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

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

v.

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 — APPELLE

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

BRIEF ON BEHALF OF APPELLANTS, RICHARD C. OLIPHANT, M.D. AN
LOUISVILLE PHYSICIANS FOR WOMEN, PLLC

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With five copies to:

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With the original brief and ten copies sent via registered mail pursuant to CR 76.40(2) to:

SUPREME COURT OF KENTUCKY
Susan Stokley Clary
Supreme Court Clerk
State Capitol, Room 235
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Frankfort, KY 40601

It is further certified that the record on appeal has not been withdrawn by counsel for Appellants.

Counsel for Appellants, Richard C. Oliphant, M.D. and Louisville Physicians for Women, PLLC

INTRODUCTION

This is a medical malpractice case resulting in a unanimous defense verdict after a five-week trial. The Court of Appeals reversed and remanded the verdict for a new trial on the basis that one aspect of one expert's testimony regarding a mathematical formula for timing fetal blood loss was not reliable under *Daubert* and constituted reversible error. This Court granted discretionary review of the intermediate appellate court's to-be-published Opinion.

STATEMENT CONCERNING ORAL ARGUMENT

This Court made no reference to oral arguments in its order. (Order Granting Discretionary Review, 11/13/13). Dr. Oliphant does not believe that the issues raised on appeal warrant oral argument. Should this Court determine that oral arguments would be helpful, Dr. Oliphant and Louisville Physicians for Women welcome the opportunity to discuss these issues with the Court. To the extent that the Court's decision may impact other cases, that impact may be best addressed orally rather than in legal memoranda.

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STATEMENT OF THE CASE

A. The Parties

Appellees, Billie Jo and Kevin Ries, on behalf of Lauren Elizabeth Ries, (hereafter, "the Rieses"), allege that Appellants, Richard C. Oliphant, M.D. and his medical group, Louisville Physicians for Women, PLLC (hereinafter collectively referred to as "Oliphant"), Tonya Robinson, M.D. and her group, Neonatal Associates, P.S.C. (hereinafter collectively referred to as "Robinson")[1], and Baptist Hospital East[2] deviated from the standard of care during the birth of their daughter, Lauren, on January 20, 1997, and such deviations caused her injuries. With respect to these Appellants, the Rieses alleged that Oliphant, an obstetrician, failed to promptly respond to calls from Baptist East nurse Sherry McGrath and affect an earlier delivery. The Rieses filed this lawsuit against Oliphant in 2005.

B. Medical Treatment

Mrs. Ries awoke at home around 5:00 a.m. on January 20, 1997, and discovered a gush of blood vaginally. Her husband called her OB group[3] and was connected with Oliphant,[4] who was delivering a child at Norton Suburban Hospital. Oliphant appropriately instructed her to go to the hospital. Upon arrival at Baptist East, Mrs. Ries was first assessed around 5:50 or 6:05 a.m. by a nurse, who saw no signs of an active bleed and did not request Oliphant's immediate presence in her first call to him. At approximately 6:16 a.m., noting changes on the fetal monitoring strip, the nurse re-

[1] The Rieses, Dr. Robinson, and Neonatal Associates entered into a settlement agreement after the Court of Appeals rendered its decision and they are no longer a party to this case.
[2] The Rieses and Baptist Hospital East entered into an Agreed Order of Dismissal, and Baptist Hospital East is no longer a party to this case.
[3] Louisville Physicians for Women, PLLC.
[4] Billie Jo Ries's regular obstetrician was Dr. Arthur Donovan; however, Dr. Oliphant was the obstetrician on call for the group at that time.

contacted Oliphant to ask for his immediate presence. Oliphant arrived at around 6:30 a.m. and finished a vaginal exam at 6:36 a.m., which also showed no signs of an active bleed. Oliphant recommended an urgent C-section. After a relatively lengthy discussion with Mrs. Ries, Oliphant obtained Mrs. Ries's consent. He, then, took her to the operating room, prepared her for surgery, and made his first incision at 6:56 a.m. He delivered Lauren at 6:59 a.m.

C. Dr. Goldsmith's Expert Testimony

At trial, Robinson (neonatologist) presented Dr. Jay Goldsmith (neonatologist) (hereinafter referred to as "Goldsmith") as one of her many expert witnesses. Robinson went through a lengthy process in order to have Goldsmith approved as an expert witness. Goldsmith was disclosed as an expert for Robinson on December 30, 2009. Dr. Crawford, the Rieses' neonatology expert (hereinafter referred to as "Crawford"), was deposed by Robinson's counsel on March 24, 2010, during which she was asked about mathematical calculations provided by Robinson regarding timing the fetal bleed. The Rieses deposed Goldsmith (Robinson's neonatology expert) on April 23, 2010 and May 26, 2010. Based on Crawford's deposition testimony regarding Robinson's calculations, Goldsmith testified about his own mathematical calculations regarding timing the fetal bleed. The Rieses made a motion to strike part of Goldsmith's testimony, but did **not** make a *Daubert* motion at that time. Instead, they reserved the right to file a *Daubert* motion at a later date.

At the final pretrial conference on August 11, 2010, no mention was made of a potential *Daubert* challenge concerning Goldsmith. At that point, the court entered an order that all expert opinion testimony was reliable and relevant.[5] The Rieses then decided

[5] Final Pretrial Conference Order, 8/23/10, R. at Vol. 21, 3014-3021, attached hereto as **Exhibit C.**

to file a *Daubert* challenge a month later, during the third week of trial. After a 36-minute hearing, the court determined that "arguments made by Plaintiffs' counsel go to the weight the jury should afford as opposed to its admissibility."[6] It denied the *Daubert* challenge and proceeded with the last two weeks of trial.[7]

Goldsmith's testimony regarding his mathematical formula was deemed reliable under the *Daubert* standard by the trial court. He based his opinions on the equilibration rates of adults and children as part of a mathematical formula that he used to determine the equilibration rate and timing of the fetal bleed in this case. As part of his analysis, he used scientific studies and principles establishing the equilibration rates of human adults, human children, and animal fetuses. All parties acknowledged that there are no scientific studies addressing the equilibration rate of human fetuses as it is deemed highly unethical and immoral to conduct such studies on human fetuses. The trial court, in using its discretion as gatekeeper, determined that this evidence was reliable under *Daubert*. The Court of Appeals disagreed, however, and, as part of its Opinion, which was devoid of scientific support, firmly stated that equilibration rates of human adults and children cannot serve as the basis for assuming the equilibration rate of a human fetus.[8]

D. Procedural History

A five-week trial began on August 31, 2010. The jury rendered a unanimous verdict for all defendants on September 28, 2010, and the Jefferson Circuit Court entered a final and appealable judgment consistent with the unanimous verdict on December 14,

[6] VR No. 159, 9/20/10, 10:41:26.
[7] VR No. 159, 9/20/10, 10:08:18-10:43:40.
[8] Opinion at 11-12.

2010.[9] The Rieses filed an appeal on January 11, 2011, arguing the trial court committed reversible error when it allowed Goldsmith to testify regarding the timing of the bleed. The Court of Appeals reversed and remanded for a new trial on December 21, 2012.[10] The Rieses, Dr. Robinson, and Neonatal Associates entered into an agreement after the Court of Appeals rendered its decision and they are no longer a party to this case. Oliphant filed for discretionary review with the Supreme Court, which was granted on November 13, 2013.

