IN THE

Supreme Court

of the

State of South Dakota

No. 31052

KEVIN WALTON AND JULIE WALTON

APPELLANTS/PLAINTIFFS

VS.

HURON REGIONAL MEDICAL CENTER, INC.,
WILLIAM J. MINER, M.D., AND JOHN AND JANE DOES

APPELLEES/DEFENDANTS

An appeal from the Circuit Court, Third Judicial Circuit
Beadle County, South Dakota

The Hon. Patrick T. Pardy
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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Notice of Appeal filed on April 8, 2025

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JURISDICTIONAL STATEMENT

Plaintiffs appeal from Summary Judgment entered by the Hon. Patrick Pardy on March 11, 2025, for which notice of entry was given on March 23, 2025. This Court has jurisdiction, per SDCL 15-26A-3(1). Plaintiffs filed a notice of appeal on April 8, 2025.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request the privilege of appearing before this Court for Oral Argument.

INTRODUCTION

Kevin Walton alleges that he received disabling brain injuries while in the care of Huron Regional Medical Center and Dr. William Miner.

The primary parties are the Plaintiffs/Appellants Kevin Walton and his wife, Julie Walton; and the Defendants/Appellees who provided medical care to Mr. Walton, including Huron Regional Medical Center ("HRMC" or "the Hospital") and William Miner, M.D. ("Miner" or "Dr. Miner").

The Circuit Court granted Defendants' *Daubert* motion to exclude one of Plaintiffs' experts, Dr. Richard Adler, entirely. The Circuit Court rejected a request to reconsider that *Daubert* ruling and granted Summary Judgment on the basis that without Dr. Adler's testimony, Kevin cannot prove causation.

STATEMENT OF THE CASE & FACTS

The Events

On April 8, 2018, Kevin Walton was admitted to the Huron hospital with excruciating testicular pain. [R01.966]. During his three-day stay, the Hospital administered Kevin toxic, high doses of narcotics, including pain medication, sedatives, and a muscle relaxant (namely: hydromorphone, oxycodone, hydrocodone, tramadol, diazepam, pregabalin, Trazadone, and baclofen, all at the same time). [R01.3049-3050].

On the morning of the third day, a nurse found Kevin unresponsive and gasping for air; she moved Kevin to a seated position and immediately terminated all medication. [R01.3053]. The nurse told Julie: "He scared me. He was breathing like a man taking his last breaths." [*Id.*]. Kevin's pain subsided; and he was discharged later that day, April 11th. [*Id.*].

Almost immediately after discharge, Kevin began exhibiting unusual symptoms, such as acting "uncharacteristically childlike," and "stuttering and engaging in odd conversations." [R01.3059]. Kevin's condition worsened over the following days and weeks.

His wife Julie kept a log. [R.3275]. Kevin had "confusion, memory loss & weird behavior," and he seemed to be "choking all the time." [R01.3060]. Over the next four days he exhibited further confusion, memory problems, and vision problems. [*Id.*].

Kevin attempted to return to work, where he was a skilled employee at a machine shop. But within a couple of hours, his boss called Julie to come and get Kevin, because "it seems like working [with] a mentally challenged man...stuttering and blank eyes / off balance." [*Id.*]. Julie's journal reports similar problems the following day, and, essentially every day for a month. [*Id.*].

That month, the family went camping (which had long been a favorite pastime). The ordeal was "eye-opening" for Julie, as she learned how poorly he was functioning. Kevin could not cut his own steak; he almost got lost walking a short distance to another camper; he continued having problems choking; and he had an unstable gait. [*Id.*]. Kevin also developed a "foreign accent," which witnesses described as similar to a Hutterite accent. [R01.3055].[1] These problems (and more) persist today. [R01.3060].

Witness after witness testified that Kevin is a husk of his former self, and they associated the onset of these changes with his discharge from the Hospital.[2] Kevin used to teach Sunday School and was able to answer all the Bible questions put to him by the students. [R01.3061]. He was regarded as "very sharp" by his friends...a "fast talker" with "amazing attention to detail."

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[1] Foreign accent syndrome is a rare but well-established neurological condition which is associated with brain injury.

[2] Kevin's medical records from 2005 to 2017 do not reflect his current cognitive impairment, nor any foreign accent syndrome.

[*Id.*]. He was always on the go; "happy going;" always had a project to work on. [R01.3055-3060].

One friend described an informal competition, years earlier, among co-workers where the object was guessing the number of dump truck loads it would take to remove a large pile of manure from a cattle feedlot. Kevin spent much time figuring and estimating, and his guess was by far the closest. "He could never do that today. In fact, he could not even safely operate the dump truck for a single load today." [*Id.*].

Today, Kevin talks slower. He moves slower. He has right-side weakness. His speech is slightly slurred. He needs an electric scooter to go for a walk. He needs time to gather his thoughts. [R01.3055]. He can no longer change his own oil; or do carpentry work; and can't even get up on a ladder to paint. [R01.3056-3057]. Kevin soon lost his job and eventually filed for disability. Due to his impulsivity, Julie is uncomfortable leaving Kevin home alone for more than a couple of hours. [*Id.*]

Kevin's neurologist initially described his presentation as an "atypical syndrome of encephalopathy" including the possibility of a "toxic" origin. [R01.978]. A toxic/hypoxic brain injury is a type of encephalopathy.[3] [R02.758]. Cognitive testing by his treating doctors in 2019 revealed that

[3] An *encephalopathy* means a disorder of the brain, usually structural. A hypoxic brain injury is also termed "hypoxic-ischemic encephalopathy" or "HIE" or "anoxic encephalopathy."

Kevin's language abilities were 'markedly lower than expected when compared to premorbid function." [R01.990].

The Challenge of Investigating a "Mild" Brain Injury

Although catastrophic to Kevin, Julie, and their children, Kevin's condition was classified as a "mild" non-traumatic brain injury — by comparison with a "severe" non-traumatic brain injury which could result from an aneurism or drowning, for example. *Severe* non-traumatic brain injuries are often fatal.

And, this is one of the unlucky features of Kevin's lawsuit. As Dr. Adler explained, "[t]he facts of this case are certainly unfortunate for Mr. Walton from an academic perspective....[T]he nature of a hypoxic brain injury in adults is that they can leave patients dead or brain dead, rather than with lesser cognitive impairments, so it is not surprising that there is not a lot of scientific literature on persons similarly situated to Mr. Walton." [R02.765].

Further, "[t]here are no tests or procedures specific for the diagnosis of [hypoxic brain injuries]," which therefore requires a practitioner making a diagnosis to search for whatever "indirect evidence" is available "several years after the subject events in question." [R02.759]. Without a "standalone" test, a clinician arrives at a diagnosis using "an array of techniques and testing modalities about an individual to inform the eventual diagnosis," including the need for testing methods which are *not* "indicated explicitly and specifically for the clinical diagnosis of a particular condition." [R02.758].

"The correct method is to gather information about Kevin that can inform us about the existence of dysregulation in his brain activity; the nature and extent of that dysregulation; the timing of its onset; and whether his symptoms can be explained by other causes." [R02.759].

Also complicating the inquiry is that a "mild" injury to the brain is less capable of being identified using traditional brain imaging techniques, such as EEG, PET, or MRI. *See, e.g.*, [R01.3557-3576].

The Causation Dispute

In this lawsuit, Kevin alleges that he suffered these disabling injuries because of the Hospital and Dr. Miner's actions. There is no meaningful dispute that Kevin is now disabled. There is no dispute that his damages would be substantial; nor that he was administered a "massive" dose of opioids; nor that the Hospital and Dr. Miner failed to adequately monitor him.

The Circuit Court granted summary judgment on the basis that Kevin cannot prove causation.

The dispute as to causation is narrow. During the discovery phase, the question of causation coalesced around only four possibilities with enough factual basis to merit consideration: (i) Kevin is faking or malingering, (ii) Kevin has a psychiatric disorder ("conversion disorder" or a "functional neurologic disorder") so that his mind somehow manufactures his disabilities without any physical (organic) cause, (iii) Kevin suffered an organic brain injury because his brain cells had inadequate oxygen supply while he was

overdosed on opioids (a "hypoxic brain injury"), or (iv) a combination of these causes.[4] [R01.1952-1954, 3374].

The Defendants have not suggested any other cause. And, at the final hearing in this case (February 2025), the Defense conceded that Kevin is not malingering/faking. [R02.1299].

So, in practice, the only possibilities are that Kevin has: (a) conversion disorder *only*, (b) an organic brain injury *only*, or (c) a combination of both.

To prove their case, Plaintiffs are not required to definitively rule out the conversion-disorder hypothesis. A person can suffer an organic brain injury and also suffer conversion disorder; or, said differently, a conversion disorder does not prevent organic brain injuries, or vice versa. Similarly, to rebut Plaintiffs' case, it is not enough for the Defense to show that Kevin suffers conversion disorder; they must also exclude an organic brain injury, or, at least convince a Jury that Kevin's evidence of an organic brain injury is insufficient.

The Defense contends that Kevin suffers only from conversion disorder (also called a "functional neurologic disorder"). Plaintiffs contend that Kevin suffers only from an organic brain injury.

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[4] Conversion disorder/functional neurologic disorder is not the same as malingering. It is a psychiatric (mental) disorder in which symptoms manifest without a physical cause. Its definition includes the element that the patients' symptoms are not plausibly explained by an organic disorder. (This creates a risk of over-diagnosis: A physician may affix a conversion-disorder label to a patient before ruling out all plausible organic causes.) [R01.3501-3506].

Defendants' Evidentiary Admissions

Even prior to this lawsuit, Kevin's medical records contained evidence of *both* diagnoses: a hypoxic brain injury, and, functional neurologic disorder.

For example, in the year following his discharge, two of Kevin's treating doctors (neurologists in Sioux Falls and Minneapolis) diagnosed Kevin with functional neurologic disorder/conversion disorder. [R01.3045].

But, in that same time-frame, both Defendants (Dr. Miner and the Hospital) independently noted in Kevin's medical records that he had suffered a brain injury. On a form sent to the "Brain Injury Rehabilitation Center," Dr. Miner handwrote an entry saying '*Yes*,' Kevin has a brain injury, which he noted was non-traumatic in nature, and then Dr. Miner signed his name to the form. [R01.3076]. This is an evidentiary admission by a Defendant, and it is an admission against interest, so it is particularly credible. Similarly, on 4/4/2020, the Hospital created a record stating that Kevin "is a 41-year old male who has a previous medical diagnosis of hypoxic brain injury with an approximate onset of two years ago." [*Id.*]. On 7/6/2020, Dr. Colton Ketelhut (a doctor of physical therapy employed at the Hospital) reported in his work-up that Kevin "presents with signs and symptoms consistent with...hypoxic brain injury." [R01.994].

Initial Brain Imaging

In the weeks following discharge, Kevin's treating physicians ordered brain imaging studies, including two MRIs, an EEG, and a PET scan.

[R.01.3046-3047]. None of those revealed a brain injury on visual review. But visual review of images generally *does not* identify "mild" brain injuries such as from which Kevin may suffer. Visual review of brain imaging neither proves nor disproves normal brain function or the absence of a mild brain injury. [R01.3397.].

Experts Retained by Plaintiffs

Among the experts Kevin retained to assist with the prosecution of his case are Dr. Kenny Stein (an internist); Dr. Joseph Wu (a psychiatrist); Dr. Richard Adler (a psychiatrist); and Dr. Wes Center (a psychologist who performed a qEEG study of Kevin's brain).

Dr. Kenny Stein

Dr. Stein is board-certified in internal medicine. He provided uncontested testimony about the risks of administering high dosages of pain medication and muscle relaxants. These narcotics—when administered at high levels and in combination with each other—create the risk of slowed breathing, respiratory failure, hypoxemia (low blood oxygen), brain injury, and death. [R.01.3047-3054].

Also unchallenged is Dr. Stein's observation that due to these great risks it is critical for health care providers to continuously monitor the vital signs of patients receiving these medications, and thus prevent respiratory

distress, brain injury, and death.[5] [R01.3050]. The Hospital and Dr. Miner failed to provide electronic, continuous monitoring of Kevin. [*Id.*]. Dr. Stein opined that this was a violation of the standard of care which placed Kevin in great peril for the duration of his three-day hospital stay. [*Id.*].

Dr. Stein characterized the level of narcotics given to Kevin as a "massive dose." [R01.3065-3066]. This breached the standard of care; it was wrong to administer such dosages of opiates in conjunction with sedatives, and, particularly while Kevin was "on a regular floor [of the Hospital] without continuous monitoring of his oxygen saturation, respiratory rate, and ideally capnography to measure his exhaled carbon dioxide concentration." [*Id.*].

Dr. Stein also found that Kevin's symptoms at the Hospital were consistent with a hypoxemic (low oxygen) event, which were also consistent with brain injury from that hypoxic event, which by all accounts would have occurred on the morning of April 11, 2018. [R.3070]. Dr. Stein also pointed out, however, that he could not definitively identify a period of time when Kevin was experiencing hypoxia due to the Hospital's failure to continuously monitor his oxygen saturations: "But you keep asking for evidence in the medical record, and that's part of the problem, is that he wasn't adequately monitored, *so you're asking for evidence that is unobtainable.*" [R01.3052-3053].

[5] Continuous monitoring would track Kevin's heart rate; respiration rate; blood-oxygen saturations; and his exhaled carbon dioxide concentration. And, continuous monitoring would also create a record of those vital signs for review, later.

Thus, at trial Dr. Stein would offer testimony:

- that Kevin was administered a "massive," toxic overdose;
- that Kevin's injuries are "consistent with a brain injury" and, in particular, "consistent with a brain injury resulting from a toxic overdose and hypoxic event on April 11 in the hospital." [R01.3071].
- that Kevin's sudden decrease of pain in the early morning hours of April 11th is also consistent with a brain injury, because "hypoxemic brain injury helps with testicular pain," by limiting the brain's ability to recognize pain. [R01.3051].

In his expert report, Dr. Stein concluded that "within a reasonable degree of medical certainty the...[injury from which] Mr. Walton still suffers were caused by the iatrogenic overdose of combined high dose hydromorphone as well as oxycodone, hydrodone, tramadol, diazepam, pregabalin, Trazadone, Baclofen," and those "breaches of the standard of care....were the direct cause of neurologic damage that occurred to Mr. Walton and from which he still suffers to this day." [R02.3228].

In his deposition, however, Dr. Stein deferred to other experts (*e.g.*, psychiatrists) as to whether Kevin suffered a psychiatric disorder rather than an organic injury to brain tissue. "There are several people saying that it's functional [neurologic disorder]...I'm going to stay out of that....[I'm] not offering an opinion as to whether or not Mr. Walton has a hypoxic brain injury...." [R01.3069-3070]. But Dr. Stein testified that "*if a Jury finds that*

Mr. Walton has a hypoxic brain injury, these violations of the standards of care [by Defendants] is what caused it." [R01.3050].

The Defense did not move to exclude any expert testimony by Dr. Stein, and the Circuit Court did not exclude it.

Dr. Joseph Wu

To fill the potential gap left by Dr. Stein's opinion — *i.e.*, whether Kevin suffers from conversion disorder (a psychiatric disorder) — Kevin turned to a psychiatrist. Kevin initially retained psychiatrist Joseph Wu from Irvine, California. Dr. Wu conducted a records review and then conducted analysis of a PET scan, comparing Kevin's results against those of a control group. Dr. Wu was unable to provide information regarding his control group, [R01.716], and other researchers were unable to load his (older, outdated) software onto their systems and replicate his results. [R01.2089]. Kevin withdrew Dr. Wu as an expert. [R01.2768].

Dr. Richard Adler

Kevin was then referred to Dr. Richard Adler, a Harvard-trained physician, board-certified in psychiatry. [R01.1381]. Dr. Adler's clinical and forensic practice involves complex head injuries and matters of cognitive impairment, in both civil and criminal cases.

In two decades of his practice, he has appeared 72 times as an expert witness, and (until now) Dr. Adler's testimony has never been excluded or

limited. [R01.1905, 1932] Dr. Adler has privileges at the University of Washington hospital in Seattle and sees patients at his office.

Dr. Adler met with Kevin (and interviewed Julie) during a five-hour examination. He reviewed hundreds of pages of records and medical literature. He ordered and obtained advanced neurological testing and neuro-imaging studies. At the time of his deposition, Dr. Adler had spent 65 hours on his analysis. [R01.1940].

Based upon a wide variety of information, and for multiple reasons, Dr. Adler concluded that Kevin's deficits reflect a physical ("organic") injury to Kevin's brain, rather than a psychiatric problem. He ruled out conversion disorder / functional neurologic disorder. And, Dr. Adler concluded that Kevin's brain injury was hypoxic, that is, caused by having too little oxygen flowing to the brain for a significant period (rather than, for example, a brain injury caused by head trauma). [R01.3413.]

Dr. Adler's Analysis

The Circuit Court excluded Dr. Adler's testimony in its entirety and then granted summary judgment on the basis that without his testimony, Plaintiffs cannot prove causation. So we summarize Dr. Adler's analysis here.

The Research Questions, the Method, the Facts & Data

Plaintiff's counsel asked Dr. Adler to investigate whether Kevin suffers from conversion disorder or from an organic brain injury and, if the latter,

whether it more likely was caused by the overdose on opioids that directly preceded his symptoms or from a snowmobile accident about 15 years before the symptoms. (There is no other known potential cause of an organic brain injury for Kevin.)

During his five-hour, in-person evaluation, Dr. Adler learned that Kevin had been involved in an (apparently minor) snowmobile crash in approximately 2003, where Kevin hit his head; was treated in the emergency room; and released. No records have been found for this snowmobile event, but, Kevin did report the same event to a treating clinician in 2020.[6]

Method: To answer these questions, Dr. Adler employed the diagnostic method customarily used in medicine. [R01.1920-21.] The diagnostic method typically involves gathering patient history and symptoms, performing physical examinations, forming a differential diagnosis (*i.e.*, a list of plausible potential diagnoses), conducting diagnostic tests, analyzing results, ruling out alternative explanations, and arriving at a final diagnosis – while remaining open to new information that would change the diagnosis. [R01.1807, *et seq.*] "Differential diagnoses have generally been accepted as reliable by federal courts." *Mattis v. Carlon Elec. Prods.*, 114 F. Supp. 2d 888, 893 (D.S.D. 2000) (Piersol, J.).

[6] The Defense's experts had copies of that 2020 record. All of the Defense's experts failed to analyze the significance of the snowmobile incident, and only one of them has even mentioned it.

Facts & Data: In working through the diagnostic process, Dr. Adler gathered and considered an abundance of facts and data. These included:

- *Patient History*: Kevin Walton's medical history, including any pre-existing conditions and previous cognitive or emotional issues.
- *Witness Statements*: Testimonies from family members or caregivers about changes in Kevin's behavior and abilities.
- *Medical Records*: Hospital records from the admission when Kevin was overdosed on opioids.
- *Clinical Observations*: Notes from healthcare providers regarding Kevin's condition during and after the hospital stay.
- *Neuropsychological Evaluations*: Assessments conducted to evaluate Kevin's cognitive functions post-incident. These included:
    - Personality Assessment Inventory: Used to assess various aspects of Kevin's personality and emotional functioning.
    - Gudjonsson Suggestibility Scale: Administered to measure suggestibility.
    - Impact of Event Scale - Revised: Administered to assess the impact of traumatic events on Kevin's current functioning.
    - CNS Vital Signs Report: Included in the evaluation to assess cognitive functioning.

- Quickview Social History: Used to gather a comprehensive social history of Kevin Walton.

