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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| LAUREN E. SCOTTOLINE, Individually, and as Parent and Guardian of J.S.S, a Minor, and STEPHEN SCOTTOLINE, Parent of J.S.S, a Minor,<br><br>Plaintiffs Below, Appellants,<br><br>v.<br><br>WOMEN FIRST, LLC, and CHRISTIANA CARE HEALTH SYSTEM, INC.<br><br>Defendants Below, Appellees. | № 48,2024<br><br>ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE<br><br>C.A. № N19C-08-135 FWW |

# OPENING BRIEF OF APPELLANT

Dated: March 22, 2024

*/s/ Bruce L. Hudson, Esq.*

**Hudson, Castle & Inkell, LLC**
Bruce L. Hudson, Esquire (#1003)
Joshua J. Inkell, Esquire (#5620)
Daniel P. Hagelberg, Esquire (#6813)
2 Mill Road, Suite 202
Wilmington, DE 19806
(302) 428-8800
Bruce@HCIlaw.com
Josh@HCIlaw.com
Daniel@HCIlaw.com
Attorneys for Appellants

/s/ JEFFREY M. WEINER, Esq.

Jeffrey M. Weiner, Esquire #403
1332 King Street
Wilmington, Delaware 19801
(302) 652-0505
Of Counsel for Appellants

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## NATURE OF PROCEEDINGS

On August 15, 2019, Lauren and Stephen Scottoline, the parents of minor child "J.S.S." ("Plaintiffs") filed an initial Complaint in the Superior Court alleging negligence in connection with a permanent brain injury suffered by the child at birth. On March 2, 2021 Plaintiffs filed an Amended Complaint, correcting the names of Defendants as Christiana Care Health Services, Inc. ("CCH"), and Women First, LLC ("Women First").[1] In sum, Plaintiffs allege that J.S.S. suffered a permanent brain injury known as Hypoxic Ischemic Encephalopathy ("HIE"), a condition caused by oxygen deprivation during birth, as a result of medical negligence by staff of both Defendants during labor and delivery. Plaintiffs' allegations of causation were premised upon the opinion of Plaintiffs' expert pediatric neurologist, Daniel Adler, M.D. ("Dr. Adler").

On October 3, 2022, Defendants filed a motion *in limine* seeking to exclude the testimony of Dr. Adler, arguing that J.S.S.' neurodevelopmental and behavioral disabilities were caused not by HIE, but rather by Autism Spectrum Disorder ("ASD"), a condition with similar symptoms to HIE, and which Defendants claim did not originate during labor and delivery.[2] On November 10, 2022, Plaintiffs

[1] Pls. Initial Compl. (A-65); *See also* Pls. Amended Compl. (A-136).
[2] Defs. First Mot. (A-210).

submitted a response in opposition to this motion, and the Superior Court heard oral argument on December 16, 2022.[3]

On March 1, 2023, the court granted Defendants' motion in part, holding that Plaintiffs were precluded "*from introducing at trial Dr. Adler's opinion or testimony that hypoxic ischemic encephalopathy caused J. S. S' behavioral syndrome that falls within the autism spectrum."*[4] The Superior Court excluded Dr. Adler's opinions for three reasons: his opinion "[did] not have reliable scientific basis," "[was] not the product of reliable methodology and amount[ed] to little more than the expert's *ipse dixit* conclusions."[5]

On March 10, 2023, approximately three weeks before the three-week trial scheduled for April 3, 2023 was to begin, the court held a pretrial conference during which Defendants sought a continuance of the trial on the grounds that the March 1, 2023 Order, which limited but did not exclude Dr. Adler's trial testimony, made it unclear exactly what damages Plaintiffs would be able to pursue at trial.[6] Defendant Women First further suggested the need for a future *Daubert* hearing.[7] The court acknowledged that its ruling was not clear[8] a possible need for further discovery to

[3] Pls. Resp. to Defs. First Mot. (A-231); *See also* Oral Argument Tr. Defs. First Mot. (A-250)
[4] Mem. Op. (attached as Exhibit A).
[5] *Scottoline v. Women First, LLC*, 2023 WL 2325701; 2023 Del. Super. LEXIS 101, *8, 15.
[6] Pretrial Conference Tr. 49:8-21 (A-359).
[7] Pretrial Conference Tr. 43:7-9 (A-353).
[8] Pretrial Conference Tr. 48:22-49:7 (A-358-59).

include "probably some additional depositions of both Dr. Adler and the . . . life care plan expert potentially" indicating that the record would likely not survive a close look on appeal and granted a continuance to allow additional discussion and discovery among the parties regarding Dr. Adler's testimony.[9]

On June 8, 2023, in accord with the court's recommendation, Plaintiffs submitted a third report from Dr. Adler, which followed the doctor's third in-person examination of J.S.S. on March 24, 2023. This report contained Dr. Adler's updated assessment of J.S.S. as well as additional scientific literature in support of his opinions.[10] Dr. Adler's assessment highlighted J.S.S.' then-current condition and provided comprehensive insights into the factors connecting his HIE birth injury with his neurological and neurobehavioral disabilities, some of which are also recognized as symptoms of ASD. In addition, Dr. Adler used the magic words "differential diagnosis" in forming his opinion in his third report. Defendants, however, did not follow up on the court's recommendation to pursue additional discovery or to seek a *Daubert* hearing to develop the factual record.

On July 12, 2023, the matter was reassigned to a new judge, and on August 3, 2023, Defendants renewed their objections to Dr. Adler's testimony in a second

[9] *Id.* at 358-361(48:22-51:15).
[10] Dr. Adler's Reports (A-61, A-144, A-374).

motion *in limine*.[11] On September 1, 2023, Plaintiffs submitted their response in opposition to the renewed motion.[12]

On September 14, 2023, the case was reassigned yet again to a third judge, who held oral argument on Defendants' renewed motion on November 20, 2023.[13] Prior to oral argument, Plaintiffs had submitted additional case law, the third report of Dr. Adler that contained his differential diagnosis, and notified Defendants that they would be relying on Del. Super. Ct. Civ. R. 60.[14] On December 15, 2023, notwithstanding the additional opinion of Dr. Adler using the magic words "differential diagnosis," citing to the recently discovered case law of *Norman*, and a plea to cure the injustice by application under Del. Super. Ct. Civ. R. 60, the Superior Court granted Defendants' second motion *in limine*, and expanded its March 1, 2023, ruling by excluding all of Dr. Adler's testimony, in addition to the testimony of Plaintiff's lifecare plan expert "for the same reasons set out in the Court's [March 1, 2023] Memorandum Opinion."[15]