ARGUMENT

Kentucky courts have established that review of a trial court's determination regarding the admissibility of expert testimony is limited.[11] Findings as to *reliability* of evidence are reviewed under the clearly erroneous standard while findings of *relevance* are reviewed under the abuse of discretion standard.[12] The Rieses asserted, and the Court of Appeals agreed, that the trial court committed reversible error by admitting Goldsmith's testimony because it was unreliable.[13] The Court of Appeals further held that permitting this testimony constituted grounds for a new trial as the jury could have reached a different conclusion had it not been admitted.[14]

Oliphant respectfully disagrees with the Court of Appeals' conclusions regarding the admissibility of Goldsmith's testimony as reversible error and, thus, grounds for a new

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[9] Judgment, 12/13/10, R. at 1915, attached hereto as **Exhibit A.**

[10] Court of Appeals' Opinion, December 21, 2012, attached hereto as **Exhibit B.**

[11] Opinion at 12; *Lukjan v. Commonwealth*, 358 S.W.3d 33, 40-41 (Ky. App. 2012); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[12] *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004); *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 101-02 (Ky. 2008).

[13] Opinion at 14. The Court of Appeals quickly dispensed with the defense parties' arguments that the Rieses' *Daubert* challenge was untimely and, therefore, had been waived by holding that even if this error were insufficiently raised below because of late filing, the evidentiary error constituted palpable error.

[14] *Id.*

trial. The trial court was plainly in the prime position to determine reliability and did not err in its determination that the expert in question met that requirement. The Court of Appeals, however, intruded on the trial court's role as gatekeeper by disagreeing on abstract grounds as to the reliability of that testimony and determining that its admission was grounds for a new trial. In particular, the court substituted its lay impression of the scientific efficacy of Goldsmith's methodology and animal studies, having no scientific evidence in the record from which to base its conclusion, and essentially engaged in a *de novo Daubert* hearing postulated in the course of an opinion. Moreover, the court, in its to-be-published Opinion, managed to transform a reliable scientific opinion – corroborated by, but not dependent upon animal studies – into one that must be dependent upon human fetal studies, even though those studies would be impossible to obtain because conducting tests on human fetuses would be unethical, if not criminal.

Furthermore, the Court of Appeals erroneously assumed that not admitting this testimony would have yielded a completely different result. This is illogical given that the jury returned a general verdict regarding standard of care and causation, and the testimony from Goldsmith did not touch on the standard of care given by Oliphant. The court failed to recognize that in the absence of any comment regarding standard of care as to Oliphant, that issue stood resolved in Oliphant's favor, thus requiring the presumption that the jury **had not** found a violation in its response to its instruction. Oliphant is before you today based on only one aspect of testimony from an expert witness who was never called by him, never rendered standard of care opinions regarding his care of the patient at issue, and whose causation opinions were not pertinent to Oliphant's defense.

It is important that this Court correct the Court of Appeals' decision and instead uphold the original decision of the trial court and its jury. First, after applying the appropriate standard of review analyses, this Court will find that there was no abuse of discretion regarding the determination of relevance and no clear error regarding the reliability of Goldsmith's testimony and, even if there were error, a finding of harmless error is necessary when a verdict is supported by other sufficient evidence. Second, a finding of harmless error, if any, is especially true when considering the cumulative, more persuasive, causation evidence presented to this jury during the nearly five-week trial. Third, a challenge of Goldsmith's testimony only goes to the causation element and ignores the requirement to find a standard of care violation as against Oliphant. Fourth, the Court of Appeals was wrong in substituting their judgment regarding the reliability of an expert witness in place of the trial court's judgment as it is largely within the discretion of the trial court to make this determination. Fifth, it would be unjust and unfair to require Oliphant to endure the hardships of a second trial based on the alleged unreliability of an expert that he did not utilize or rely on for testimony supportive of his care or causation theory at trial. Finally, should this Court disagree with the previous arguments on behalf of Oliphant and find that it was error to admit Goldsmith's testimony, this decision was nothing more than harmless error and is not grounds for a new trial. Therefore, this Court should disregard the Court of Appeals' Opinion and uphold the unanimous jury verdict in favor of Oliphant.[15]

[15] The verdict was originally in favor of Dr. Oliphant, Dr. Robinson, and Baptist Hospital East. *See* Jury Instructions and Verdict Forms, R. at 3150-3167, previously attached as Exhibit 1 to the Rieses' Brief before the Court of Appeals. For ease of reference, it is attached hereto as **Exhibit D**. Dr. Oliphant is now the only remaining defendant in this litigation.

I. The Court of Appeals' decision is inconsistent with well-established Kentucky law requiring a finding of harmless error when a verdict is supported by other sufficient evidence.

The Court of Appeals has effectively ignored the vast preponderance of evidence heard by the jury over a five-week trial and then substituted itself for the trial judge in assessing the admissibility of one aspect of the testimony of one expert witness who was called by a co-defendant (Robinson). Before addressing the court's deficiencies in following this Court's pronouncements on the admissibility of expert evidence, it is best to first consider the alarming manner in which the court:

1. overlooked the failure of any witness to establish the presence of fresh blood at any time *after* Mrs. Ries arrived at the hospital;

2. swept past the fact that Goldsmith was a witness called by Robinson, not Oliphant;

3. ignored the fact that Oliphant did not rely upon Goldsmith either for standard of care or causation opinions, then

4. leapt to the conclusion that permitting *one aspect* of Goldsmith's testimony constituted reversible error, when any error, *ad arguendo*, was clearly harmless – particularly for Oliphant.

The court failed to follow Kentucky's "harmless error" pronouncements, hastening to focus on Goldsmith's mode of analysis, ignoring an abundance of factual evidence and other experts' opinions, then compounding their error by concentrating on one element of Goldsmith's analysis and substituting its perception of science for that of an "expert" and the "trial judge". Furthermore, the same party who called Goldsmith as an expert witness, thus creating this initial controversy, is no longer a part of this case; yet, Oliphant remains

to defend the very limited testimony of an expert that was not his witness, made no comment about Oliphant's care in this matter, and did not contribute to Oliphant's defense.

The Court of Appeals stated that, to constitute reversible error, a reasonable possibility must exist that the verdict would have been different absent the admission of the evidence.[16] *Crane*, however, was a criminal case that had at issue the possibility of "an error of constitutional proportions," which required a heightened harmless error standard.[17] Given the constitutional concern of depriving someone of their liberty, this Court in *Crane* held that "an error of constitutional proportions must be shown to be harmless beyond a reasonable doubt."[18] Moreover, "the question here is not whether the jury reached the right result regardless of the error, but whether there is a reasonable possibility that the error might have affected the jury's decision."[19]

Quite simply, the heightened harmless error standard relied upon by the court is inapplicable to a civil case such as this. Rather, Kentucky's harmless error rule in civil cases provides that the "admission of incompetent evidence is harmless if the facts are otherwise shown by proper evidence, or when the verdict or judgment is supported **by other sufficient evidence**."[20] To that end, appellate courts may affirm a judgment below for **any reason** supported by the record.[21]

Kentucky law instructs that any error in the admission of Goldsmith's testimony is harmless unless the Rieses are able to convince the Court that **the outcome of trial would**

