010; 10:56:44. Dr. Oliphant argued in support of Dr. Goldsmith at the bench during Dr. Goldsmith's testimony (VR No. 159 1: 9/20/2010; 11:20:22- 11:10:50) (Mr. Toner: "Obviously I'm very interested in what he's saying. It is causation where we're right there together."). Dr. Oliphant spring-boarded other proof in through Dr. Goldsmith (VR No. 159 2: 9/20/2010; 2:02:30- 2:03:35). Dr. Oliphant boosted the Goldsmith causation analysis by urging that causation can be determined "retrospectively." VR No. 159 2: 9/20/2010; 1:29:15-1:40:26. Dr. Oliphant cited Dr. Robinson's testimony throughout his current brief (Oliphant Br. at 12, n. 35; at 13, n. 36, 38); and he has generally urged the admission of Dr. Goldsmith's opinion throughout the proceedings before the Court of Appeals. See Oliphant's Appellee's Brief at the Court of Appeals, *seriatim*. His argument that the Rieses' settlement with Dr. Robinson should somehow end the issue of the *Daubert* error regarding admission of the Goldsmith testimony is hardly the position he has taken thus far, when he well could have left it up to Dr. Robinson's counsel if he so chose.

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<sup>6</sup> No appeal was taken from this ruling either. The Rieses decided, as a matter of strategy, not to force the issue as far as it affected peremptory challenges, so each of the three defendants got four strikes. See VR No. 147 5: 9/1/2010; 4:44:10 – 4:45:37 for trial court's ruling establishing the specific factual support for the ruling that the defendants were not antagonistic.

### Events Surrounding Lauren's Birth

Billie Jo awoke at 5:00 a.m. on January 20, 1997, went to the bathroom, and saw some spots of blood on the bathroom floor and in the commode. She was then 36 weeks pregnant. Both Kevin and Billie Jo Ries described the spots of blood as minimal in volume. VR No. 152 5:9/9/10; 1:03:12-1:04:00; VR No. 157 4: 9/16/10; 4:03:50-4:04:44. Billie Jo put a wash cloth between her legs in case of more bleeding, and she and Kevin rushed to BHE. The nursing staff made observations about the bleeding and asked Billie Jo and Kevin questions about the amount of bleeding. Billie Jo was at BHE for an hour and a half (the defendants said an hour and ten minutes) before delivery. She delivered Lauren at 6:59 a.m.

Dr. Oliphant erroneously states that there was no proof of bleeding in the hospital, which he uses to argue, presumably, that there would have been insufficient proof to support a verdict in the Rieses favor (frankly, one is not clear why Dr. Oliphant makes many of his factual arguments and only a few will be responded to in this Counter Statement of the Case). Kevin testified that bloody chux padding that had been placed under Billie Jo was changed by the nurses, VR 152 6: 9/9/10; 2:50:11, and the delivery record confirms up to a 300 milliliter loss of blood in the 15 minutes before Lauren's birth (this is more than enough to account for a blood loss of 60 to 90 ml). Pl. Tr. Ex. 5. Moreover, Dr. Oliphant's own expert witness, Dr. Elliott, provided testimony that explains how Lauren could have had the bleed *without* any vaginal bleeding being observed. Dr. Elliott testified that a fetal bleed can bleed into the amniotic sac, which would *not* result in any observation of vaginal bleeding. VR No. 156 3: 9/15/2010; 2:39:18- 2:40:00.

The defendants jointly contended that Lauren bled out one-third to one-half of her blood volume before she ever got to Baptist East. They argued that Lauren's umbilical cord had an anatomical variation known as a vasa previa with velamentous vessels.<sup>7</sup> They claimed that the vasa previa somehow spontaneously ruptured, so that Lauren – while a fetus – uncontrollably bled out while Billie Jo was still at home.

The Rieses, on the other hand, presented proof that there may or may not have been a vasa previa, because one can determine a vasa previa only by viewing the location of the umbilical cord *in situ* and *before* birth. VR No. 149 4; 9/3/10; 04:34:06. Dr. Zane Brown, an obstetrical expert testifying for the Rieses, thought it more likely that the bleeding at home was due to a *maternal* abruption, so that the spots Billie Jo and Kevin observed were maternal blood and not fetal. VR No. 149 4: 0/3/10; 05:44:36. Indeed, the observation by the labor and delivery nurse of dark red blood during vaginal exam is more consistent with maternal bleeding than fetal bleeding. Pl. Tr. Ex. 3.

Billie Jo and Kevin were adamant that they did not see the one-quarter cup of blood that would have constituted a one-third fetal blood volume hypothesized lost by confusing defendants. Dr. Brown testified that, had Lauren really lost as much blood at home as the defense contended, she would have been dead by the time Billie Jo arrived at Baptist East. *Id.* Dr. Carolyn Crawford, a neonatology expert testifying for the Rieses, believed that Lauren's blood loss, whether from velamentous vessels or vasa previa, had

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<sup>7</sup> Velamentous vessels means that the umbilical cord splits from the protective covering of the cord before reaching the placenta and implants along the cervical wall; vasa previa means that the umbilical vessels pass over the opening of the cervix, where they are vulnerable to rupture by vaginal examinations (such as the one Dr. Oliphant did at 6:36 a.m.), rupture of membranes, or the mother's experience of active labor. Dr. Oliphant's witness, Dr. Thomas Elliott, testified that Billie Jo never went into active labor. VR No. 156 2:9/15/10; 11:30:20.

to have occurred somewhere between birth and twenty minutes before Lauren's birth.

VR No. 151 4: 9/8/10; 2:15:20.

Thus, both the Rieses and all defendants (with Dr. Oliphant fully on board), devoted much time and energy proving how little or how much bleeding occurred at the Rieses' home. This was a level playing field as the lay witnesses described what they saw; as nurses described what they observed in terms of bleeding at the hospital; as competing arguments were made about entries in the Intrapartum Record, Pl. Tr. Ex. 30, such as the meaning and import of (depending on how you read it) either "bldg" or "bldy"; as experts opined on whether Lauren could or could not have survived a fetal bleed at home of that magnitude; or whether her post-birth kidney damage would or would not have been of a different character. Every expert disclaimed any ability to precisely time the blood loss *until it came to* Dr. Goldsmith. And it was the admission of his qualitatively different testimony – purported to be "scientific" and "mathematical" evidence, and therefore cut-and-dried and not really subject to debate – that the Court of Appeals deemed reversible error; the admission of which required a new trial.

#### **Dr. Goldsmith's Equilibration Theory and Mathematic Model**

Dr. Goldsmith first articulated his equilibration theory and mathematical model in his April 23, 2010 deposition.<sup>8</sup> He began his theorizing with Lauren's laboratory blood counts taken at 7:50 a.m., 50 minutes after her birth. He assumed that Lauren had a normal fetal blood volume at 5:00 a.m., and he assumed she lost 60 ml at about that time. Even though he has no independent proof that there was a 60 ml (one-quarter cup) fetal

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<sup>8</sup> His CR 26.02 expert disclosure gave no hint that he would express an opinion about either causation in general or about a specific scientific theory that, according to him, allows him to establish the time of a supposed fetal bleed. *See* Appendix TAB 2.

bleed, he then sets out to “prove” that it happened at that time by “mathematically” matching it up with the 7:50 a.m. hematocrit value of 26.8. Pl. Tr. Ex. 13. Dr. Goldsmith’s theory is that a fetus replaces lost blood volume (equilibration) in the exact same manner as does a born baby (a neonate) or an adult, and at the same rate.