On December 26, 2023, Plaintiffs filed an Application with the Trial Court to certify an interlocutory appeal.[16] On January 3, 2024, Defendants filed a letter with

[11] Defs. Second Mot. (A-380).
[12] Pls. Resp. to Defs. Second Mot. (A-417).
[13] Oral Argument Tr. Defs. Second Mot. (A-428).
[14] *Id.* at 17:19-20. (A-444).
[15] Order Upon Defs. Second Mot. (Exhibit B) (emphasis added).
[16] Pls. Application for Interlocutory Appeal (A-453).

the court stating they did not oppose Plaintiffs' application.[17] The court denied Plaintiffs' application on January 5, 2024.[18]

On January 10, 2024, Defendants filed a motion for summary judgment, and on January 26, 2024 Plaintiffs filed a brief in opposition.[19] On January 31, 2024, the court granted summary judgment, in favor of Defendants, without any oral argument.[20]

On February 6, 2024, Plaintiffs filed a timely appeal of these decisions with this Court. This is Plaintiffs' Opening Brief in support of their appeal, which seeks the reversal of the Superior Court's Order Granting Defendants' Motion for Summary Judgment (attached hereto as Exhibit C), and a reversal of the Superior Court's Orders precluding the trial testimony of Plaintiffs' experts Dr. Adler and Jody Masterson (attached hereto as Exhibits A & B).

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[17] Defs. Letter (A-459).
[18] Order Refusing Pls. Application for Interlocutory Appeal (A-461).
[19] Defs. Mot. for Summ. J. (A-472); *See also* Pls. Response to Defs. Mot. for Summ. J. (A-477).
[20] Order Granting Defs. Motion for Summ. J. (Exhibit C).

## SUMMARY OF ARGUMENT

1. The trial court erred in violating this Court's holdings in *Norman v. All About Women* and *Wong v. Broughton* when it excluded Plaintiffs' sole causation expert, Daniel Adler, M.D. in part in a memorandum opinion issued on March 1, 2023 ("March 1, 2023 Order") by holding that the expert's opinions did not have reliable scientific basis, were not the product of reliable methodology, and amounted to little more than *ipse dixit* conclusion. The trial court further erred in excluding Dr. Adler's opinions in whole on January 31, 2024 after a subsequent report was issued, which contained the magic words "differential diagnosis" as well as additional literature to support his opinions.

The trial court's ruling is not in conformity with *Daubert* and this Court's precedent in *Norman* and *Broughton.* Dr. Adler's opinions were not required to be supported by literature and he came to his conclusions by utilizing a differential diagnosis even though he did not use the "magic words" differential diagnosis until his third expert report. Furthermore, Dr. Adler's opinions were supported by two of J.S.S.'s treating physicians. Accordingly, Dr. Adler's opinions have satisfied the trial court's gatekeeping responsibility and any criticism of his opinions should be the subject of cross examination.

2. The trial court abused its discretion in denying Plaintiffs' request for a *Daubert* hearing to the extent that the trial court or the defendants did not appreciate

his methodology and the support for his opinions. A *Daubert* hearing would have permitted Plaintiffs to establish the basis for Dr. Adler's opinions beyond the three expert narrative reports and the discovery deposition taken by the defendants.

3. The trial court further erred in excluding the opinions of Jody Masterson, RN, whose opinions were based on those of Dr. Adler because the trial court should not have excluded the opinions of Dr. Adler.

4. The trial court erred in failing to reconsider its rulings under Delaware Superior Court Rule 60 ("Rule 60") due to no extraordinary circumstances and the timeliness of the request. Unlike its federal counterpart, Rule 60 has no deadline to request relief. Relief under Rule 60 was appropriate because all counsel involved in this case overlooked two controlling decisions of this Court: *Norman v. All About Women* and *Wong v. Broughton.* Moreover, the trial court did not apply this Court's precedent in issuing its March 1, 2023 Order, which excluded in part the opinions of Dr. Adler. Accordingly, relief under Rule 60 was the appropriate remedy in this case to avoid an application to this Court.

## STATEMENT OF FACTS

Plaintiffs, Lauren and Steven Scottoline, are the parents of J.S.S., a minor, who was born in critical condition on July 28, 2015, at Christiana Care Hospital, a facility of Defendant Christiana Care Health Systems, Inc. ("CCHS"). The labor and childbirth were managed by midwives and physicians employed by Defendant Women First, and also nurses employed by Defendant CCHS. Despite multiple telephone requests from the staffs of both Defendants, the on-call obstetrician employed by Women First failed to appear at bedside during the mother's labor, and J.S.S. was eventually delivered emergently by the CCH 24-hour attending obstetrician.

Immediately after delivery, J.S.S. was transferred to the CCH Newborn Intensive Care Unit (NICU), where he was placed on full body thermal cooling to minimize brain swelling due to oxygen deprivation during labor and delivery. Only a few hours after his birth, CCHS' neonatologist, Carlos Duran, MD, diagnosed J.S.S. with "severe encephalopathy of unclear etiology."[21] At three days of life, an electroencephalogram test was conducted, and the treating pediatric neurologist, Richard Fischer, MD, described the results as "severely abnormal" and "consistent with a severe encephalopathy."[22] At six days of life, Dr. Fischer diagnosed J.S.S.

[21] (A-483-84).
[22] (A-485).

with hypoxic ischemic encephalopathy ("HIE"), a brain injury caused by lack of oxygen that carries a high risk of permanent neurodevelopmental and behavioral disabilities.[23] J.S.S. remained in the CCH NICU for 3 weeks after this diagnosis before being discharged from the hospital.

At 20 months of age, J.S.S. was assessed to be functioning at only 12-13 months of language development.[24] One month later, behavioral pediatrician Anne Meduri, MD, evaluated J.S.S. and noted he had "developmental delays in all areas with [physical therapy], [occupational therapy], [speech therapy], and [early childhood education] being provided. He is making slow progress. There have been some concerns about a possible autistic spectrum disorder, though today I was not struck by that."[25] These concerns were reiterated by Dr. Meduri when, at 26 months of age, she noted the possibility of an Autism Spectrum Disorder ("ASD") diagnosis.[26] Dr. Meduri saw the child again at 33 months of age, and commented that J.S.S. "remained delayed" despite his progress, and that they were waiting on the results of a special education eligibility evaluation by the Appoquinimink School District.[27] During this period, neither Dr. Fischer, nor Dr. Meduri diagnosed J.S.S.

