Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinion handed down on the **13th day of April, 2022** are as follows:

PER CURIAM:

2021-C-00763 KIMBERLY BROOKE LABAUVE, ET AL. VS. LOUISIANA MEDICAL MUTUAL INS. CO., ET AL. (Parish of Jefferson Davis)

AFFIRMED IN PART, REVERSED AND VACATED IN PART, REMANDED. SEE PER CURIAM.

Weimer, C.J., dissents in part and assigns reasons.

Genovese, J., concurs in part, dissents in part, and assigns reasons.

Crain, J., concurs.

SUPREME COURT OF LOUISIANA

No. 2021-C-00763

KIMBERLY BROOKE LABAUVE, ET AL.

VS.

LOUISIANA MEDICAL MUTUAL INS. CO., ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Jefferson Davis

PER CURIAM

We granted certiorari in this case for the primary purpose of addressing two narrow issues: (1) whether any errors in the district court's evidentiary rulings interdicted the jury's fact-finding process; and (2) if so, whether the court of appeal erred in reviewing the record de novo.

UNDERLYING FACTS AND PROCEDURAL HISTORY

The underlying facts of this complex case are discussed in the opinion of the court of appeal, as reported at *LaBauve v. Louisiana Med. Mut. Ins. Co*., 19-0848 (La. App. 3 Cir. 4/28/21), 318 So.3d 983. For purposes of the issues currently before us, it suffices to say this litigation arises from a medical malpractice suit brought by plaintiffs, individually and on behalf of their minor daughter, against Dr. Daryl Elias, Jr. and his insurer. Plaintiffs alleged Dr. Elias committed malpractice during the child's delivery, causing a separated right shoulder and a broken clavicle. Plaintiffs also alleged the child suffered permanent injury when the five nerve roots of her brachial plexus (the system of nerves that control arm and shoulder movement) were completely and partially avulsed (removed) from the spinal cord, causing her to lose the use of her right arm.

Defendants retained Dr. Michele Grimm as an expert in biomedical engineering and brachial plexus injury mechanics. Dr. Grimm intended to testify the child's injuries could have been caused by maternal forces during the delivery.

Among other experts, plaintiffs retained Dr. Scott Kozin, the child's treating orthopedic surgeon. Dr. Kozin intended to testify that the cause of the child's injuries was the force applied by Dr. Elias and not maternal forces of labor.

Plaintiffs filed a motion in limine to exclude the testimony of Dr. Grimm. Defendants filed a motion in limine to exclude Dr. Kozin's testimony insofar as he opined the cause of the child's injuries was the force applied by Dr. Elias.

After a pre-trial hearing, the district court denied plaintiff's motion to exclude Dr. Grimm's testimony. The court also granted defendants' motion in limine to exclude Dr. Kozin's testimony as to the cause of the child's nerve injury.

The case then proceeded to a jury trial. At the conclusion of trial, a jury returned a verdict in favor of defendants, finding the treatment provided by Dr. Elias to the child did not fall below the applicable standard of care for an obstetrician gynecologist.

Plaintiffs appealed. In a divided opinion, the majority of the court of appeal found the district court abused its discretion in refusing to admit Dr. Kozin's testimony as to the cause of the child's injury and further determined the district court abused its discretion in admitting the testimony of Dr. Grimm. The court found the combination of the admission of Dr. Grimm's testimony and the exclusion of Dr. Kozin's testimony constituted "legal error and an abuse of discretion that prejudiced the jury, leading to its inconsistent determination." *LaBauve,* 318 So.3d at 994. As a result, the court of appeal conducted a de novo review of the record. Based on this review, the court of appeal concluded the evidence in the record established that Dr. Elias breached the standard of care by applying excessive force during the child's

delivery. The court then rendered judgment in favor of plaintiffs and awarded damages.

Upon application of defendants, we granted certiorari to review the correctness of the court of appeal's determination. *LaBauve v. Louisiana Med. Mut. Ins. Co.*, 21-0763 (La. 10/5/21), 325 So.3d 1065.

DISCUSSION

The court of appeal found the district court committed prejudicial legal error in excluding Dr. Kozin's testimony in part and permitting Dr. Grimm to testify. Prior to addressing these specific evidentiary rulings, we find it helpful to briefly review the standards of admission of expert testimony.