Dr. Oliphant wrongly contends that “[a]lthough the parties disagree over the rate of fetal equilibration, they do not dispute the fact that it occurs in response to blood loss and results in decreased hematocrit levels.” (Dr. Oliphant’s footnote cites only to defense testimony, or the defense cross of Dr. Puri). Oliphant Br. at 12. The Rieses *do* dispute the fact of equilibration in the intrauterine environment. The Rieses outline of submitted testimony in their *Daubert* motion<sup>9</sup> stands completely un-contradicted. Dr. Jeffrey Phelan testified that he knew of no data anywhere that provides a scientific basis for equilibration in the intrauterine environment. As the Rieses argued during the hearing on September 20, 2010, unlike a born baby or adult, the *in utero* fetus is receiving a continuous supply of blood from the placenta. VR No. 159 1: 9/20/2010; 10:20:00-10:20:59. The placenta has a reserve estimated by Dr. Brown at 150 mls,<sup>10</sup> and according to defense experts, such as Brian Carter, M.D., that placental reserve is replacing the blood lost in any fetal bleed for up to two hours. VR No. 157 1; 9/16/2010; 9:47:50-9:48:16; 9:51:10- 9:52:08. This immediate source of transfusion obviates the need for equilibration *in utero*. Moreover, the fetus is inside a sac containing amniotic fluid, to which the skin is permeable. *Id.* The fetus can be transfused by the maternal circulation

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<sup>9</sup> Motion for Daubert Hearing Regarding the Mathematical Model for Intra-Uterine Bleeding Proposed by Jay Goldsmith, M.D., filed 9/13/2010, RA 2789-2795, the first business day after the trial court turned down the Rieses request to rebut Dr. Goldsmith’s theory with Dr. Phelan. See Appendix, TAB 3.

<sup>10</sup> Rieses’ Appellants Brief at Court of Appeals, Appendix, TAB 9.

across the placental fetal/maternal interface. *Id.* The Rieses do not concede Dr. Goldsmith's first unsupported but represented-to-be-scientific assumption that equilibration occurs in the fetal intrauterine environment.

Undeterred, Dr. Goldsmith then assumes that an *in utero* fetus not only equilibrates, but will equilibrate at the same rate as a born baby or human adult. While that rate is scientifically established in adults and children (at anywhere from two to four hours after birth), it has never been established for an *in utero* fetus. The *Daubert* arguments focused on the rate issue, although the general principle of *in utero* equilibration is not scientifically established as similar to born babies or adults. Dr. Goldsmith conceded in his deposition that he did not even know if any scientific data established the equilibration rate for an intrauterine fetus.<sup>11</sup> When Dr. Goldsmith referred to animal studies, he conceded that those were studies done on animals *after* birth and he further conceded that they did not provide support for equilibration in the intra-uterine environment. *Id.* At his second deposition, and after a month to check for supporting

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<sup>11</sup> "Q Well, are these studies done in intrauterine fetuses? A No, they're done in animals after birth. Q So where is there any scientific basis for how an intrauterine fetus behaves with regard to equilibration? A I would have to go check. I am not sure. Q So as you sit here today with all of your knowledge and experience and training, you have not gone and checked this basic fundamental principle that underlies your major opinion to get even one source about how equilibration works in a fetus; is that right, Dr. Goldsmith? A If it works -- I have sources in terms of babies. I don't have sources in terms of intrauterine models. I don't know if there is an intrauterine model. But it's a fairly-accepted model of a general standard principle of equilibration. If you put equilibration into or looked under equilibration in any textbook, the neonatology textbook, you are going to see the principles of equilibration. Q And you came here today to give your deposition to tell me about this opinion, which wasn't in your disclosure -- MR. SMITH: Objection. BY MS. OLDFATHER: Q -- and you have no source for these principles as they apply to an unborn baby; is that right? A I do not." Goldsmith Depo., 4/23/10, at 140-41. This was placed in the record on September 20, 2010. VR No. 159 1:9/20/2010; 10:22:11-10:31:53.

data, Dr. Goldsmith was unable to provide any scientific support for his proposed equilibration rate for an *in utero* fetus: “As I said to you before, I am not aware of and have not spent the time to research on an intrauterine situation. These are all extrauterine situations, which I’m talking about.” Goldsmith 2d Depo., 5/26/10, at 46, and *see generally* 43-49. Simply put, Dr. Goldsmith never had any support for equilibration by, and rate of equilibration of, an *in utero* fetus other than the lawyer-speak of Dr. Robinson’s counsel.<sup>12</sup>

Even with this matter now before the Commonwealth’s highest Court, Dr. Oliphant cannot provide any record reference of *any testimony, by deposition or affidavit* that serves as a basis for an *in utero* fetus equilibration rate. There are multiple record references where expert witnesses testify that it is unknown, but not one reference where anyone, including Dr. Goldstein, stated under oath *either* that he had investigated this issue himself and compiled sufficient data to constitute a scientific sample, *or* where anyone stated under oath that any animal studies served as an analogy for otherwise unavailable human studies.<sup>13</sup> If there were such proof, surely the Court of Appeals and this Court would have been pointed to it by now.

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<sup>12</sup> All referenced depositions were filed in the trial court record during the September 20, 2010, hearing discussed in the next section. *See* n. 11.

<sup>13</sup> To be sure, Dr Robinson’s counsel filed four articles on the morning of September 20, 2010 with his just-filed Response to the Rieses’ *Daubert* motion, but Dr. Goldstein gave no affidavit, nor did any knowledgeable witness sponsor Mr. Darby’s lawyer-speak that the articles were “spot-on” (VR No. 159 1:9/20/2010; 10:35:25) with Dr. Goldsmith’s theory. It would certainly be beyond the province of the courts to reach the conclusion, with no supporting witness, that sheep studies could or could not be adequately translated to the human. There is also the point that even if it were appropriate for the court to consider lawyer arguments about what four studies say or don’t say, the articles actually support the Rieses, and not Goldsmith’s premise. Each of those studies establish that an *in utero* sheep fetus equilibrates *much more rapidly* than a born baby lamb. The Kwan

Nevertheless, Dr. Goldsmith was allowed to testify, *as if it were fact*, that he had proven that Lauren suffered her bleed at 5:00 a.m. (while Billie Jo was still at home). He proposed this formula: he added a 30 ml equilibration plasma volume (that he assumes an *in utero* fetus would generate in the two hours from 5:00 a.m. to birth at 7:00 a.m. since he assumes the same rate as an adult of full equilibration in four hours, which he prorates to 50% in 2 hours), to an assumed starting total blood volume of 180 ml at 5:00 a.m.; from which he subtracted a hypothesized bleed of 60 ml, also at 5:00 a.m.; with an assumed starting hematocrit of 45%; and then he added 40 ml of volume provided by the post-birth resuscitation (before the 7:50 a.m. blood test). This “mathematically” results in a hematocrit of 28%, which Dr. Goldsmith characterized as “pretty close” to her actual laboratory hematocrit of 26.8. *See* Appendix, TAB 5 at 11:16:49. Dr. Goldsmith offered this testimony as based on “my experience” and “studies.” These were “experience” and “studies” never reviewed by the trial court, disclaimed under oath, and absent from any *Daubert* review.