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[23] (A-484).
[24]Child Development Watch Appt. on March 27, 2017 ("…receptive language at 12 months and expressive language at 13 months.") (A-486).
[25] Developmental Follow-Up Report on April 4, 2017 (A-487-88).
[26] Developmental Follow-Up Report on October 3, 2017 (A-489-90).
[27] Developmental Follow-Up Report on May 1, 2018 (A-491).

with autism. Both doctors noted his history of body cooling, global delays and HIE injury, and Dr. Meduri noted that J.S.S.' impairments had "features" of ASD. Dr. Fischer expressed his concerns by noting that the child was "showing a variety of behaviors consistent with mild autism spectrum disorder, particularly regarding language and age-appropriate social skills."

At 34 months of age, and after a three-day assessment, the Appoquinimink School District diagnosed J.S.S. with educational ASD, as defined by the Individuals with Disabilities Education Act ("IDEA").[28] The assessment was conducted by a Psychologist, an Educational Diagnostician, and a Speech Language Pathologist, using the Autism Observation Schedule Second Edition ("ADOS-2"), a test that is used to determine if a student qualifies for special education resources.[29] Their collective assessment was that J.S.S. demonstrated many features of autism, including impairment of reciprocal social interactions and communication, and limited play skills. They determined that J.S.S. met the eligibility criteria (autism) to receive special education, and he was subsequently enrolled in the special education program.

Dr. Adler has authored three expert reports and given deposition testimony detailing the child's HIE injuries at birth, and how those HIE injuries continue to

[28] Evaluation Summary Report dated May 18, 2018 ("ESR 2018") (A-505).
[29] *See* 34 C.F.R. § 300.8 & 14 Del. Admin. Code §925.6.6.

affect J.S.S.[30] Dr. Adler referenced four articles during his deposition as well as the DSM-5.[31] At least one of the articles showed an association between autism and HIE. However, Dr. Adler explained during his deposition that ASD is a syndrome consisting of a collection of different symptoms, and most of these experienced by J.S.S. were caused by his HIE, which was diagnosed at birth.[32]

Dr. Adler is the *only* expert designated in this case who has personally examined J.S.S., having seen him three times over a four-year period, on May 22, 2019, June 14, 2019, and March 24, 2023. Dr. Adler issued a report following each assessment, and in these reports Dr. Adler concurs with the early diagnosis of HIE, and opines that this permanent hypoxic brain injury is the cause of J.S.S.'s neurodevelopmental and behavioral disabilities for which he will require lifelong care.[33]

By 2023, when the trial court's opinions on Defendant's motions were rendered, J.S.S. was 7 ½ years old, and he had received extensive medical care and therapies for his HIE birth injury, including physical therapy, speech therapy, occupational therapy, and special education classes. Despite his age, J.S.S. continued

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[30] Dep. Tr. Daniel Adler, MD (A-147); *See also* Dr. Adler's First, Second, and Third Reports (A-61, A-144, A-374).
[31] American Psychiatric Association, The Diagnostic and Statistical Manual of Mental Disorders, (5th ed. 2013) (hereinafter ("DSM-5").
[32] Dep. Tr. Daniel Adler, MD 87:4-89:4 (A-169).
[33] Dr. Adler's Reports (A-61, A-144, A-374).

to wear diapers, struggled with maintaining eye contact with others and, when he did communicate, rarely spoke in a full sentence, reflecting his difficulties in verbal expression. He was physically hyperactive, and his attention span was notably short, making it challenging for him to focus on tasks or activities for extended periods. According to his pediatric neurologist, Dr. Fischer, who has treated J.S.S. since birth, J.S.S. will require ongoing assistance with daily living tasks, either from his parents or in a residential facility. Furthermore, it is unlikely that J.S.S. will achieve independence as an adult, necessitating long-term support and care throughout his life. A lifecare plan containing future costs associated with J.S.S.' disability was prepared by Plaintiff's lifecare expert, Jody Masterson, R.N. based upon Dr. Adler's assessment.[34] An updated plan was prepared by her following Dr. Adler's last examination of J.S.S on March 24, 2023.[35]

[34] First Masterson report (A-74)
[35] Second Masterson report (A-386)

## ARGUMENT

### V. THE TRIAL COURT VIOLATED THIS COURT'S HOLDINGS IN *NORMAN V. ALL ABOUT WOMEN* AND *WONG V. BROUGHTON* BY EXCLUDING THE TESTIMONY OF PLAINTIFFS' ONLY CAUSATION EXPERT, WHICH FALLS WITHIN HIS AREA OF EXPERTISE AND IS ADMISSIBLE UNDER *DAUBERT*.

(1) QUESTION PRESENTED:

Did the trial court err in granting summary judgment when it found that Dr. Adler's expert opinion and testimony was unreliable due to lack of a scientifically reliable basis and methodology, despite this Court's precedent in *Norman v. All About Women,* and J.S.S.'s diagnosis of an HIE birth injury which happens to share some overlapping symptoms with ASD? This issue was preserved for appeal.[36]

(2) SCOPE OF REVIEW:

On appeal from a grant of summary judgment, this Court reviews all issues of law *de novo "*to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[37] Additionally, this Court normally applies an abuse of discretion standard when it reviews a trial court's decision to admit or exclude expert testimony.[38] "In

[36] A-237, A-417, A-477.
[37] *Brown v. United Water Del., Inc.*, 3 A.3d 272, 275 (Del. 2010) (*quoting Estate of Rae v. Murphy*, 956 A.2d 1266, 1269-70 (Del. 2008)).
[38] *M.G. Bancorporation v. Le Beay*, 737 A.2d 513, 522 (Del. 1999).

reviewing the motion judge's decision, we review the motion judge's findings of fact 'to determine if they are supported by the record and are the product of a logical and orderly reasoning process.'"[39]

(3) MERITS OF ARGUMENT:

Delaware has adopted the federal standard in *Daubert* and its progeny for admissibility of expert witness testimony under Delaware Rule of Evidence 702.[40] Under DRE 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
b) The testimony is based on sufficient facts or data;
c) The testimony is the product of reliable principles and methods; and
d) The expert has reliably applied the principles and methods to the facts of the case.[41]

Consistent with *Daubert,* Delaware courts apply a five-step test, to determine the admissibility of scientific or technical expert testimony.[42] Under this test, the trial judge must determine whether:

1) The witness is qualified as an expert by knowledge, skill, experience, training or education;
2) The evidence is relevant;

[39] *GMC v. Grenier*, 981 A.2d 524, 527-28 (Del. 2009).
[40] *M.G. Bancorporation,* 737 A.2d 513, 521.
[41] D.R.E. 702.
[42] *Bowen v. E.I. DuPont de Nemours & Co., Inc.,* 906 A.2d 787, 795 (Del. 2006).