- *Traditional Brain Imaging Studies:* prior EEGs and a new one in June 2023; prior MRIs and a new one in June 2023; and a prior PET scan.
- *Quantitative Analysis of Imaging Studies*: a quantitative EEG (qEEG) report, a quantitative MRI (qMRI) report, and a quantitative PET scan (qPET) report.

See generally, [R01.1831-1864].

The Defense's *Daubert* motion challenged only the *last* category of data (and the Circuit Court addressed only the *last* category) — the *quantitative* imaging reports that Dr. Adler considered. Neither the Defense nor the Circuit Court offered valid explanation why the exclusion of a single category of facts & data invalidates Dr. Adler's conclusions.

The Quantitative Imaging Studies

Here's a brief explanation of the quantitative imaging studies, since the *Daubert* challenge focuses on them.

Each of the underlying methods (EEG, PET, and MRI) measures a different aspect of the human brain: an EEG measures brain electrical activity; a conventional PET scan measures variances in how the brain metabolizes glucose (its source of fuel); and an MRI reveals variances in brain structure.

Each of the underlying methods result in images which are traditionally read by humans (who visually look at a printout or computer screen). The practitioners who conduct this review are trained to see nuance in the visual representation, whether the squiggles of an EEG, the white/gray contrast of an MRI, or color variations of a PET. [R01.3397.]

However, each of these traditional methods produces *data* which can be further analyzed with computing power, in order to remove subjectivity, as well as to identify far more detailed variances than can be perceived with the human eye. Further, once quantified, these variances in a patient's imaging can be compared to databases of normal brains. [R01.3397-98.]

Quantitative analysis of traditional brain testing is a well-established field of medicine. [R01.3398.] The Defendants' own experts acknowledge these emerging fields, and one of them even claims to review "computer generated quantitative assessments of brain volume on a daily basis." [R01.720]. It is not quackery. With the advent of modern computing power, quantitative assessment of brain imaging technology is providing an important evolution in medicine.

Quantitative EEG

Quantitative electroencephalography (qEEG) is "a family of specialized techniques for analyzing brain electrical activity" data that is first acquired via a conventional EEG and then subjected to "computer processing...to generate detailed, statistically based graphs, tabular data, brain electrical activity maps,

and reports. qEEG captures brain dynamics with precision and can identify patterns associated with neurological and psychological conditions." [R02.3]

The science of qEEG is "generally accepted" and has been "an established field since the 1970s, when advancements in computing made it possible to digitize and analyze EEG data." [R02.3-5]. Practitioners of qEEG analysis utilize various "reference normative databases" (*i.e.*, statistical control groups) in order to compare a patient's brain function with 'normal' brains. [R02.3].

The qEEG study here was performed by Dr. Wesley Center. The Circuit Court found that Dr. Center is "well-qualified" and has "extensive training in qEEG, regularly attends seminars to stay current, and performs approximately 50 qEEG analyses per year." [R01.2711.] Dr. Center wrote a report on the qEEG findings, which Dr. Adler read and considered.

Quantitative PET & Quantitative MRI

Similar to the advancements made possible by computer analysis of ordinary EEG readings, quantitative analysis is likewise capable of generating more sophisticated readings of traditional PET and MRI scans than unaided visual readings. Quantitative analysis of MRI and PET scans developed more recently than qEEG, based on similar principles underlying the quantification of PET and MRI scans.

Dr. Adler ordered quantitative analyses of Kevin's MRI and PET scans by a commercial company named Qubiotech whose software is approved for clinical use in hospitals in the European Union. [R01.1140.]

Dr. Adler's Conclusions:
No "Functional Neurologic Disorder" (Conversion Disorder)

Conversion disorder/functional neurologic disorder is a psychiatric diagnosis. Dr. Adler is a psychiatrist. He ruled out conversion disorder on at least four grounds. [R01.1921.]

1. DSM-5 criteria not met, because of a plausible organic explanation.

Conversion disorder is "related to how the brain functions, rather than *damage* to the brain's structure (such as from...infection or injury)."[7] Accordingly, the DSM-5 diagnostic elements for conversion disorder require a physician to first rule out physical causes of the symptoms. [R02.627]. In Kevin's case, the overdose of opioids made hypoxic brain injury a plausible alternative cause. [R02.622]. This alone precludes a diagnosis of conversion disorder. But other factors also weigh against such a diagnosis. [R01.1921.]

2. No heightened suggestibility (which tends to accompany conversion disorder)

Heightened suggestibility tends to coincide with conversion disorder. Dr. Adler administered the Gudjonsson Suggestibility Scale to assess Kevin. The results showed that he was not highly suggestible, which is inconsistent

[7] https://www.mayoclinic.org/diseases-conditions/conversion-disorder/symptoms-causes/syc-20355197

with the typical profile of someone with conversion disorder. [R01.1897]. This finding makes conversion disorder less likely.

3. No significant history of other psychiatric illness (which would be expected in a conversion-disorder patient)

Conversion disorder tends to occur in patients with a significant prior history of mental illness. *See, e.g.*, [R01.3467-3472]. Dr. Adler noted that Kevin did not have a *significant* preexisting history of psychiatric disorders. *E.g.*, [R01.1885-1886]. This, too, makes conversion disorder less likely.

4. Kevin's Foreign Accent Syndrome is unlikely to arise as part of conversion disorder

Kevin suffers an odd neurologic deficit called "Foreign Accent Syndrome." As Dr. Adler noted, FAS overwhelmingly arises from physical brain injury. [R01.1884]. The presence of FAS thus makes conversion disorder less likely as a cause of Kevin's symptoms.

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On these four separate, mutually reinforcing grounds, Dr. Adler concluded that, more likely than not, Kevin's disabilities are not caused by conversion disorder.

Conclusion: No Malingering

Dr. Adler also considered the possibility that Kevin was malingering. None of the tests indicated malingering. [R01.1888, 1896.] Because the

Defense now concedes that Kevin is not malingering, [R02.1299], we do not discuss this issue further.

Conclusion: Organic Brain Injury from Opioid-Induced Hypoxia

By excluding malingering and conversion disorder as likely causes of Kevin's deficits, Dr. Adler would help a Jury to conclude that the only remaining potential cause — organic brain injury from hypoxia — is the likely cause of Kevin's deficits. If there are only three possibilities an[8]d you exclude two of them, then the remaining one is it.

But Dr. Adler did not rely solely on the process of elimination. Other factors weighed in favor of an organic brain injury:

1. Increased vulnerability to physical brain injury because of a prior injury

Kevin had a snowmobile accident in 2003 or 2004 — 14 or 15 years before the events at issue in this case.[9] Kevin likely suffered a mild traumatic brain injury from that accident. [R01.1893]. Such an injury makes a person more vulnerable to future neurologic insults. [*Id.*] Kevin's increased

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[8] *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 973 (8th Cir. 1995) ("Indeed, ruling out alternative explanations for injuries is a valid medical method.")

[9] Kevin's ability to carry on a normal (even vigorous) lifestyle between 2003 and 2018 rules the snowmobile crash as the sole and proximate cause of his new injuries in 2018. No treating physician has suggested that Kevin's April 2018 injuries were caused by a 2003 snowmobile incident.

vulnerability raises the likelihood that he suffered a physical brain injury from the opioid overdose at Huron Regional on April 11, 2018.

2. Timeline of symptoms is consistent with physical injury

The timeline of Kevin's symptoms is consistent with a physical brain injury. Thus, Dr. Adler noted that Kevin's mental status was altered shortly after he was found with "irregular, shallow" breathing. [R01.1881-1882]. Furthermore, the gradual progression of symptoms over days is consistent with the gradual death of brain cells that would be expected from a brain injury. [R01.1899-1890]. This increases the likelihood of a physical brain injury.

3. Dr. Huxford's August 2019 testing independently indicated a physical brain injury

Dr. Adler also relied on results from independent testing of Kevin by psychologist Michael Huxford in August 2019. Dr. Huxford's testing also showed significant abnormalities despite good effort by Kevin and valid results. [R01.1886-1896]. Furthermore, Dr. Adler noted that Kevin was admitted to The Brain Injury Rehabilitation Center not for conversion disorder, but for a traumatic brain injury. [R01.1886].

4. CNS Vital Signs testing indicated a physical injury.

Dr. Adler also noted that the CNSVS testing results were consistent with hypoxic brain injury. The CNSVS is sensitive to malingerers and patients

with conversion disorder. Kevin's CNSVS results showed true cognitive deficits. [R01.1886, 1897-1899, Adler Dep, 82, 128-31].

5. No known possible cause of an organic brain injury apart from hypoxia (oxygen deprivation)

There is only one plausible cause of any physical brain injury manifesting in Kevin on April 11, 2018, and the succeeding days — namely, the opioid overdose and respiratory insufficiency. Kevin suffered no trauma to his head around then. He suffered no infection in his head. Kevin had a snowmobile accident in 2003 or 2004. But as Dr. Adler notes, since Kevin had no ongoing symptoms in the 14 or 15 years between the accident and the symptoms that began in April 2018, it is not plausible that the snowmobile accident suddenly, coincidentally caused those symptoms. [R01.1896]. Given a physical brain injury, hypoxia is the only plausible cause.

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But Dr. Adler obtained additional facts & data, too. Dr. Adler ordered *quantitative* EEG, MRI, and PET studies of Kevin. Those studies were performed by qualified experts, who produced reports, discussed above. Dr. Adler considered those reports together with the other facts & data he collected. They further supported the conclusion that Kevin suffered an organic brain injury from hypoxia.

Dr. Center's qEEG concluded that Kevin's brain demonstrates objective signs of injury, and that those signs of injury were *consistent with* a hypoxic event. Dr. Center also agreed that those signs could also be consistent with a

head-on snowmobile crash, but, ultimately explained that the findings of brain injury would need to be "clinically correlated," which means, sent to a doctor to be compared to the rest of the information available, including the timing of onset. [R01.1167.]

The quantitative assessment of Kevin's 2023 MRI revealed "abnormalities" that are "bilateral...symmetrical... patchy...and fairly widespread. The overall appearance is consistent with a generalized insult such as hypoxia." [R01.1858.]

A PET scan had been obtained from Kevin in May 2018, a few weeks after his hospitalization. Dr. Adler ordered a quantitative analysis of that PET data in September 2023. From this, Dr. Adler concluded that the quantitative PET analysis was likewise "consistent with a generalized insult such as hypoxia rather than traumatic brain injury." [R01.1861.]

On the basis of the foregoing facts, Dr. Adler concluded that Kevin suffers not from conversion disorder but from an organic brain injury caused by hypoxia while he was in the hospital.

THE PROCEEDINGS BELOW

The Daubert Motion

The Defendants filed a motion to exclude Dr. Adler *entirely*, but the focus of their motion was narrow. In fact, it was narrow in two ways: (i) the Defense sought to exclude Dr. Adler because quantitative brain imaging studies are not rated or approved for the hyper-specific purpose of diagnosing

adult hypoxic brain injuries; and (ii) the Defense sought to exclude all of Dr. Adler's testimony because he had relied on such reports (even though he had gathered and considered a multitude of other evidence).

The Circuit Court accepted the Defense's assumption. Principally on that basis, the Circuit Court held that it was improper for Dr. Adler to read or consider the quantitative imaging reports. It ordered his testimony excluded in its entirety.

The Original Daubert Order

Following a hearing in October 2024, the Circuit Court issued a written memorandum opinion excluding Dr. Adler's testimony entirely. [R01.2700].

Subsequent Motions

Following the Circuit Court's original *Daubert* order, Plaintiffs filed a motion to reconsider [R01.2978], along with affidavits by Dr. Adler, Dr. Center, and Dr. Rusty Turner (a neurologist who supervises Dr. Center's qEEG work). Those papers sought to elaborate on the same points made in the original briefing, and, to correct or clarify misunderstandings.

The Circuit Court directed the parties at the hearing to focus upon the procedural arguments, *i.e.*, the standards for reconsideration, and announced it was less interested in hearing the merits. Further, the Circuit Court asked on multiple occasions for Kevin's counsel to point out "manifest" errors in the original decision, which Kevin's counsel did, but to no avail.

Ultimately, the Court determined that the arguments should have been raised earlier; it refused to find error in its opinion; and it denied reconsideration. [R02.1179].

In light of the exclusion of Dr. Adler, both the Hospital and Dr. Miner filed summary judgment motions, on the ground that Plaintiffs could not prove causation without Dr. Adler's testimony. The Circuit Court granted both motions. [R02.1181].

From this, Kevin and Julie now appeal and assign the following five errors.

STATEMENT OF THE ISSUES

1.

Did the Circuit Court err by exceeding its gatekeeping authority and applying too strict a standard to expert testimony?

Yes, the Circuit Court erred. The quantitative imaging studies (qEEG, qMRI, and qPET) are sufficiently established techniques that it was proper for a physician to rely on them or extrapolate from them. This is true, even if the physician is not a specialist, and even if the tests are not been validated for specific diagnoses. That is not a requirement applied in medicine.

- *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968 (8th Cir. 1995).
- *State v. Carter*, 2023 S.D. 67, ¶ 54.
- *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 86 (1st Cir. 1998)

2.

Did the Circuit Court err by excluding Dr. Adler's testimony based upon factual errors?

Yes, the Circuit Court erred. The Circuit Court made manifest factual errors by misstating that Kevin's cognitive testing was normal; that Dr. Adler had relied solely on the quantitative testing to reach his opinions; and that Dr. Center had disavowed the use of qEEG here.

- *State v. Hullinger*, 2002 S.D. 83, ¶ 13.
- SDCL 19-19-702.

3.

Did the Circuit Court err by failing to conduct a meaningful review of the *Daubert/Lemler* factors?

Yes, the Circuit Court erred. Because of its narrow and strict focus, and in light of its factual errors, the Circuit Court failed to conduct a review of the factors as they pertain to Dr. Adler, generally as a physician engaged in the diagnostic method, and, as they pertain to the broader question of reliability of quantitative testing to investigate brain function.

- *State v. Lemler*, 2009 S.D. 86, ¶ 25
- Hutton, C., SOUTH DAKOTA EVIDENCE, 409 (2nd ed., 2013) (listing seven additional factors)

4.

Did the Circuit Court err by granting summary judgment on the ground that Plaintiffs could not prove causation without Dr. Adler's testimony?

Yes, the Circuit Court erred. Even without Dr. Adler's testimony, a jury could conclude from the Defendants' admissions and Dr. Stein's testimony that Kevin Walton suffered a hypoxic brain injury. Dr. Stein's un-challenged expert testimony establishes breaches, and, his 'consistent with' testimony is sufficient to negate summary judgment on causation.

- *Garrido v. Team Auto Sales, Inc.*, 2018 S.D. 44, ¶ 17.
- SDCL 15-6-56.

5.

Did the Circuit Court err by failing to reconsider its original Daubert order?

Yes, the Circuit Court erred. Unlike federal law, South Dakota law permits trial courts to reconsider any order, where doing so will correct error and avoid unnecessary delay and appeals. The Circuit Court misconstrued the standard for reconsideration; however, if its original order is erroneous, the issue is moot. On appeal, the standard of review for this Court appears to be whatever the underlying standard was on the original motion.

- *Sacred Heart Health Servs., Inc. v. Yankton 19*, 2020 S.D. 64, ¶ 25.
- SDCL 15-6-54(b).
- *State v. Madsen*, 2009 S.D. 5, ¶ 12.

STANDARD OF REVIEW

There are three standards of review implicated by this appeal.

This Court reviews a grant of summary judgment *de novo*. *Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 17.

A Circuit Court's decisions regarding the reliability and admissibility of expert opinion are reviewed for an abuse of discretion. *State v. Edelman*, 1999 SD 52, ¶ 4. "By definition, a decision based on an error of law is an abuse of discretion." *Credit Collection Services, Inc. v. Pesicka*, 2006 S.D. 81, ¶ 4. A Circuit Court also abuses its discretion when a "mistake of fact...[forms] the basis for its conclusion" about admissibility under *Daubert*. *State v. Hullinger*, 2002 S.D. 83, ¶ 13.

This Court has not expressly stated a standard of review for motions to reconsider, but it appears to review them under whatever underlying standard was attached to the original motion at issue. *E.g., State v. Madsen*, 2009 S.D. 5, ¶ 12.

ARGUMENT

1. The Circuit Court abused its discretion by acting as an "armed guard" rather than as a "gatekeeper" -- requiring that medical tests be disregarded unless they have been specifically validated for a particular diagnosis.

Prior to *Daubert* and *Kumho*, the barrier to admissibility of scientific testimony was high. In response to widespread exclusion of expert witnesses whose methods had not yet achieved "general acceptance," the United States

Supreme Court and then this Court liberalized the admissibility of expert testimony "with the 'general approach of relaxing the traditional barriers to "opinion" testimony.'" *State v. Guthrie*, 2001 S.D. 61, ¶ 36 (quoting *Daubert* at 588).

A Gatekeeper, not an Armed Guard

The *Daubert/Kumho* standard "more clearly defines *the degree* of scrutiny the Circuit Court must give to all experts in satisfying the 'gatekeeping' role." Kern, J., *et al.*, "*Daubert, Kumho, and its Impact on South Dakota Jurisprudence: An Update*," 49 S.D. L. REV. 217, 243 (2004) (emphasis in original).

> While circuit courts are to determine whether the expert testimony is 'reliable' and 'will assist the trier of fact,' the *'trial courts are gatekeepers, not armed guards*....[T]he standard for qualifying a witness as an expert is permissive and liberally construed.

Tosh v. Schwab, 2007 S.D. 132, ¶ 41 (Meierhenry, J., dissenting) (quoting Kern J., at 244) (emphasis added). '[T]rial courts should keep in mind that 'experts need not possess a special key or invoke a magic incantation before the gates of the courtroom are opened to them.'" *Id*, at 245 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

"The rule clearly 'is one of admissibility rather than exclusion.'" *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 24, n.4 (quotation omitted). "Generally, an expert's opinion is reliable if it is *derived from the*

foundations of science rather than subjective belief." *State v. Guthrie*, 2001 S.D. 61, ¶ 36.

"*Daubert* was intended to liberalize the admissibility of expert opinion testimony, keeping out only the 'junk science.'" *Tosh v. Schwab*, 2007 S.D. 132, ¶ 41 (Meierhenry, J., dissenting) (citations omitted).

"The *basis* of an expert's opinion is generally a matter going to the weight of the testimony rather than the admissibility." *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 39 (quoting *State ex rel. Dep't of Transp. v. Spiry*, 1996 S.D. 14, ¶ 16).

(a) The Circuit Court's order exceeded its gate-keeping function by relying on a non-existent requirement that medical tests be specifically validated for every potential diagnosis the test may be considered for.

Here, the Defendants' motion was clever, in that it artificially created a new scientific standard: that no medical testing can be used unless it is specifically rated and approved for the exact condition of the plaintiff; and, that if a doctor orders such a non-sanctioned test, he must therefore be excluded altogether.

That is not how science works. That is not how medicine works. As Dr. Adler explained:

> Diagnostic tests do not give diagnoses. The tests provide factual findings about the patient's body - e.g., a white blood cell count, the presence or absence of bacteria in the cerebrospinal fluid, an abnormal density in part of the brain, etc. The factual findings are not diagnoses. Any given finding may be consistent with multiple diagnoses. A physician tries to gather enough facts from different sources to identify the most likely diagnosis.