If an *in utero* fetus equilibrates *faster* than the four hours that Dr. Goldsmith assumed, then the time of the bleed is consistent with the Rieses’ proof — that is, that it occurred when Lauren and Billie Jo were already at BHE and in Dr. Oliphant’s hands, or even at time of delivery. And there is good reason to think that the equilibration rate is faster, because the physiological environment of a fetus is not comparable to that of a child or an adult. A fetus suffering a loss of blood volume will both equilibrate and

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article, for example, establishes that a sheep fetus has complete equilibration in two hours, which is twice as fast as Dr. Goldsmith assumed. Consequently, there are fundamental differences in equilibration depending upon whether one is born or intrauterine. *See* Appendix, TAB 4.

compensate for that blood loss in ways that differ substantially from neonates, children, and adults. The fetus receives a constant, and self-adjusting, blood supply from the placenta, powered by a vigorous exchange with the maternal side of the placenta, all of which is sufficient to provide as much as double the total fetal blood volume. VR No. 157 1: 9/17/10; 9:46:56-9:48:39.

The complete lack of any record support for any scientific basis of this purportedly “scientific” opinion is central to the Rieses’ argument, and was central to the Court of Appeals’ decision. *See* CA Op. at 9-12. Dr. Oliphant accuses the Court of Appeals of “substituting its perception of science for that of an ‘expert’ and the ‘trial judge,’” Oliphant Br. at 7. But the point is that the Court of Appeals searched the record and there simply was no support offered by the defense to establish that this opinion was reliable enough for the jury to even consider.

### **Procedural History**

Dr. Oliphant acknowledges that the trial court held a final pre-trial conference on August 11, 2010, after which it entered an order that “all expert opinion testimony was reliable and relevant.” Oliphant Br. at 2. *See* Oliphant Br. Appendix, Exhibit C, referenced holding at the top of page 2. However, Dr. Oliphant cannot cite the Court to any line of testimony reviewed for reliability under *Daubert* during the final pre-trial conference for the simple reason that it did not happen, a fact which Dr. Oliphant admits in his brief. *Id.* The Rieses did file a request for a *Daubert* hearing on September 13, 2010, a full week before the motion was heard and a full week before Dr. Goldsmith’s testimony. RA 2789-2795. Appendix, TAB 3. That motion was heard on September 20, 2010, for about thirty minutes. VR No. 159 1; 10:08:23- 10:41:00. The Rieses filed

deposition testimony supportive of their arguments. The defendants did not present any affidavits or any testimony. Although Dr. Goldsmith was present, he offered no proof. The trial court made no express finding about reliability, instead ruling only as follows:

Having heard arguments, the court is going to deny plaintiffs' motion for a Daubert hearing based upon fact it was not timely filed. We did deal, not in any similar detailed fashion, back at the final pre-trial conference on August 11 with Dr. Goldsmith's mathematical formula. At that time pursuant to Plaintiffs' motion to strike his testimony or in limine motion to exclude. I also feel that based upon, and this is an alternative ruling, based on arguments and materials that I have reviewed, its, that his testimony is appropriate and the arguments that were made by plaintiffs' counsel go to weight that the jury should afford his testimony rather than its admissibility.

VR No. 159 1; 10:40:33.

The Jefferson Circuit Court held trial beginning on August 31, 2010. Proof was heard for fourteen (14) days.<sup>14</sup> Over the Rieses' repeated pretrial and during-trial protests, the trial court allowed Dr. Goldsmith to give his "scientific" testimony. As mentioned above, this was the only scientific testimony setting a specific time for the bleed, purporting to be based on accepted scientific and mathematical principles.

The trial court's instructions required the jury to return a verdict for the Rieses only if it ruled for them on *both* the standard of care and causation prongs. In other words, the Rieses could prevail only if the jury was persuaded that Dr. Oliphant failed to meet the applicable standard of care, and that his failure was a substantial factor in causing Lauren's injuries. See Instructions, Oliphant Appendix, Br., Exhibit D.

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<sup>14</sup> Dr. Oliphant's repeated chorus of a "five-week" trial is simply wrong. See Certified Copy of Record on Appeal and Video Log which details fourteen days of proof. Even including a lengthy voir dire session, arguments and opening statements from three parties and extensive bench conferences, the entire proceeding comprises 21 days of video records, which is far short of the "five week" trial Dr. Oliphant claims throughout his brief.

Conversely, it could return a verdict for the three defendants if it believed EITHER that they met the standard of care OR that Lauren had bled out at home before ever coming into defendants' hands. Dr. Oliphant has a verdict on just that Instruction. There is no way for him to say that the finding in his favor was because the jury believed he provided reasonable care, as opposed to the jury having concluded, as all defendants jointly claimed, that Lauren was injured through an act of God that occurred at home before her mother arrived at Baptist East.

None of the defendants have ever argued, and Dr. Oliphant does not argue here, that the jury could not have found in the Rieses' favor on standard of care violations. That being the case, reversible error in the causation proof is enough to justify a new trial.

Dr. Oliphant supposes that the jury must have cleared him of liability on standard of care grounds. The pertinent response is that one can never know; however, in response to Dr. Oliphant's speculation about the jury deliberations, given the relatively short time the jury was out, what with three defendants and fourteen days of proof, it is most likely that the jury ate lunch and decided just one issue—causation (rather than three distinct and diverse cases of standard of care violations).

The jury returned a defense verdict on September 28, 2010, and the trial court entered its judgment on that verdict on December 14, 2010. On December 21, 2012, the Court of Appeals unanimously reversed that judgment. It agreed that Dr. Goldsmith's equilibration theory and mathematical model flunked the test for scientific reliability under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), and KRE 702. CA Op. at 7-12. Because of that, the trial court abused its discretion in admitting Dr. Goldsmith's testimony. *Id.* And

– because it was the only “scientific” proof about the timing of Lauren’s bleed, – its erroneous admission was not harmless. CA Op. at 13-14. The appeals court therefore remanded the case for a new trial.<sup>15</sup>

On November 13, 2013, this Court granted discretionary review. Before this Court, Dr. Oliphant makes five arguments: (1) the Court of Appeals exceeded its limited scope of review when it assessed and rejected the trial court’s decision to allow Dr. Goldsmith’s testimony, Oliphant Br. at 18-26; (2) the Court of Appeals improperly used a heightened standard for gauging whether the trial court’s error was harmless, Oliphant Br. at 7-10; (3) error as to causation is harmless and does not require reversal of a general verdict without error as to standard of care, Oliphant Br. at 15-18; (4) the trial court’s error, if any, was harmless in light of other proof, Oliphant Br. at 10-14, 28-30; and (5) even if the trial court erred, it would be unjust to require retrial, Oliphant Br. at 27-28. The Rieses now respond to each argument in the sequence stated, rather than in the order as addressed in Oliphant’s brief.