3) The expert's opinion is based upon information reasonably relied upon by experts in the particular field;
4) The expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and
5) The expert testimony will not create unfair prejudice or confuse or mislead the jury.[43]

When an expert's testimony is challenged, *Daubert* requires the trial judge to act as a "gatekeeper," not a fact finder, in determining whether the proffered evidence is both "relevant" and "reliable."[44] The court's inquiry "must be solely [focused] on principles and methodology, not on the conclusions that they generate."[45] The party seeking to introduce expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence.[46] Proponents do not need to demonstrate to the judge by a preponderance of the evidence that the opinion is correct, but "[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty, arguably, there are no certainties in science."[47] Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.[48]

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[43] *Id.* (*citing Tolson v. State*, 900 A.2d 639, 645 (Del. 2006); *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004)).
[44] *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597 (1993).
[45] *Id.* at 595.
[46] *Bowen,* 906 A.2d at 795.
[47] *Daubert,* 509 U.S. at 590.
[48] *Id.*

The concurrence in *Daubert* closed with this prescient parting thought "I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role."[49]

While *Daubert* deals with the gatekeeping function of all expert testimony, it is important to note the difference between the scientific principles of many specialties compared to those of the medical arts. The Delaware Superior Court explained these differences well in *State v. McMullen*, citing the Third Circuit and Fifth Circuit, which emphasized that the practice of medicine is an art and cannot be held to the same level of proof as Newtonian science. [50] Accordingly, courts should use caution when applying *Daubert* to medical expert testimony, a s they are "generally not appropriate for assessing the evidentiary reliability of a proffer of expert clinical medical testimony".[51] While each factor of *Daubert* will be addressed herein, the cornerstone of admissibility of medical expert opinion is whether the expert was qualified and used a reliable methodology. Whether the trial court agrees with the opinion is not a factor to be considered.[52]

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[49] *Id*. at 600-601 (Rehnquist concurring).
[50] *State v. McMullen*, 900 A.2d 103, 114 (Del. Super. 2006).
[51] *Id.*, *quoting*, *Moore v. Ashland Chem.*, 126 F.3d 679, 688-690 (5th Cir. 1997), *vacated, on reh'g en banc*, 151 F.3d 269 (5th Cir. 1998).
[52] *In re Paoli R.R. Yard Pcb Litig.*, 35 F.3d 717, 746 (3d Cir. 1994).

The trial court in this case recognized that there is a "strong preference" for admitting expert opinions "when they will assist the trier of fact in understanding the relevant facts or the evidence."[53] "When credible, qualified experts disagree, a litigant is entitled to have the jury, not the trial court, decide which expert to believe."[54] *"Daubert* requires only that the trial court determine whether the proponent of the evidence has demonstrated that scientific conclusions have been generated using sound and reliable approaches.[55]

### 1. Dr. Adler is Qualified as an Expert by Knowledge, Skill, Experience, Training, and Education.

Defendants do not contest that Dr. Adler is a well-qualified expert. However, his qualifications bear repeating here. Dr. Adler is a graduate of the Albert Einstein College of Medicine and has been board certified by the American Board of Psychiatry & Neurology, with a special qualification in child neurology, since 1982.[56] He has examined and treated multiple children with brain damage due to HIE and hundreds of children with autism during his 43 years of experience in child neurology.[57]

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[53] *Norman v. All About Women, P.A.,* 193 A.3d 726, 730 (Del. 2018). *See also*, Order Granting Defs. Motion for Summ. J. (Ex. C).
[54] *Seifert v. Balink,* 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816 (*citing Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1196 (9th Cir. 2005)).
[55] *McMullen*, 900 A.2d at 114; *citing In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994).
[56] Dr. Adler's CV (A-50).
[57] Dep. Tr. Daniel Adler, MD 14:6-15:22 (A-151).

### 2. Dr. Adler's Opinion is Based on Relevant Evidence.

Evidence is relevant if it aids the fact finder and has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[58]

Dr. Adler's testimony is vitally relevant to the most critical issue in this case – causation. He is the sole causation expert for Plaintiff, expected to testify that J.S.S.'s permanent neurodevelopmental and behavioral disorders are caused by his HIE birth injury. Thus, by excluding Dr. Adler's testimony, the trial judge is preventing Plaintiffs from laying the foundation upon which they can establish causation. Dr. Adler's testimony is necessary to establish the baseline for J.S.S.' injuries, and would tend to prove that HIE can in fact cause the type of injuries suffered by J.S.S. It is also critical to the component of special damages in Plaintiffs' case since Plaintiffs' lifecare plan expert formulated Plaintiff's future costs of care based upon Dr. Adler's reports and testimony.

### 3. Dr. Adler's Opinion is Based on Information Reasonably Relied Upon by Experts in his Particular Field.

The trial court erred in excluding the opinions of Dr. Adler when the trial court held that his opinions lack reliability because they were not supported by medical literature and that he did not employ a reliable methodology.

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[58] *Sheehan v. Oblates of St. Francis de Sales,* 15 A.3d 1247 (Del. 2011). D.R.E. 401.