> If a diagnostic test provides facts about the body that make a potential diagnosis more likely or less likely, then a physician should consider that information. It doesn't matter whether that diagnostic test has previously been used by a physician who is considering the potential diagnosis at issue. ...
>
> Diagnostic tests are not approved, certified, or otherwise validated for each specific potential diagnosis for which they may provide relevant information. It would be effectively impossible to do so. For example, on a quick search of the Internet, it appears there are over 200 types of cancer, over 600 recognized neurologic disorders, around 7,000 genetic disorders, and so on. It would be arbitrary and senseless to prevent physicians from considering test results unless the test had been previously validated for a specific potential diagnosis. If physicians were prevented from doing so, medicine would be crippled, and patient harm from diagnostic errors would proliferate.

[R02.3375-76.]

The Circuit Court erred by repeatedly invoking a stricter standard than its gatekeeping role allows. The Circuit Court adopted the Defense's artificial scientific standard (that a specific test must be specifically approved for a specific diagnosis) and then proceeded to analyze 7 out of the 8 factors in the narrow manner invited by the Defense. *See,* [R01.2707-2712].

In the span of six pages, the Circuit Court used a variation of the phrase "to diagnose *hypoxic* brain injury" in its analysis of testability; peer review; error rate; general acceptance; relationship of the technique/methods; expert's qualifications; and non-judicial use. Based upon this mistaken understanding of its role, it excluded Dr. Adler. Instead, the Circuit Court should have concluded that it is permissible for a competent professional to employ testing to *assist* in the diagnostic process, so long as a rational connection is drawn between the broader science and this specific patient.

(b) New technologies are admissible when the expert extrapolates from existing methods

The 8th Circuit case of *Hose v. Chicago Nw. Transp. Co.* is instructive on this point. 70 F.3d 968 (8th Cir. 1995). *Hose* involved a novel brain injury: an alleged toxic encephalopathy due to manganese poisoning. The plaintiff's expert conceded that there was no known scientific literature as to the use of PET scans for manganese poisoning. Yet, the expert was permitted to rely upon those PET scans by *extrapolating* their significance. In its affirmance, the 8th Circuit agreed such evidence was permissible "because it was relevant in terms of excluding other diagnoses of [plaintiff's] injuries and was limited to *showing consistency with, not diagnostic proof of,* manganese encephalopathy." 70 F.3d at 973. In short, since PET scans were a known technology for investigating the condition of brains, that expert was permitted to employ that technology for a novel use. In such cases, the limitation is only that "there is an analytical connection between the known data and the expert's opinion." *State v. Lemler,* 2009 S.D. 86, ¶ 25

(c) FDA approval is not required.

A Circuit Court also errs in its gatekeeping function by requiring FDA approval for use of medical tests. This Court has recognized that medical testing modalities are admissible, even though "not yet...approved by the FDA" for the specific use, including when there is "limited data" due to a small subset of affected patients. *See State v. Carter,* 2023 S.D. 67, ¶ 54 (*citing Smith v. Com.*, No. 2008-SC-000786-MR, 2010 WL 1005907, at *3 (Ky. Mar.

18, 2010)). Adult patients with hypoxic brain injuries are a rare occurrence (since, as Dr. Adler explained, the hypoxia is usually fatal). FDA approval was not necessary prior to Dr. Adler using quantitative brain imaging for Kevin.

(d) It is error to require hyper-specific testing prior to admissibility

This Court has held it to be error when a Circuit Court required hyper-specific testing to validate the methods used in the case at hand. *In re T.A.*, 2003 S.D. 56, ¶27. "Parents would have this Court create a requirement that the medical profession devise a test to determine how and why a child bruises in order for a medical professional to testify as to whether the child's injuries are consistent with abuse." *Id.* In a similar vein, this Court has recognized that it is error when a Circuit Court too narrowly constrains the subject matter of the pertinent scientific inquiry. *See State v. Wills*, 2018 S.D. 21, ¶26 (citing with approval to Montana case for the proposition that a trial court "too narrowly conceived the subject matter" when it disqualified an expert witness).

(e) It is error to require an expert to possess exacting levels of skill or to hold specialist credentials

Under the *Daubert* standard, an experienced medical doctor does not need a specific 'specialist' designation in order to testify as an expert on medical matters. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ("Disputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony."); *accord,*

State v. Hullinger, 2002 S.D. 83, ¶ 17-18 (abuse of discretion to require proffered expert to be "highly skilled or experienced in administering and analyzing the results" of the test). It is sufficient that the proffered expert has at least some training and that the testing comports with existing standards. *See, also. First Western Bank Wall v. Olsen*, 2001 S.D. 16, ¶ 10 ("we do not examine an expert's qualifications under such a restricted focus").

Here, the Circuit Court concluded that because Dr. Adler was not a "nuclear medicine doctor" or a "radiologist," he lacked the necessary specialization "to use qEEG, NeuroCloud VOL, and NeuroCloud PET to diagnoses hypoxic brain injury...." [R02.2711].

In summary, the gatekeeping function is intended to weed out *junk science* and *subjective* testimony. It is a rule of inclusion, not exclusion. *Daubert* and *Kumho* intentionally relaxed the standards, in order to permit experts to testify about novel uses for technology, long prior to when those novel uses achieve general acceptance.

"The proffered opinion *may be inferred from accepted facts*, and the subject of the scientific testimony need not be known to a certainty." *State v. Lemler*, 2009 S.D. 86, ¶25. Here, there is no dispute with the underlying, accepted fact: quantitative imaging technologies can provide insight into the condition of human brains, in ways that visual inspection of an MRI, EEG, or PET scan could not. There is also no dispute that these technologies have widespread use in the United States (in the case of qEEG) and that these exact software platforms are used by physicians in European hospitals (in the case

of the quantitative analysis of PET and MRI available via NeuroCloud PET and NeuroCloud VOL).

If the Defense believes that Dr. Adler misread, misunderstood, or mistakenly applied these technologies, the place for addressing this is via cross-examination. A Circuit Court is not equipped to resolve scientific questions like this, and, it oversteps its gatekeeping role by doing so.

Here, the Circuit Court erred by requiring

> a level of assurance that science realistically cannot achieve and that *Daubert* does not demand. The adoption of such a standard impermissibly changes the trial judge's role under *Daubert* from that of gatekeeper to that of armed guard. That mistaken application of the law likewise constitutes an abuse of discretion.

Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 86 (1st Cir. 1998) (cleaned up; citation omitted).

In sum, the Circuit Court abused its discretion by applying the wrong legal standard. It was proper for Dr. Adler to read and consider the quantitative imaging reports. The order excluding Dr. Adler should be reversed in its entirety.

2. The Circuit Court abused its discretion by getting basic facts wrong in support of its exclusion of Dr. Adler

It is also an abuse of discretion when a lower court uses faulty information as a basis to exclude evidence. Here, the Circuit Court made demonstrable factual errors in its written opinion.

(a) Kevin's psychological testing was abnormal and indicative of a hypoxic brain injury

In the course of reaching its decision the Circuit Court wrote that "Dr. Adler did not indicate that any of [Kevin's] psychological testing was indicative of hypoxic brain injury," and it found this fact to be "significant." [R01.2709; Memorandum Opinion, p. 10]. But this is wrong. And this error is demonstrated in at least five places in the Record.

- As Dr. Adler testified, Kevin's (CNSVS) testing results showed true cognitive deficits. [R.1886, 1897-1898; Adler Depo. 82; 128-31].[10]
- Dr. Adler's interview and assessment confirmed that Kevin's gradual progression of symptoms (increasing cognitive impairment) over a period of days is consistent with the gradual

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[10] The Circuit Court was told this via Kevin's briefing, three months prior to the first Daubert hearing. [R01.1961].

And even in its own briefing, the Hospital highlighted three *further* examples of Kevin's cognitive deficits:

- *first*, in spite of being functionally disabled and unable to work, one of the neurocognitive batteries revealed the Kevin himself was unaware of the true extent of his own disability. *See*, [R01.2556] (Keving presently has a "non-elevated score related to" the "current impact" of the "anchoring event," as related in the Hospital's Reply brief, and referencing the IES-R test); and
- *second*, that Kevin's "memory and concentration were impaired." *See*, [R01.2555] (discussing Kevin's "brief mental status examination"); and
- *third*, that Kevin's testing revealed "weakness in visual memory, psychomotor and motor speed." *See*, [R01.2555] (discussing CNS-VS testing).

death of brain cells that would be expected from a brain injury. [R. 1899-1900; Adler Depo. 134-137].[11]

- Dr. Adler drew upon *prior* psychological testing by a treating doctor in 2019 showing significant abnormalities despite good effort. [R01.1886, 1896].[12] Huxford's testing also indicated a lack of malingering (which was a potential cause to rule out). *Id.*
- Dr. Adler also conducted "suggestibility" testing. Kevin's scores indicated low suggestibility, which was an indicator that Kevin did *not* have functional neurological disorder.[13] So, although this particular test is not "*indicative* of hypoxic brain injury"[14] in isolation, it provided a further basis *to rule out* functional neurological disorder, and thus point toward a brain injury.
- And, Dr. Adler used the DSM-5 to assess the diagnostic criteria for conversion disorder. Based upon his testing and other information, Dr. Adler concluded that the criteria were not met. [R.1897-1898, 1885-1886][15] And by ruling out conversion

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[11] The Circuit Court was likewise told this via Kevin's briefing, three months prior to the first Daubert hearing. [R01.1960].

[12] *Id.*

[13] *E.g.*, [R.3458] (comprehensive review of 1285 patients indicates that functional neurological disorder is "characterized by heightened responsiveness to verbal suggestion")

[14] As argued by the Hospital below, at [R.2556].

[15] This, too, was explained to the Circuit Court via the same briefing, months prior to the first Daubert hearing.

disorder, this left a brain injury as the leading, verifiable cause of Kevin's injuries.

(b) Dr. Adler used multiple sources of data to form his opinions, and not *only* the quantitative analysis.

In parallel with its mistake that Kevin's neuropsychological testing was "normal," the Circuit Court concluded that the *only* evidence of Kevin's brain injury was from quantitative analysis. [R01.2702; 2709]. This is also error.

This error was apparent from the Record as of the original *Daubert* order in October 2024. Dr. Adler's report (at page 32) explains that he arrived at his opinions using a multitude of "convergent" data sources (Figure 17), and, throughout his deposition he identified and clarified the various sources of information he used, beyond the quantitative analysis.

Then, as part of the motion for reconsideration, Dr. Adler's Declaration provided another detailed analysis of his method, including his explanation that he could reach the same conclusion using Factor 1 through 11, which excluded the quantitative imaging information. [R01.3382-3389] (¶¶ 54 to 116). *See, also,* [R013408] ¶ 219] ("with or without consideration of the quantitative reports").

(c)Dr. Center did not disavow the use of qEEG technology for its use by Dr. Adler to evaluate Kevin's condition

Third, the Circuit Court found (mistakenly) that the expert who performed the qEEG study (Dr. Wesley Center) had disavowed the use of

qEEG for diagnostic purposes. This, too, was wrong. This error is demonstrated in several places in the Record

This error arose from a single piece of deposition testimony, which Circuit Court interpreted as meaning Dr. Center believed "qEEG cannot be used for diagnostic purposes, deeming such use as illegitimate." [R01.2726; Memorandum Opinion, p. 12]. In short, Dr. Center said qEEG is not a standalone diagnostic test for a brain injury, but, that it can be properly used with other information to render a diagnosis.

- In Dr. Center's original report, he qualified his findings as needing "clinical correlation." [R02.23]
- In Dr. Center's original report, he also advised that qEEG tests are "ancillary tests that are not intended to provide a diagnosis by themselves but are used to evaluate the nature and severity of deregulation." [R02.135]. "A diagnosis is performed by the clinician [who integrates various information] to render a diagnosis.." *Id.*
- In his supplemental affidavit, Dr. Center explained the Circuit Court had taken him out of context. "As I testified, qEEG is appropriately used to test a hypothesis of a diagnosis made by competent medical authority and to explore the extent and nature of that diagnosis from a neurobehavioral perspective. I was referring both to my [own] inability to diagnose any medical condition regardless of the technology I use *as I am not a*

physician, and that qEEG is not properly used in a vacuum...." [R02.8].

- Dr. Center also expressly *endorsed* how his qEEG report had been used here: namely, that Dr. Adler "used my qEEG report to inform his diagnosis of Mr. Walton....This is an acceptable use of Kevin Walton's qEEG report by a psychiatrist" as "one piece of information among other evidence." [R02.9].
- "Provided that the qEEG is being used with other diagnostic data and information, it is a valid, accepted tool for use to aid in diagnosis." *Id.*

In summary, the Circuit Court excluded Dr. Adler's testimony based upon three demonstrable factual errors: that Kevin's cognitive testing was normal; that Dr. Adler solely relied on quantitative testing; and that Dr. Center disavowed its use for diagnosing Kevin. All of those errors were critical to its evaluation of the admissibility of Dr. Adler's testimony. These errors were manifest from the Record as it existed prior to the original *Daubert* hearing, and Kevin attempted to correct each of them via reconsideration. A reliance upon erroneous facts to exclude expert testimony is an abuse of discretion. Dr. Adler's exclusion should be reversed upon this basis, as well.

3. The Circuit Court abused its discretion by failing to conduct a meaningful review of the *Daubert/Lemler* factors.

In light of the Circuit Court's legal and factual errors, its analysis of the *Daubert/Lemler* factors was erroneous. *State v. Lemler*, 2009 S.D. 86.

As noted above, the Defense and the Circuit Court focused entirely on one category of facts and data that Dr. Adler considered: the quantitative imaging reports. The Circuit Court applied each of the *Daubert* factors in hyper-specific fashion. The Court did not ask if the qEEG, qMRI, and qPET technologies were reliable in providing relevant information about the brain, but whether the technologies had been specifically proven to diagnose a brain injury caused by hypoxia (as opposed to other causes of brain injury). As discussed above, that is the wrong question and the wrong way to apply *Daubert*.

Notably, the Circuit Court did not address any of the factors as they pertain to Dr. Adler as a medical doctor offering opinions using the diagnostic method. And the Circuit Court's analysis of the quantitative technology did not address the science underlying it, focusing solely on the narrow question of its use for "diagnosing hypoxic brain injury."[16]

If one asks the correct question – whether the technologies reliably provide information about the brain that may be relevant – the answer is Yes.

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[16] Dr. Adler can also meet the seven "additional" *Daubert* factors that Dr. Hutton identified in her evidence treatise. Hutton, C., SOUTH DAKOTA EVIDENCE, 409 (2nd ed., 2013). They were outlined and applied in the briefing below. [R01.2981; 3001-3002].

In summary form, the factors would have been readily provable using the evidence that the Circuit Court had before it.

	Dr. Adler's Differential Diagnosis Method	Quantitative Brain Imaging Technology
Testable[17]	Yes. (Any doctor can follow and repeat the same method.)	Yes. Any doctor can take Kevin's existing EEG, MRI, or PET (or another patient's EEG, MRI, or PET) and run them through the same software, since it is broadly and commercially available. [R01.3404.]
Peer Reviewed	Yes.	Yes, as to the underlying science. [R01.3404.]
Known Error Rate	Yes. (Any doctor can look for errors in the methodology.)	Yes as to the brain imaging (EEG, MRI, PET) and as to the quantitative analysis of them. [R01.3404-05.]
Standards	Yes.	Yes as to the brain imaging (EEG, MRI, PET) and as to the quantitative analysis of them. [R01.3405.]
General Acceptance	Yes.	No, but "wide" acceptance of qEEG to assess brain injury, including hypoxia;[18] and clinical use of NeuroCloud PET & VOL in European hospitals.[19]
Relationship of Method to Technique	Yes. (diagnosing a patient as to potential psychiatric illness)	Yes, extrapolating brain quantification software to evaluate brain condition.
Qualified Expert	Yes (psychiatrist ruling out and diagnosing brain maladies)	Yes. The imaging was performed by qualified technicians, and the quantitative analysis was performed by qualified experts – Dr. Center for qEEG, and the EU-approved software by QuBiotech for qMRI and qPET.
Non-Judicial Uses	Yes. (The practice of medicine.)	Yes. Widespread use of qEEG for decades, both in research and clinically. For qMRI and qPET, clinical use of the QuBiotech software in European hospitals (with other providers performing similar services in the US and elsewhere).

[17] *State v. Lemler*, 2009 S.D. 86, ¶ 35 (admission of disputed expert upheld in part because "the theories and techniques in question either had been or *could* be tested")

[18] [R02.5] (Center Affidavit, ¶ 10)

[19] The Defense concedes that NeuroCloud VOL and PET are used in European hospitals to provide brain imaging for patients. [R.25621-2562].

When properly applied, Dr. Adler's proposed testimony, and his reliance upon quantitative imaging technology, meets the necessary standards. None of his testimony should have been excluded.

4. Even without Dr. Adler's testimony, a jury can reasonably find that the Defendants' overdosing of Kevin caused his current deficits. So the grant of summary judgment should be reversed.

Both the Hospital and Dr. Miner confined their motions to the issue of causation, based upon the exclusion of Dr. Adler. Thus, in the event that this Court reverses all or part of Dr. Adler's exclusion, the summary judgment motion will be moot, and it should be reversed.

In the alternative (and without conceding that Dr. Adler's testimony should be excluded or limited), the Circuit Court's grant of summary judgment was in error *even without Dr. Adler*.

The Record contained sufficient grounds upon which Kevin can prove causation, albeit with circumstantial evidence; expert testimony about how Kevin's injuries are "*consistent with*" certain causes; adverse inferences; and party admissions, as opposed to direct opinion causation testimony from an expert.

In South Dakota medical cases, "circumstantial evidence can create an inference of causation even though it does not negate the existence of remote possibilities that the injury was not caused by the defendant." *Garrido v. Team Auto Sales, Inc.*, 2018 S.D. 44, ¶ 17 (quoting *Van Zee v. Sioux Valley*

Hosp., 315 N.W.2d 489, 495 (S.D. 1982)). "It must be a clear case before a trial judge is justified in taking these proximate cause issues from the jury." *Garrido v. Team Auto Sales, Inc.*, 2018 S.D. 41, ¶ 16.

Once a breach of the standard of care is shown, a medical malpractice plaintiff can defeat a summary judgment motion by presenting circumstantial evidence from which "a jury could reasonably infer from the evidence...that [the medical provider's] negligence injured [the plaintiff]." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 35.

"[T]here must be no genuine issue on the *inferences* to be drawn from [the] facts." *Godbe v. City of Rapid City*, 2022 S.D. 1, ¶¶ 20. A plaintiff need only prove "that it is more probable that the harm resulted from some negligence for which defendant was responsible than in consequence of something for which [s]he was not responsible." *Id.*, ¶ 35

Here, the Record *even without* Dr. Adler contains sufficient evidence of causation. Dr. Stein testified that Kevin's injuries are consistent with a hypoxic injury, and, that the circumstances created by the Hospital and Dr. Miner are consistent with creating such injuries. In addition, Dr. Stein provided circumstantial evidence as to the *timing* of causation when he recognized that Kevin's sudden cessation of pain in the early morning hours of April 11 is consistent with brain injury occurring at that time.

The Jury could find evidence in the Defense's admissions, namely, their creating medical records indicating that Kevin has a non-traumatic brain injury, and that his injuries are consistent with such an injury. And, the Jury

could use an adverse inference against the Defendants, namely, that the absence of contemporaneous records of hypoxia is their own fault, and that they cannot benefit from the absence of safety records they failed to create in the first place. *Gotto v. Eusebe-Carter*, 69 A.D.3d 566, 568, 892 N.Y.S.2d 191, 193 (2010). The Record is sufficient to sustain a verdict on causation, even without Dr. Adler.

5. The Circuit Court erred by issuing its original Memorandum Opinion and then by failing to reconsider it.

Finally, we address the procedural aspects of a motion to reconsider.