It is well settled that a district court has wide discretion in determining whether to allow a witness to testify as an expert, and its judgment will not be disturbed by an appellate court unless it is clearly erroneous. *Mistich v. Volkswagen of Germany, Inc*., 95-0939 (La. 1/29/96), 666 So.2d 1073, 1079. Nonetheless, the jurisprudence has recognized the district court's discretion is not absolute. *Clement v. Griffin*, 91-1664, 92-1001, 93-0591, 93-0648 (La. App. 4 Cir. 3/3/94), 634 So.2d 412, 424, *writs denied*, 94-0717, 94-0777, 94-0789, 94-0791, 94-0799, 94-0800 (La. 5/20/94), 637 So.2d 478.

In *State v. Foret*, 628 So.2d 1116, 1122-23 (La. 1993), we adopted the four non-exclusive factors established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), to be considered by district courts in determining the admissibility of expert testimony:

> (1) the "testability" of the scientific theory or technique;
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> (2) whether the theory or technique has been subjected to peer review and publication;
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> (3) the known or potential rate of error; and

> (4) whether the methodology is generally accepted in the scientific community.

Subsequently, in *Cheairs v. State ex rel. Dept. of Transp. & Dev.*, 03-0680 (La. 12/3/03), 861 So.2d 536, 542–43 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548 (11th Cir. 1998)), we held that admission of expert testimony is proper only if all three of the following factors are established:

> (1) the expert is qualified to testify competently regarding the matters he intends to address;
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> (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
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> (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

In 2014, the legislature amended Article 702 of the Code of Evidence to provide:

> 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:
>
> (1) 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;
>
> (2) The testimony is based on sufficient facts or data;
>
> (3) The testimony is the product of reliable principles and methods; and
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> (4) The expert has reliably applied the principles and methods to the facts of the case.

Although this amendment ostensibly adds two requirements to the three-prong inquiry adopted in *Cheairs*, these additions do not change the law, but are instead grounded in the longstanding principles recognized in *Daubert*. *Blair v. Coney*, 19-0795 (La. 4/3/20), __ So.3d __, *reh'g denied*, 19-0795 (La. 7/9/20), 298 So.3d 168.

With these general precepts in mind, we now turn to a review of the specific rulings at issue.

Exclusion of Dr. Kozin's Testimony

Plaintiffs sought to call Dr. Kozin as an expert in pediatric orthopedics to testify that the child's injuries were caused by the force applied by Dr. Elias during the delivery. The district court excluded this testimony, reasoning that Dr. Kozin was not qualified to testify as to the standard of care of an obstetrician such as Dr. Elias and any testimony by him in this regard would be prejudicial. In finding the district court erred, the court of appeal acknowledged that Dr. Kozin, as an orthopedist, was not qualified to testify as to the standard of care of an obstetrician, but found he was qualified to render an opinion on the diagnosis and treatment of brachial plexus injuries in newborns as he devoted a large portion of his practice to this specialty. Defendants urge us to find the court of appeal erred in reversing the ruling of the district court limiting Dr. Kozin's testimony.

Based on our review of the record, we find no error in the judgment of the court of appeal insofar as it reversed the district court's ruling limiting Dr. Kozin from testifying as to the cause of the child's injuries. The record establishes Dr. Kozin is the founder and Chief of Staff of the Brachial Plexus Center at Shriners Hospital in Philadelphia. He specializes in brachial plexus injuries in newborns and has treated hundreds of children with this type of injury from all over the world.

We recognize that Dr. Kozin, as an orthopedic surgeon, is not qualified to give an opinion on the standard of care applicable to an obstetrician such as Dr. Elias. However, a review of Dr. Kozin's excluded testimony reveals he did not render any opinions on whether Dr. Elias breached the standard of care or was otherwise negligent. Rather, he simply testified as to the cause of the child's injury, explaining that based on his expertise, he was "certain the force applied by the delivering physician led to this injury."

Our jurisprudence has long held that the mere fact that a medical procedure is unsuccessful "is not per se an indication of medical malpractice." *Campo v. Correa*, 01-2707 (La. 6/21/02), 828 So.2d 502, 513 (quoting *Gunter v. Plauche*, 439 So.2d 437, 439 (La. 1983)). Similarly, Dr. Kozin's opinion that the actions of Dr. Elias caused the child's injury does not amount to an opinion on the question of whether medical malpractice occurred in this case or whether Dr. Elias breached the standard of care. It is simply an opinion of the cause of the injury given by an expert qualified to do so.