The third requirement of *Daubert* is that the expert rely on information reasonably relied upon by experts in their particular field.[59] However, this Court has recognized that the third prong of *Daubert* is limited to safeguarding against the use of unreliable hearsay.[60] "The factor does not pertain to information which the expert has not relied on."[61] In *Norman*, this Court held that a medical expert in a medical negligence case, testifying on standard of care and causation, was sufficient when relying on training, experience, and a review of medical records and deposition transcripts.[62] This Court further held that " [m]edical literature or peer reviewed publications may be useful factors in an appropriate case, and may be relevant to the defense in this case, but they have no bearing on the admissibility of [the expert's] opinions."[63]

This Court affirmed its position in *Wong v. Broughton* that an expert's opinion need not be supported by medical literature.[64] In *Wong*, the defendants argued that Plaintiffs' expert should have been excluded because his "opinion was not based on information reasonably relied upon by experts in his field because he failed to cite any literature for excluding . . . other causes of [the baby's] injury and failed to

[59] D.R.E. 703; *Norman*, 193 A.3d at 731.
[60] *Norman*, 193 A.3d at 731.
[61] *Id.*
[62] *Id.*.
[63] *Id. See also*, *Wong v. Broughton*, 204 A.3d 105 (Del. 2018); *Dale v. State*, 301 A.3d 1194, 2023 WL 4628801 (Del. Jul. 19, 2023).
[64] *Wong*, 204 A.3d at 111.

distinguish effectively [other literature], which conflicts with his opinions."[65] The defendants in *Wong* cited to literature and the plaintiffs' expert did not provide any literature to dispute the defendants' literature, did not distinguish the literature, which conflicted with his opinions, and did not provide any literature to support his opinion.[66] This Court again held that "the requirement that the expert's opinion be based upon information reasonably relied upon by experts in the particular field is a guard against the use of inadmissible hearsay and "does not pertain to information which the expert has not relied on.'"[67]

Yet the trial court has violated that well-established principle here. Contrary to this Court's guidance in *Norman*, the trial court struck Plaintiff's only causation expert, who is the only expert by any party who personally examined J.S.S., because Dr. Adler's opinion relied primarily on factors other than medical literature. *Norman* instructs that so long as Dr. Adler's opinion is based on some information reasonably relied upon by experts, the credibility of his opinion then becomes an issue of fact for a Delaware jury to decide.

Finally, while *Norman* instructs that a review of medical literature is not a mandatory requirement under *Daubert*, it is crucial to note that no known literature

[65] *Id.*
[66] *Id.*
[67] *Id.*

disputes the association between HIE and ASD[68], and Defendants have failed to produce any literature or evidence to counter this association in court. In other words, this is not an "either-or" situation where a neurodevelopmental or behavioral disorder must be defined as either HIE or ASD related. Rather, the two diagnoses can co-exist.

The Ohio Court of Appeals has recently addressed a case with strikingly similar facts to the present case in *Ellis v. Fortner.*[69] In *Ellis* the child was diagnosed with HIE at birth and subsequently diagnosed with autism.[70] The plaintiffs' expert in *Ellis* disagreed that the child even had autism. Rather, the plaintiff's expert in *Ellis*, like Dr. Adler, felt that the child's intellectual impairment, sensory motor deficits, speech and language impairment, impaired attention span, impaired social maturity, and impaired persona and adaptive skills were caused by the HIE and not autism.[71] The *Ellis* trial court was presented with three articles supporting plaintiff's expert opinion, one of which was Singh, R., Turner, R. C., Nguyen, L., Motwani, K., Swatek, M., & Lucke-Wold, B. P. (2016), *Pediatric Traumatic Brain Injury and Autism: Elucidating Shard Mechanisms*, Behavioral Neurology, 2016, which provided the below chart to understand the shared behavioral symptoms between

[68] Dep. Tr. Daniel Adler, MD 154:17-155:5 (A-186).
[69] 2021 WL 1226675 (Ohio Ct. App. 2021).
[70] *Ellis v. Fortner*, C.V.-2016-07-2898 at **2 (*Ohio C.P. 2018).
[71] *Id. at *3.*

ASD and traumatic brain injury ("TBI") (HIE is a form of pediatric TBI) which HIE causes:[72]

TABLE 1: Shared behavioral symptoms between ASD and pediatric TBI.

| Symptom | ASD | Pediatric TBI | Refs |
|---|---|---|---|
| ADHD | X | | [13] |
| Anxiety/stress | X | X | [13] |
| Balance/coordination | X | X | [14] |
| Communication deficits | dx | X | [15] |
| Depression | | X* | [13] |
| Emotional-empathy lacking | | X | [13] |
| Emotional dysregulation | | X | [13] |
| Emotional recognition | X | X* | [13] |
| Executive function impaired | X | X | [16] |
| Family relationships | | X | [13] |
| Headaches | | X | [12] |
| Language deficits/delays | dx | X | [17] |
| Mental retardation | X | | [11] |
| Repetitive behaviors | dx | | [3] |
| Restricted Interests | dx | | [18] |
| Seizures | X | X | [19] |
| Self-regulation behavior impaired | X | X | [13] |
| Sensory dysfunction | dx | | [20] |
| Social-loneliness and isolation | | X | [21] |
| Social interaction/skills | dx | X | [13] |

X: highly prevalent; dx: part of diagnostic criteria; *: greatest area of deficit in TBI.

The expert *Ellis* withstood the defendant's *Daubert* challenge, the matter proceeded to trial where the verdict was for the Plaintiffs, appealed, and the trial court's decision was affirmed.[73]

[72] *Ellis v. Fortner*, C.V.-2016-07-2898 at *3 (Ohio C.P. 2018).
[73] *Ellis v. Fortner*, 2021 WL 1226675 (Ohio Ct. App. 2021).

Dr. Adler's professional opinion, supported by medical literature, establishes a clear association between J.S.S' HIE injury and the neurodevelopmental and behavioral challenges necessitating lifelong care. Moreover, Dr. Adler has noted that J.S.S. has nine of the symptoms listed in the chart (ADHD, balance/coordination, communication deficits, emotional recognition, language deficits/delays, repetitive behaviors, seizures, self-regulation behavior impaired, social skills) with only two of those being present in ASD alone (ADHD and repetitive behaviors). Notably, Defendants' opposition to Dr. Adler's opinion lacks substantial backing, relying solely on legal arguments rather than medical expertise or contrary literature. Indeed, reputable medical literature further supports Dr. Adler's opinion. According to the DSM-5, a standardized guide published by the American Psychiatric Association, ASD symptoms can stem from various biological or environmental factors beyond genetic predisposition, which demonstrates the plausibility of an HIE-ASD link.[74]

**4. Dr. Adler's Testimony Will Assist the Trier of Fact to Understand the Evidence and to Determine a Fact in Issue.**

Under *Daubert*, the preliminary assessment to determine if testimony will assist the trier of fact requires the trial judge to determine "[1] whether the reasoning or methodology underlying the testimony is scientifically valid, and [2] whether that

[74] DSM-5 at 51.

reasoning or methodology properly can be applied to the facts in issue."[75] The trial court accepted Defendants' flawed argument that Dr. Adler did not "utilize a differential diagnosis or other reliable method to support his specific causation opinion in this case".[76] In its first decision, the trial court ruled that "Dr. Adler did not employ a reliable methodology to conclude that J.S.S.' ASD was caused by HIE as opposed to another possible cause."[77]