The Circuit Court refused to reconsider the issue on its merits and instead exercised its discretion *not* to reconsider those merits. The Circuit Court cited no authority in its ruling but appeared to follow a more stringent test for reconsideration, such as those followed in some federal circuits.

A Circuit Court in South Dakota has broad flexibility to conduct such a reconsideration, which implies broad discretion to *refuse* to do so. By Rule, any order or decision in a case "is subject to revision at any time before the entry of [final] judgment." SDCL 15-6-54(b). "A memorandum decision is not a binding decision ending the case, [and] it is the prerogative of the circuit court to re-think a decision from the bench or a memorandum decision." *Sacred Heart*, 2020 S.D. 64, ¶ 25 (quotation omitted).

We suggest that regardless of the standard for reconsideration, when a Circuit Court has issued an opinion that contains legal and factual errors, its

duty is to correct those errors through further proceedings, and its failure to correct those errors is an inherent abuse of its discretion. *C.f., Brendtro v. Nelson*, 2006 S.D. 71, ¶ 42 (Konenkamp, J., concurring) ("Judges have an obligation to reexamine their views when superior proof is brought forth to challenge previous understandings. For me, such is the case here.").

And in all instances, the review on appeal is simply the same standard as the underlying question, based upon the entirety of the Record. Notably, the Circuit Court did not strike any of the materials submitted with the motion to reconsideration, and, they remain part of the Record.

In short, the *Daubert* question should be resolved under the ordinary *Daubert* analysis upon the entire Record.

CONCLUSION

Dr. Adler's testimony was challenged (and then excluded) on the basis that he subjected Kevin's unusual case to *newer tests* (a quantitative EEG) and *cutting-edge tests* (quantitative software analysis of his MRI and PET scans) that other physicians use in their clinical practice.

Dr. Adler did not invent these tests for litigation, nor are those tests tantamount to quackery. He approached this case like he would approach any complex head injury. His testimony should not have been excluded, and summary judgment was in error. We request reversal of both rulings.

Dated this 30th day of May, 2025.

HOVLAND, RASMUS &
BRENDTRO, PROF. LLC

/s/ Daniel K. Brendtro
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Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,996 words, exclusive of the Table of Contents, Table of Authorities, Statement of Legal Issues, Jurisdictional Statement, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2025, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

and via email attachment to the following address:
scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 30th day of May, 2025, I filed the foregoing via Odyssey, with presumptive service upon the parties via counsel:

Appellee:	***Appellee:***
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Daniel K. Brendtro
One of the attorneys for Appellant

APPELLANTS' APPENDIX - #31052

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STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

PATRICK T. PARDY
Circuit Judge
200 E. Center Street
Madison, SD 57042
605-256-5035
605-256-5012

COUNTIES
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

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200 E. Center Street
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October 8, 2024

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RE: *Kevin Walton and Julie Walton v. Huron Regional Medical Center, Inc., William J. Miner, M.D., and John Does and Jane Does* – 02CIV20-51; Defendant's Motion to Exclude Testimony of Richard S. Adler, M.D.

INTRODUCTION

This is a medical malpractice matter initiated by Kevin and Julie Walton (hereinafter "Plaintiffs") against Huron Regional Medical Center, Inc.; William J. Miner, M.D.; and John Does and Jane Does (hereinafter "Defendants") to recover damages Plaintiffs allege were caused during Kevin Walton's stay at Huron Reginal Medical Center, Inc. during April 2018. Defendant HRMC has made a Motion to preclude Plaintiff from using Dr. Center and Dr. Adler, M.D., in whole or in part, as a medical expert because their methodologies are not scientifically valid or accepted. The Plaintiffs have since removed Dr. Center from their witness list and stated the motion is now moot as it relates to Dr. Center.

After considering the proffered expert testimony, the arguments of counsel and the applicable authorities, Defendant's motion to exclude certain opinions of expert Richard S. Adler, M.D., is GRANTED.

BACKGROUND

On April 9, 2018, Kevin Walton was admitted to Huron Regional Medical Center (hereinafter "HRMC") for testicular pain. During his stay, Mr. Walton was prescribed Dilaudid to manage the pain. Under the care of Dr. Miner, Mr. Walton's dosage of Dilaudid was increased. Mr. Walton alleges that HRMC failed to adequately monitor him and, when staff did check on him, they found him near death with irregular and shallow respirations. As a result, Mr. Walton contends that he suffered an opioid overdose leading to hypoxic brain injury. He claims that this event caused confusion, agitation, speech in a foreign accent, generalized weakness, weakness in his right leg, and difficulty walking. HRMC denies these allegations, attributing the symptoms to Mr. Walton's pre-existing and post-hospital medical conditions.[1]

In support of his claims, Mr. Walton has retained Dr. Adler, a Harvard-trained physician, board-certified in psychiatry, with a specialization in child and adolescent psychiatry. Dr. Adler has concluded that Mr. Walton experienced hypoxia, which he believes is directly and proximately

[1] Mr. Walton suffered a head injury when he was in a snowmobiling accident.

caused Mr. Walton's injury. To reach this conclusion, Dr. Adler utilized a range of diagnostic tools, including neuroevaluative testing through administration of neuroevaluating testing, done via quantitative electroencephalogram (herein after qEEG), brain magnetic resonance imaging (MRI), including volumetric quantification, review and possible analysis of further testing (such as a PET scan)[2]. Dr. Adler also conducted psychological testing and interviews, as well as the opinions of Dr. Center to form his opinion.

Plaintiffs argue that the methods employed by Dr. Adler and Dr. Center are reliable, well-established, and meet the Daubert standards. To determine that Mr. Walton suffered from hypoxia, Dr. Adler and Dr. Center used NeuroCloud software. Specifically, the MRI of Mr. Walton's brain, conducted on June 6, 2023, was analyzed using NeuroCloud VOL; while the PET scan from May 31, 2016, was analyzed with NeuroCloud PET. Both software tools are commercially developed products from Quibiotech Health Intelligence. Additionally, Dr. Adler and Dr. Center used qEEG in conjunction with NeuroCloud to analyze Mr. Walton's brain images. Mr. Walton asserts that qEEG and NeuroCloud have been in use since the 1990s for both practice and research. The combination of qEEG, NeuroCloud, and the absence of other plausible causes for Mr. Walton's symptoms led Dr. Adler and Dr. Center to conclude that he suffered from hypoxia rather than a traumatic brain injury.[3] The NeuroCloud software, NeuroCloud VOL and NeuroCloud PET, along with the qEEG software, are the subjects of the Defendants' motion.

Contrary to the argument made by the Plaintiffs, HRMC asserts that the methodology used by Dr. Adler and Dr. Center fail under the *Daubert* factors based on the argument that the

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[2]The scans were not read by Dr. Adler. The scans were interpreted by Dr. Center, Ph.D., who is the LPC of Brain and Behavior Associates, hired by the Plaintiffs as an expert. Dr. Center will not be called at trial. Dr. Adler relied on Dr Center's readings to form his own opinion.

[3] Dr. Adler and Dr. Center use a prior snowmobile accident that caused an emergency room visit and surgery to Mr. Walton's lower jaw in their analysis. HRMC contends that no medical records have been disclosed from any medical provider that reflect the incident or jaw surgery. As such, Dr. Adler and Dr. Center attribute the injury Mr. Walton is facing to the incident at HRMC hospital and not to the snowmobile accident.

technology used is unreliable and defective and will not help assist the jury. HRMC points out that there is a disclaimer on the NeuroCloud VOL and NeuroCloud PET studies, which states: "Disclaimer: The results provided by NeuroCloud PET are not a diagnostic report but a tool for image quantification. Qubiotech Health Intelligence S.L. accepts no responsibility for the use of NeuroCloud PET for purposes other than those specified." HRMC further notes that NeuroCloud VOL and NeuroCloud PET are listed to reveal conditions such as Alzheimer's disease, frontal temporal dementia, multiple sclerosis, temporal lobe epilepsy, Parkinson's disease, and refractory epilepsy, but does not list hypoxic brain injury. Consequently, HRMC argues that Dr. Adler and Dr. Center should not be permitted to testify about the technology's diagnostic capabilities, as qEEG and NeuroCloud are not intended to diagnose hypoxic brain injury based on the commercial technology used.

APPLICABLE LAW

Admissibility of expert testimony is governed by SDCL § 19-19-702 ("Rule 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.

SDCL § 19-19-702.

The South Dakota Supreme Court has adopted the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, regarding admissibility of expert testimony, requiring that "the proponent offering expert testimony [] show that the expert's theory or method qualifies as scientific,

technical, or specialized knowledge[.]" *Burley v. Kytec Innovative Sports Equipment, Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402 (citing *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993)). "This burden is met by establishing that there has been adequate empirical proof of the validity of the theory or method." *State v. Guthrie*, 2001 S.D. 61, ¶ 34, 627 N.W.2d 401, 416.

In terms of reliability of expert testimony, four Daubert factors guide the Court's consideration: "(1) whether the theory or technique in question can be (and has been) tested, (2) whether it has been subjected to peer review and publication, (3) its known or potential error rate and the existence and maintenance of standards controlling its operation, and (4) whether it has attracted widespread acceptance within a relevant scientific community." *State v. Lemler*, 2009 S.D. 86, ¶ 24, 774 N.W.2d 272, 280. When assessing an expert's methodology in terms of reliability, a trial court can consider several nonexclusive factors, including:

> (1) whether the method is testable or falsifiable; (2) whether the method was subjected to peer review; (3) the known or potential error rate; (4) whether standards exist to control procedures for the method; (5) whether the method is generally accepted; (6) the relationship of the technique to methods that have been established as reliable; (7) the qualifications of the expert; and (8) the non-judicial uses to which the method has been put[.]

Id. ¶ 35, 627 N.W.2d at 416 (citing *Daubert*, 509 U.S. at 593-95).

Prior to admitting expert testimony, the trial court must "first determine that such qualified testimony is relevant and based on a reliable foundation." *Id.* ¶ 32, 627 N.W.2d at 415; *see also Rogen v. Monson*, 2000 S.D. 51, ¶ 13, 609 N.W.2d 456, 459 (stating the trial court must ensure that an expert's testimony rests on both "a reliable foundation and is relevant to the task at hand"). "A fundamental baseline for reliability is that experts are limited to offering opinions within their expertise." *Reinfeld v. Hutcheson*, 2010 S.D. 42, ¶ 27, 783 N.W.2d 284, 292 (quoting *Garland v. Rossknecht*, 2001 S.D 42, ¶ 11, 624 N.W.2d 700, 703). The trial court exercises a gatekeeping

function, and the trial court's discretionary authority is broad. *Kostel v. Schwartz*, 2008 S.D. 85, ¶ 79, 756 N.W.2d 363, 387-88 (citations omitted); *See State v. Lemler*, 2009 S.D. 86, ¶ 24, 774 N.W.2d 272, 280 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999)) (stating that the *Daubert* reliability test is "flexible," and specific *Daubert* factors "neither necessarily nor exclusively applies to all experts or in every case"). Additionally, the trial court must decide whether an expert's knowledge will "assist the trier of fact to understand the evidence or to determine a fact in issue," under Rule 702. *Burley*, 2007 S.D. 82, ¶ 16, 737 N.W.2d at 404.

The proponent of the testimony must demonstrate that the testimony is competent, relevant, and reliable pursuant to SDCL § 19-19-104(a) by a preponderance of the evidence. *Id.* ¶ 13, 737 N.W.2d at 403 (citing *Daubert*, 509 U.S. at 592 n. 10). "Relevance embraces 'evidence having 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.'" *Id.* (quoting *Guthrie*, 2001 S.D. 61, ¶ 32, 627 N.W.2d at 415). "A party who offers expert testimony is not required to prove to a judge in a *Daubert* hearing that the expert's opinion is correct: all that must be shown is that expert's testimony rests upon 'good grounds, based on what is known.'" Id. at ¶ 24 (quoting *Daubert,* 509 U.S. at 590). Consequently, when determining reliability, "[t]he focus ... must be solely on principles and methodology, not on the conclusions that they generate." *State v. Huber*, 2010 S.D. 63, ¶ 29, 789 N.W.2d 283, 292 (quoting *Lemler*, 2009 S.D. 86, ¶ 25, 774 N.W.2d at 281).

ANALYSIS

HRMC argues that Dr. Adler's diagnostic methodology is unreliable and should therefore be excluded. The core of HRMC's concerns focuses on the reliability of the qEEG and NeuroCloud technologies employed by Dr. Adler and Dr. Center in reaching the hypoxic brain injury diagnosis.

Additionally, HRMC contends that Dr. Adler's testimony will not assist the jury and should be excluded on those grounds as well.

Plaintiffs theorize that HRMC's actions were the legal cause of Mr. Walton's brain injury based on two main points: (i) HRMC administered higher dosages of Dilaudid, Toradol, and Percocet to Mr. Walton; and (ii) HRMC failed to adequately monitor Mr. Walton, leading to slow respiratory breathing, and subsequently causing a hypoxic brain injury. In support of this theory, Dr. Adler's methodology was as follows:

Dr. Adler, when approached with this matter, used a diagnostic method that is typically used in medicine. Dr. Adler (a) gathered some of the patient's history and symptoms; (b) performed physical examinations; (c) conducted diagnostic tests; (d) analyzed the results; (e) formed a differential diagnosis; (f) ruled out alternative explanations; and (g) arrived at a final diagnosis. Dr. Adler viewed Mr. Walton's medical history, including any pre-existing conditions and previous cognitive or emotional issues, witness statements from family members or caregivers, medical records from the alleged overdose on opioids, clinical observations, neuropsychological evaluations, and *imaging studies*.

The imaging studies were conducted via neuroimaging and EEG analyses. These tests included (a) an MRI of the brain, (b) a PET scan which was analyzed using the NeuroCloud PET; (c) a quantitative MRI which showed bilateral, patchy volume loss, particularly in areas pertinent to Mr. Walton's issues; and (d) a qEEG. HRMC argues that Dr. Adler's opinion regarding the imaging studies is unreliable due to the methodology used by Dr. Adler. Plaintiffs contend that HRMC's propositions regarding the imaging studies are one of credibility for the jury to decide, not for this Court to decide because of the methodology.

1. **Whether the Plaintiffs have established that Dr. Adler's testimony meets the Daubert factors as applied by South Dakota courts, thereby permitting him to testify at trial.**

a. Whether the method itself is testable.

HRMC challenges the reliability and validity of the testing methods employed by Dr. Adler and Dr. Center. According to HRMC, when questioned about the accuracy of the qEEG, Dr. Adler was unable to provide information and deferred to

Dr. Center. When Dr. Center was subsequently asked the same question, he responded that he did not know, as the accuracy of the qEEG is not typically addressed. Furthermore, HRMC raises concerns regarding NeuroCloud technology, both the VOL and PET. Dr. Adler reportedly stated that there has been no testing for the accuracy or reliability of the NeuroCloud VOL and PET methods in relation to hypoxic brain injury.

The Plaintiffs' experts, as well as the record, provide no evidence that qEEG or the NeuroCloud technology is testable. The Plaintiffs never addressed this factor in their briefs or affidavits.

b. Whether the method was subject to peer review.

HRMC argues that the methods utilized by Dr. Adler and Dr. Center lack peer review validation. Specifically, Dr. Adler acknowledged that there are no peer-reviewed publications concerning the use of qEEG for diagnosing hypoxic brain injury. Dr. Center confirmed this assertion. Similarly, regarding the NeuroCloud VOL and PET systems, Dr. Adler indicated that no peer-reviewed publications exist for using these technologies to diagnose hypoxic brain injury.

The Plaintiffs did not provide any evidence on this factor in their briefing and affidavits. The record is void of any peer review regarding the use of qEEG, NeuroCloud VOL, and NeuroCloud PET to diagnose hypoxic brain injury.

c. Whether there is a known or potential error rate

Dr. Adler testified he was unaware of the error rate associated with using qEEG for diagnosing hypoxic brain injury. Dr. Center similarly indicated that no established rate of error exists for this method. Regarding the NeuroCloud VOL and PET testing, both Dr. Adler and Dr. Center were unable to provide information on any rate of error testing for diagnosing hypoxia with this technology. The record is void of any evidence regarding the potential error rate with use of this technology in general, or more specifically, with the use of this technology to diagnosis hypoxic brain injury.

The Plaintiffs did not provide any evidence regarding the potential error rate of the qEEG, NeuroCloud VOL, and NeuroCloud PET.

d. Whether standards exist to control procedures for the method

HRMC asserts that there are no established standards or control procedures for the test methods or algorithms used in qEEG and NeuroCloud VOL and NeuroCloud PET systems. These testing methods are commercial programs, and as a result, the Plaintiffs have not identified any existing standards for these technologies. Furthermore, when questioned, the Plaintiffs' experts were unable to provide any data or standards related to this testing method.

e. Whether the method is generally accepted.

HRMC highlights Dr. Adler's deposition testimony, where he admitted to being unaware of any hospitals that use qEEG to diagnose hypoxic brain injury. Dr. Center testified that he was not aware of anyone using qEEG-guided neurofeedback in Sioux Falls. Additionally, Dr. Adler stated that he was also unaware of any hospitals employing NeuroCloud VOL and NeuroCloud PET systems for diagnosing hypoxic brain injury.

Plaintiffs assert the reliability of qEEG, citing its FDA approval and its broad applicability for various purposes. They note that the FDA has approved qEEG devices specifically for analyzing digital EEGs, which they argue underscores the tool's reliability.

Plaintiffs argue that qEEG is a well-established diagnostic method, having been used since 1994 to assess brain function, detect abnormalities, and assist in the diagnosis and treatment of neurological disorders. They emphasize that qEEG is commonly used in conjunction with other diagnostic tools. Plaintiffs' argue that Dr. Adler employed qEEG along with additional methods to provide a comprehensive assessment. Dr. Adler also considered various potential causes for Mr. Walton's issues, including conversion disorder, physical brain injury, malingering, and a traumatic brain injury from a past snowmobile accident. After evaluating these alternatives and ruling them out, Dr. Adler concluded that hypoxia was the most likely diagnosis.

Plaintiffs argue that they are using qEEG primarily to demonstrate the presence of brain abnormalities rather than to specifically indicate a hypoxic brain injury. Plaintiffs argue Dr. Adler employed the qEEG in conjunction with other evidence to support his diagnosis of hypoxic brain injury, relying on the qEEG mainly to identify abnormalities. It is significant however that Dr. Adler did not indicate that any of his psychological testing was indicative of hypoxic brain injury.

Regarding the NeuroCloud technology used for MRI and PET scans, Plaintiffs argue that it is reliable due to its use in multiple hospitals across the EU and the UK. The NeuroCloud has a CE mark, signifying its compliance with health, safety, and environmental protection standards for products sold within the European Economic Area. Plaintiffs assert that the use of NeuroCloud for analyzing MRI and PET data is supported internationally and should be considered valid here. The determination of its reliability and relevance is for the jury to decide.

Contrary to Plaintiffs' assertion, HRMC points out that NeuroCloud VOL and PET are approved in Europe for different purposes other than diagnosing a hypoxic brain injury. Plaintiffs have not provided a single example where these technologies were used to diagnose a hypoxic brain injury.

f. Whether the relationship of the technique to the methods that have been established is reliable

HRMC argues that the testing methods used by the Plaintiffs' experts lack a connection to the reliable diagnostic practices employed in hospitals and clinics for assessing hypoxic brain injury. Specifically, HRMC points out that Dr. Christopher Gregory, a nuclear radiologist at Avera McKennan, interpreted Mr. Walton's PET scan as normal, which contrasts with Dr. Adler's interpretation showing abnormalities.