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<sup>15</sup> Because it reversed on this point, the appeals court did not reach the Rieses’ additional argument — that, even if the trial court had discretion to allow Dr. Goldsmith’s testimony, it abused its discretion by refusing to allow the Rieses’ expert, Dr. Phelan, to rebut that testimony. *See* Ries Court of Appeals Brief at 23-25; CA Op. at 14.

## ARGUMENT

### **I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING EXPERT OPINION THAT HAD NEVER BEEN TESTED, PUBLISHED, TESTIFIED ABOUT, NOR PEER-REVIEWED.**

#### **A. Standard of Review**

The Court of Appeals correctly limited its scope of review: “We review the trial court’s findings of fact as to the reliability of the evidence under the clearly erroneous standard, and the trial court’s conclusion as to relevance under the abuse of discretion standard. . . . Also, the trial court’s failure to conduct a preliminary hearing will only be disturbed based upon an abuse of discretion.” CA Op. at 8.

Dr. Oliphant does not quarrel with the appeals court’s statement of its limited review. Oliphant Br. at 18-19.<sup>16</sup> Nor could he. See *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 101 (Ky. 2009) (appeals court reviews a trial court’s “ruling on the reliability of scientific evidence . . . [by asking] whether the ruling is supported by substantial evidence”); *Miller v. Eldridge*, 146 S.W.3d 909, 911 (Ky. 2004) (appeals court reviews trial court’s “rulings regarding the admissibility of expert witness testimony under an abuse of discretion standard”). When, as here, the trial court makes no factual findings in support of its rulings on reliability, “the proper appellate approach . . . is to engage in a clear error review by looking at the record to see if the trial court’s ruling is supported by substantial evidence.” See *Miller*, 146 S.W.3d at 921-22. That is

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<sup>16</sup> Instead, Dr. Oliphant argues that the Court of Appeals exceeded the scope of limited review that it described and, in so doing, “usurped” the jury’s proper role in deciding what weight to give Dr. Goldsmith’s expert testimony. Oliphant Br. at 18-26. But, for the reasons detailed in the text, this ignores the trial court’s gatekeeper function, which is to guard against a jury’s hearing – and deciding what weight to give – unreliable pseudo-science.

exactly what the Court of Appeals did, and found no evidence to support any factual finding of reliability.

**B. The Court of Appeals Correctly Held That The Trial Court Failed to Fulfill Its Gatekeeper Function, and Thus Allowed The Jury to Hear Unreliable Expert Testimony.**

Kentucky's evidence rules relax the traditional ban on opinion testimony, permitting it when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." KRE 702.

But not all opinion testimony is admissible simply because the witness is an "expert"; on the contrary, relevant expert opinions are admissible only if the basis for them, or methodology for arriving at them, is "reliable." Ever since *Daubert*, 509 U.S. 579 (construing FED. R. EVID. 702), and its application to Kentucky evidence law, see *Mitchell*, 908 S.W.2d 100, *overruled on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), trial courts have been required to serve as gatekeepers, "charged with keeping out unreliable, pseudoscientific evidence." *Miller*, 146 S.W.3d at 913. This is not a task the trial courts can choose to avoid. Rather, the trial court "*must* determine . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact . . . . This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Miller*, 146 S.W.3d at 913-14 (quoting *Daubert*, 509 U.S. at 592-93).

The factors governing a trial court's gatekeeper function under *Daubert* are well settled. "When faced with a proffer of expert testimony under KRE 702, the trial judge's task is to . . . assess whether the proffered testimony is both relevant and reliable."

*Commonwealth v. Christie*, 98 S.W.3d 485, 488-89 (Ky. 2002). Courts have identified four (non-exclusive) factors guiding the trial court's assessment of reliability:

(1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.

*Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578-79 (Ky. 2000); *Gunderson*, 279 S.W.3d at 104 (quoting *Miller*, 146 S.W.3d at 919) (internal quotations omitted). The trial court's gatekeeper function is key in a jury trial "to protect juries from being bamboozled by technical evidence of dubious merit." *City of Owensboro v. Adams*, 136 S.W.3d 446, 451 (Ky. 2004) (quoting *SmithKline Beecham Corp. v. Apotex Corp.*, 247 F.Supp.2d 1011, 1042 (N.D. Ill. 2003)). Indeed, it is the power of science that brings with it the persuasion of scientific proof, and hence the importance of the gatekeeper role of the trial courts to prevent juries from the mischief that can happen when they have no experience of their own to bring to bear on the circumstances at hand, but rather are completely at the mercy of the experts.

"In assessing the admissibility of expert testimony pursuant to KRE 702, a trial court . . . *must* determine at a preliminary hearing" whether the expert's specialized knowledge will assist the fact-finder. *Thompson*, 11 S.W. 3d at 583 (emphasis added).

"In making this determination, the trial court *must* ensure that any and all expert testimony that is admitted is both relevant and reliable." *Id.* (emphasis added).

While the trial court thus is obligated to make a preliminary inquiry to ensure the reliability of expert testimony, the contours of its inquiry are flexible. *See Thompson*, 11 S.W.3d at 578 (“the inquiry into reliability and relevance is a flexible one”). Indeed, *Christie* concluded that the trial court can meet its core obligation – to assess the reliability of proffered expert testimony – without holding a formal hearing on admissibility. *Christie*, 98 S.W.3d at 488. But a trial court should admit expert testimony “without first holding a hearing” *only* “when the record [before it] is complete enough to measure the proffered testimony against the proper standards of reliability and relevance.” *Id.* at 489 (quoting *Jahn v. Equine Services, P.S.C.*, 233 F.3d 382, 383 (6<sup>th</sup> Cir. 2000)). That record – one “upon which a trial court can make an admissibility decision without a hearing” – usually will consist of “the proposed expert’s reports, affidavits, deposition testimony, existing precedent, and the like.” *Id.* at 488-89. In the absence of a formal hearing, such a robust record “is necessary in order to give a trial court an adequate basis for making its decision on the relevancy and reliability of the proposed expert’s testimony and to allow for appellate review of the trial court’s decision.” *Id.* at 489; *see also* CA Op. at 7 (citing and quoting *Lukjan v. Commonwealth*, 358 S.W.3d 33, 41 (Ky. App. 2012) for similar propositions and its faithful application of the holdings of *Gunderson*).

In approving the gatekeeper decision without an actual hearing, this Court made it clear in *Gunderson* that *at a minimum* the trial court must state the reliability finding on the record: “The trial court affirmatively stated on the record that it had reviewed the material submitted by the parties relative to the testimony of the Gundersons’ causation experts and concluded that the testimony was reliable. This is the minimum required for a

*Daubert* ruling.” *Gunderson*, 279 S.W.3d at 101. Further, *Gunderson* makes clear the kind of copious record that will allow a trial court to gauge the reliability of expert testimony without a formal *Daubert* hearing. There, “the trial court had before it a mountain of discovery material, including lengthy depositions of the causation experts, affidavits of the experts, reports of the experts, a voluminous amount of scientific studies, reports and publications relied on by experts, and extensive briefing by the parties.” *Gunderson*, 279 S.W.3d at 101. The pretrial record occupied an entire room in the trial judge’s chambers and he had “spent weeks” reading the material. *Id.* And the court’s lengthy hearing, in which it heard extensive argument about each piece of challenged scientific evidence, made “apparent . . . that the trial judge was well versed on the copious record.” *Id.* Thus, while appellate courts “prefer trial courts to include findings of fact in their *Daubert* rulings,” they will excuse the failure to do so where, as in *Gunderson*, “the trial court’s ruling is supported by substantial evidence.” *Id.*

The contrast between *Gunderson* and the record here amply explains why the Court of Appeals correctly deemed the trial court to have lacked substantial evidence – or indeed *any* evidence – upon which to base its *Daubert* finding.