Generally, when a disease or disorder has several possible causes, an expert shall employ a definitive scientific process, commonly referred to as a differential diagnosis, to "rule in and rule out" other potential causes of the disorder before reaching a conclusion.[78] "A differential diagnosis is deemed reliable for *Daubert* purposes if it is rendered after the physician conducts a physical examination, takes a medical history, reviews clinical tests, including laboratory tests, and excludes obvious (but not all) alternative causes."[79] "Furthermore, a differential diagnosis is not considered unreliable simply because 'no epidemiological studies, peer-reviewed published studies, animal studies, or laboratory data are offered in support

[75] *Daubert,* 509 U.S. at 592-593.
[76] Defs. First Mot. at 15 (A-228).
[77] Mem. Op. at 14. (Exhibit A).
[78] *Scaife v. AstraZeneca LP*, 2009 WL 1610575, at *16 (Del. Super. Jun. 9, 2009) (citing *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 854 (Del. Super. 2000)).
[79] *McMullen,* 900 A.2d at 1167 (Del. Super. 2006) (citing *Bowen v. E.I. DuPont De Nemours and Co., Inc.*, 2005 WL 1952859, at * 10 (Del. Super. Ct. June 23, 2005), *aff'd Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787 (Del. 2006).

of the opinion.'"[80] However, an expert "need not conduct every possible test to rule out all possible causes of a patient's [injury], so long as he or she employed sufficient diagnostic techniques to have good grounds for his or her conclusion."[81]

Dr. Adler was called upon by Plaintiffs in this case to analyze the medical records and examine the child J.S.S. Those records already contained a diagnosis of HIE by J.S.S.' treating doctors shortly after birth, and while he was still in the NICU. Dr. Adler's task was not to form novel findings unless the analysis of the records did not stand up to his scrutiny. More importantly, the original diagnosis of HIE was made by two treating doctors before Dr. Adler was retained as an expert, thereby obviating the need for further differential diagnosis.[82] Defendants do not appear to challenge this original diagnosis of HIE, rather they question the cause of J.S.S.' neurological and neurodevelopmental disabilities – *i.e.* were these disabilities caused by HIE or ASD? Tellingly, there is no evidence of other possible causes identified by either party.

In formulating an expert opinion Dr. Adler utilizes his training and 43 years of experience as a pediatric neurologist, incorporating knowledge of abnormal

[80] *McMullen*, 900 A.2d at 117.
[81] *McMullen,* 900 A.2d at 116 (*citing* the Reference Manual on Scientific Evidence at 481).
[82] See, *Dale v. State*, 301 A.3d 1194, 2023 WL 4628801 (Del. Jul. 19, 2023) *quoting, Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 807 (3d Cir. 1997) (" it is perfectly acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners.").

central nervous system development in children. J.S.S.' abnormal brain development stemming from the HIE birth injury serves as the foundational basis for his opinions. His opinions were derived from a comprehensive review of all medical records, his own examinations of the child, his extensive practice and experience, as well as reference to medical textbooks and literature.[83] Thus, his opinions were derived by using a differential diagnosis, even if he did not use the magic words until his third report.

When evaluating a child for possible ASD, Dr. Adler utilizes the "Diagnostic and Statistical Manual, Fifth Edition ("DSM-5") Diagnostic Criteria for 299.00 Autism Spectrum Disorder (ASD)," a standardized guide published by the American Psychiatric Association that healthcare providers commonly use to diagnose ASD.[84] The DSM-5 is a tool that guides various types of clinicians working in the mental health and psychiatric fields. The guide advises:

> "The symptoms contained in the respective diagnostic criteria sets do not constitute comprehensive definitions of underlying disorders, which encompass cognitive, emotional, behavioral, and physiological processes that are far more complex than can be described in these brief summaries. Rather, they are intended to summarize characteristic syndromes of signs and symptoms that point to an underlying disorder with a characteristic developmental history, biological and environmental risk factors, neuropsychological and physiological correlates, and typical clinical course."[85]

[83] Dr. Adler Third Report (A-374).
[84] DSM-5 at 5 (Diagnostic Criteria for 299.00 Autism Spectrum Disorder) (emphasis added)
[85] DSM-5 Use of the Manual at 19.

The DSM-5 instructions continue with more warnings that the manual is a static guide that is useful for classifying things but requires the use of a skilled expert to sort out exactly what they are seeing within the clinical setting. The judgment of the expert utilizing the DSM-5 is placed paramount in the instructions of how to approach cases with this tool:

> "The case formulation for any given patient must involve a careful clinical history and concise summary of the social, psychological, and biological factors that may have contributed to developing a given mental disorder. Hence, it is not sufficient to simply check off the symptoms in the diagnostic criteria to make a mental disorder diagnosis."[86]

The DSM-5 does not explicitly "rule out" other potential causes for autism, rather it emphasizes a comprehensive assessment approach that considers various factors, including medical, environmental, and psychosocial influences, when diagnosing ASD. The collection of symptoms bundled together as autism may also be present due to a separate cause other than what caused the autism.

In his third report, Dr. Adler provided a historical context of an autism diagnosis, highlighting the evolution of diagnostic criteria from the DSM-1 to the DSM-5. He emphasized that autism is not solely a genetic disorder, as it can be associated with various developmental disorders or neurological disturbances. He further explained that the developmental milestones of J.S.S., as documented in the

[86] DSM-5 Approach to Clinical Case Formation at 19 (emphasis added).

medical records, exhibit a pattern indicative of neurological impairment caused by the HIE birth injury rather than solely genetic predisposition. [87]

Dr. Adler does not disagree with J.S.S.'s diagnosis of autism. Upon his review of the medical records, and his three examinations of J.S.S., Dr. Adler confirmed that "[t]he behaviors exhibited by [J.S.S.] fulfill the criteria set in the DSM-5 for autism."[88] There is a distinction, however, between the behaviors fulfilling the applicable criteria for the diagnosis of ASD and concluding that the ASD is the cause of J.S.S.' behaviors. The criteria itself calls upon clinicians to use their judgment in evaluating whether the behaviors have other origins. Specifically, subsection E of the diagnostic criteria permits the diagnosis provided that, "[t]hese disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay."[89] The criteria also emphasize the high occurrence of comorbid conditions in ASD patients.[90]

[87] Dr. Adler's Third Report (A-374).
[88] *Id*. at 377.
[89] DSM-5 at 51 (emphasis added).
[90] *See* DSM-5 at 58 ("about 70% of individuals with autism spectrum disorder may have one comorbid mental disorder, and 40% may have two or more comorbid mental disorders.")