HRMC emphasizes that PET scans are a well-established and reliable diagnostic tool. In addition to the PET scan, Dr. Adler performed an EEG, which also showed no significant abnormalities, despite some mixed activity. According to HRMC, while the NeuroCloud VOL identified an abnormality, this finding contradicts the results from more reliable and established MRI scans. HRMC contends that the discrepancies between the NeuroCloud VOL and the MRI findings suggest that the computerized programs used to read MRIs may be unreliable, especially when the actual MRI images are interpreted as normal.[4] Again, the Plaintiffs did not address this factor as it relates to hypoxic brain injury or brain injury in general.

g. Whether the expert has qualifications

HRMC contends that Dr. Adler lacks the qualifications necessary to interpret MRI results. As a psychiatrist, Dr. Adler is not as qualified as radiologists, who are specialized in reading MRI scans. HRMC further points out that Dr. Adler acknowledges that nuclear medicine doctors are

[4] See Ex. D to the Affidavit of Joel R. Meyer, M.D., FACR at p.2.

best suited to read PET scans and neurologists are most qualified to interpret EEG scans. Given that Dr. Adler's practice is primarily forensic, comprising 70% of his work, and he only sees about eight patients a week without hospital privileges, HRMC argues that he lacks the appropriate training to accurately read these diagnostic results.

Additionally, HRMC highlights that Dr. Adler admitted to not reviewing Mr. Walton's medical records to understand his history. Specifically, Dr. Adler was unaware of Mr. Walton's cognitive and physical symptoms between 2005 and 2007, including his anxiety and depression—factors that are crucial for a comprehensive evaluation of the results.

Despite Plaintiffs noting that Dr. Adler has treated a patient with a hypoxic brain injury approximately four or five years ago, which they argue contributes to his experience, HRMC highlights that Dr. Adler has admitted he has never claimed that qEEG can diagnose hypoxic brain injury. Dr. Adler is uncertain whether any court has permitted him to use qEEG to distinguish between traumatic brain injury and hypoxic brain injury. Dr. Center, who is qualified and certified to conduct qEEG, testified in his deposition that qEEG cannot be used for diagnostic purposes, deeming such use as illegitimate. Dr. Center has explicitly refused to diagnose hypoxia using qEEG and testified he would decline to do so if requested.[5]

Although this court does not question Dr. Adler's qualification as a doctor, the Court does have significant concerns relating to his qualifications to use qEEG, NeuroCloud VOL and NeuroCloud PET to diagnose hypoxic brain injury, particularly considering Plaintiffs first expert witness came up with a different diagnosis using the same technology.

[5] Plaintiffs contend that Dr. Center, who performed the qEEG analyses relied upon by Dr. Adler, is well-qualified despite not being called to testify at trial. Dr. Center has extensive training in qEEG, regularly attends seminars to stay current, and performs approximately 50 qEEG analyses per year. Even though Dr. Center is not going to testify at trial, Dr. Center does have the necessary qualifications.

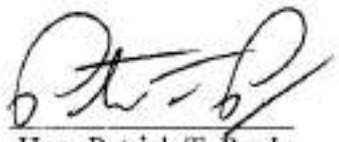
h. Whether there is a non-judicial use to which the method has been put.

HRMC asserts that, based on their research, there is no established non-judicial use of the testing methods employed in this case for diagnosing hypoxic brain injury. HRMC contends that Mr. Walton's treating physicians did not utilize any of the methods employed by Dr. Adler or Dr. Center. Furthermore, HRMC argues that the testing methods used by Dr. Adler and Dr. Center originate from a commercial internet site designed for use in litigation.

The technology in question certainly has non-judicial uses, however, the Plaintiffs have failed to provide any evidence of this technology being used to diagnose hypoxic brain injury for purposes other than litigation.

CONCLUSION

Based on this record, the Plaintiffs' have failed to meet their burden regarding the *Daubert* factors and therefore the Defendant's Motion to Exclude Expert Testimony of Dr. Adler is GRANTED.



Hon. Patrick T. Pardy
Circuit Court Judge
Third Judicial Circuit

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BEADLE	THIRD JUDICIAL CIRCUIT
KEVIN WALTON AND JULIE WALTON, Plaintiffs, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., and JOHN DOES and JANE DOES, Defendants.	02CIV20-000051 **ORDER DENYING MOTION TO RECONSIDER**

On May 31, 2024, Defendant Huron Regional Medical Center, Inc. ("HRMC") filed a *Motion to Exclude the Testimony of Plaintiffs' Experts Dr. Richard S. Adler, M.D. and Dr. Wesley D. Center, PhD, LPC*. Defendant Dr. William Miner, M.D. joined the Motion on May 31, 2024. On October 8, 2024, the Court entered its Memorandum Decision, granting the motion to exclude expert testimony of Dr. Adler.[1] Plaintiffs filed a *Motion to Reconsider Exclusion of Dr. Richard Adler* on January 24, 2025. A hearing on Plaintiffs' motion was held, on the record, on February 27, 2025. At the hearing, Plaintiffs were represented by their counsel, Mr. Daniel K. Brendtro, Defendant HRMC was represented by its counsel, Mr. Mark W. Haigh and Defendant Dr. Miner was represented by his counsel, Mr. Gregory J. Bernard. Having considered the parties' arguments, briefs, and other documentary evidence, and for the reasons stated in the Court's findings and conclusions made on the record, which are hereby incorporated herein, the *Motion to Reconsider Exclusion of Dr. Richard Adler* is **DENIED**.

[1] At the original hearing on the Motion to strike experts, Plaintiffs' counsel conceded he no longer intended to call Dr. Center as a witness at trial, and in any event, the Court's ruling on the motion to strike Dr. Adler would apply equally to Dr. Center.

BY THE COURT 3/11/2025 11:26:53 AM

Honorable Patrick Pardy
Third Circuit Court Judge

Attest:
Hines, Cora
Clerk/Deputy

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BEADLE	THIRD JUDICIAL CIRCUIT
KEVIN WALTON AND JULIE WALTON, Plaintiffs, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., and JOHN DOES and JANE DOES, Defendants.	02CIV20-000051 **SUMMARY JUDGMENT**

Pending is *Defendant Huron Regional Medical Center, Inc.'s Motion for Summary Judgment*. Also pending is Defendant William Miner, M.D.'s *Motion for Summary Judgment*. The Motions seek summary judgment on Plaintiffs' claims against the respective Defendants for the reason that Plaintiffs have failed to produce expert witness testimony necessary under South Dakota law to establish that the negligence of the Defendants caused Plaintiffs to suffer any injury. A hearing on the motions was conducted, on the record, on February 27, 2025. At the hearing Plaintiffs were represented by their counsel, Mr. Daniel K. Brendtro, Defendant HRMC was represented by its counsel, Mr. Mark W. Haigh, and Defendant Dr. Miner was represented by his counsel, Mr. Gregory J. Bernard. Having considered the parties' arguments, briefs, and other documentary evidence, and for the reasons stated in the Court's ruling made on the record, which is hereby incorporated herein, it is hereby

ORDERED, AJUDGED, and DECREED as follows:

1. That the Motions for summary judgment are **GRANTED,** Plaintiffs shall take nothing on their claims against the Defendants, and this action against the Defendants

is dismissed on its merits and with prejudice; and

2. That costs in the sum $_____, to be hereinafter inserted by the Clerk, are awarded to Defendant Huron Regional Medical Center, Inc. against Plaintiffs; and

3. That costs in the sum of $_____, to be hereinafter inserted by the Clerk, are awarded to Defendant William Miner, M.D. against Plaintiffs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT 3/11/2025 11:26:28 AM

Honorable Patrick Pardy
Third Circuit Court Judge

Attest:
Hines, Cora
Clerk/Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF BEADLE)		IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
KEVIN WALTON AND JULIE WALTON, Plaintiffs, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND JOHN DOES AND JANE DOES, Defendants.		02CIV20-000051 **DEFENDANT HURON REGIONAL MEDICAL CENTER, INC.'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Defendant Huron Regional Medical Center, Inc., submits the following Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment.

FACTS

1. This case arises out of Plaintiff Kevin Walton's ("Plaintiff") hospitalization at HRMC for testicular pain. Complaint ¶ 10.

2. On April 9, 2018 Plaintiff presented to the HRMC emergency room with complaints of pain. His wife noted Plaintiff had been suicidal due to the pain and he was bent over moaning in pain. Haigh Aff. ¶ 2, Ex. A (Huron Regional 190).

3. Plaintiff was admitted to HRMC on April 9, 2018 for testicular pain and discharged on April 11, 2018. Complaint ¶ 10; Haigh Aff. ¶ 3, Ex. B (Huron Regional 255).

4. During Plaintiff's hospitalization, he was prescribed Dilaudid for testicular pain. Complaint ¶¶ 11-12.

5. During the course of his hospitalization, Plaintiff was also given other pain medications for his severe testicular pain. Complaint ¶ 13.

6. Plaintiff contends that he suffered a hypoxic brain injury during the course of his hospitalization at HRMC; however, he can present no evidence that he suffered a hypoxic brain injury while a patient at HRMC. Plaintiff's oxygen saturations were monitored while he was a patient at HRMC and none of the oxygen saturations show a level below 93%. Haigh Aff. ¶ 4, Ex. C (Huron Regional 206-07).

7. After Plaintiff's hospitalization, he sought out medical treatment from numerous healthcare providers. His neurologist, Dr. William Rossing, diagnosed Plaintiff with functional neurologic disorder after conducting tests. Haigh Aff. ¶ 5, Ex. D (AMG Neuro 19-23).

8. Dr. Rossing referred Plaintiff to a University of Minnesota neurologist, Dr. Joseph Matsumoto who also diagnosed him with a functional neurological disorder. Haigh Aff. ¶ 6, Ex. E (UMMC 10).

9. In addition to these diagnoses from Plaintiff's treating physicians, Plaintiff had numerous tests to rule out organic brain issues such as hypoxic brain injury. Plaintiff had an MRI of the brain on April 20, 2018 at HRMC which was read as normal. Haigh Aff. ¶ 7, Ex. F (Huron Regional 261).

10. Plaintiff had a second MRI of the brain on July 9, 2018, at Avera McKennan Hospital which was read as normal. Haigh Aff. ¶ 8, Ex. G (AMH 183).

11. Plaintiff had a PET CT of the brain on May 31, 2018 which was normal. Haigh Aff. ¶ 9, Ex. H (AMH 159).

12. Plaintiff also had an EEG of the brain taken at Avera McKennan Neurology on May 23, 2018 which was normal, and an EEG taken on July 25, 2018 which was normal. Haigh Aff. ¶¶ 10, 11, Exs. I, J (AMG Neuro 35; AMH 228).

13. Plaintiffs have presented no competent expert testimony that Plaintiff Kevin Walton developed a hypoxic brain injury as a legal cause of Defendants' negligence. *See* Plaintiffs' expert disclosures.

Dated at Sioux Falls, South Dakota, this 19 day of November, 2024.

EVANS HAIGH & ARNDT, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant Huron Regional Medical Center, Inc., hereby certifies that a true and correct copy of the foregoing "Defendant Huron Regional Medical Center, Inc.'s Statement of Undisputed Material Facts" was filed electronically using the Odyssey File and Serve system which will send notification of such filing to the following:

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Attorneys for Defendant William J. Miner, M.D.

on this 19 day of November, 2024.

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BEADLE	THIRD JUDICIAL CIRCUIT
KEVIN WALTON AND JULIE WALTON, Plaintiffs, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., and JOHN DOES and JANE DOES, Defendants.	02CIV20-000051 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW, Defendant William J. Miner, M.D., by and through his attorney of record, and in accordance with SDCL 15-6-56(c)(1), hereby identifies the following material facts as to which there is no genuine issue to be tried:

1. In this medical malpractice action, Plaintiffs have asserted that while Plaintiff Kevin Walton was hospitalized at HRMC from April 9, 2018 to April 11, 2018, he was given a high dose of opioid medications and sustained a hypoxic brain injury. *Amended Complaint* ¶¶ 11-21.
2. Plaintiffs have brought three counts in this case: 1) Negligence, 2) Vicarious Liability, and 3) Loss of Consortium. *Amended Complaint*.
3. Plaintiffs identified an expert, Dr. Kenneth Stein, who opined that Dr. Miner breached the standard of care. *Expert Report of Dr. Kenneth Stein*, attached to *Affidavit of Kimberly Pehrson* as Exhibit A.
4. Dr. Stein opined that Dr. Miner breached the standard of care in the following ways:
    a. "It was inappropriate and a breach of the standard of care for Dr. Miner to continue orders to administer this massive dose of hydromorphone to Mr. Walton,

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especially as he was also being administered the above named sedative medications and while he was on a regular medical floor without continuous monitoring of his oxygen saturation, respiratory rate and ideally capnography to measure his exhaled carbon dioxide concentration." *Exhibit A* p. 8.

b. "[I]t was a breach of the standard of care by both Dr. Miner and HRMC to administer these medications in these doses to Mr. Walton on a regular medical/surgical ward without continuous monitoring of oxygen saturation and respiratory rate." *Id.*

c. "It was a breach of the standard of care for Dr. Miner not to contact a pain management specialist, anesthesiologist or urologist to evaluate Mr. Walton during his hospitalization April 9th through April 11th or to have Mr. Walton transferred to another hospital where he could be treated by these specialists." *Id.* p. 9.

d. "It was a breach of the standard of care for Dr. Miner to not arrange for Mr. Walton to undergo psychiatric evaluation for suicide risk while he was in inpatient." *Id.*

5. Dr. Stein was deposed on June 13, 2022. Exhibit B to *Affidavit of Kimberly Pehrson.*

6. During his deposition, Dr. Stein reiterated these opinions that Dr. Miner breached the standard of care. *Exhibit B* p. 137_{1}-140_{9}.

7. Dr. Stein testified that "Dr. Wu is stating that based on his interpretation of the PET scan, there's signs of hypoxic brain injury. So it would have occurred at one of those times [either in the hospital or at home afterwards] *if Dr. Wu's readings are correct*. *Exhibit B* p. 89_{3-6} (emphasis added).

8. Dr. Stein testified that because he did not know whether Mr. Walton took the prescribed medications when he returned home, he could not determine whether Mr. Walton was harmed by the medicine prescribed at discharge.

> Q. When he was discharged, which of these meds did he take and what frequency?...
>
> A. ...I don't believe they remembered what medicines specifically he took after he got home. ...
>
> Q. And the -- this breach from the standard of care by Dr. Miner then in prescribing these medications, you can't say more likely than not it caused damage to Mr. Walton?
>
> A. If we don't know if he took it or not, no.

Exhibit B p. $133_{10\text{-}11,\ 17\text{-}19,\ 24}$-$134_{3}$.

9. Dr. Stein admitted that no harm was caused to Mr. Walton due to Dr. Miner not consulting with a psychiatrist. *Exhibit B* p. $140_{5\text{-}9}$.

10. Dr. Stein testified:

> Q. Okay. So you're not offering an opinion as to whether or not Mr. Walton has a hypoxic brain injury; is that true?
>
> A. Correct. There are several people that are saying that it's functional. Dr. Wu is saying that it's anatomic. I'm going to stay out of that.

Exhibit B p. 143_{25}-144_{5}.

11. Dr. Stein testified:

> Q. Are you going to testify that Mr. Walton has a hypoxic brain injury?
>
> A. Asked and answered.

Q. Unfortunately, you don't get to object.

A. No. I don't get to object. I get to say the words asked and answered. It's not an official objection. I – once again, I am not going to be giving the opinions on whether it's a functional problem or an organic brain injury. If there is a hypoxic brain injury, that's for Dr. Wu to state, so I'll leave it at that.

Exhibit B p. 149_{17}-150_{1}.

12. An MRI of Kevin Walton's brain taken on April 20, 2018 at HRMC was read as normal. *Exhibit C.*

13. An MRI of Kevin Walton's brain taken on July 9, 2018 at Avera McKennan Hospital was read as normal. *Exhibit D.*

14. A PET CT of Kevin Walton's brain was taken on May 31, 2018, and it was read as normal. *Exhibit E.*

15. An EEG of Kevin Walton's brain taken on May 23, 2018 at Avera McKennan Neurology was read as normal. *Exhibit F.*

16. An EEG of Kevin Walton's brain was also taken on July 25, 2018 and was read as normal. *Exhibit G.*

17. Plaintiffs have identified Ajimol Lukose, DNP, RN-BC as a nursing expert in this case. *Exhibit H.*

18. RN Lukose was deposed on June 2, 2022. *Exhibit I.*

19. RN Lukose testified that she is not qualified to give an opinion on the standard of care of an internal medicine physician. *Exhibit I* p. $146_{11\text{-}14}$.

20. RN Lukose also testified that she is not offering standard of care opinions about Dr. Miner's care. *Exhibit I* p. $145_{13\text{-}15}$.

21. Plaintiffs' counsel has stated that Dr. Wu will not be called as a witness. *Exhibit J* (letter from Brendtro to Haigh dated April 22, 2024).

22. Plaintiffs' counsel has stated that Dr. Center will not be called as a witness. *Exhibit K* (*[[Plaintiff's Response to]] Defendants' Motion to Exclude Testimony of Richard S. Adler, M.D. and Wesley D. Center, Ph.D.*) p. 7 fn. 2.

23. Plaintiff's counsel agreed that "any ruling as it relates to Dr. Adler and this technology would be the same ruling as it applies to them, so we don't have to go through a whole 'nother *Daubert* hearing." *Exhibit L* p. 7:4-8.

24. This Court granted Defendants' Motion to Exclude Expert Testimony of Dr. Adler. *Exhibit M (Memorandum Decision* dated October 8, 2024).

25. Plaintiffs have not identified any other expert witnesses to provide opinions regarding causation and the specific harm to Plaintiff. *Affidavit of Attorney Kimberly Pehrson* ¶ 4.

Dated this 2nd day of December, 2024.

THOMAS BRAUN BERNARD & BURKE, LLP

/s/ Kimberly Pehrson

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CERTIFICATE OF SERVICE

I, Kimberly Pehrson, attorney for William J. Miner, M.D., do hereby certify that on the 2nd day of December, 2024, a true and correct copy of the foregoing *Statement of Undisputed Material Facts* relative to the above-entitled matter, was filed via Odyssey File and Serve, which will effect service on the following individuals:

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STATE OF SOUTH DAKOTA) : §§ COUNTY OF BEADLE)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
KEVIN WALTON AND JULIE WALTON, Plaintiffs, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND JOHN DOES AND JANE DOES, Defendants.	02CIV20-000051 **RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS (HRMC)**

COME NOW, Plaintiffs, Kevin and Julie Walton as required by SDCL 15-6-56(c)(2), and provide a response to the moving party's (HRMC's) statement of facts upon which Plaintiffs contend a genuine issue exists to be tried:

Introductory Statement: A lengthy statement of ADDITIONAL FACTS IN DISPUTE follows here, *infra*, beginning at ¶ 14.

Further, these responses are also subject to any inferences that can be drawn from the facts as a whole; any *res ipsa loquitur* inference or instruction; and, any inference that can be drawn from the Hospital's failure to order and carry out continuous monitoring, thereby eliminating necessary oxygen saturation data related to Kevin's injury.

1. This case arises out of Plaintiff Kevin Walton's ("Plaintiff) hospitalization at HRMC for testicular pain. Complaint ¶10.

UNDISPUTED.

2. On April 9, 2018 Plaintiff presented to the HRMC emergency room with complaints of pain. His wife noted Plaintiff had been suicidal due to the pain and he was bent over moaning in pain. Haigh Aff. ¶ 2, Ex. A (Huron Regional 190).

UNDISPUTED.