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[16] Opinion at 14 (citing *Crane v. Commonwealth*, 726 S.W.2d 302 (Ky. 1987); KRE 103(a)).
[17] *Crane*, 726 S.W.2d at 307.
[18] *Id.*
[19] *Id.*
[20] *Conley v. Fannin*, 215 S.W.2d 122, 123 (Ky. 1948) (quoting *Honaker v. Crutchfield*, 57 S.W.2d 502, 504 (Ky. 1933)) (emphasis added).
[21] *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 575-76 (Ky. 2009) (citing *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 (Ky. 2009)).

have been different had the trial court disallowed Goldsmith's mathematical model testimony.[22] In *Davis*, the plaintiffs challenged the use of an opinion letter, which they argued was inadmissible hearsay, during the cross-examination of the plaintiffs' engineering experts. The court in *Davis* concluded that the defendants' use of the letter, even if hearsay, was not grounds for vacating the defense verdict because the court could not conclude that the plaintiffs would have prevailed if the trial court had excluded the letter.[23]

Rather than determining that the Rieses would have prevailed had the trial court excluded Goldsmith's formula testimony, the Court of Appeals reversed after concluding merely that there is a **reasonable possibility** that the trial's outcome would have been different.[24] Not only did the court apply the incorrect standard, its legal reasoning in determining that the standard was satisfied is equally questionable. The court's only justification for making this conclusion was that because 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."[25] Yet, the court failed to consider another overarching principle in a harmless error analysis – that is, "[i]f such

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[22] *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 776 (Ky. App. 2007).

[23] *Id.* ("Even were we to determine, *arguendo*, that Fischer's reference to the OHBC opinion letter constituted hearsay, any error in its admission would be insufficient to entitle Davis to the relief he seeks. The substantial rights of the parties were not affected by reference to the letter during examination of the witnesses or during closing arguments. Further, denial of the relief requested will not result in a violation of the interests of substantial justice. We are unable to conclude the outcome of the trial would have been any different had reference to the letter been excluded. Therefore, any alleged error would be harmless at best. *See* 61.01.")

[24] Opinion at 14.

[25] Opinion at 13-14.

evidence is or would have been 'merely cumulative,' it is likely to be found to have involved harmless error."[26]

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.[27]

Had the court followed *Miller, Emberton, Conley,* and *Davis* rather than *Crane*, it would have recognized at the outset that there was more than sufficient evidence – aside and apart from Goldsmith's analysis and opinions – for affirming the jury's unanimous defense verdict.

II. The trial court's decision regarding Dr. Goldsmith, even assuming it was in error, was harmless with respect to Oliphant in light of the voluminous and more persuasive causation evidence presented on his behalf.

It is without question that Goldsmith was not a testifying expert on behalf of Oliphant. While his testimony supported the already voluminous and persuasive evidence presented on behalf of Oliphant over the course of nearly five weeks of trial, it was not relied on as a pertinent part of Oliphant's defense.[28] Rather, Oliphant built his own solid defense, which led the jury to a unanimous verdict.

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[26] Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 1.10[7][d] (4th ed. 2003) (quoting *Rogers v. Commonwealth*, 60 S.W.3d 555, 559-60 (Ky. 2001); and citing *Mix v. Smith*, 387 S.W.2d 1 (Ky. 1965); *Prudential Ins. Co. v. Asbury*, 164 S.W.2d 957 (Ky. 1942); *Heilman v. Snyder*, 520 S.W.2d 321 (Ky. 1975); *Carter v. Commonwealth*, 782 S.W.2d 597 (Ky. 1990)).

[27] CR 61.01.

[28] Oliphant's cross-examination of Goldsmith lasted approximately 28 minutes out of approximately 4.5 hours of testimony in a five-week trial.

The court espoused in its Opinion that Goldsmith's mathematical formula was the *only* source of causation evidence timing the fetal bleed at a point before any caregiver could have prevented injury to Lauren.[29] On the contrary, Oliphant presented the following evidence in proving more persuasively that the bleed occurred exclusively at home:

1. Every witness who testified agreed that the only documented bleed occurred at the Rieses' home at approximately 5 AM when Mrs. Ries noticed drops of blood on the bathroom floor and in the toilet. The Rieses' theory of the case is that a fetal bleed causing injury to Lauren occurred at the hospital, approximately 30 minutes prior to Lauren's delivery. Had Lauren bled while at the hospital, that blood would have appeared in Billie Jo's cervix and been plainly evident to medical providers. No medical witness, however, could offer tangible evidence of a bleeding episode at the hospital. Thus, the medical evidence and factual testimony at trial supported the fact that no episode of bright red bleeding occurred after the Rieses arrived at the hospital.[30]

2. During the Caesarian section and delivery, Oliphant diagnosed a vasa previa, a rare condition where fetal blood vessels run over the baby's head and directly in front of the cervix, thereby making them particularly vulnerable to rupture. The vasa previa was further complicated by the presence of velamentous vessels, which were observed via pathologic examination by Dr. Robert Bendon, an obstetrical and perinatal pathologist. Upon pathological examination, Dr. Bendon determined that the fetal bleed occurred when three velamentous vessels were torn *before* Lauren's delivery. Based on hematocrit levels and studies done on fetal sheep, Dr. Bendon assessed a range for the timing of the fetal bleed – from a few minutes to as much as six hours prior to Lauren's delivery.[31]

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[29] Opinion at 4-5.

[30] Testimony by Dr. Brown, VR No. 149, 9/3/10, 05:41:08-05:42:17; Testimony by Dr. Crawford, VR No. 151, 9/8/10, 04:21:36; Testimony by Dr. Elliott, VR No. 156, 9/15/10, 11:53:01-11:53:29; Testimony by Dr. Goldsmith, VR No. 159, 9/20/10, 1:35:25-1:36:27.

[31] VR No. 162, 9/23/10, 9:59:05, 10:01:22, 10:17:51-10:18:55; 10:28:41-10:31:53; *see also*, Dr. Elliott at VR No. 156, 9/15/10, 11:05:02.

3. Dr. Oliphant offered strong evidence that the Rieses' causation theory is untenable. Two of the Rieses' experts, Dr. Zane Brown and Dr. Carolyn Crawford, offered the opinion that a fetal bleed occurred when the fetal heart monitor began to exhibit decelerations at 6:15 AM. Dr. John Elliott, Oliphant's standard of care and causation expert, testified that an active fetal bleed would be evident on a fetal heart monitor only if the monitor showed signs of acidosis or hypoxemia, not decelerations. Importantly, the fetal heart monitor showed no signs of acidosis or hypoxemia.[32]

4. Dr. Vinay Puri, Lauren's treating pediatric neurologist, testified that the initial bleed at home around 5 AM could, and did, cause at least some irreversible brain damage to Lauren – he just could not quantify how much damage occurred at that time. Dr. Puri further testified that the injury to the brain that occurred at home before Mrs. Ries arrived at the hospital was a significant injury. Moreover, Lauren's brain damage continued even after she had this acute bleed at home around 5 AM – it continued up to the time that Lauren was born and even a day or two after she was born.[33]

5. Soon after Lauren's delivery, lab values showed evidence of severe damage to some of her vital organs, including her kidneys and liver. The parties agree that these injuries resulted from the loss of fetal blood. It takes time for the loss of blood to cause these injuries, and even longer for lab values to reflect damage to organs. Had the blood loss occurred close in time to Lauren's delivery, the lab values drawn shortly thereafter would not have shown evidence of severe organ damage.[34] Because the lab values showed severe organ damage, the medical evidence supports and the jury could have concluded that the fetal blood loss occurred much earlier than the delivery, most likely at home when Mrs. Ries discovered a gush of blood and blood clots.