First, there was no record to support the “first” *Daubert* order of August 23, 2010, which Dr. Oliphant candidly admits.<sup>17</sup> Next, nothing had improved in terms of any reliability proof by September 20, 2010. Dr. Goldsmith’s CR 26.02 disclosures do not describe his scientific model, nor any basis for it. Dr. Goldsmith submitted no report. He candidly admitted in his depositions that he knew of no scientific support for deeming

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<sup>17</sup> CA Op. at 8 n.6 (characterizing finding and detailing the Rieses’ repeated objections to Dr. Goldsmith’s proposed testimony).

fetuses comparable to born children and adults with respect to the way in which, and the rate at which, they compensate for an acute *in utero* blood loss. See CA Op. at 8-10 (summarizing basis for Dr. Goldsmith's theory). No other expert support was offered for it. No showing of any independent experience was made by Dr. Goldsmith. There was no medical evidence in the record to support Dr. Goldsmith's novel theory, and since a fetal blood supply system admittedly differs in fundamental ways from that of a born child or adult, Dr. Goldsmith articulated no support – not even a claimed support – for his naked assumptions. Not only was a full, formal, *Daubert* hearing lacking, but the trial court did not make the reliability finding which the case law requires at a bare minimum,<sup>18</sup> since the trial court ruled only that the proffered testimony was “appropriate.” See p. 12, *supra*.

The trial court erroneously let a lawyer's argument substitute for scientific support; as a result, the Court of Appeals found that there “simply existed no ‘objective sources’ of record supporting Goldsmith's assumption,” and thus an inadequate record to support the trial court's evidentiary ruling.<sup>19</sup> CA Op. at 11. After all, a trial court's “broad latitude to make the reliability determination does *not* include the discretion to

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<sup>18</sup> “The trial court affirmatively stated on the record that it had reviewed the material submitted by the parties relative to the testimony of the Gundersons' causation experts and concluded that the testimony was reliable. This is the minimum required for a *Daubert* ruling.” *Gunderson*, 279 S.W.3d at 101.

<sup>19</sup> As the Court of Appeals correctly stated: “[N]o animal studies were ever specifically cited as a basis for Goldsmith's assumption as to the rate of equilibration in a human fetus in utero. In response to the Rieses' motion for a *Daubert* hearing, appellees cited to four scientific studies appearing in sundry medical journals. However, no medical expert offered an opinion as to the significance of these studies or whether these studies supported Goldsmith's assumption. In fact, Goldsmith never stated that he utilized the proffered studies and never rendered an opinion upon such studies.” CA Op. at 11. And this case makes clear why it is wrong for a trial court to rely on a lawyer's argument, rather than “objective sources” of record, in performing its gatekeeper function: Dr. Oliphant's lawyers' representations turned out to be erroneous. At least one article that was supposed to support Dr. Goldsmith's theory (but that, once again, he never purported to rely on) in fact refutes it. See Appendix, TAB 4.

abdicate completely its responsibility to do so.” *City of Owensboro v. Adams*, 136 S.W.3d 446, 451 (Ky. 2004) (quoting *Elsayed Muktar v. Cal. State Univ.*, 299 F.3d 1053, 1064 (9<sup>th</sup> Cir. 2002)) (emphasis in original). The trial court must, “at least, state on the record its *Daubert* conclusion with respect to reliability.” *Id.* at 451. And its “determination on the admissibility of expert testimony *without an adequate record* is an abuse of discretion . . . .” *Christie*, 98 S.W.3d at 489 (emphasis added).

**C. The Court of Appeals Correctly Held That, Because Dr. Goldsmith’s “Equilibration” Theory Flunks the Test for Scientific Reliability, the Trial Court Erred in Allowing Its Admission Into Evidence.**

For the above reasons, the trial court failed to conduct an adequate hearing about the reliability of Dr. Goldsmith’s novel “equilibration theory,” failed to make adequate findings on the record, and failed to require substantial evidence of reliability. Those are reasons enough to affirm the Court of Appeals. But the Rieses’ appellate argument does not hinge on – and the Court of Appeals’ reversal does not depend solely on – the trial court’s *procedural* errors. Rather, as the appeals court held, the trial court’s *substantive* conclusion – that the theory was sufficiently reliable to allow for expert opinion testimony – constituted an abuse of discretion or clear error. *See* CA Op. at 11-14.

Dr. Goldsmith’s core testimony was that he could time Lauren’s *in utero* blood loss by applying the rates at which children and adults replace lost blood – even though children and adults have self-contained blood systems, while fetuses do not. In making this assertion, Dr. Goldsmith acknowledged that he knew of no studies on whether *in utero* fetuses equilibrate at the same rate as children or adults, that he never has tested his hypothesis, that he knew of no literature making the assertion, that there has been no peer

review of the assertion, and that he never has testified (nor has anyone else) about this theory.

This plainly fails to meet the *Thompson*, 11 S.W.3d at 578-79, and *Gunderson*, 279 S.W.3d at 104, factors for any scientific reliability assessment. Dr. Goldsmith's theory or technique has not "been tested," nor has it "been subjected to peer review and publication," nor are there "standards controlling the technique's operation," nor does the theory or technique "enjo[y] general acceptance within the relevant . . . specialized community." *Id.* Moreover, while these factors are not exclusive, the paucity of the trial court's articulated basis for finding Dr. Goldsmith's theory reliable, and its failure to cite any other factor (if, indeed, the trial court relied on other factors), frustrates appellate review. *See Christie*, 98 S.W.3d at 488-89; *Adams*, 136 S.W.3d at 451. The trial court simply abdicated its gatekeeper function of "distinguishing 'between science and pseudo-science.'" *Gunderson*, 279 S.W.3d at 104 (quoting *Miller*, 146 S.W.3d at 919).