3. Plaintiff was admitted to HRMC on April 9,2018, for testicular pain and discharged on April 11, 2018. Complaint If 10; Haigh Aff. ¶ 3, Ex. B (Huron Regional 255).

UNDISPUTED.

4. During Plaintiffs hospitalization, he was prescribed Dilaudid for testicular pain. Complaint ¶11-12.

UNDISPUTED.

5. During the course of his hospitalization. Plaintiff was also given other pain medications for his severe testicular pain. Complaint ¶13.

UNDISPUTED, BUT INCOMPLETE. During Kevin's

hospitalization (April 8 to April 11, 2018), he was administered an "overdose of combined high dose" pain and sedating medications, and a muscle relaxant, namely, "hypdromorphone as well as oxycodone, hydrocodone, tramadol, diazepam, pregabalin, Trazadone, Baclofen." *See, below.*

6. Plaintiff contends that he suffered a hypoxic brain injury during the course of his hospitalization at HRMC; however, he can present no evidence that he suffered a hypoxic brain injury while a patient at HRMC. Plaintiffs oxygen saturations were monitored while he was a patient at HRMC and none of the oxygen saturations show a level below 93%. Haigh Aff. ¶ 4, Ex. C (Huron Regional 206-07).

DISPUTED. In addition to Dr. Adler's opinions and report, Plaintiffs have presented substantial circumstantial and direct evidence that Kevin suffered a brain injury while a patient at HRMC. *See, below.* And, DISPUTED as to the monitoring assertion: Plaintiffs' oxygen saturations were only sporadically monitored; the low reading of 93% occurred after Kevin had been aroused/awakened; and, the basic act of arousing Kevin would result in an immediate increase in his saturations. *See*, below, ¶ 20.

7. After Plaintiffs hospitalization, he sought out medical treatment from numerous healthcare providers. His neurologist, Dr. William Passing, diagnosed Plaintiff with functional neurologic disorder after conducting tests. Haigh Aff. ¶ 5, Ex. D (AMG Neuro 19-23).

UNDISPUTED, but DISPUTED INFERENCE. ***See,*** **Additional Facts, below.**

8. Dr. Rossing referred Plaintiff to a University of Minnesota neurologist. Dr. Joseph Matsumoto who also diagnosed him with a functional neurological disorder. Haigh Aff. ¶ 6, Ex. E(UMMC10).

UNDISPUTED, but DISPUTED INFERENCE. Dr. Matsumoto's records show that the referral was limited solely to the question of "Matsumoto's opinion about <u>any possible movement disorder</u>." ***Id.*****, 2. The referral did not ask Matsumoto to rule out a brain injury resulting from a toxic and hypoxic event at the hospital.** ***Id.***

9. In addition to these diagnoses from Plaintiffs treating physicians, Plaintiff had numerous tests to rule out organic brain issues such as hypoxic brain injury. Plaintiff had an MRI of the brain on April 20, 2018 at HRMC which was read as normal. Haigh Aff. ¶ 7,Ex. F (Huron Regional 261).

UNDISPUTED, but DISPUTED INFERENCE. The record indicates that a normal MRI is not proof of normal brain function. ***See,*** **Adler Declaration, ¶ 135-138; 167-195. Instead, a conventional MRI is less sensitive than a quantitative MRI analysis.** ***Id.*** **In addition, an MRI alone does not rule out organic brain injury.** ***Id.***

10. Plaintiff had a second MRI of the brain on July 9, 2018, at Avera McKennan Hospital which was read as normal. Haigh Aff. ¶ 8, Ex. G (AMH 183).

UNDISPUTED, but DISPUTED INFERENCE. ***See,*** **Response to ¶ 9, above.**

11. Plaintiff had a PET CT of the brain on May 31, 2018, which was normal. Haigh Aff 49, Ex.H (AMH159).

DISPUTED INFERENCE. The record indicates that a normal PET scan reading is not proof of normal brain function. ***See,*** **Adler**

Declaration. Instead, a conventional PET is less sensitive than a quantitative PET analysis. ***Id.***

12. Plaintiff also had an EEG of the brain taken at Avera McKennan Neurology on May 23, 2018 which was normal, and an EEG taken on July 25, 2018 which was normal. Haigh Aff. ¶ 10, 11, Exs. I, J (AMG Neuro 35; AMH 228).

UNDISPUTED, but DISPUTED INFERENCE. The record indicates that a normal EEG reading is not proof of normal brain function. ***See,*** **Adler Declaration; Center Declaration. Instead, a conventional EEG is less sensitive than a quantitative EEG.** ***Id.***

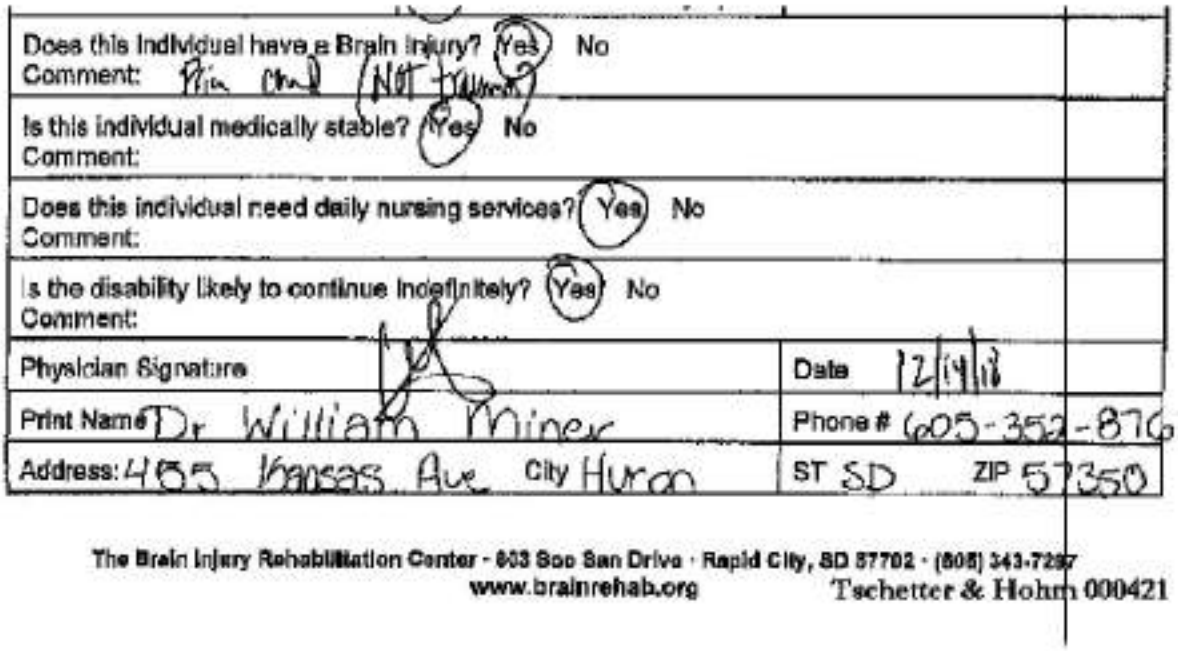
13. Plaintiffs have presented no competent expert testimony that Plaintiff Kevin Walton developed a hypoxic brain injury as a legal cause of Defendants' negligence. See, Plaintiffs' expert disclosures.

DISPUTED. ***See, below.*** **Plaintiffs have provided testimony and a report from Dr. Kenneth Stein, as well as various other supporting, circumstantial evidence that Kevin Walton developed an injury while in the care of the Hospital and Dr. Walton, and, that in all probability it was the result of a toxic overdose and a low oxygen event on April 11, 2018.**

FURTHER DISPUTE: After the hospitalization, Dr. Miner and the Hospital began reporting within Kevin's records that Kevin *did*, in fact, suffer a hypoxic brain injury.

For example, the Hospital included the following statement in Kevin's medical record on April 4, 2020: "Mr. Walton is a 41-year old male who has a previous medical diagnosis of hypoxic brain injury with an approximate onset of two years ago." Brendtro Affidavit, Exhibit B-03.

Likewise, about seven months after the hospitalization, Dr. Miner hand-wrote and signed a form indicating that Kevin had a Brain Injury (not-trauma), dated December 14, 2018. Brendtro Affidavit, Exhibit B-02. This is the key portion of that form:



Does this Individual have a Brain Injury? (Yes) No Comment: Brain Dmg (NOT Trauma)		
Is this individual medically stable? (Yes) No Comment:		
Does this individual need daily nursing services? (Yes) No Comment:		
Is the disability likely to continue indefinitely? (Yes) No Comment:		
Physician Signature	Date 12/14/18	
Print Name Dr William Miner	Phone # 605-352-8767	
Address: 455 Kansas Ave City Huron	ST SD ZIP 57350	

The Brain Injury Rehabilitation Center - 603 Soo San Drive - Rapid City, SD 57702 - (605) 343-7257
www.brainrehab.org

Tschetter & Hohm 000421

ADDITIONAL FACTS IN DISPUTE

14. **As an introductory matter, both of the Defendants' summary judgment motions presume that Dr. Adler's testimony will continue to be excluded in its entirety.** In the companion motion filed by Plaintiffs to reconsider that exclusion, we set forth the basis upon which his testimony should admitted. If that motion is granted, these summary judgment motions would be moot.

15. **Beyond Dr. Adler's testimony, there is both direct and circumstantial evidence that Kevin Walton suffered a brain injury caused by Defendants.**

16. **There is substantial circumstantial evidence that Kevin suffered a brain injury as a result of his hospitalization, from April 8 to April 11, 2018, as offered by Dr. Stein:**

    a. **It is undisputed in this case that during Kevin's hospitalization, he was administered an "overdose of combined high dose" of several pain and sedating medications, and a muscle relaxant, namely, "hypdromorphone as well as oxycodone, hydrocodone, tramadol, diazepam, pregabalin, Trazadone, Baclofen." Brendtro Affidavit, Exh. B-02 (Expert report of Kenny Stein, M.D., p. 9)**

    b. **It is undisputed that the overdose administered to Kevin greatly**

increased his risk of respiratory complications (respiratory depression, hypoxemia, respiratory arrest, and death), and, this was done without appropriate vital sign monitoring, in violation of the standard of care. Brendtro Affidavit, Exh. B-02 (Expert report of Kenny Stein, M.D., p. 9)

c. Dr. Stein's conclusion is that Kevin Walton was administered such high doses of medication that it resulted in toxicity, which the nursing staff failed to recognize. Brendtro Affidavit, Exh. B-02 (Expert Report, p. 9); Exh. B-01 (Expert Deposition of Kenny Stein, M.D., p. 207-209 (listing factors)).

d. It is undisputed that the toxic dose of "the medications that were administered in the hospital" is something which is known to cause, and is consistent with brain injury. Brendtro Affidavit, Exh. B-01 (Expert Deposition of Kenny Stein, M.D., p. 89). "[W]ithin a reasonable degree of medical probability...if the jury finds that Mr. Walton has a hypoxic brain injury, these violations of the standard of care [by Defendants] are what caused it." Brendtro Affidavit, Exh. B-01 (Expert Deposition of Kenny Stein, M.D., p. 144)

e. "[W]ithin a reasonable degree of medical certainty" the timing of such an injury would have been "that time around 7:20" in the morning on

April 11, 2018, in the hospital. Brendtro Affidavit, Exh. B-01 (Expert Deposition of Kenny Stein, M.D., p. 92).

f. In addition, Dr. Stein noted that Kevin's sudden decrease in pain in the early morning hours of April 11, 2018, is hypothetically consistent with a hypoxic injury. In particular, in response to the question as to why Kevin's ultra-high doses of pain medication do not seem to work at all, until a reduction in pain in the early morning of April 11, 2018, Dr. Stein testified a plausible explanation is that "hypoxemic brain injury helps with testicular pain." Brendtro Affidavit, Exh. B-01 (Expert Deposition of Kenny Stein, M.D., p. 186-189). He then explained the science behind it.

g. In addition, Dr Stein identified in his deposition several factors and circumstances that are consistent with a brain injury, namely, those facts that "would indicate that Mr. Walton had a hypoxic brain injury [in the hospital] before 7:20 am on April 11th" including "things being a little confused or slurred" for Kevin; "he couldn't stay awake;" "he didn't know what was wrong;" "he couldn't keep his eyes open;" "the nurse stated she had come in and found that Kevin was not breathing correctly;" "he was breathing like a man taking his last breaths;" "Kevin wasn't really making sense;" "he had some problems choking

while he was trying to eat"; "he was quite confused and didn't quite remember everything that was going on at that point." Brendtro Affidavit, Exh. B-01 (Expert Deposition of Kenny Stein, M.D., p. 161-166)

17. It should be noted that Dr. Adler (independent of the challenged brain imaging data), concluded from the remaining available evidence that Kevin has a brain injury that was caused by his medication overdose. *See,* Dr. Adler's Report; Deposition; and Declaration, ¶¶ 1-119.

18. And, without using the challenged imaging data, Dr. Adler also ruled out the only other two differential diagnosis possibilities (malingering and conversion disorder). Adler Declaration, ¶¶ 1-98. Dr. Adler did so as an experienced psychiatrist, and, without regard to the challenged brain imaging studies. Likewise, Dr. Adler ruled out the Defense's only theory as to Kevin's injury (conversion disorder).

19. The Hospital's negligence in record-keeping and negligence in monitoring Kevin's vital signs (breaches of the standard of care, per Dr. Stein) directly resulted in the lack of specific evidence as to timing and duration of Kevin's respiratory depression: "But you keep asking for evidence in the medical record, and that's part of the problem, is that he wasn't adequately monitored,

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so you're asking for evidence that is unobtainable. He wasn't adequately monitored, so we don't know what his [oxygen saturations] were in between the times when they came in to wake him up and put a pulse ox[imeter] on his finger, other than when they put on the continuous pulse ox[imeter] briefly after the 7:20 in the morning event on the 11th." Brendtro Affidavit, Exh. B-02 (Expert Deposition of Kenny Stein, M.D., p. 118-119).

20. The fact that Kevin's respirations are at 8 or 9 per minute, and that his oxygen saturation is at 92% does not disprove the existence of hypoxia or brain injury. "[G]enerally when patients wake up, if their oxygen level had been low and they hadn't been breathing as much, they start taking bigger breaths and their oxygen levels come up a little more." Brendtro Affidavit, Exh. B-02 (Expert Deposition of Kenny Stein, M.D., p. 168-69). A reasonable inference is that they were lower than 92% prior to measurement.

21. In a light most favorable to the non-moving party (the Plaintiffs), when Kevin was found (unresponsive, breathing shallowly), the nurse on staff immediately called his wife, Julie, and told her, "She said, "He scared me. He was breathing like a man taking his last breaths." She said, "So I got him up and then put him in the chair, and we're going to keep him awake for a while." (Deposition of Julie Walton, Pg. 65, Lines 24-25, Pg. 66, Lines 1-3; Brendtro Exh. B-09).

22. It is within the Jury's common understanding that being in such a condition so

as to appear to be taking one's last breath is associated with a severe lack of oxygen.

23. From all of this, Dr. Stein concluded that "within a reasonable degree of medical certainty the...[injury from which] Mr. Walton still suffers were caused by the iatrogenic overdose of combined high dose hypdromorphone as well as oxycodone, hydrodone, tramadol, diazepam, pregabalin, Trazadone, Baclofen," and those "breaches of the standard of care....were the direct cause of neurologic damage that occurred to Mr. Walton and from which he still suffers to this day." Brendtro Affidavit, Exh. B-01 (Expert report of Kenny Stein, M.D., p. 9). The only caveat was that he was not directly diagnosing a brain injury. Instead, he explained that all of the evidence was consistent with a brain injury, which Kevin would have received on April 11, 2018.

24. It is also within the Jury's common understanding to determine that the injury to Kevin occurred in the Hospital, based upon their various observations as to who Kevin was prior to the hospitalization and who he was after. This inference can be drawn from the lay testimony of Kevin's family, friends, and co-workers.

25. Numerous lay witnesses identified that Kevin was immediately and substantially different and impaired following his hospitalization, in contrast to the person he had been before.

26. Ruth Wolff, Julie Walton's mother, said Julie reported to her, the next morning after discharge, "I think they broke my Kevin." (Deposition of Ruth Wolff, Page 26; Brendtro Exh. B-05). Ruth was referring to the hospital stay.

27. Kevin's friend, Wayne Jones, said, "It had been a matter of a few weeks at least after he got out of the hospital, through a mutual friend of ours, said that Kevin had some issues. The first time I had seen him after he got out of the hospital, he could barely put a sentence together now." (Deposition of Wayne Jones, Page 11, Lines 20-23 / Brendtro Exh. B-06). "He's definitely not the same person, that's for sure," after coming out of the hospital. Before entering the hospital, "Kevin was a very fast talker, always fidgety, moving around a lot, and now everything has slowed down for him tenfold. (Deposition of Wayne Jones, Pg. 12, Lines 13-20.)

28. Kevin's friend, Montie Harmdierks, said after the hospital stay, Kevin was "walking, dragging, limping on his leg," and in the last five or six years, Kevin's walking had "changed quite a bit, from what he was before. He hobbled and now he's got his brace on his leg and everything to keep his leg in the right position." (Deposition of Montie Harmdierks, Page 14, Lines 11-17/ Brendtro Affidavit, Exhibit B-07). Montie said, "From since I've known him, it's a huge change," because "[b]efore whatever at the hospital happened," "he was able to get up and around and move around and do things, lay down on the ground

to crawl underneath a car, to change oil or whatever, and now he can't do that no more." (Deposition of Montie Harmdierks, Page 14, Lines 20-25).

29. When asked, how Kevin was different, Montie said, "What has changed? A lot. Don't seem to be himself like he used to be." (Deposition of Montie Harmdierks, Page 15, Lines 7-8.) Before, Kevin was "Happy going, just easy going about things, just everyday life, things that are simple tasks for a lot of people are not simple tasks for him anymore," like "[g]oing for a walk anywhere, it isn't the same. He's always got to use his scooter to go for a walk," a scooter with "a big tire on the front and two little tires on the back. It's like a tricycle that's electric. I guess I call it a scooter." (Deposition of Montie Harmdierks, Page 16, Lines 14-19.)

30. Montie testified further of changes in Kevin "His abilities, his speech is different, being able to be mobile. (Page 17, Lines 10-11.) Regarding Kevin's speech, Montie said, "he talks like a Hutterite. Sorry. He has kind of a German -- I don't know, if you have been around colony people, you would understand." (Deposition of Montie Harmdierks, Page 17, Lines 13-16.)

31. And, Kevin's thinking had changed. Montie testified that "when he goes to think, sometimes he's gotta sit there and think about the words before he can get them out. Sometimes words he says aren't real clear, but you just ask him again what he said. What else? Just his mobility and speaking and that has really

changed." (Deposition of Montie Harmdierks, Page 17, Lines 17 - 20). Montie said of Kevin, He ain't what he used to be. "[H] e's not able to do the things that he used to do." (Deposition of Montie Harmdierks, Page 19, Lines 22-25.)

32. When asked if Kevin was able to do the mechanical stuff that he and Montie used to do together, Montie said, "I don't think so. Like I've changed the oil in their car for them." (Deposition of Montie Harmdierks, Page 19, Lines 4-5).

33. When asked what else Montie had noticed about changes to Kevin's thought processes, Montie testified, "Sometimes if I call and ask him a question about something, I'm working on whatever, just oddball question for him, sometimes he's gotta think about it for a while, sometimes he might have an answer right now. It depends if we have corresponded before about whatever it is." And, sometimes he could come up with an answer, "sometimes he wants to think about it. It depends on what it is, I guess. I don't really have an example to give you of what, but sometimes he's gotta think about it, sometimes he's got an answer now or maybe at the end of the phone call as you get rattling about other stuff." (Deposition of Montie Harmdierks, Page 23, Lines 1-14.)