6. Although 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.[35] Even if Goldsmith is incorrect that the rate of fetal

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[32] VR No. 156, 9/15/10, 1:36:35-1:37:07, 1:39:55-1:40:40, 1:45:50-1:47:14.
[33] VR No. 151, 9/8/10, 11:11:22-11:15:45, 11:55:07-11:55:43.
[34] VR No. 159, 9/20/10, 1:56:20-2:02:07, 1:58:30.
[35] Other experts, in addition to Dr. Goldsmith, acknowledged the scientific theory of equilibration: Dr. Puri at VR No. 151, 9/8/10, 12:18:02; Dr. Elliott at VR No. 156, 9/15/10, 2:45:00-2:46:58; and Dr. Robinson at VR No. 163, 9/24/10, 1:20:19-1:21:14 ("(Counsel for Oliphant) **Q:** If we wanted to take the time, could you and I

> equilibration is equivalent to the rate in adults and children, insufficient time had passed from when the Rieses allege the fetal bleed occurred to cause a decrease in hematocrit from 45 to 27. Equilibration does not occur rapidly enough to reduce the hematocrit so drastically in such a short period of time. Had the fetal bleed occurred close in time to Lauren's delivery, a hematocrit level of 27 would not have been seen until much later.[36] Again, the medical evidence supports and the jury could have concluded that the blood loss occurred much earlier than the delivery, most likely at home.

The Rieses frankly admitted in their brief before the Court of Appeals that, given the competing causation theories derived from the direct observations of lay witnesses, the medical record, and inferences from that proof, which were independent from Goldsmith's formula, the jury could have concluded that either theory (bleed occurred at home or 30 minutes before delivery) was correct.[37] In light of this concession, their stated justification for challenging the admission of Goldsmith's testimony was that it merely tipped the scales in the defendants' favor, which suggests that their concerns went more to its weight than its admissibility. The Court of Appeals went much further, however, and held that the outcome of the entire trial could have been different in the absence of Goldsmith's formula.

The fact remains that the jury heard a lot of evidence about the fetal bleed and its timing – and this testimony and evidence did not derive from Goldsmith alone.[38] In fact,

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go through the [equilibration] formulas, the neonatal physiology, that would indicate that Lauren's vital signs in the nursery and her hemoglobin and hematocrit were sufficient to perfuse her brain, could we actually show that mathematically? **A:** Yes.").

[36] Dr. Goldsmith at VR No. 159, 9/20/10, 11:21:56, 11:22:35-11:23:05; Dr. Robinson at VR No. 163, 9/24/10, 11:03:44-11:04:20 (noting specific lab values, including hemoglobin, hematocrit, and platelet count); Dr. Robinson at VR No. 163, 9/24/10, 4:03:55-4:04:25 ("**Q:** If I understand correctly from the hematocrit and hemoglobin, she had lost about a third of her blood, correct? **A:** Right, and there's no way we would have gotten that hemoglobin from something acute and I think that was pretty well discussed with Dr. Goldsmith."); Dr. Bendon at VR No. 162, 9/23/10, 10:29:00-10:31:00.

[37] Rieses' Brief before Court of Appeals, p. 4, fn 3.

[38] Many experts gave their opinion on when they thought the timing of the bleed (or injury) occurred and that testimony regarding timing can be found throughout the record. Dr. Brown at VR No. 149, 9/3/10, 3:30:15,

you could take away Goldsmith's mathematical formula and his overall testimony would still be reliable and well-supported by medical evidence in the record and generally accepted scientific studies. The mathematical equation was just one more way to say the same thing that other expert witnesses and the medical facts were already saying – that the injury occurred *before* Mrs. Ries got to the hospital. The amount of or rate of equilibration does not make a difference; it just adds a detail to the substantial testimony and evidence that already existed as to the timing of the injury to the baby.

Over the course of nearly five weeks, the testimony of Goldsmith was a relatively minor footnote in the overwhelming body of evidence factually showing that the unforeseeable and unpreventable bleed incurred by Lauren occurred *before* the Rieses arrived at the hospital. The testimony of Goldsmith – a witness not for Oliphant but for Robinson – held little significance in Oliphant's defense and was, at best, corroborative and merely cumulative of every factual witness, including the Rieses, in proving that the fetal bleed occurred at home between 5:00 and 5:15 AM.

Despite the absence of any challenge to the extensive standard of care evidence presented in favor of Oliphant, and in spite of the multitude of other, more persuasive, causation theories offered by Oliphant, the Court of Appeals nonetheless concluded that it can step into the shoes of the jury and determine that the jury's unanimous factual finding in favor of Oliphant would have been different in the absence of **one** aspect of a neonatologist's causation theories. It is the duty of the Supreme Court to intervene and overturn such a speculative invasion into the deliberation of a jury.

3:34:14; Dr. Crawford at VR No. 150, 9/7/10, 4:29:02, 4:56:50; Dr. Puri at VR No. 151, 9/8/10, 11:11:22-11:15:45, 11:55:07-11:55:43; Dr. Phelan at VR No. 154, 9/13/13, 11:17:56; Dr. Elliott at VR No. 156, 9/15/10, 11:21:47-11:23:18; Dr. Barnes at VR No. 157, 9/16/10, 11:00:59-11:01:31, 11:35:47; Dr. Robinson at VR No. 163, 9/24/10, 3:47:33; Dr. Bendon at VR No. 162, 9/23/10, 10:01:48-10:02:40, 10:29:00-10:31:00, 11:09:05-11:11:45, 11:15:30-11:16:32.

III. There can be no basis for reversal on a challenged causation issue alone if the jury was instructed to find both a standard of care violation and that it caused an injury.

The Court of Appeals committed error when it reversed and remanded the trial court's unanimous jury verdict based on a single challenged piece of testimony regarding causation. In finding that the trial court committed reversible error in admitting one piece of causation evidence, the court completely disregarded the fact that the trial court instructed the jury to decide issues of fact with respect to both standard of care and causation. There are cases when a standard of care violation is admitted and, thus, causation is the only question remaining. This was absolutely **not** the case here. The Court of Appeals simply ignored the strong likelihood that the jury rendered its unanimous verdict in favor of Oliphant on standard of care grounds.

The trial court instructed the jury that to find **against** Oliphant, he must have violated his standard of care as an obstetrician **and** that it caused an injury. Goldsmith is a neonatologist, not an obstetrician. He never expressed standard of care opinions about Oliphant, but others did. Their testimony, however, is not a subject of this appeal. Since standard of care evidence is not a subject of this appeal, then it can be presumed to be in Oliphant's favor.

If the jury found in Oliphant's favor on standard of care, then it never reached the issue of causation during its deliberation. Given the fact that it arrived at its unanimous verdict in *about one hour* after it had heard evidence for five weeks, this is a reasonable inference to make. If one cannot make the logical leap that Oliphant lost the jury on standard of care, then the opposite must be assumed and an attack on Goldsmith, a neonatologist devoid of obstetrical standard of care opinions, is irrelevant to Oliphant. It is

difficult to understand how the court could determine that the admission of Goldsmith's mathematical formula testimony constituted reversible error without addressing the possibility that the jury could have rendered its verdict on standard of care alone.