A brief review of *Thompson* – which barred expert testimony – and *Gunderson* – which allowed it – reveals how far short Dr. Goldsmith's testimony falls from accepted standards of reliability. *Thompson* involved a claimed design flaw in a multi-piece Goodyear tire rim. A proffered expert, Dr. Hahn, was prepared to testify that there was a much safer design. *Thompson*, 11 S.W.3d at 580. But Dr. Hahn never had used the bolting system that he deemed safer in the relevant trucking industry. *Id.* at 581. He never had submitted his theory to any tire manufacturer, to OSHA, or to any sort of peer review. *Id.* He never had published articles concerning his theory. *Id.* And he never had designed a tire or ring. *Id.* On this record, the trial court found that the proffered testimony did not meet three of the *Daubert* factors and that the fourth (potential rate of

error) was inapplicable because Dr. Hahn had performed no tests. *Id.* This Court affirmed the trial court's exclusion of Dr. Hahn's testimony as unreliable.<sup>20</sup>

Dr. Goldsmith's testimony suffers the same defects as Dr. Hahn's. He did not show that his theory – that fetuses “equilibrate” from blood loss at the same rate as born children and adults – had been tested. His theory has not been published nor subjected to peer review. And his theory does not enjoy general acceptance within the relevant scientific community. As such, it – like Dr. Hahn's testimony – fails to meet three of the four *Daubert* factors. And, like Dr. Hahn's testimony, the fourth factor is inapplicable, because there is no way to compute an error rate for Dr. Goldsmith's untested theory.

By contrast, *Gunderson* allowed the introduction of expert testimony. At issue in that product liability case was whether a particular drug, Parlodel, caused Ms. Gunderson's death. The trial court allowed expert testimony about causation, and the appellate courts affirmed, even in the absence of adequate epidemiological studies (deemed the “gold standard for determining causation”). *Id.* at 105-06. But it did so because the experts relied on a variety of pieces of evidence – case reports, animal studies, and general chemical properties of the class of drugs – that all had “scientific underpinnings, [were] derived from recognized scientific methodologies, and [were] shown to have general acceptance within the scientific community as [factors] tending to show that Parlodel causes postpartum seizures.” *Id.* Here, Dr. Goldsmith relied on no

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<sup>20</sup> This Court's decision that the trial judge did not abuse her discretion by excluding the testimony does not automatically mean that its admission would have been an abuse of discretion. But the text allows for no other conclusion. The proffered testimony flunked three of four *Daubert* factors and the fourth did not apply. The trial court found no other applicable factor. Admission of evidence that does not meet any *Daubert* factor, and for which there is no other applicable reliability factor, would render those factors – and the many cases that cite them – meaningless.

such combination of evidence to support his novel theory. Indeed, he could cite neither independent study or investigation nor third-party study or publication hypothesizing that a fetus equilibrates at the same rate as a born child or adult. Rather, he used a purportedly straight-forward mathematical formula that could not be challenged to “sell” a disputed proposition based on at least one unreliable assumption. This formula and its assumptions were used to convince a jury that it was undeniable that Lauren’s bleed had happened at home, and since there was no scientific support for the formula or its critical assumption of fetal equilibration rate, the jury was “bamboozled” by pseudo-science and the trial court failed to fulfill its responsibility to be a gatekeeper on “scientific” evidence. With nothing offered to substitute for the record that might have been developed at a full hearing, there was no evidence, to say nothing of “substantial evidence,” which could have supported any decision that the testimony was sufficiently reliable to warrant its admission into evidence.<sup>21</sup> Such a conclusion would be “clear error” since the record lacked substantial evidence supporting the trial court’s decision that the testimony was sufficiently reliable to warrant its admission into evidence.<sup>22</sup>

For all these reasons, the Court of Appeals correctly held that the trial court erred in letting Dr. Goldsmith testify about equilibration and compensation – that is, to use his

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<sup>21</sup> The Court of Appeals likewise was correct to reject the trial court’s alternative holding – that the Rieses sought a *Daubert* hearing too late. See CA Op. at 8 n.6. The record is clear, as the appeals court held, that the Rieses repeatedly objected to Dr. Goldsmith’s pseudo-scientific testimony. *Id.* Moreover, parties always are free to object to testimony during trial – as the Rieses did here – on familiar evidentiary grounds; motions in limine and *Daubert* hearings are simply alternative (and sometimes strategically advantageous) means for obtaining evidentiary rulings before trial or before a witness testifies.

<sup>22</sup> Again, no expert testified about the articles that Dr. Oliphant’s lawyers submitted to the trial court, Dr. Goldsmith did not rely on them, and – ultimately – they do not support Dr. Goldsmith’s assumption. See CA Op. at 11 (summarizing studies and trial court’s error in relying on them).

novel theory to extrapolate and “prove scientifically” the time of Lauren’s blood loss. And, for the reasons detailed below, the Court of Appeals correctly held that this was not harmless error.

**II. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT’S ABUSE OF DISCRETION WAS NOT HARMLESS ERROR.**

Dr. Oliphant argues that the Court of Appeals improperly imposed a heightened harmless error standard. It did not. Dr. Oliphant next argues that any error was harmless for two reasons: first, because Dr. Goldsmith’s testimony went only to causation, not standard of care, which he contends allows a general verdict to stand despite the error, and, second, because, he contends, that any evidentiary error was offset by other equally persuasive causation proof. Neither argument has merit.

**A. The Court of Appeals Properly Stated and Applied the Harmless Error Standard.**

Dr. Oliphant argues that the Court of Appeals improperly applied a “heightened harmless error standard.” Oliphant Br. at 8. And he concludes that the appeals court used a standard fit only for criminal cases, not civil cases, because the opinion cites *Crane v. Commonwealth*, 726 S.W.2d 302 (Ky. 1987). Oliphant Br. at 9; see CA Op. at 13. But *Crane* did not establish a different standard for gauging harmless error in criminal cases, and the appeals court did not apply a heightened standard.

*Crane* said (as did the Court of Appeals here) that the “test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different.” *Id.* at 307. That does not require a different standard for gauging harmless error in civil and criminal cases. The burden of proof differs in civil and criminal cases, of course, and so application of the standard – the same standard – is a

different analysis but against the same standard. In a criminal case like *Crane*, the issue becomes whether (without the erroneously admitted evidence) there is any reasonable possibility that the jury would have found reasonable doubt of guilt. In a civil case like this, the issue becomes whether (without the erroneously admitted evidence) there is any reasonable possibility that the jury would have found that the preponderance of the evidence favored the Rieses, rather than Dr. Oliphant. That analysis is exactly what the Court of Appeals did.

Indeed, *Crane* effectively says as much in the sentence immediately following its recitation of the applicable standard: “Because the test is phrased in terms of ‘reasonable possibility,’ an error of constitutional proportions must be shown to be harmless beyond a reasonable doubt.” *Id.* at 307. In other words, the “reasonable possibility” standard is applied to the burden of proof. In a criminal case, that burden is “beyond a reasonable doubt.” In a civil case, the same standard is applied to the different burden of proof. It thus is the burden of proof that distinguishes the harmless error analysis in criminal and civil cases, not a different harmless error standard. And that explains why the Court of Appeals has repeatedly applied the standard to civil cases.<sup>23</sup> See *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 121 (Ky. App. 1999); *Crowe v. Crenshaw*, 2007 WL 419692 at \*4, No. 2006-CA-000104-MR (Ky. App. 2007) (Attached at Appendix TAB 6).

**B. Evidentiary Error That Taints *Either* Causation or Standard of Care Requires Reversal of a General Verdict.**

Trial involved two contested issues, causation and breach of the applicable standard of care. The jury returned a general verdict in Dr. Oliphant’s favor. Dr.

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<sup>23</sup> This Court apparently has not had an opportunity to articulate the standard in a civil case. Neither, however, has it ever suggested that a different standard applies.