In conclusion, we find Dr. Kozin was qualified to testify as to causation and his opinion on this issue was relevant and probative. The district court erred in restricting his testimony, and the court of appeal properly reversed that ruling.

Admission of Dr. Grimm's Testimony

Dr. Grimm was presented as an expert for the defense in biomedical engineering and brachial plexus injuries. After her deposition was taken, plaintiffs filed a motion in limine to exclude or limit Dr. Grimm's testimony based on *Daubert* grounds. Following a hearing, the district court concluded Dr. Grimm's testimony satisfied the *Daubert* standard, but reserved plaintiffs' right to object to Dr. Grimm's trial deposition.[1]

At trial, the defense tendered Dr. Grimm as an expert in biomechanical engineering and brachial plexus injury mechanics, and the district court accepted her as an expert in those fields. Prior to admission of her testimony, plaintiffs' counsel objected to Dr. Grimm's testimony regarding the child's susceptibility to injury, pointing out Dr. Grimm admitted there is no way to predict whether the child was more susceptible to injury. The district court denied this objection, stating, "I don't

[1] The parties agreed Dr. Grimm would be allowed to testify at trial via video deposition.

see how that hurts you . . .” and “that’s what cross-examination of an expert does.” Plaintiffs also argued that Dr. Grimm’s speculation that the child’s low Apgar score made her more susceptible to injury should be excluded as unsupported by the evidence.[2] The district court denied this objection.

Thereafter, the jury was allowed to hear Dr. Grimm’s testimony without restriction. Based on her review of the medical records, Dr. Grimm opined the child’s injury was caused by maternal forces of labor.

On appeal, the court of appeal found the district court abused its discretion in allowing the jury to hear Dr. Grimm’s testimony. In reaching this conclusion, the court of appeal remarked upon the “controversial nature” of this evidence and found Dr. Grimm’s conclusions were not reliable, explaining “[t]here is no evidence regarding whether her means of data collection, her simulation studies, or her conclusions regarding the capabilities of maternal forces of labor have been peer reviewed or accepted into the medical communities of obstetrics, orthopedics, or neurosurgeons who view and treat brachial plexus injuries regularly.” *LaBauve,* 318 So.3d at 994.

We disagree. A review of the record indicates Dr. Grimm published two papers in 2003, one of which comprises her opinions in the instant case. The computer model Dr. Grimm used was developed in the 1970s to study human injuries during crashes. Dr. Grimm revised and adapted this model to study the stretch of the nerves of the brachial plexus during the birth process and to determine the likely cause of injury. Dr. Grimm testified that all of her papers on the brachial plexus injuries have been published in peer-reviewed obstetrical journals, as well as engineering peer review journals and an engineering textbook. Because Dr. Grimm cannot ethically use human infants for her studies, her research is based on analogues

[2] The Apgar score uses several factors to determine how well the baby tolerated the birthing process and how well the baby is doing outside the mother’s womb.

in the animal world, and Dr. Grimm testified the "percent of stretch has actually been shown to be consistent between nerves across species. . . ." Moreover, the American College of Obstetricians and Gynecologists commissioned Dr. Grimm to study the effect of maternal forces of labor on brachial plexus injuries in 2011, and the commission concluded that brachial plexus injuries can be caused by factors other than the force of the delivering physician.[3]

We concede the maternal traction theory has engendered some controversy around the country. However, the majority of courts which have addressed this issue have concluded expert testimony on this theory is sufficiently reliable to be admissible. *See, e.g., Estate of Ford v. Eicher*, 250 P.3d 262, 269 (Colo. 2011) (collecting cases).