The Rieses' entire appeal hinges on **causation**; a plaintiff needs both causation and negligence (duty/breach) to prevail. Given the instruction, which the Rieses proposed and supported, the law presumes that the jury made its decision – at least as to Oliphant – on the issues of duty and breach of duty.

Instruction No. 3

Richard C. Oliphant, M.D.

> It was the duty of defendant Richard C. Oliphant, M.D., in the care and treatment of plaintiffs Billie Jo Ries and Lauren Ries to exercise that degree of care and skill ordinarily expected of a reasonably competent physician specializing in obstetrics and acting under the same or similar circumstances.
>
> If you are satisfied from the evidence that defendant Richard C. Oliphant, M.D., failed to comply with this duty, and that such failure was a substantial factor in causing injury to plaintiff Lauren Ries, you will find for the plaintiffs; otherwise you will find for defendant Richard C. Oliphant, M.D.
>
> Record your verdict on Verdict Form 3.[39]

Oliphant invites the Court to review the actual verdict form utilized by this jury during the one-hour deliberations following this five-week trial.[40]

[39] Jury Instructions and Verdict Forms, R. at 3150-3167, **Exhibit D**.
[40] The verdict was in favor of Dr. Oliphant, Dr. Robinson, and Baptist Hospital East. *See* Jury Instructions and Verdict Forms, R. at 3150-3167, **Exhibit D**.

VERDICT FORM 3

(For use with Instruction No. 3)

Did defendant Richard Oliphant, M.D. fail to comply with the ~~duties~~ DUTY set forth in Instruction No. 3, and, if so, was that failure a substantial factor in causing injury to plaintiff Lauren Ries?

Yes _____

No ✓

Foreperson (If Unanimous)

The jury was undoubtedly focused on the issue of **duty** -- as is evidenced by their handwritten notes on the verdict form – thus, the jury never even got to the issue of causation.[41] All of this discussion as to theories of causation is for naught because the jury was unanimous in its decision for a defense verdict – you don't even get to causation if the standard of care was met and was the deciding factor. Goldsmith had no opinions regarding the standard of care as to Oliphant; thus, Goldsmith had no influence at all on the jury's verdict that Oliphant met the standard of care.

It is telling that the Rieses in their brief before the Court of Appeals exhibited the intellectual honesty to acknowledge that the jury was required to prove both a failure by Oliphant to meet the applicable standard of care and that such failure caused an injury.[42] By this admission, the Rieses were forced to argue that *one piece* of Goldsmith's causation testimony could have affected the jury's decision on both standard of care and causation.

[41] Verdict Form 3, R. at 3162, **Exhibit D.**
[42] Rieses' Court of Appeals Brief, p. 4.

It is thus equally telling that the court completely failed to address standard of care and constructed its Opinion around the idea that the admission of duplicative causation testimony geared toward defending the acts of the neonatologist alone was sufficient to find reversible error.

IV. The Court of Appeals misapplied Kentucky law and erroneously substituted its judgment in place of the broad discretion given to trial courts in determining the admissibility of expert testimony.

By substituting their own scientific conclusions for those of a witness never called nor relied upon by Oliphant, the court has usurped the trial court's role as gatekeeper, the jury's role as fact finder, and Oliphant's right to a verdict by his peers. Quite simply, a reviewing court should not substitute its perception of science for the opinion of a scientist. When the court did substitute its perception of science for the opinion of someone more eminently qualified in scientific matters, it did so incorrectly by erroneously citing the proof and arriving at mistaken conclusions as to scientific hypotheses.

The court acknowledged its limited role in reviewing a trial court's ruling on the admissibility of expert testimony and the broad discretion afforded to trial court judges, yet nevertheless overstepped its bounds and reversed a trial court judge who acted well within his discretion. It is clear that in Kentucky, "[t]he decision to qualify a witness as an expert rests in the sound discretion of the trial court."[43] An appellate court reviews a trial court's decision to admit expert testimony for both clear error and abuse of discretion.[44] Furthermore, trial court decisions regarding the admissibility of expert witness testimony are entitled to deference on appeal because trial courts are best able to evaluate the

[43] *Kemper v. Gordon*, 272 S.W.3d 146, 154 (Ky. 2008); *Owensboro Mercy Health Sys. v. Payne*, 24 S.W.3d 675, 677 (Ky. App. 2000).
[44] *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004).

proposed evidence.[45] A party has more than adequate opportunity to cross-examine an expert witness on any subject that reflects on the expert's credibility.[46] Therefore, if the Rieses felt so strongly that Goldsmith's testimony was fundamentally unfair and unreliable, the opportunity to present that criticism would have been on cross-examination, which they did,[47] and thus allow the jury to judge the expert's credibility for themselves.

Most significantly, the appellate court disregarded this Court's recent pronouncements in *Gunderson*,[48] which notably and coincidentally involved decisions regarding the admissibility of expert testimony by the same trial court judge who admitted Goldsmith's testimony in this case. The appellate court misapplied Kentucky law and erroneously concluded that Goldsmith's testimony did not meet the requirements of *Daubert* by following a questionable line of reasoning:

> 1. Although the fact that equilibration occurs is an undisputed scientific fact, Goldsmith and others can only assume that a human fetus equilibrates at the same rate as human adults and children. Goldsmith did not conduct "independent research" to arrive at this conclusion.
>
> 2. Because Goldsmith's assumption is not derived from his own independent research, to be admissible it must be supported by "objective sources."

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[45] *Id.* at 914.

[46] *Tuttle v. Perry*, 82 S.W.3d 920, 923-924 (Ky. 2002).

[47]
Q: And you told Mr. Darby that you've written 7 articles, written 33 book chapters and edited 14 other books. Have you ever published, even once, Dr. Goldsmith, on that so-called theory?
A: No.
...
Q: Dr. Phelan's opinion has been out there for your peers and his to criticize, to critique, to add to, to modify or to comment on, right?
A: It has.
Q: But yours hasn't?
A: That's correct.

VR No. 159, 9/20/10, 3:48:20-3:49:58.

[48] *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93 (Ky. 2008).

3. Because Goldsmith cited no "objective sources" supporting his assumption about the rate of equilibration in human fetuses, his mathematical formula is not reliable.

As an initial matter, Goldsmith's assumption is indeed supported by objective sources, including animal studies, a practice endorsed by this Court in *Gunderson.*[49] Goldsmith derived his formula from scientific studies setting forth the equilibration rate among five groups: (1) human adults, (2) human children, (3) animal adults, (4) animal neonates, and (5) animal fetuses. Given the relationship between equilibration rates in the latter three groups and comparing those with the relative rates in the first two groups, Goldsmith made a reasonable, scientifically-informed inference about the likely equilibration rate in human fetuses.[50]

In *Gunderson*, this Court made it clear that the lack of affirmative human data from which to draw conclusions does not render an expert's opinions unreliable:

> Science, like many other human endeavors, draws conclusions from circumstantial evidence when other, better forms of evidence is not available. . . . **Moreover, one cannot ethically experiment on human beings,** exposing them to the near certainty of some number of deaths, **simply to satisfy some evidentiary standard** . . . . In science, as in life, where there is smoke, fire can be inferred, subject to debate and further testing.[51]

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[49] *Id.* at 105.