Goldsmith's "equilibration" testimony went only to causation. For that reason, Dr. Oliphant argues that – even if the trial court erred in admitting Dr. Goldsmith's testimony and even if the jury relied on "junk science" in rendering its general verdict – the Court of Appeals erred in reversing the judgment because the jury could have decided that Dr. Oliphant did not breach the standard of care.

To be sure, no one knows whether the jury believed that (a) Dr. Oliphant was not negligent (that is, he did not breach the standard of care), (b) although negligent, Dr. Oliphant's negligence did not cause Lauren's injuries, or (c) both. That is, after all, the nature of a general verdict. But Dr. Oliphant is quite wrong in his assertion that a general verdict survives evidentiary error that taints one of two contested issues. On the contrary, given the ambiguity inherent in a general verdict, the tainting of either contested issue requires reversal, and the Court of Appeals got it right.

*Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008), shows the flaw in Dr. Oliphant's reasoning. The case involved Dr. Kemper's alleged failure to timely diagnose a patient's stomach cancer, a disease from which she eventually died. *Id.* at 149. There, as here, the jury found for the doctor. *Id.* There, as here, no one could tell from the defense verdict whether it hinged on standard of care, causation, or both. There, as here, the plaintiff challenged on appeal an evidentiary ruling involving an expert's testimony about causation. *See id.* at 155-56. This Court held that the trial court's evidentiary ruling was in error. *Id.* And there, as it should here, this Court remanded the case for a new trial. In *Kemper*, this Court did not (and should not here) deem the evidentiary error harmless just because the jury verdict could have resulted from its conclusion that the doctor did not breach the applicable standard of care. Implicit in *Kemper* is the principle – a principle

fatal to Dr. Oliphant's argument – that evidentiary error tainting one prong of a multi-prong instruction (and resulting general verdict) taints the entire verdict.

*Kemper's* implicit holding is consistent with explicit holdings in earlier Kentucky cases. *Dickerson v. Martin*, 450 S.W.2d 520 (Ky. 1970), involved a pedestrian-motorist accident. There were two issues: whether the pedestrian was contributorily negligent, and whether the motorist had a "last clear chance" to avoid the accident. The jury held for the pedestrian. The appeals court concluded that the pedestrian was contributorily negligent as a matter of law. But because there was "no way to know whether the verdict . . . was based on a finding of no contributory negligence or a finding of last clear chance," the appeals court remanded the case for retrial. *Id.* at 524. Likewise, in *Mason v. Stengell*, 441 S.W.2d 412, 417 (Ky. 1969), the now-Supreme Court rejected the same argument that Dr. Oliphant makes here, quoting 5 Am.Jur.2d, Appeal and Error, § 787, at p. 229, for the proposition that "where the verdict is general and there is a showing of error prejudicially affecting one of the various grounds of action or defense presented, the verdict must generally be set aside since no determination can be made as to which of the issues or defenses the jury relied upon in reaching its verdict." *Accord Temple v. Helton*, 571 S.W.2d 647, 648 (Ky. App. 1978); *Hammitte v. Livesay*, 436 F.2d 1134, 1139 (6<sup>th</sup> Cir. 1971) (applying Kentucky law); *see also Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503, 505 (Ky. 1989) (distinguishing between special interrogatories, which "results in separate verdicts on each issue submitted," and general verdict "which is incapable of being broken up into its constituent parts" (citation and internal quotations omitted)).

Dr. Oliphant cites no cases supporting its contrary view of the law. *See* Oliphant Br. at 15-18 (citing no cases under Headnote III). In the Court of Appeals, Dr. Oliphant relied primarily on *Conley v. Fannin*, 215 S.W.2d 122, 123 (Ky. 1948), *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 575-76 (Ky. 2009), and *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 776 (Ky App. 2007). But, as the Rieses argued below, *Conley* did not involve the effect on a general verdict of evidentiary error tainting one prong; rather, it found error harmless where ample competent evidence proved the same point. *Emberton* likewise did not involve the issue presented here, but rather an argument (that this Court rejected) that two general verdict instructions – one involving a restaurant and one involving its employee – were logically inconsistent. And *Davis* was a harmless error case, not one involving the effect of error on a general verdict. Perhaps recognizing that these cases do not support his point, Dr. Oliphant still cites them, *see* Oliphant Br. at 8-9 n.20-22, but for the more generic proposition that evidentiary error is harmless if the verdict is supported by other competent evidence proving the same point.

If the admission of Dr. Goldsmith’s “equilibration” theory tainted the causation prong, as it must have, Dr. Oliphant has a judgment that he cannot show to be error free. The evidentiary error requires reversal of the general verdict and resulting judgment, as the Court of Appeals held, and a remand for retrial.

**C. The Trial Court’s Evidentiary Error Was Not Offset by Other Scientific Causation Proof.**

Erroneous admission of Dr. Goldsmith’s scientific testimony cannot be deemed harmless unless it is duplicative of similar *scientific* evidence in the record. But nowhere does Dr. Oliphant point this Court to any proof of the same quality and character as Dr. Goldsmith’s scientific formula. Rather, he labors to repeat every piece of trial testimony

supporting his view that Lauren bled at home. *See* Oliphant Br. at 7-14. But all of that proof is from visual observations or the medical records, and opinions based on those visual observations and records. Dr. Goldsmith, by contrast, offered the only “scientific evidence” purporting to establish the timing of Lauren’s bleed.

Dr. Oliphant’s suggestion that the Goldsmith testimony added nothing material to the balance of the causation case defies the record that he cites. He does not – and cannot – cite to any other evidence establishing the timing of Lauren’s fetal bleed as a matter of mathematical predictability. While each of his other experts had an opinion, that opinion was based upon the factual evidence, such as observations of the amount of blood at home, observations of the amount of blood at Baptist East, or whether Lauren could have survived for as long as the doctors says she was *in utero* after a bleed of the magnitude his experts describe.<sup>24</sup>

Likewise, the Rieves’ experts – Drs. Brown and Crawford – stated their view that the vasa previa rupture and consequent fetal bleed happened at about 6:36 a.m. (Dr. Brown), or close to birth but no earlier than 20 minutes before birth (Dr. Crawford). But those opinions, like those for Dr. Oliphant, were based on the factual observations noted above; they, like Dr. Oliphant’s experts’ opinions, did not purport to establish the time of Lauren’s bleed with mathematical certainty.<sup>25</sup> As the Court of Appeals correctly

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<sup>24</sup> Dr. Oliphant’s argument that this evidence is undisputed (because there was no proof of bleeding in the hospital) is misplaced. *See* Counterstatement of the Case, p. 5, *supra*, for a summary of the testimony responsive to the defense’s claim that a supposed absence of in-hospital bleeding was fatal to the Rieves’ claims.