**5. Ultimately Dr. Adler took these criteria into account when examining J.S.S., and it became part of his conclusion that HIE is the cause of J.S.S.' behaviors, and some of the symptoms associated with the child's HIE are also listed as characteristics of ASD.[91]Dr. Adler's Testimony Will Not Create Unfair Prejudice or Confuse or Mislead the Jury.**

D.R.E 403 permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.[92]

The probative value of Dr. Adler's testimony, which is crucial in elucidating the complex and highly relevant issue of the cause of J.S.S.'s injuries, substantially outweighs any potential dangers outlined in D.R.E. 403. Rather than posing risks of unfair prejudice, confusion, or misleading the jury, Dr. Adler's testimony serves to clarify and inform the jury about the causation of J.S.S.' injuries. Therefore, allowing Dr. Adler's testimony is essential for a comprehensive understanding of the case, including identification of the costs of J.S.S.' medical treatment and lifecare, and any potential concerns warranting the exclusion of his testimony would be outweighed by its significant relevance and importance to the proceedings.

[91] Dep. Tr. Dr. Adler, 88:22-89:4 (A-169-70) ("…the perinatal events are the competent producing cause of all of [J.S.S.]' neurological and neurodevelopmental disabilities, his motor issues, his cognitive impairment, his language issues and his behavioral problems.")
[92] D.R.E. 403.

## II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' REQUEST FOR A *DAUBERT* HEARING

(1) QUESTION PRESENTED

Did the trial court err in denying Plaintiffs' request for a *Daubert* hearing, which would have permitted Dr. Adler from fully explaining his opinions and methodology? This issue was preserved for appeal. A-426.

(2) SCOPE OF REVIEW

The Court applies an abuse of discretion standard when it reviews a trial court's decision to deny a request for a *Daubert* hearing.[93]

(3) MERITS OF ARGUMENT

An underlying issue in this case, as well as other cases that lack trial testimony or a *Daubert* hearing, is that the expert's opinions, and the foundation for those opinions, may not be fully developed because the expert did not fully describe their methodology with the magic words, "differential diagnosis" in their report or the examining attorney did not ask the enough questions during the discovery deposition.

In *State v.* McMullen, the trial court held a *Daubert* hearing inquire about the expert's methodology where the opposing party disputed the science behind the proffered expert testimony.[94] Plaintiffs in this instant case requested a *Daubert*

[93] *Hudson v. State*, 2024 WL 91187, 2024 Del. LEXIS 13, *19.
[94] *McMullen*, 900 A.2d at 105.

hearing to fully develop the testimony of Dr. Adler prior to trial.[95] The trial court abused its discretion in declining that request.

Dr. Adler described his methodology during his deposition - that he reviewed literature, examined J.S.S. and reviewed J.S.S.'s medical records.[96] Dr. Adler is a medical doctor, and his methodology addresses the concerns between the trial court's gatekeeping function of an expert opinion and the admissibility of the expert's opinion at trial. Dr. Adler's opinions have been disclosed in the form of three expert reports and his deposition testimony. His opinions have unlocked the gate to trial. However, the admissibility of his opinions at trial will require an additional hurdle, one of which is the foundation of his opinions. Dr. Adler's opinions and his methodology have not fully been developed on the record because he has not been presented to the court by way of a *Daubert* hearing or to the jury by way of direct examination.

Plaintiffs aver that the trial court's March 1, 2023 Order was issued in error, and that it should be reversed, and that Dr. Adler should be permitted to testify consistent with his opinions. However, in the alternative, the trial court's denial of a *Daubert* hearing was an abuse of discretion.

[95] *See*, Pls. Resp. to Defs. Second Mot. (A-417).
[96] Adler Dep.: 35:4-37:7 (A-156).

## III. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF PLAINTIFFS' LIFE CARE PLANNING EXPERT, WHICH IS PREMISED UPON DR. ADLER'S PROPOSED TESTIMONY

(1) QUESTION PRESENTED

Did the trial court err in excluding the testimony of Plaintiffs' Life Care Plan expert, Jody Masterson, RN, which is premised on the opinion of Dr. Adler, thus depriving the Plaintiffs of essential evidence for establishing damages and resulting in unfair prejudice to the Plaintiffs' case? This issue was preserved for appeal.[97]

(2) SCOPE OF REVIEW

The Court applies an abuse of discretion standard when it reviews a trial court's decision to admit or exclude testimony.[98]

(3) MERITS OF ARGUMENT

On December 4, 2020, after first evaluating relevant medical records of J.S.S. and his mother, Dr. Adler's reports/opinions, and interviewing J.S.S.' parents, Plaintiffs' life care plan expert, Jody Masterson, RN, prepared an initial lifecare plan.[99] As a result of Dr. Adler's subsequent reports, the passage of three years, and a second interview of the parents and J.S.S at their home, Ms. Masterson prepared an addendum to the life care plan dated August 8, 2023, addressing primarily

[97] (A-417).
[98] *M.G. Bancorporation v. Le Beay*, 737 A.2d 513, 522 (Del. 1999).
[99] Jody Masterson Life Care Plan (Dec. 4, 2020) (A-74)

inflationary changes since her initial report.[100] This plan was to serve as the basis for her proposed trial testimony identifying J.S.S.' future treatment and lifecare needs related to his neurodevelopmental and behavioral disabilities caused by his HIE birth injury.

In response to the Defendants' Second Motion in Limine, the trial court expanded upon the March 1, 2023 Opinion in its December 15, 2023, opinion by also excluding the proposed testimony of Nurse Masterson, Plaintiffs only lifecare expert.[101] The court's exclusion of both expert's opinions effectively deprived Plaintiffs of any reasonable opportunity to establish both causation and special damages at trial.