[50] Of note, Dr. Bendon, placental pathologist, testified as to the percentage of blood loss (30%) that would cause a fetus to go into shock and its condition worsen. He based this figure on sheep studies and testified, "I don't know of anyone who's actually bled out blood volumes of [human] babies to find out." He then referenced the timing of the fetal bleed in this case and, based on the hematocrit levels in the medical record *and scientific studies done on fetal sheep*, he narrowed it down to occurring sometime between 6 hours and minutes before this baby's delivery. VR No. 162, 9/23/10, 9:59:05, 10:01:22, 10:17:51-10:18:55; 10:28:41-10:31:53.

[51] *Id.* at 104-105 (emphasis added).

The heightened reliability standard the court employed here suggests that only those opinions which are supported by scientific certainty are admissible, an idea starkly refuted by this Court:

> *Daubert* does not require proof to a scientific certainty, or even proof convincing to the trial judge. The trial judge is not required to find that the proffered opinion is scientifically correct, but only that it is trustworthy because it is tied to good scientific grounds. **What *Daubert* does require is that the expert's opinion be based on sound methodologies of the type used by experts in the field in which the opinion is offered.** There can be little question that scientists routinely use animal studies . . . to infer conclusions, which are expressed in peer-reviewed journals and textbooks.[52]

The Court of Appeals seems to suggest that, for Goldsmith's testimony to have been reliable and admissible, Goldsmith needed to prove the impossible. The appellate court even acknowledges that no scientific research about equilibration is done on human fetuses because "death of the fetus would be the usual outcome,"[53] yet ignores the fact that medical ethics would not allow it. How can an expert provide evidence of studies involving human fetuses (which the court required in its Opinion) when medical ethics would not allow those studies to occur?

It would be one thing if the court had cited solid, scientific evidence that Goldsmith's formula is unreliable. Had that occurred, this Court could weigh the trial court's reasoning to determine whether it had erred in a clear and convincing manner. As it is, the Court of Appeals opined – without one shred of scientific authority – that Goldsmith's utilization of human and animal evidence failed to pass the test of a *Daubert*

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[52] *Id.* at 105 (quoting *Brasher v. Sandoz Pharmaceuticals Corp.*, 160 F.Supp.2d 1291, 1296 (N.D. Ala. 2001)) (emphasis added).
[53] Opinion at 9 n. 8.

challenge that transpired in its own chambers, absent counsel, witness, or scientific evidence.

Quite simply, the court did not cite any scientific sources in support of its conclusion that Goldsmith's assumption about the human fetal equilibration rate, or his reliance on animal studies in reaching that assumption, are unreliable. The following are quotes from the court's Opinion to illustrate the specious and conclusory nature of the court's pseudo-scientific findings:

> "The scientific fact that equilibration occurs in humans cannot serve as a basis of Goldsmith's assumption equating the rates of equilibration in a human fetus in utero to that of a human adult/child."[54]
>
> "The scientific fact that equilibration occurs in humans is simply inconsequential to determining the rate of such equilibration for a fetus."[55]
>
> "There was no scientific foundation presented by Goldsmith to determine the rate of equilibration of a human fetus in utero that served as a basis for Goldsmith's mathematical formula timing Lauren's bleed."[56]

What scientist on the Court of Appeals was qualified to make these blanket assertions as to such a scientific and complicated study as equilibration theory? In making these conclusions, not only did the court see fit to substitute its judgment as to the scientific reliability of medical opinions for that of the trial court, which had superior knowledge of the record and the underpinning of Goldsmith's opinions, but it substituted its judgment for that of an actual scientist and physician. The court apparently made its own scientific conclusion that studies involving human adult/child equilibration rates are

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[54] Opinion at 10.
[55] *Id.*
[56] *Id.*

not sufficiently related to equilibration rates of human fetuses and deemed that aspect of Goldsmith's testimony unreliable. More specifically, the court concluded, without support or explanation, that "[t]he scientific fact that equilibration occurs in humans is simply inconsequential to determining the rate of such equilibration for a fetus."[57] Such a judicial overreach is exactly what the Supreme Court and others have sought to prevent.

In holding that Goldsmith's formula could be reliable only if there exist "objective sources" of record supporting his assumption, the court applied a rule that applies only when an expert's opinions are based solely on a literature review.[58] Goldsmith derived his mathematical formula and assumptions not from a literature review but from uncontroverted, scientific principles relating to total fetal blood volume, hematocrit and hemoglobin levels, and the process of equilibration.

The court's conclusion reveals a crucial misunderstanding about Goldsmith's formula. The formula itself is based upon simple mathematical functions applied to the process of equilibration. The variables put into the formula vary depending upon the volume of blood loss, the measured hematocrit and hemoglobin levels following the blood loss, the time blood was drawn to measure the hematocrit and hemoglobin levels, and the assumed rate of equilibration. Once each of these variables is put into the formula, the formula calculates the approximate time the blood loss occurred. The rate of equilibration is a variable on equal footing with the other variables and can be changed to yield different results.

As such, just because Goldsmith considered proven scientific principles and assumed that the rate of fetal equilibration is equal to adult and child equilibration does not

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[57] *Id.*

[58] *See Burton v. CSX Transp., Inc.*, 269 S.W.3d 1 (Ky. 2006).

mean that his formula and testimony are scientifically unreliable. The Rieses even had the opportunity to cross-examine Goldsmith and bring to the jury's attention any doubt regarding his calculated timing of the fetal bleed. In fact, in her cross-examination of Goldsmith, counsel for the Rieses asked Goldsmith to recalculate his findings based on changes to variables, including volume of blood loss and the rate of equilibration.[59] This exchange demonstrates that Goldsmith's choice of an equilibration rate merely goes to the weight of his testimony rather than its reliability. **The mathematical and scientific principles underlying Goldsmith's formula are undisputed;[60] the parties merely disagree over the value of a single input variable.** The Court of Appeals reached an incorrect result by missing this point. Even more so, the Rieses failed to adequately cross-examine if they thought this formula was so unreliable.

That Goldsmith's formula is scientifically reliable also finds support from one of the Rieses' experts, Dr. Carolyn Crawford (neonatologist). During her deposition, Robinson's counsel took Crawford through Goldsmith's calculations (though not explicitly identified as such at the time) regarding blood loss and the subsequent dilution of hemoglobin through equilibration.[61] Crawford agreed that Goldsmith's calculations were correct assuming a certain starting blood volume. Although Robinson's counsel did not question Crawford regarding all of Goldsmith's calculations timing the fetal bleed, Crawford did not indicate that Goldsmith's calculations were unreliable. Rather, by agreeing with Goldsmith's calculations, Crawford endorsed their reliability.

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[59] (Unofficial) Transcript of Trial, September 20, 2010, p. 153-176 (originally included as Exhibit C to Oliphant's Brief before the Court of Appeals). VR No. 159, 9/20/10, 2:38:49-3:04:52.

[60] This theory was acknowledged by other experts during trial. Dr. Puri at VR No. 151, 9/8/10, 12:18:02; and Dr. Elliott at VR No. 156, 9/15/10, 2:45:00-2:46:58.

[61] Deposition of Carolyn Crawford, M.D., March 24, 2010, p. 65-88 (originally included as Exhibit D to Oliphant's Brief before the Court of Appeals).

