



# Seifert v. Balink, 888 N.W.2d 816 (Wisc. S.Ct. 2017)

Topics Covered: Abusive litigation against physicians

## **Outcome: Somewhat unfavorable**

### **Issue**

The principal issue in this case was whether a medical expert's testimony, based primarily on his personal experience rather than on published studies, was properly admitted in a medical malpractice suit.

### **AMA interest**

The AMA supports state medical societies in combating lawsuit abuse.

### **Case summary**

Kay Balink, MD, a family practitioner, provided prenatal care for Braylon Seifert's mother. At the start of her pregnancy the mother weighed 269 pounds. During the course of her pregnancy she gained another 36 pounds. For this and other reasons, Dr. Balink recommended that Braylon be delivered through induced labor.

Braylon's mother followed Dr. Balink's recommendation, but the induced delivery proved difficult. After pushing for one hour and failing to make significant progress, his mother became exhausted. Dr. Balink then tried a vacuum device to assist in the delivery. The crown of Braylon's head emerged from the birth canal but was retracted. This led Dr. Balink to believe that Braylon's shoulders were stuck inside the canal and was causing a condition known as shoulder dystocia. Dr. Balink then employed other techniques to facilitate delivery. Braylon was born with nerve damage from oxygen depletion, which resulted in permanent impairment of his left arm.

Through his parents, Braylon sued Dr. Balink and Dr. Balink's insurance company for medical negligence. The plaintiffs maintained that Dr. Balink should not have performed a vacuum assisted birth and had applied excessive traction to dislodge Braylon's shoulder. The defendants argued that Dr. Balink had met the standard of care, and it was the forces associated with the mother's contractions and pushing, rather than the efforts of Dr. Balink, that had caused the injury.

The plaintiffs proffered Jeffrey Wener, MD, an obstetrician/gynecologist, as an expert witness on the proper standard of care. Dr. Wener opined that Dr. Balink had made several mistakes in both the predelivery examinations and during the birth itself, as a result of which her care fell below accepted standards. He based his opinion on his "holistic" experiences as an obstetrician/gynecologist, rather than on specific findings or recommendations in the medical literature.

The defendants attempted to exclude Dr. Werner's testimony, arguing that it failed the standards of admissibility set forth under the applicable Wisconsin law. The trial court found sufficient elements of reliability in the testimony to allow its admission. The jury found for Braylon and his parents.

Dr. Balink and her insurance company appealed to the Wisconsin Court of appeals, which affirmed. The defendants appealed to the Wisconsin Supreme Court.

On January 6, 2017, in a split decision, the Supreme Court affirmed. It found that Dr. Wener could testify based on his personal, anecdotal experiences, so long as those experiences were based on reliable principles and methods. The dissenting opinion found that the majority had focused on the wrong issue. Dr. Wener's testimony went to his own standard of care, but the proper measure should have been the standard of care for a family practitioner delivering a baby. As to what that standard was, Dr. Wener had not testified.

### **Litigation Center involvement**

The Litigation Center, along with the Wisconsin Medical Society filed an *amicus* brief to the Wisconsin Supreme Court. The brief argued against the admissibility of Dr. Wener's testimony.

Wisconsin Supreme Court brief