The trial court offered no new grounds for excluding Plaintiffs' causation and lifecare experts, stating simply that these experts were precluded from testifying "[…] for the same reasons set out in the Court's Memorandum [March 1, 2023] Opinion."[102] No further explanation was provided by the court for its total exclusion of both experts' testimony despite the additional medical literature cited by Dr. Adler, the addition of the magic words "differential diagnosis," the additional case law provided by Plaintiffs, and the absence of any additional evidence from Defendants

[100] Jody Masterson Revised Life Care Plan (Aug. 8, 2023) (A-386).
[101] Order Upon Defs. Second Mot. at 12 (Exhibit B).
[102] *Id.* (emphasis added).

following the March 1, 2023 opinion. Moreover, the court denied Plaintiffs' request for an evidentiary hearing prior to its ruling, whereby Dr. Adler could have explained his opinion firsthand.[103] As a result, the court was left with nothing but attorney argument regarding nuances of Dr. Adlers' proposed testimony, which served as a predicate for Ms. Masterson's trial testimony.

[103] Pls. Resp. to Defs. Second Mot. (A-417).

## V. THE TRIAL COURT ERRED IN FAILING TO RECONSIDER ITS MARCH 1, 2023 RULING UNDER DEL. SUPER. CT. CIV. R. 60 ONCE PLAINTIFFS BROUGHT CONTROLLING CASE LAW TO ITS ATTENTION.

(1) QUESTION PRESENTED

Did the trial court err in declining to reconsider the March 1, 2023 opinion under Del. Super. Ct. Civ. R. 60, despite Plaintiffs' request, thereby failing to rectify the unfair constraint placed on Plaintiffs' sole causation expert and its prejudicial effect on Plaintiffs' case? This issue was preserved for appeal.[104]

(2) SCOPE OF REVIEW

Review of a trial court's granting or denial of a Del. Super. Civ. R. 60 motion is reviewed for an abuse of discretion.[105]

(3) MERITS OF ARGUMENT

During oral argument on Defendants' Second Motion in Limine, Plaintiffs' counsel asked the court to revisit the original March 1, 2023 opinion, pursuant to Del. Super. Civ. R. 60 ("Rule 60"), because of the extreme prejudice and draconian effect on Plaintiffs' case that would result from the exclusion of Plaintiffs' sole causation expert.[106] The trial court declined to revisit its ruling stating "there were no extraordinary circumstances warranting reconsideration" and "a fair reading of

[104] (A-428).
[105] *Simpson v. Simpson*, 2019 Del. LEXIS 388, *11.
[106] Oral Argument Tr. Defs. Second Mot. (A-428).

the [Plaintiff]'s argument revealed it to be an untimely 'Rule 59(e) motion for reargument in disguise.'"[107] This refusal violates the nature and purpose of Rule 60. The trial court also claimed that its March 1, 2023 Order addressed *Norman* because it was cited in a footnote.[108]

By establishing Rule 60, Delaware's system of jurisprudence recognizes that lawyers and judges, like all individuals, are susceptible to errors. The rule serves as a safety net, allowing for the correction of such errors or injustices. It provides a mechanism through which parties can bring forth new evidence, address newly discovered facts, rectify procedural errors, or challenge judgments tainted by fraud or misconduct.[109] Unlike the Federal counterpart, Delaware Superior Court Civil Rule 60 has no time limitation.[110]

In essence, Rule 60 reinforces the principle that we are all human and subject to making mistakes. It underscores the importance of fairness and justice within the legal system by providing a means to rectify errors and ensure that judgments accurately reflect the merits of the case.

By denying Plaintiffs' request to revisit the trial court's March 1, 2023 opinion, based on the timing of Plaintiffs' request, the court ignored the clear

[107] Order Granting Summary Judgment (Exhibit C).
[108] Order Upon Defs. Second Mot at 11 (Exhibit B).
[109] Del. Super. Ct. Civ. R. 60.
[110] *Robins v. Garvine*, 136 A.2d 549, 552 (Del. 1957).

conflicts of the opinion with precedent established by this Court in *Norman*. This oversight was raised in response to Defendants' Second Motion *in Limine* when Plaintiffs first became aware of the controlling case law. None of counsel representing the parties previously addressed *Norman*. Granted, the trial court did cite to *Norman* in its March 1, 2023 Order for the sole purpose of defining the *Daubert* standard in that "[t]here is a 'strong preference' for admitting expert opinions 'when they will assist the trier of act in understanding the relevant facts or the evidence.'"[111]

However the analysis in the March 1, 2023 Order, which excluded Dr. Adler's opinion, *inter alia*, for lack of supporting literature of his expert opinion, relied on *Wilant v. BNSF Ry. Co.*, a Delaware Superior Court decision, which held an "association between two conditions are not, standing alone, sufficient evidence to support an opinion as to causation."[112] In *Wilant* an employee inhaled diesel fumes years prior and alleged that those fumes caused his bladder cancer *years prior*.[113] The literature that the challenged expert relied on stated that there was a relative risk ratio of diesel fumes causing bladder cancer no greater than those not exposed to diesel.[114] The Superior Court in *Wilant* recognized that if there was no greater risk

[111] *Scottoline*, 2023 WL 2325701; 2023 Del. Super. LEXIS 101, *8
[112] *Scottoline*, 2023 WL 2325701; 2023 Del. Super. LEXIS 101, *14, *citing*, *Wilant v. BNSF Ry. Co.*, 2020 WL 2467076; 2020 Del. Super. LEXIS 227.
[113] *Wilant*, 2020 WL 2467076; 2020 Del. Super. LEXIS 227, *1 (emphasis added).
[114] *Wilant*, 2020 WL 2467076; 2020 Del. Super. LEXIS 227, *6

of those exposed to diesel of developing bladder cancer than those who were not exposed to diesel fumes then the causal link could not be established.[115] It is important to note that *Wilant* did not cite to *Norman*.

In the instant case however, J.S.S. has been diagnosed with HIE which is generally accepted a cause the neurodevelopmental and cognitive delays experienced by J.S.S. Dr. Adler's opinion is that those delays were caused by the HIE, which was allegedly caused by the negligent medical care of Defendants' employees. Furthermore, Dr. Adler has explained that autism is the label given to the group of some of the symptoms that J.S.S. is experiencing. It is up to the jury to determine whether those delays experienced by J.S.S. are caused by his HIE or some other unknown cause, which also has caused his autism.

[115] *Wilant*, 2020 Del. Super. LEXIS 227, *8

## CONCLUSION

For all of the aforementioned reasons, Plaintiffs respectfully submit that they are legally entitled to the admission of Dr. Adler's and Nurse Masterson's testimony at trial and therefore the contrary rulings of the Delaware Superior Court should be reversed. In the alternative, Plaintiffs respectfully submit that this case should be remanded so that a *Daubert* hearing may occur so that the record of Dr. Adler's methodology may be fully understood and at that time the trial court may rule on the admissibility of his opinions.