In this regard, we find the reasoning of the Wisconsin Court of Appeals in *Bayer ex rel. Petrucelli v. Dobbins*, 2016 WI. App 65, 36, 371 Wis.2d 428, 450–51, 885 N.W.2d 173, 184 (2016), to be persuasive. In *Bayer*, the plaintiffs alleged the defendant doctor used excessive traction during the delivery of their child, causing

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[3] The ACOG task force concluded that not all brachial plexus injuries are the result of excessive force by the physician:

> Recent multi-disciplinary research now stressed that the existence of NBPP (neonatal brachial plexus palsy) following birth does not a priori indicate that exogenous forces are the sole cause of this injury. And, in the presence of shoulder dystocia, all intervention by way of ancillary maneuvers – no matter how expertly performed – will necessarily increase strain on the brachial plexus.
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> * * *
>
> Neither high-quality nor consistent data exists to suggest that NBPP can be caused only by a specific amount of applied force beyond that typically used by healthcare providers during any delivery. Instead, available data suggest that the occurrence of NBPP is a complex event, dependent not only on the forces applied at the moment of delivery, but also on the constellation of forces (e.g., vector and rate of application) that have been acting on the fetus during the labor and delivery process, as well as individual fetal tissue characteristics (e.g. in situ strain and acid-base balance). In addition to research within the obstetric community, the pediatric, orthopedic, and neurologic literature now stress that the existence of NBPP following birth does not a priori indicate that exogenous forces are the cause of this injury.

the child to suffer a permanent right brachial plexus injury. In response to that allegation, the doctor contended he appropriately used only gentle downward traction to deliver the child and sought to introduce expert evidence, including testimony from Dr. Grimm, to support his theory that the child's injury was caused by maternal forces of labor, including the forces associated with contractions and pushing. The trial court excluded the evidence. On appeal, the appellate court reversed, stating:

> Ultimately, this is a case in which opinion in the relevant scientific field is divided regarding whether maternal forces of labor can cause permanent brachial plexus injuries. However, "[t]he mere fact that some experts may disagree about the reliability of [the maternal forces theory] does not mean that testimony about [that theory] violates the *Daubert* standard." See [*State v.*] *Giese*, 356 Wis.2d 796, 23, 854 N.W.2d 687. "If experts are in disagreement, it is not for the court to decide 'which of several competing scientific theories has the best provenance.' " *Id.* (quoting *Ruiz–Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir.1998)). To the contrary, "[t]he accuracy of the facts upon which the expert relies and the ultimate determinations of credibility and accuracy are for the jury, not the court." *Id.* [footnote omitted].

Bayer, 2016 WI App 65, 36, 371 Wis. 2d at 450–51, 885 N.W.2d 173, 184.

The reasoning of *Bayer* is in accordance with our jurisprudence, which recognizes it is "not defendants' burden to present evidence with an absolute degree of certainty, and not the trial judge's function to determine which theory was the best supported." *Wingfield v. State ex rel. Dep't of Transp. & Dev.*, 01-2668 (La. App. 1 Cir. 11/8/02), 835 So.2d 785, 797, *writ denied*, 03-0313, 03-0339, 03-0349, (La. 5/30/03), 845 So.2d 1059-60.

Based on our review of the record, we conclude the district court did not abuse its great discretion in finding Dr. Grimm's testimony was admissible under the standards set forth in La. Code Evid. art. 702 and *Daubert/Foret*. The court of appeal erred in reversing the district court's evidentiary ruling.

Remedy

Having found the district court erred in refusing to admit portions of Dr. Kozin's testimony, we must now consider the effect of that error on the jury's verdict. Article 103(A) of the Code of Evidence provides, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ." However, we have recognized that if a trial judge commits consequential error by denying the jury relevant, admissible evidence, or by admitting evidence that should have been excluded, the fact finding process is interdicted; thus, the verdict is tainted. *Said v. Federated Rural Elec. Ins. Exch*., 21-0078 (La. 4/20/21), 313 So.3d 1241, 1243. Generally, when a legal error interdicts the fact finding process, the manifest error standard no longer applies. *Id.*

Defendants submit that any error in excluding portions of Dr. Kozin's testimony is harmless. They point out Dr. Kozin's excluded testimony on the cause of the injury was largely duplicative of the testimony of plaintiffs' other experts, Dr. Edith Gurewitsch Allen and Dr. Robert Allen. Therefore, they conclude the admission of Dr. Kozin's testimony could not have affected the jury's fact-finding process in any significant way.