34. Kevin had once put a 25-by-25-foot addition in his house, but now, when asked if Kevin was capable of today of doing this, testified, "No." "He just couldn't do it. He ain't got the power to do it, I guess to say, the muscle, the ability to move around and get up and down, to be a, quote, unquote, construction worker

or carpenter to do that job." (Deposition of Montie Harmdierks, Page 27, Lines 23-25, Page 28, Lines 1-5.)

35. When asked if Kevin could stain the wood ceiling, like he'd done before the accident, Montie testified, "No," "[b]ecause he wouldn't be able to stand on a ladder long enough. If he could -- he could probably get up on the step maybe, I don't know. I guess I've never seen him up on a ladder for many, many years." (Deposition of Montie Harmdierks, Page 26, Lines 6-12.)

36. Kevin's friend, Theodore "Ted" Schlechter, interacted with Kevin at Walmart after the hospital incident while their wives shopped, and said, of Kevin's appearance, "At that time he was -- he wasn't walking well. He was mostly in either a scooter chair or a wheelchair. He was thinner. Seemed weaker than he used to. Speech was slightly slurred. It seemed like he really had to concentrate to even get a thought across." (Deposition of Ted Schlechter, Page 13, Lines 6-10 Brendtro Affidavit, Exhibit B-10.)

37. When asked to compare his interaction with Kevin at Walmart to how Kevin was before the time in the hospital, Theodore testified, "He was a very sharp individual before. He knew what he wanted to say. He had no trouble getting it across. He was always busy, always had something he was trying to get done, always -- you know, I think at that time they were living on a farm and always had to get back to get something done on the farm. He was quite active. Very

sharp individual. Knew -- knew lots. Didn't have trouble getting his point across." (Deposition of Ted Schlechter, Page 14, Lines 1-9).

38. When Kevin's sister, Maria Dorris, was asked what Kevin was like before the hospital incident, she said he was "Like me, outgoing, always on the go, running around. I think there's only Kevin and one other of my sisters that were just like go, go, go, go, go and working hard." But now, Maria said, "Well, I can run circles around him. Slower." (Deposition of Maria Dorris, Page 8, Lines 10-14 / Brendtro Affidavit, Exhibit B-11). When she was asked, "Other than needing the leg brace and just kind of moving slower, is there anything else you have noticed that's changed about Kevin?" Maria responded, "His talking, he talks slower. Watching him eat, he's only tried to eat around me a couple times, when he has to. Textures are funny with him." (Deposition of Maria Dorris, Page 12, Lines 9-14.)

39. Maria testified she gives him rides to therapy or other places, and "help[s] him get in and out of the vehicle." She helps him "more of kind of helping lift him than it is just guiding him" into her Durango. (Deposition of Maria Dorris, Page 12, Lines 16-22.)

40. Kevin's wife described him as acting uncharacteristically childlike in the day following his discharge. On April 12, 2018, he "giggled like a kid," and he commented that driving on the on-ramp at Mitchell to get on Interstate 90 was

like a roller coaster, "Whee, that was fun. It's like a roller coaster. Can we do that again?" (Julie Walton Deposition, p. 86-87 / Brendtro Affidavit, Exhibit B-09). He also started stuttering and engaging in odd conversations. *Id.*, p. 86, 90.

41. Immediately after the hospital discharge in April 2018, Julie started a log of the various behaviors because they are so concerning and unusual. This includes "confusion & memory loss & weird behavior," on April 12, 2018, including Kevin not remembering he had gone to Costco less than three hours earlier. Julie Walton Deposition Exhibit (handwritten log; attached to Brendtro Affidavit, Exh. 8). It also seems like he is "choking all the time." *Id.* The same unusual behavior continues every day for the next four days, including confusion, memory problems, and vision problems. *Id.*

42. Kevin attempted to return to work on April 16, 2018, and the "boss calls [Julie] to come get him. States it seems like working w/ a mentally challenged man...stuttering and blank eyes / off balance." *Id.* Similar problems are reported the following day, and essentially every day for a month. *Id.*

43. A month later, on May 12, 2018, Julie and Kevin went camping, which had long been a favorite pastime for both of them. Julie remarks that it was "very difficult - huge eye opener on how bad Kevin is asway from home. Walking in camper very unstable. Couldn't cut up steak @ supper. Almost got lost going

from friends camper to ours. Went for walk on path – very short, very unstable, choking bad in evening." *Id.*

44. The problems persist to this day, and Julie is not even comfortable leaving Kevin home for more than a couple of hours alone.

45. Kevin's friend and classmate Wayne Jones explained that Kevin was a very fast talker prior to the hospitalization, with an "amazing attention to detail." Kevin was very sharp. Jones Depo., p. 11-24/ Brendtro Affidavit, Exhibit B-06. Wayne gave numerous examples, including the most picturesque of all the witnesses: that Kevin won an informal competition to guess the number of truck loads it would take to remove a large pile of manure from a cattle feedlot. Wayne said that Kevin was by far and away the closest, after spending much time figuring and estimating. He could never do that today. In fact, he could not even safely operate the dump truck for a single load today. *Id.*

46. And, Kevin's friend Ted explained that Kevin prior to the hospitalization was someone who taught Sunday School, and was able to answer all of the theological and Biblical questions that the kids would put to him; he was effective at getting his point across, and a "very sharp individual." After the hospitalization, Kevin could no longer could do any of those things. Schlechter Depo., p. 10-14/ Brendtro Affidavit, Exhibit B-10

Dated this 27th day of January, 2025

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Dated on this 27th day of January, 2025

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Filed: 1/27/2025 5:36 PM CST Beadle County, South Dakota 02CIV20-000051

STATE OF SOUTH DAKOTA) : §§ COUNTY OF BEADLE)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
KEVIN WALTON AND JULIE WALTON, Plaintiffs, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND JOHN DOES AND JANE DOES, Defendants.	02CIV20-000051 **RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS (MINER)**

COME NOW, Plaintiffs, Kevin and Julie Walton as required by SDCL 15-6-56(c)(2), and provide a response to the moving party's (Dr. Miner's) statement of facts upon which Plaintiffs contend a genuine issue exists to be tried.

As an introductory matter, Plaintiffs have offered a lengthy set of "ADDITIONAL FACTS IN DISPUTE," in conjunction with their response to HRMC's statement of undisputed facts.

So as not to repeat it in its entirety here, those Additional Facts are incorporated here, by reference, and, referred to in some of the responses below.

Plaintiffs' responses here are also subject to any inferences that can be drawn from the facts as a whole; any *res ipsa loquitur* inference or

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instruction; and, any inference that can be drawn from Dr. Miner's failure to order continuous monitoring, thereby eliminating necessary oxygen saturation data related to Kevin's injury.

1. In this medical malpractice action, Plaintiffs have asserted that while Plaintiff Kevin Walton was hospitalized at HRMC from April 9, 2018 to April 11, 2018, he was given a high dose of opioid medications and sustained a hypoxic brain injury. *Amended Complaint* ¶¶ 11-21.

UNDISPUTED

2. Plaintiffs have brought three counts in this case: 1) Negligence, 2) Vicarious Liability, and 3) Loss of Consortium. *Amended Complaint.*

UNDISPUTED

3. Plaintiffs identified an expert, Dr. Kenneth Stein, who opined that Dr. Miner breached the standard of care. *Expert Report of Dr. Kenneth Stein*, attached to *Affidavit of Kimberly Pehrson* as Exhibit A.

UNDISPUTED

4. Dr. Stein opined that Dr. Miner breached the standard of care in the following ways:

    a. "It was inappropriate and a breach of the standard of care for Dr. Miner to continue orders to administer this massive dose of hydromorphone to

Mr. Walton, especially as he was also being administered the above named sedative medications and while he was on a regular medical floor without continuous monitoring of his oxygen saturation, respiratory rate and ideally capnography to measure his exhaled carbon dioxide concentration." *Exhibit A* p. 8.

b. "[I]t was a breach of the standard of care by both Dr. Miner and HRMC to administer these medications in these doses to Mr. Walton on a regular medical/surgical ward without continuous monitoring of oxygen saturation and respiratory rate." *Id.*

c. "It was a breach of the standard of care for Dr. Miner not to contact a pain management specialist, anesthesiologist or urologist to evaluate Mr. Walton during his hospitalization April 9th through April 11th or to have Mr. Walton transferred to another hospital where he could be treated by these specialists." *Id.* p. 9.

d. "It was a breach of the standard of care for Dr. Miner to not arrange for Mr. Walton to undergo psychiatric evaluation for suicide risk while he was in inpatient." *Id.*

UNDISPUTED

5. Dr. Stein was deposed on June 13, 2022. Exhibit B to *Affidavit of Kimberly Pehrson.*

UNDISPUTED

6. During his deposition, Dr. Stein reiterated these opinions that Dr. Miner breached the standard of care. *Exhibit B* p. 1371-1409.

UNDISPUTED

7. Dr. Stein testified that "Dr. Wu is stating that based on his interpretation of the PET scan, there's signs of hypoxic brain injury. So it would have occurred at one of those times [either in the hospital or at home afterwards] *if Dr. Wu's readings are correct. Exhibit B* p. 83-6 (emphasis added).

DISPUTED. <u>This is a narrow misreading of Dr. Stein's testimony.</u> In full context, Dr. Stein did not testify that Kevin went home and was injured by events occurring at home, and caused at home. Instead, he testified on at least three separate occasions that the injury began at the hospital. (1) Dr. Stein said that, "If a hypoxic brain injury did occur, the hypoxic brain injury, within a reasonable degree of medical probability, <u>occurred on the night of the 10th, morning of the 11th of April 2018</u>, may possibly have been worsened by any events that happened after he went home and was sleeping for "20" hours." Stein Deposition, p. 145. (2) He reiterated this a second time: "[W]ithin a reasonable degree of medical probability,

during the night of the 10th into the morning of the 11th is when the hypoxemic injury occurred, and it may have possibly been worsened somewhat by some hypoxia that may have occurred at home if it did occur at home during that prolonged period that he was being very drowsy and sleepy." Stein Deposition, p. 173. (3) And he said it two more times within a page of each other: "[w]ithin a reasonable degree of medical probability, if there was injury that happened, it occurred in the hospital. There may or may not have been additional injury that occurred after he left the hospital within a reasonable degree of medical probability." Stein Deposition, p. 91. "We know within a reasonable degree of medical probability, there was injury that occurred at that time around 7:20, that time period around there. There may well have been injury that occurred before that or a bit after that. We can't say specifically because we don't have the monitoring." Stein Deposition, p. 92.

8. Dr. Stein testified that because he did not know whether Mr. Walton took the prescribed medications when he returned home, he could not determine whether Mr. Walton was harmed by the medicine prescribed at discharge.

> Q. When he was discharged, which of these meds did he take and what frequency?...
>
> A. ...I don't believe they remembered what medicines specifically he

took after he got home. ...

Q. And the -- this breach from the standard of care by Dr. Miner then in prescribing these medications, you can't say more likely than not it caused damage to Mr. Walton?

A. If we don't know if he took it or not, no.

Exhibit B p. 133:10-11, 17-19, 24-1343.

UNDISPUTED, but DISPUTED INFERENCE: As set forth in the response to Paragraph 7, above, Dr. Stein does not opine that Kevin was injured only for the first time during his first night home from the hospital, from causes solely arising at home.

9. Dr. Stein admitted that no harm was caused to Mr. Walton due to Dr. Miner not consulting with a psychiatrist. *Exhibit B* p. 1405-9.

UNDISPUTED.

10. Dr. Stein testified:

Q. Okay. So you're not offering an opinion as to whether or not Mr. Walton has a hypoxic brain injury; is that true?

A. Correct. There are several people that are saying that it's functional. Dr. Wu is saying that it's anatomic. I'm going to stay out of that.

Exhibit B p. 14325-1445.

UNDISPUTED, but DISPUTED INFERENCE. Dr. Stein offered substantial testimony that an overdose that occurred on April 11; that it was toxic; and that it was consistent with a brain injury. *See*, ADDITIONAL FACTS (set forth in Plaintiffs' Response to HRMC's undisputed facts); and, *see also*, those facts that Dr. Stein testified "would indicate that Mr. Walton had a hypoxic brain injury [in the hospital] before 7:20 am on April 11th," including: "things being a little confused or slurred" for Kevin; "he couldn't stay awake;" "he didn't know what was wrong;" "he couldn't keep his eyes open;" "the nurse stated she had come in and found that Kevin was not breathing correctly;" "he was breathing like a man taking his last breaths;" "Kevin wasn't really making sense;" "he had some problems choking while he was trying to eat"; "he was quite confused and didn't quite remember everything that was going on at that point." Brendtro Affidavit, Exh. B (Expert Deposition of Kenny Stein, M.D., p. 161-166).

11. Dr. Stein testified:

> Q. Are you going to testify that Mr. Walton has a hypoxic brain injury?
>
> A. Asked and answered.
>
> Q. Unfortunately, you don't get to object.

A. No. I don't get to object. I get to say the words asked and answered. It's not an official objection. I – once again, I am not going to be giving the opinions on whether it's a functional problem or an organic brain injury. If there is a hypoxic brain injury, that's for Dr. Wu to state, so I'll leave it at that.

Exhibit B p. 149:17-150:1.

DISPUTED INFERENCE. Dr. Stein's can offer testimony that Kevin's injuries are consistent with a brain injury, and consistent with a brain injury resulting from a toxic overdose and a hypoxic event on April 11 at the hospital, and, that Kevin was in fact administered a toxic overdose. *See,* ADDITIONAL FACTS (set forth in Plaintiffs' Response to HRMC's undisputed facts).

12. An MRI of Kevin Walton's brain taken on April 20, 2018 at HRMC was read as normal. *Exhibit C.*

UNDISPUTED, but DISPUTED INFERENCE. The record indicates that a normal MRI is not proof of normal brain function. *See,* Adler Declaration. Instead, a conventional MRI is less sensitive than a quantitative MRI analysis. *Id.*

13. An MRI of Kevin Walton's brain taken on July 9, 2018 at Avera McKennan Hospital was read as normal. *Exhibit D.*

UNDISPUTED, but DISPUTED INFERENCE. The record indicates that a normal MRI is not proof of normal brain function. *See,* Adler Declaration. Instead, a conventional MRI is less sensitive than a quantitative MRI analysis. *Id.*

14. A PET CT of Kevin Walton's brain was taken on May 31, 2018, and it was read as normal. *Exhibit E.*

UNDISPUTED, but DISPUTED INFERENCE. The record indicates that a normal PET scan reading is not proof of normal brain function. *See,* Adler Declaration. Instead, a conventional PET is less sensitive than a quantitative PET analysis. *Id.*

15. An EEG of Kevin Walton's brain taken on May 23, 2018 at Avera McKennan Neurology was read as normal. *Exhibit F.*

UNDISPUTED, but DISPUTED INFERENCE. The record indicates that a

normal EEG reading is not proof of normal brain function. *See*, Adler Declaration; Center Declaration. Instead, a conventional EEG is less sensitive than a quantitative EEG. *Id.*

16. An EEG of Kevin Walton's brain was also taken on July 25, 2018 and was read as normal. *Exhibit G.*

UNDISPUTED, but DISPUTED INFERENCE. The record indicates that a normal EEG reading is not proof of normal brain function. *See*, Adler Declaration; Center Declaration. Instead, a conventional EEG is less sensitive than a quantitative EEG. *Id.*

17. Plaintiffs have identified Ajimol Lukose, DNP, RN-BC as a nursing expert in this case. *Exhibit H.*

UNDISPUTED.

18. RN Lukose was deposed on June 2, 2022. *Exhibit I.*

UNDISPUTED.

19. RN Lukose testified that she is not qualified to give an opinion on the standard of care of an internal medicine physician. *Exhibit I* p. 14611-14.

UNDISPUTED.

20. RN Lukose also testified that she is not offering standard of care opinions about Dr. Miner's care. *Exhibit I* p. 145:13-15.

UNDISPUTED.

21. Plaintiffs' counsel has stated that Dr. Wu will not be called as a witness. *Exhibit J* (letter from Brendtro to Haigh dated April 22, 2024).

UNDISPUTED.

22. Plaintiffs' counsel has stated that Dr. Center will not be called as a witness. *Exhibit K* ([[*Plaintiff's Response to]] Defendants' Motion to Exclude Testimony of Richard S. Adler, M.D. and Wesley D. Center, Ph.D.*) p. 7 fn. 2.

UNDISPUTED (other than the possibility Dr. Center would be called as a rebuttal witness based upon the testimony at trial regarding qEEG or his

report.)

23. Plaintiff's counsel agreed that "any ruling as it relates to Dr. Adler and this technology would be the same ruling as it applies to them, so we don't have to go through a whole 'nother *Daubert* hearing." *Exhibit L* p. 74-8. **UNDISPUTED.**

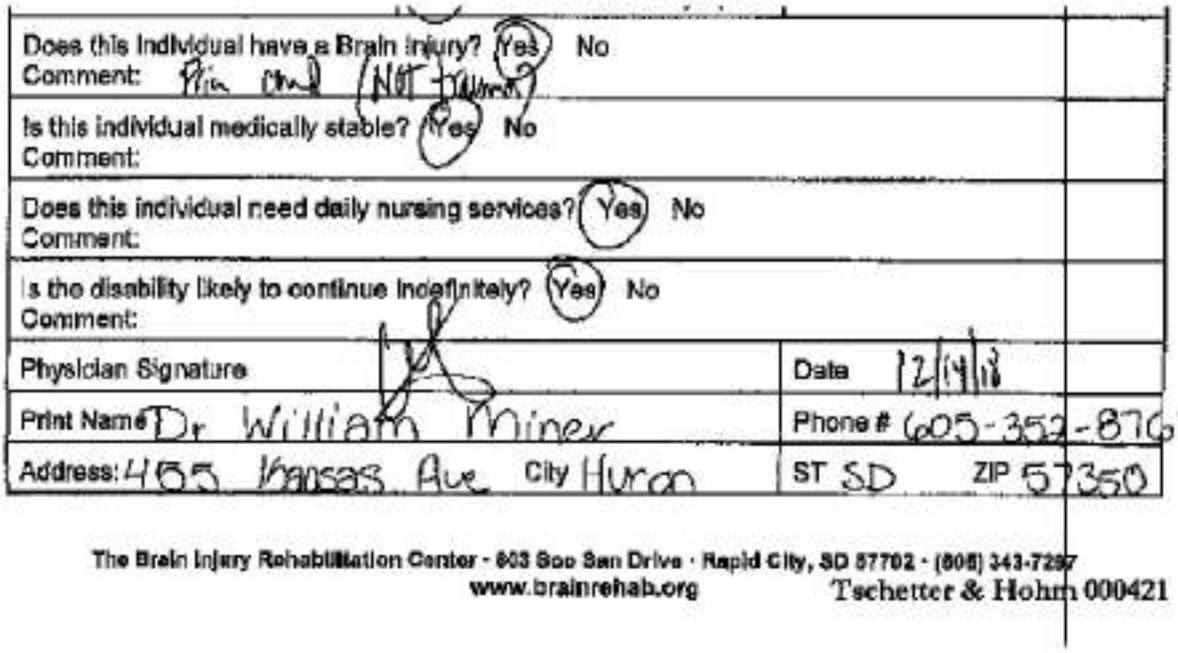
24. This Court granted Defendants' Motion to Exclude Expert Testimony of Dr. Adler. *Exhibit M (Memorandum Decision* dated October 8, 2024). Plaintiffs have not identified any other expert witnesses to provide opinions regarding causation and the specific harm to Plaintiff. *Affidavit of Attorney Kimberly Pehrson ¶ 4.*

DISPUTED , *see,* Motion to Reconsider, *and see,* evidence and argument related to "consistent with" causation, and circumstantial evidence of causation, from Deposition and Report of Kenny Stein.