The Court of Appeals, in its Opinion, referenced the Rieses' argument that the trial court lacked adequate records to determine Goldsmith's admissibility.[62] It later held that there was "simply no evidentiary objective source in the record to support the trial court's finding that Goldsmith's assumption and, thus, his mathematical formula were reliable."[63] However, at no point in between did the Court of Appeals discuss the lengthy process the trial court went through to determine Goldsmith's reliability as an expert witness. It appears as if the Court of Appeals completely disregarded the fact that Goldsmith:

1. Was disclosed as an expert on December 30, 2009;
2. Was deposed twice, once on April 23, 2010 and once on May 26, 2010;
3. Survived a motion in limine to exclude part of his testimony made by the Rieses on July 12, 2010;[64]
4. Had an order entered after the final pretrial conference on August 11, 2010 that stated that all expert testimony was reliable and relevant;[65] and
5. Survived a late attempt at a *Daubert* motion,[66] which occurred three weeks into trial, after the Rieses declined to make such a motion at all the previous pre-trial conferences and hearings.

The Court of Appeals seemed to ignore Goldsmith's extensive *curriculum vitae,* which outlines his vast experience as a neonatologist, author, scientist, former Chair of the Department of Pediatrics at Ochsner Clinic and former Co-Director of Nurseries at

[62] Opinion at 5.

[63] Opinion at 12. *But see, Hamilton v. Commonwealth*, 293 S.W.3d 413, 417 (Ky. App. 2009), citing *Commonwealth v. Christie*, 98 S.W.3d 485, 488-89 (Ky. 2002). "Usually, the record upon which a trial court can make an admissibility decision without a hearing will consist of the proposed expert's reports, affidavits, deposition testimony, existing precedent, and the like."

[64] Plaintiffs' Motion in Limine to Exclude Portions of Defense Experts' Testimony, Vol. 13, R. 1839-1850; Final Pretrial Conference Order, 8/23/10, R. at Vol. 21, 3014-3021, **Exhibit C.**

[65] Final Pretrial Conference Order, 8/23/10, R. at Vol. 21, 3014-3021, **Exhibit C.**

[66] After a lengthy hearing, the trial court determined that "arguments made by Plaintiffs' counsel go to the weight the jury should afford as opposed to its admissibility." VR No. 159, 9/20/10, 10:41:26. It denied the Daubert challenge and proceeded with the last two weeks of trial. VR No. 159, 9/20/10, 10:07:30-10:43:40.

Ochsner Foundation Hospital, both in New Orleans, Louisiana.[67] The Rieses believe that because Goldsmith's opinions and mathematical formula were not based on independent research, he was not qualified to testify on the subject.[68] That argument has no merit as "[a]ny lack of specialized training goes only to the weight, not the competency, of the evidence."[69] It was not an abuse of discretion for the trial court to permit Goldsmith to testify as an expert on this topic because his testimony was reliable and supported by sound scientific principles. It was simply up to the jury to decide whether his testimony was credible.

The timing of the fetal bleed was a question of fact for the jury to determine based on all of the evidence. The Court of Appeals determined that because the equilibration rate of an in utero human fetus "was a critical factor in [Goldsmith's] mathematical formula timing Lauren's bleed, the admission of Goldsmith's testimony surrounding his mathematical formula constituted error."[70] Yet, in the same breath, the court stated that "[a] review of the trial court reveals that the timing of Lauren's blood loss became a critical factual issue for the jury to resolve."[71] This is exactly the point. The Court of Appeals took that factual determination away from the jury by stepping into their shoes and making the decision for them – even though the appellate court did not hear five weeks of evidence from approximately 27 witnesses as this jury did.

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[67] *See* Dr. Goldsmith's curriculum vitae, attached hereto as **Exhibit E**. Dr. Goldsmith's CV was originally part of Robinson's CR. 26.02 Expert Disclosure, Vol. 6, R. at 811-838, and was included as Exhibit 2 to the Rieses' Brief before the Court of Appeals.
[68] Response to Motion for Discretionary Review, p. 9.
[69] *Tapp v. Owensboro Med. Health Sys.*, 282 S.W.3d 336, 339 (Ky. App. 2009).
[70] Opinion at 12-13.
[71] Opinion at 13.

V. It would be inherently unjust to require Oliphant alone to endure another trial based on an issue regarding the reliability of one aspect of Goldsmith's testimony, when Oliphant did not call Goldsmith as an expert witness, did not elicit standard of care or causation opinions from him, did not present or rely on any part of his mathematical formula as part of Oliphant's defense, and the party whom Goldsmith's testimony supported is no longer a party to the case.

As stated above, Goldsmith was not a testifying expert for Oliphant. He was produced, presented to the jury, and questioned by Robinson. Oliphant's examination of Goldsmith lasted only 25 minutes out of the 4.5 hours he was on the stand. As such, his testimony, while corroborative of Oliphant's evidence, was elicited on behalf of Robinson to support Robinson's care and theories and had no effect on the strength of Oliphant's case. Since this verdict was rendered by the Court of Appeals, Robinson has settled with the Rieses and is no longer a party to this action. Therefore, should this Court affirm the granting of a new trial, it would be sending Oliphant back to the trial court level based on testimony from an expert who did not and could not testify as to Oliphant's standard of care and whose testimony was not a part of or pertinent to his case in chief or defense. It would be illogical and a waste of the courts' and the parties' resources to require that of Oliphant.

In addition, the effect of settlement by one co-defendant during an appeals process is a relatively unexplored area of Kentucky law. Other jurisdictions have held that when parties settle a case on appeal, the issue subsequently becomes moot.[72] It is therefore "the duty of the appellate court to set aside the decree below and to remand the cause with

[72] *Wang Laboratories, Inc. v. Toshiba Corp.*, 793 F. Supp. 676, 677 (E.D.V.A. 1992); *Smith International, Inc. v. Hughes Tool Co.*, 839 F.2d 663 (U.S. Ct. App. 1988) (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (U.S. 1936)).

directions to dismiss."[73] Thus, it is logical to conclude that the issue of Goldsmith's testimony became moot once Robinson settled out of the case.

Were this Court to affirm the Court of Appeals' decision to grant a new trial in this matter, the implications would be far from fair and just. It would saddle the burden and expense of another potentially five-week trial and added years of litigation on a party who had no connection with the reason the Court of Appeals ordered a new trial in the first place. It would be unreasonable, and above all else, unjust to require that of Oliphant. Therefore, even if this Court agrees with the Court of Appeals' determination that Goldsmith's testimony is grounds for a new trial, the issue should now be considered moot.

VI. Should the Court disagree with Oliphant's arguments and determine that it was error to admit Goldsmith's testimony, such error was harmless and does not require a new trial.

Goldsmith's testimony regarding equilibration theory was appropriately admitted at trial. Should this Court disagree, however, it should at the very least consider its admission harmless and not grounds for a new trial.

Kentucky law states "no error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict or vacating, modifying, or otherwise disturbing a judgment or order, **unless refusal to take such action appears to the court inconsistent with substantial justice.**"[74] The Court of Appeals has held that even though an expert's evidence in support of his opinion may be considered weak by the reviewing court, those opinions are not erroneously considered by the jury when that expert's testimony only lasted a couple of hours in a nearly two-week trial, **and** the expert

[73] *Id.*
[74] CR 61.01 (emphasis added).

is subject to cross-examination.[75] In its review, the court paid particular attention to the cross-examination and noted it was "robust, thorough, and effective."[76] Thus, it was up to the jury to evaluate the credibility of the witness's testimony based on the issues brought up during cross-examination.[77] The court felt "confident that Kentucky juries can hear . . . expert testimony and weigh it accordingly."[78] Likewise, this Court has recently held that expert testimony regarding standard of care was not unduly prejudicial because it was cumulative.[79]

These recent cases support Oliphant's argument that the evidence at issue here is harmless and should not warrant a new trial. As in *Rehm*, Goldsmith's testimony was a drop in the bucket of the collective testimony heard by the jury over the course of the trial – Goldsmith was on the stand for less than one day, approximately 4.5 hours, out of a five-week trial. How can one realistically argue that testimony amounting to such a small portion of an entire trial would have changed the outcome, especially when the jury returned its unanimous verdict for Oliphant and the other defendants in about an hour?