Our jurisprudence has long recognized that greater weight may be accorded to the testimony of a treating physician "who has had the benefit of repeated examinations and sustained observation of the plaintiff under his direct care. . . ." *Wild v. Continental Cas. Co*., 234 So.2d 783, 784 (La. App. 1 Cir. 1970). Dr. Kozin was the child's treating orthopedist and performed surgery on her. His position as treating physician gave him unique insight into the nature and cause of the child's injury. By limiting his testimony, the district court deprived the jury of the benefit

of Dr. Kozin's highly relevant observations and conclusions as to the cause of the injury.

Alternatively, defendants submit that any error in this regard is not consequential because the excluded portions of Dr. Kozin's testimony relate solely to the issue of causation. Because the jury determined Dr. Elias did not breach the applicable standard of care, defendants reason the jury never reached the issue of causation.

We agree the jury's finding that Dr. Elias did not breach the applicable standard of care obviated the need for the jury to reach the issue of causation. Nonetheless, Dr. Kozin's testimony regarding the cause of the injury was an important factual foundation in plaintiffs' theory that the child's injury could not have occurred absent a breach of the standard of care by Dr. Elias. Without Dr. Kozin's testimony on causation, the jury was deprived of the benefit of important factual observations by the treating physician which they could have used when evaluating the standard of care evidence presented by the parties. Thus, although the jury did not directly pass on the issue of causation, the exclusion of relevant causation evidence had the strong potential to adversely impact the jury's determination on whether a breach of the standard of care occurred.

In summary, the district court's ruling deprived the jury of critical testimony from the child's treating physician and had the clear potential to interdict the fact-finding process. Accordingly, we conclude the exclusion of relevant portions of Dr. Kozin's testimony was a consequential error.

Having found consequential error, we must now determine whether the court of appeal was correct in its decision to perform a de novo review of the record. We have recognized that when a district court's ruling is both erroneous and consequential, a remand for a new trial is not always necessary if the court of appeal

has the complete record before it. *Gonzales v. Xerox Corp.*, 320 So.2d 163, 165 (La. 1975). Thus, we have allowed the appellate courts, in the interest of judicial economy, to decide the cases based on a de novo review of the facts on record.

This is not to say, however, that de novo review is required in every case. *See Ragas v. Argonaut Southwest Ins. Co.*, 388 So.2d 707, 708 (La. 1980) (explaining that our opinion in *Gonzales*, *supra*, "should not be read to require that the appellate court must find its own facts in every such case."). As we explained in *Wegener v. Lafayette Ins. Co.*, 10-0810 (La. 3/15/11), 60 So.3d 1220, 1233–34:

> The authority for an appellate court to remand a case to the trial court for proper consideration, where it is necessary to reach a just decision and to prevent a miscarriage of justice, is conferred by La. C.C.P. art. 2164. Whether a particular case should be remanded is a matter which is vested largely within the court's discretion and depends upon the circumstances of the case. *See Alex v. Rayne Concrete Service,* 2005–1457 (La.1/26/07), 951 So.2d 138, 155. [footnote omitted].

See also Melerine v. Tom's Marine & Salvage, LLC, 20-0571 (La. 3/24/21), 315 So.3d 806, 822 ("this court has recognized that in limited circumstances, when necessary to reach a just decision and to prevent a miscarriage of justice, an appellate court should remand the case to the trial court under the authority of Louisiana Code of Civil Procedure article 2164, rather than undertaking de novo review.").

Under the circumstances of this case, we are convinced the court of appeal abused its discretion by undertaking a de novo review of the record rather than remanding the case for a new trial. As we have discussed, the error flowing from the improper exclusion of Dr. Kozin's testimony permeated multiple aspects of this case and had the potential to affect how the jury viewed and weighed other evidence. These considerations require that this matter be retried. *See Melerine*, 315 So.3d at 822 (explaining remand for a new trial was necessary when the erroneous rulings "undoubtedly affected trial strategy and witness selection by both sides.").

In reaching this conclusion, we are not unmindful of the fact that neither party requested a new trial. We further acknowledge plaintiffs' concerns that a new trial will result in additional expenses for the parties. Nonetheless, we are firmly convinced a miscarriage of justice occurred in this case and may only be remedied through a new trial.