<sup>25</sup> Other proof – again, not involving a scientific or mathematical calculation – established that Dr. Oliphant himself ruptured the vasa previa about 25 minutes before Lauren’s birth. VR 149 4: 9/3/10; 04:38:29. And Dr. Bendon believed that the vasa

analyzed it: “As viewed by the jury, Goldsmith utilized mathematical certainty to resolve the complex factual issue of timing Lauren’s massive bleed. The persuasive effect of Goldsmith’s testimony cannot be overstated.” CA Op. at 13-14 and n.11 (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 1.10(7)(d) (4<sup>th</sup> ed. 2003) (quoting J. Mueller & Kirkpatrick, *Federal Evidence*, § 18 (2d ed. 1994) for the proposition that, if “erroneously admitted evidence tends to be more persuasive than other properly admitted evidence, its admission is considered reversible error.”)). Dr. Oliphant also emphasizes the strength of Dr. Goldsmith’s credentials. This is just the point when he is allowed to wrap his opinion not only in the trappings of science but also the certainty of mathematics coupled with his résumé. In *Lukjan*, the Court of Appeals made just this observation about the “Commonwealth’s three arson experts . . . [whose] . . . testimony . . . was powerful given their positions of esteem and authority.” 358 S.W. 3d. at 43.

Ultimately, then, Dr. Oliphant simply cannot point to any other proof that this jury heard that is of the same quality and character, and says the same thing, that the trial court allowed Dr. Oliphant to prove through Dr. Goldsmith: Dr. Goldsmith’s use of a supposed scientific fact (the equilibration rate of the *in utero* fetus), working backward from a 7:50 a.m. blood sample, to “prove” a 60 mL blood loss at 5:00 a.m. It therefore follows that this testimony, if admitted in error, is prejudicial, and is not made harmless by any other properly-admitted evidence.

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previa rupture happened somewhere between “minutes prior to delivery” and “six hours prior to delivery.”

### **III. THERE IS NOTHING UNJUST ABOUT REMANDING FOR RETRIAL WHEN DR. OLIPHANT BENEFITTED FROM THE TRIAL COURT'S ERRONEOUS ADMISSION OF DR. GOLDSMITH'S TESTIMONY.**

Finally, Dr. Oliphant argues briefly that – even if the trial court committed reversible error in admitting Dr. Goldsmith's testimony – it is unjust to require him to face a second trial because Dr. Robinson, not Dr. Oliphant, called Dr. Goldsmith as a witness. Oliphant Br. at 27-28. But this was not a bifurcated trial. All parties were able to examine all witnesses (and both the Rieves and Dr. Oliphant questioned Dr. Goldsmith – Dr. Oliphant questioning him for roughly 25% of the time the defense spent with Dr. Goldsmith in the entirety).

And – more importantly – causation was an element of the Rieves case against both Dr. Oliphant and Dr. Robinson. Dr. Goldsmith's implicit testimony – that neither Dr. Oliphant nor Dr. Robinson could have caused Lauren's injuries because, *as a matter of scientific fact*, she suffered her bleed at home at 5:00 a.m. – clearly and improperly benefitted Dr. Oliphant. Dr. Oliphant never sought to distance himself from this testimony when it benefitted him. For the entire trial and throughout the appeal until Dr. Robinson settled, Dr. Oliphant was happy to take the causation proof Dr. Goldsmith had to offer. That proof tainted the causation evidence for all three defendants. That does not change just because Dr. Robinson is no longer in the case. There is nothing unjust about depriving Dr. Oliphant of the benefit of proof that never should have been admitted. Certainly, Dr. Oliphant did not try to prevent the admission of this unsupported proof. And there is nothing inherently unfair in a new trial against only the remaining defendants, as settlements routinely happen on appeal.

Moreover, the legal principle that Dr. Oliphant asserts, and the cases he recruits for it, are entirely inapplicable here. Dr. Oliphant says that “when parties settle a case on appeal, the issue subsequently become moot.” Oliphant Br. at 27. And he cites *Wang Laboratories, Inc. v. Toshiba Corp.*, 793 F. Supp. 676, 677 (E.D. Va. 1992), and *Smith Intern., Inc. v. Hughes Tool Co.*, 839 F.2d 663, 664 (Fed. Cir. 1988), in arguing that “the issue of Goldsmith’s testimony became moot once Robinson settled out of the case.” Oliphant Br. at 27-28. But *Wang Laboratories* and *Smith Intern.* do not address *whether* a case has become moot; they address *what to do* with a judgment below when a case become moot on appeal. And they simply apply the longstanding rule of *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950), and *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936), that true mootness on appeal usually requires vacating a judgment below.<sup>26</sup>

This case has not become moot, as the dueling briefs on the merits make clear. The Rieses and Dr. Oliphant have a live controversy. And one issue in that controversy is whether – as the Court of Appeals held – the trial court committed prejudicial and reversible error in admitting Dr. Goldsmith’s pseudo-science. If it did, as the Rieses argue here, the only proper course is to remand for a new trial. Nothing in *Wang*

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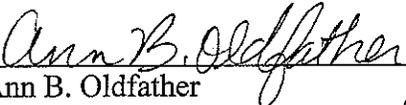
<sup>26</sup> The *Munsingwear-Duke Power* line of cases rest on the notion that it is usually unfair to saddle a losing party with the effect of an adverse judgment when that party’s effort to overturn the judgment on appeal is thwarted by mootness. To illustrate: Imagine that a teacher challenges a school’s employment practice and wins. The school appeals. While the appeal is pending, the teacher leaves the school district. The appeals court will not decide the case, which now is moot. But leaving the judgment intact means that the school loses on the merits (despite its desire and effort to appeal), and the judgment may well have preclusive effect. Under *Munsingwear* and *Duke Power*, and with the critical element of true mootness, which is absent here, the proper course when the case becomes moot on appeal is to vacate the judgment below.

*Laboratories* or *Smith Intern.* (and nothing in *Munsingwear* or *Duke Power*) suggests otherwise.

**CONCLUSION**

For all these reasons, this Court should affirm the judgment of the Court of Appeals and remand the case for retrial. Because the Court of Appeals reversed the trial court's judgment for abuse of discretion and clear error in admitting Dr. Goldsmith's testimony, it did not reach the Rieves' other grounds for reversing that judgment. For the reasons contained in the text, this Court should affirm the Court of Appeals. But if this Court reverses the Court of Appeals, it should remand the case to that court for consideration of the Rieves' other appellate arguments.

Respectfully submitted,

  
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**APPENDIX**  
**and**  
**EVIDENTIARY APPENDIX**

<b><u>TAB</u></b>	<b><u>RA</u></b>	<b><u>DESCRIPTION</u></b>
<b>1</b>		Opinion, Court of Appeals, December 21, 2012
<b>2</b>	Vol. 6 811-838	CR 26.02 Disclosure of Anticipated Testimony for Dr. Goldsmith, 12/28/2009
<b>3</b>	Vol. 19 2789-2795	Motion for <i>Daubert</i> Hearing Regarding the Mathematical Model for Intra-Uterine Bleeding Proposed by Jay Goldsmith, M.D., Plaintiff, 9/13/2010
<b>4</b>	Vol. 19 - 20 2809-2883	Objection and Response to <i>Daubert</i> Motion, Robinson, 9/20/2010
<b>5</b>		Excerpts of Trial Testimony, Jay P. Goldsmith, M.D., VR No. 159 1 and 3: 9/20/2010 (times stated therein).
<b>6</b>		<i>Crowe v. Crenshaw</i> , 2007 WL 419692, No. 2006-CA-000104-MR (Ky. App. 2007)