Furthermore, as the issue of the timing of the fetal bleed was such a crucial factor at trial, Goldsmith was not the only expert whose testimony touched on this. Given the importance of the question regarding the timing of the bleed, it would be illogical to assume Goldsmith was the only expert testifying on that issue. That would be a false

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[75] *Rehm v. Ford Motor Co.*, 365 S.W.3d 570 (Ky. App. 2011).
[76] *Id.* at 576.
[77] *Id.*
[78] *Id.* (citing *Commonwealth v. Martin*, 290 S.W.3d 59, 69 (Ky. App. 2008)).
[79] *Hashmi v. Kelly*, 379 S.W.3d 108 (Ky. 2012). In this case, the defendant sought discretionary review of a Court of Appeals' decision reversing and remanding the case to the trial court regarding CR 26 and expert disclosures. At trial, a treating physician's testimony was read into the record as expert testimony regarding standard of care. The issue was over one line regarding standard of care. Plaintiffs had other experts testify regarding standard of care which "further reduced any possible effect from [the physician's] testimony." While the Supreme Court held that it was error to allow this testimony at trial, it held that the error was harmless because the testimony was cumulative and the court reinstated the original judgment from the trial court.

assumption because not only did both defense teams bring in experts regarding the timing of the bleed,[80] but the Rieses brought forward their own experts testifying to that exact issue.[81] Therefore, as causation hinged on this issue of timing, not only did Goldsmith give his expert opinion, but *five* other qualified doctors did as well. As such, the cumulative nature of this evidence renders its admission harmless, and not grounds for a new trial.

CONCLUSION

A new trial is not the appropriate course of action for this case. The Court of Appeals misapplied and overstepped their boundaries when conducting their review of the trial court's decision to admit Goldsmith's testimony. There was ample evidence as to standard of care and causation during trial, with Goldsmith's testimony only going to causation. Even if the Court feels that it is irrelevant that Goldsmith only testified regarding causation when the jury instructions required a finding of both, there was overwhelming support for Oliphant's case without Goldsmith's testimony. Oliphant provided his own experts without the need to rely on those provided by Robinson. Should this case be remanded for a new trial, as the Defendants who did present Goldsmith are no longer a party to this case, Goldsmith will not even be brought forward to testify. Clearly, under these conditions, a new trial would prove fruitless, unnecessary, and a waste of the courts' and all parties' time and resources.

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[80] Dr. Oliphant presented Drs. Bendon (VR No. 162, 9/23/10, 9:50:16-1:08:46) and Elliott (VR No. 156, 9/15/10, 10:54:00-5:20:50; Dr. Robinson presented Drs. Goldsmith (VR No. 159, 9/20/10, 10:46:48-5:00:01) and Barnes (VR No. 157, 9/16/10, 10:58:46-2:46:42). Baptist Hospital East presented Drs. Ferrara (VR No. 160, 9/21/10, 9:22:45-2:35:31) and Strong (VR No. 154, 9/13/13, 4:21:41-4:55:50.

[81] Drs. Brown and Crawford testified they believed the fetal bleed occurred when the fetal heart monitor showed signs of decelerations; VR No. 149 4: 9/3/10, 4:38:29; VR No. 151 4: 9/8/10, 2:15:20. *See also* Brief for Appellants to Court of Appeals, p. 4.

Regardless, Goldsmith's formula did meet the *Daubert* requirements after surviving multiple tests at the trial court level and any issue with unreliability after that point should have been brought to the jury's attention during cross-examination. The Court of Appeals instead found error by erroneously postulating its own, lay conclusions as scientific fact in a pseudo-*Daubert* hearing that transpired, *ab initio*, in its Opinion.

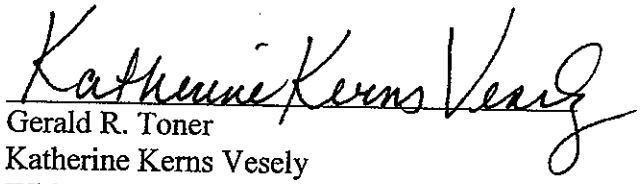
Moreover, action by this Court is required to reverse a result-driven opinion which flies in the face of a simple, logical construct: if a jury must find both a standard of care violation and that it caused injury – and the standard of care component of a case is unchallenged – there can be no basis for reversal on causation alone. In short, one cannot create a scenario requiring reversal where the jury could not have found both negligence and causation. This is particularly true for Oliphant, an obstetrician, who did not call Goldsmith, a neonatologist, as a witness, did not solicit standard of care opinions from him, and, frankly, never engaged in the controversy surrounding Goldsmith's formula testimony. The Rieses obscured the reality of this case in the minutiae of *Daubert*, Goldsmith, animal studies, etc. – this may have mattered for Robinson, i.e., precise timing of the fetal bleed relative to whether and when any interventions by Robinson could have made a difference in the outcome – **but it mattered not to Oliphant and had nothing to do with his care at issue or his defense at trial**. After nearly five weeks of evidence, culminating in a unanimous jury verdict for Oliphant, the Court of Appeals' defiance of law, logic, and science requires scrutiny and action by this Court.

Finally, should this Court feel that the previous arguments are not sufficient to overturn the Court of Appeals' decision, admitting Goldsmith's testimony is, at the very

least, harmless error as it was a small fraction of a substantially lengthy trial and was cumulative when coupled with the other expert testimony.

The trial lasted almost five weeks. The jury deliberated about one hour. Standard of care has never been the topic of this appeal. No fewer than 17 witnesses, lay and expert, gave testimony concerning Lauren's bleed – the causative issue in question. Goldsmith – a nationally renowned expert who was called by a once co-defendant – has been challenged about one small component of his testimony involving a mathematical formula used to calculate when the fetal bleed in this case may have occurred based on the well-known scientific principle of equilibration. Many other medical experts also testified about when the fetal bleed occurred in this case. Goldsmith's testimony was grounded in well-known scientific principles, it was determined to be reliable by the trial court after much discussion and scrutiny, and Goldsmith was subject to extensive cross-examination by the Rieses. Thereafter, it was up to the jury to assess the credibility of Goldsmith's testimony. The Court of Appeals committed error when it took that decision away from the jury. Thus, we respectfully request this Court reverse the Court of Appeals' decision and reinstate the unanimous jury verdict in favor of Oliphant.

Respectfully submitted,



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APPENDIX

Exhibit A: Judgment, December 14, 2010, R. at 1915

Exhibit B: Court of Appeals' Opinion, December 21, 2012

Exhibit C: Final Pretrial Conference Order, 8/23/10, R. at Vol. 21, 3014-3021

Exhibit D: Jury Instructions and Verdict Forms, R. at 3150-3167

Exhibit E: Curriculum Vitae of Jay Goldsmith, M.D., Vol. 6, R. at 811-838