DECREE

For the reasons assigned, the judgment of the court of appeal is affirmed insofar as it finds the district court erred in excluding, in part, the testimony of Dr. Scott Kozin. The judgment of the court of appeal is reversed insofar as it finds the district court erred in admitting the testimony of Dr. Michele Grimm. In all other respects, the judgment of the court of appeal is vacated, and the case is remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED AND VACATED IN PART, REMANDED

SUPREME COURT OF LOUISIANA

No. 2021-C-0763

KIMBERLY BROOKE LABAUVE, ET AL.

VS.

LOUISIANA MEDICAL MUTUAL INS. CO., ET AL.

On Writ of Certiorari to the Court of Appeal,
Third Circuit, Parish of Jefferson Davis

WEIMER, C.J., dissenting in part.

While I agree with the majority that the testimony of both Dr. Kozin and Dr. Grimm is admissible, I dissent from the majority's decision to remand this matter for a new trial. Rather, I believe the jury's verdict should be reinstated.

The purpose of a jury trial is to resolve a dispute among citizens by calling in fellow citizens to hear and evaluate the evidence and bring the matter to a conclusion. Ultimately, the jury will, as instructed, rely on common sense in addition to what was seen and heard during the course of the trial to reach a decision based on the law recited by the judge. Far more often than not, the jury reaches the correct decision.

In medical malpractice cases, the threshold issue is whether the defendant physician breached the standard of care. The standard of care in this case required the delivery of the infant without excessive force, while ensuring the best possible outcome for the infant and mother. The jury decided that Dr. Elias did not breach the standard of care and there is ample evidence in the record to support that decision. Specifically, the jury heard the testimony of Dr. Elias, Nurse Meaux (the labor and delivery nurse), the father (who was in the delivery room), and Dr. Fernandez (who served on the medical review panel), which testimony sufficiently established that the injury could be attributable to factors other than physician fault and support a

conclusion Dr. Elias did not use excessive force. The jury's belief in those witnesses was within the jury's prerogative.

Importantly, because the jury decided the case on the standard of care issue, the jury necessarily did not reach the issue of causation. The cause of the injury was of no moment once the jury found Dr. Elias was not negligent. Further, once the jury found Dr. Elias did not breach the standard of care, testimony from Dr. Kozin and Dr. Grimm focusing on the cause of the injury ceased to be relevant and any error in the admission or exclusion of such testimony was harmless. The verdict should have been reviewed under a manifest error standard.

While this is a tragic case in which a child suffered a disability, a physician's reputation is also impacted. Twelve members of the community listened and carefully considered the evidence. Reviewing the entire record, it is clear this trial involved, in part, a "battle of the experts," but other evidence was also admitted as indicated previously. The parties presented experts with similar qualifications. Their testimony offered different views of the evidence. The jury listened and carefully considered the evidence and was entitled to believe one expert over another or to disregard the experts completely. The jury made a decision to resolve the dispute, and it is time to end this matter. The majority opinion sends this matter back for a retrial, and the case will have to be placed on the district court docket with all other cases. Pursuant to La. C.C.P. art. 2164, this court has authority to remand a matter to the district court; however, based on the specific facts of this case, I would find it more appropriate for this court to make a ruling based on the complete record before it. See **Gonzales v. Xerox Corp**., 320 So.2d 163 (La. 1975). Based on the record, and employing a manifest error standard of review, I find the jury's verdict was reasonable and supported by the evidence, and should be reinstated.

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Genovese, J., concurs in part, dissents in part, and assigns reasons.

I concur in the grant of a new trial and the affirmation insofar as it finds the district court erred in excluding, in part, the testimony of Dr. Scott Kozin. I dissent from the majority in its allowance of the testimony of Dr. Michele Grimm, a non-physician expert in biomedical engineering and brachial plexus injury mechanics. Though Dr. Grimm is an expert in the aforementioned fields, she admitted that there was no way to measure or determine the amount of force needed to cause injury, nor could she say what made the child in this case more susceptible to injury. This seriously calls into question the reliability of her conclusion that the child's injury in this case could have been caused by the maternal forces of labor. I agree with the court of appeal on this issue and find the trial court's failure to exercise its gatekeeping function by conducting a thorough *Daubert* hearing prior to allowing the jury to hear Dr. Grimm's testimony demonstrates the admission of her testimony was an abuse of discretion. The district court erred in delegating its gatekeeping responsibility to the jury, which I find interdicted the fact-finding process.