FURTHER DISPUTE: After the hospitalization, Dr. Miner and the Hospital began reporting within Kevin's records that Kevin *did*, in fact, suffer a hypoxic brain injury.

For example, the Hospital included the following statement in Kevin's medical record on April 4, 2020: "Mr. Walton is a 41-year old male who has a previous medical diagnosis of hypoxic brain injury with an approximate onset of two years ago." Brendtro Affidavit, Exhibit B-03.

Likewise, about seven months after the hospitalization, Dr. Miner hand-wrote and signed a form indicating that Kevin had a Brain Injury (not-trauma), dated December 14, 2018. Brendtro Affidavit, Exhibit B-02. This is the key portion of that form:



Does this Individual have a Brain Injury? (Yes) No Comment: Brain (Not Trauma)		
Is this individual medically stable? (Yes) No Comment:		
Does this individual need daily nursing services? (Yes) No Comment:		
Is the disability likely to continue indefinitely? (Yes) No Comment:		
Physician Signature	Date 12/14/18	
Print Name Dr. William Miner	Phone # 605-352-8767	
Address: 455 Kansas Ave City Huron	ST SD ZIP 57350	

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www.brainrehab.org

A Jury could make the reasonable inference that Kevin Walton has a hypoxic brain injury and, Defendants admitted as much.

Dated this 27th day of January 2025.

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Dated on this 27th day of January 2025,

/s/ Daniel K. Brendtro
Daniel K. Brendtro

STATE OF SOUTH DAKOTA) : §§ COUNTY OF BEADLE)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
KEVIN WALTON AND JULIE WALTON, Plaintiffs, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND JOHN DOES AND JANE DOES, Defendants.	02CIV20-000051 **PLAINTIFFS' MOTION TO RECONSIDER EXCLUSION OF DR. RICHARD ADLER**

MOTION

Plaintiffs respectfully ask this Court to reconsider its October 8, 2024, decision excluding Dr. Richard Adler's testimony, on either of two grounds:

1. We ask the Court to allow Dr. Adler to testify, because the decision to exclude was premised upon: (i) a misunderstanding of Dr. Wes Center's testimony; (ii) a mischaracterization of Dr. Adler's opinions and expertise; (iii) a misunderstanding of the reliability and uses of quantitative brain imaging; and (iv) a misunderstanding as to need for specialized diagnostic reliability for each and every human malady….all leading to an incorrect and incomplete application of *Daubert* factors;

   or,

2. In the alternative, we ask the Court to allow Dr. Adler to testify to his opinions, with limitations, such as limited exclusion of portions related to NeuroCloud PET and/or NeuroCloud VOL.

In support of this Motion to Reconsider, we have filed an Affidavit/Declaration from Dr. Center clarifying his testimony and opinions, and offering further foundation for the reliability of qEEG science; and, an Affidavit/Declaration from Dr. Adler, clarifying his testimony and opinions, and offering further foundation for the reliability of his methods, his experience, and the reliability of qPET and qMRI testing science.

STANDARD

Motions for Reconsideration. A Circuit Court has the inherent power to reconsider and modify its prior rulings. *SBS Financial Services, Inc. v. Plouf Family Trust,* 2012 S.D. 67, ¶ 13. In South Dakota, the standard for reconsideration is simply whether the Circuit Court "is convinced that the holding is incorrect." *Id.* (citing *Moore v. Michelin Tire Co., Inc.,* 1999 S.D. 152, ¶ 46).[1]

In South Dakota, "[a] memorandum decision is not a binding decision ending the case. As its name implies, a memorandum opinion is merely an expression of the trial court's opinion of facts and law. Therefore, it is the prerogative of the circuit court to re-think a decision from the bench or a memorandum decision." *Sacred Heart Health Servs.,*

[1] The 8th Circuit, and various federal courts, follow a somewhat different and more restrictive approach to reconsideration, but South Dakota does not use that rule.

Inc. v. Yankton Cnty., 2020 S.D. 64, ¶ 25 (quoting *Ellingson v. Ammann*, 2013 S.D. 32, ¶ 8). Thus, any order or decision in a case "is subject to revision at any time before the entry of [final] judgment." SDCL 15-6-54(b).

Not only is reconsideration permissible, it is an obligation when the facts and law require it. "Judges have an obligation to reexamine their views when superior proof is brought forth to challenge previous understandings. For me, such is the case here." *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 42 (Konenkamp, J., concurring).

In short, because the initial *Daubert* decision is procedurally "non-final," the standard on a motion to reconsider in South Dakota courts is the same standard as on the original motion.

Expert reliability under *Daubert/Kumho*. Here, the legal standard at issue is the flexible *Daubert* framework related to questions of science. The basic question in this case is whether Dr. Adler is using scientific, medical methods by which to explain Kevin's injury and its causes, or, whether he is relying only upon his own "subjective beliefs." *See, State v. Guthrie*, 2001 S.D. 61, ¶ 36 ("Generally, an expert's opinion is reliable if it is derived from the foundations of science rather than subjective belief.")

"This burden is met by establishing that there has been adequate empirical proof of the validity of the theory or method." *State v. Guthrie*, 2001 S.D. 61, ¶ 34 (citing Edward J. Imwinkelried, EVIDENTIARY FOUNDATIONS 287 (4th ed 1998)).

In her treatise on evidence, Professor Hutton explains the test for 'reliability' as a

focus on this question: "a scientific expert's testimony will be admissible if the expert employs the same methodology in reaching the conclusion as he or she would employ if working as a scientist in the real world." Hutton, C., SOUTH DAKOTA EVIDENCE, 407 (2nd ed., 2013) (quoting Saltzburg, S., FRE MANUAL 10TH, § 702:02[8], at 702-44).

Professor Hutton set forth the eight 'non-exclusive guidelines' enumerated in *State v. Hofer,* but also listed seven more pertinent guidelines, *i.e,* creating a list of 15 factors.

Those additional factors that can be considered include:

- (9) the types of error experienced, whether likely to favor the offering party or understate what he seeks to prove;
- (10) the existence of a body of professional literature appraising the process or technique, which tends to insure widespread attention and critical scrutiny;
- (11) whether the opinion grows from independent research or was developed for the purposes of [the instant] litigation;
- (12) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- (13) whether the expert has adequately accounted for alternative explanations;
- (14) whether the expert has exercised the care appropriate to professional work; and
- (15) whether the field is known to reach reliable results in the area of the proposed testimony.

Ultimately, it is the duty of the Circuit Court to fashion a test for reliability based

upon the eight enumerated factors, as well as other pertinent considerations. Here, the Court discussed the eight guidelines. We respectfully urge the Court to reconsider its analysis. Prior to turning to the specifics of this case, we highlight common errors in the gatekeeping process.

Common pitfalls in *Daubert/Kumho* analysis. The gatekeeping function of the Court is a flexible process, designed to remove the Court from the factfinding rule, so long as the proffered scientific expert derives his or her work from actual scientific methods and processes, rather than from subjective belief.

Despite its flexible and open framework, the application of *Daubert* is subject to several common pitfalls:

- **Too narrow of an inquiry.** It is error when the Circuit Court too narrowly constrains the subject matter of the pertinent scientific inquiry. *See, State v. Wills,* 2018 S.D. 21, ¶ 26 (citing with approval to Montana case for the proposition that a trial court "too narrowly conceived the subject matter" when it disqualified an expert witness)
- **Requiring hyper-specific testing to find reliability.** It is error to require hyper-specific testing to validate the methods used in the case at hand. *In re T.A.*, 2003 S.D. 56, ¶ 27 ("Parents would have this Court create a requirement that the medical profession devise a test to determine how and why a child bruises in order for a medical professional to testify as to

whether the child's injuries are consistent with abuse.")

- **Specialist credentials not required**. An experienced medical doctor does not need a specific 'specialist' designation in order to testify as an expert on medical matters. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ("Disputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.")
- **Even non-doctors can give medical opinions**. "In other words, there is no requirement that the person actually be a doctor in order to be qualified to give a medical opinion." *In re. T.A.,* 2003 S.D. 56, ¶ 26 (applying SDCL 19-15-2). Instead, we look to their training and experience. *Id.*
- **Certainty not required.** It is error to require certainty. *State v. Lemler,* 2009 S.D. 86, ¶ 25 ("[I]t would be unreasonable to conclude that the subject of scientific testimony be 'known' to a certainty, [and] an expert may extrapolate from existing data as long as there is an analytical connection between the known data and the expert's opinion....It is only when opinion evidence is connected to existing data **only by** the *ipse dixit* of the expert, [that] a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."
- **Error to exclude causation testimony using the '*consistent with*'**

formulation. When 100% diagnostic certainty is not available, it is error to exclude an expert who testifies that a plaintiff's injuries are *consistent with* a particular cause. *State v. Guthrie,* 2001 S.D. 61, ¶ 42 ("courts applying *Daubert* generally permit these experts…to describe the symptoms…of known victims; report the symptoms [of the plaintiff]; and give an opinion that the [plaintiff's] symptoms…are '*consistent with*' those of known victims"). This rule is followed even when there is "limited scientific experience and literature" about the use of testing for that particular injury. *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 973 (8th Cir. 1995) (PET scan testimony permitted even without scientific literature supporting its use for manganese poisoning).

- **Improper focus on conclusions, rather than method.** It is also error to focus on the conclusions; instead "the focus must solely be on the principles and methodology." *Wells v. Howe Heating & Plumbing, Inc.,* 2004 SD 37, ¶ 16 (In applying *Daubert,* "[t]he focus…must be solely on principles and methodology, not on the conclusions that they generate.") S.D. 86, ¶ 25, 774 N.W.2d 272, 281
- **Error to take a contested reliability question away from the Jury.** "[T]his Court has consistently refused to extend any gatekeeping function to usurp the factual determination role of the ultimate trier of fact." *In re S.*

Dakota Microsoft Antitrust Litig., 2003 S.D. 19, ¶ 30. *Accord, State v. Guthrie,* 2001 S.D. 61, ¶ 38 ("When opposing experts give contradictory opinions on the reliability or validity of a conclusion, the issue of reliability becomes a question for the jury.")

- **Data relied upon does not need to be admissible itself.** "The data on which an expert relies need not be admissible in evidence if they are of a type reasonably relied upon by experts in the particular field of forming opinions on the subject." Hutton, C., SOUTH DAKOTA EVIDENCE, 407 (2nd ed., 2013) (citing *State v. Gallegos,* 316 N.W.2d 634-636-38 (S.D. 1982)
- **It is not necessary that the methods have been actually tested; it is sufficient that they "could be tested".** *State v. Lemler*, 2009 S.D. 86, ¶ 35 (admission of disputed expert upheld because "there was evidence that the underlying scientific process was widely accepted [and] the theories and techniques in question either had been or could be tested")

Admissible expert testimony. On the other side of the coin from those common pitfalls, there are several corollary principles that guide the admissibility of expert testimony:

- **Extrapolation is a permissible technique.** "[A]n expert's opinion is not disqualified simply because variables require extrapolation from known data. " *State v. Lemler*, 2009 S.D. 86, ¶ 37, 774 N.W.2d 272, 285

- **Ruling out other causes is a permissible technique.** In medical cases, an accepted method of conducting science related to the cause of injuries is simply a matter of ruling out other causes. *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 973 (8th Cir. 1995) ("Indeed, ruling out alternative explanations for injuries is a valid medical method.") *C.f., Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 153 (1997) (Stevens, J., concurring in part) ("It is not intrinsically 'unscientific' for experienced professionals to arrive at a conclusion by weighing all available scientific evidence—this is not the sort of 'junk science' with which Daubert was concerned.")
- **The *Hose v. Chicago Nw. Transport. Co.* case.** Perhaps the most useful and direct authority for the Court to follow in this case is an 8th Circuit case involving an expert's use of a PET scan in a manganese poisoning brain injury case. *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 973 (8th Cir. 1995). The 8th Circuit permitted the expert to testify and rely upon a PET scan, even though there was little if any scientific literature regarding the hyperspecifc use of PET scans to diagnose manganese brain injury. There, 8th Circuit admitted such testimony "because it was relevant in terms of excluding other diagnoses of [Plaintiff's] injuries and was limited to showing consistency with, not diagnostic proof of, manganese

encephalopathy. [The expert acknowledged and] testified to the limited scientific experience and literature about using PET scans in manganese cases." *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 973.

With those pitfalls and guidelines as background, we begin by addressing errors and misunderstandings within the Memorandum Opinion.

ARGUMENT

1. The Court's October 8th ruling is premised on six, critical misunderstandings

(a) Dr. Center's testimony about the permissible use of qEEG was taken out of context.

The Court's opinion was premised, in part, upon its conclusion that "qEEG cannot be used for diagnostic purposes" and that Dr. Center deems "such use as illegitimate." Memorandum, p. 12. This is based upon a misunderstanding about Dr. Center's testimony. To clear up the confusion, Dr. Center has submitted an affidavit/declaration.

In pertinent part, Dr. Center refers to this portion of his testimony and explains that his refusal to perform a diagnosis, and impermissible uses, was a statement reflecting two things: (i) that Dr. Center is not a medical professional, and thus does not diagnose medical conditions; and (ii) that a qEEG is "not properly used in a vacuum, but ***is*** properly used to confirm or disconfirm a proposed hypothesis...." [Center Declaration, ¶ 20]. In particular, qEEG can be used "to test a hypothesis of a diagnosis made by

competent medical authority and to explore the extent and nature of that hypothesis from a neurobehavioral perspective." [Center Declaration, ¶ 20.]

Dr. Center then reiterated that he stands by his conclusions in his own report, namely, that "Mr. Walton's patterns of brain electrical activity show evidence of a brain injury consistent with a hypoxic event." [Center Declaration, ¶ 21.] Dr. Center then confirms that his Report and conclusions can be relied upon by a medical doctor, and can be used "a qualified medical practitioner, such as a psychiatrist for use in a diagnosis, or differential diagnosis, who will correlate my findings with other data" and information. [Center Declaration, ¶ 23.] "Provided that the qEEG is being used with other diagnostic data and information, it is a valid, accepted tool for use to aid in diagnosis." [Center Declaration, ¶ 24.] And, Dr. Center expressly approves of Dr. Adler's use of the qEEG report "to inform a diagnosis of Mr. Walton, by correlating the neurobehavioral findings in my report with diagnostic testing and his personal examination of Mr. Walton. This is an acceptable use of Kevin Walton's qEEG report by a psychiatrist, using the report and relying upon it as but one piece of information among other evidence related to Dr. Adler's diagnosis." [Center Declaration, ¶ 25.] In short, "[t]his was hypothesis testing within the realm of what a qEEG can be used for." [Center Declaration, ¶ 21.]

Thus, although a qEEG, all by itself, cannot diagnose a hypoxic brain injury, a qEEG is a well-established tool for use in making such a diagnosis. By analogy, a thermometer cannot diagnose someone with Covid-19. But, a thermometer can be used

as a tool, along with other sources of data, to provide a doctor with a basis for concluding that a high fever is associated with the patient being in an acute phase of that particular viral infection.

From this, the Court can conclude that Dr. Adler's opinion rests upon good grounds, including in part upon Dr. Center's testing, and that the diagnosis is rooted in the scientific method.

(b) Next, the Court's decision is based upon a misunderstanding that Dr. Adler's diagnosis relied solely upon the qEEG report.

In particular, the Court inquired during the hearing as to whether Dr. Adler's opinions were inextricably linked and subservient to Dr. Center's qEEG report. Counsel attempted to explain in the initial brief, and, at the hearing that Dr. Adler arrived at his diagnosis using a multitude of convergent data sources, including as demonstrated by the diagram on page 32 of Dr. Adler's report (Figure 17). The Court's opinion arrived at the opposite conclusion, finding that Dr. Adler's other testing did not expressly conclude causation as to Kevin's brain injury, other than by relying upon the qEEG testing.

To elaborate and remedy this point, Dr. Adler's Declaration provides a detailed analysis of his method, including his explanation that based upon the "unchallenged" sources of data (*see,* Factor 1 through 11, at ¶¶ 54 to 116, *i.e.,* all the factors *except* for the quantitative imaging), Dr. Adler concludes that more likely than not, Kevin Walton's symptoms are caused by a physical brain injury from the only plausible cause (his

hospitalization), rather than conversion disorder or malingering or a solely snowmobile accident fifteen years earlier. ¶ 119. Dr. Adler explains that he can reach this conclusion "with or without consideration of the quantitative reports." ¶ 219.

Then, Dr. Adler addresses the quantitative imaging, and explained that the totality of the data when adding in testing from qMRI, qEEG, NeuroCloud PET, and NeuroCloud VOL (for MRI) further reinforced that same conclusion. [Adler Declaration, ¶ 144; ¶ 220]. Notably, each of the quantitative reports "independently of each other serves to reinforce" his conclusion. *Id.*

In short, Dr. Adler is not relying solely upon the qEEG report to reach his conclusions.

(c) Next, the Court's decision is premised upon the incorrect conclusion that diagnostic tests must be validated for use with each specific medical condition for which a physician intends to use the test.

The Defense made great efforts to convince the Court that the absence of literature or testing related to the hyperspecific use of qEEG, quantitative MRI, and quantitative PET studies for diagnosing a hypoxic brain injury was dispositive as to the reliability and admissibility of such science. The Memorandum repeats a variation of this phrase in its analysis of each of the eight factors.

Not even the Defense's own experts made this claim, however. Instead, "it appears to be a lawyer-created idea" that "has no basis in medical practice." [Adler Declaration, ¶ 17]. This argument appears to arise because "the Defense misunderstands

how diagnostic testing works in medicine." *Id.*

Instead, "[d]iagnostic tests do not *give* diagnoses. The tests provide factual findings about the patient's body—*e.g.,* a white blood cell count, the presence or absence of bacteria in the cerebrospinal fluid, an abnormal density in part of the brain, etc. *The factual findings are not diagnoses.* Any given finding may be consistent with multiple diagnoses. A physician tries to gather enough facts from different sources to identify the most likely diagnosis." [Adler Declaration, ¶ 18].

"Diagnostic tests are not approved, certified, or otherwise validated for each specific potential diagnosis for which they may provide relevant information. It would be effectively impossible to do so [as well as] arbitrary and senseless...." [Adler Declaration, ¶ 20]. Instead, the quantitative reports as to Kevin "provide information about Kevin's brain that is clearly relevant to the diagnostic questions at issue," and Dr. Adler has previously "used reports from these quantitative testing modalities in all manner of civil and criminal cases." [Adler Declaration, ¶ 22]. In particular, such quantitative testing methods are particularly useful in helping diagnose rare brain conditions for which "disease-specific formal approval did not exist." [Adler Declaration, ¶ 22].

In the course of reaching a diagnosis, Dr. Adler considered Kevin's conventional PET scan; his conventional brain MRI; a quantitative MRI; a quantitative EEG; and NeuroCloud computer analysis of the MRI and PET scans. [Adler Declaration, ¶ 22].

Each of these methods provides information about Kevin's brain. Each of these modalities is an accepted method for gathering information about any patient's brain. [Adler Declaration, ¶ 123 (qEEG, for widespread clinical forensic use in all manner of brain study); ¶ 129 (NeuroCloud PET, for clinical use broadly, including in regard to hypoxic brain injury)]. For each of these quantitative imaging tests, Dr. Adler is capable of using them in the diagnostic process "by virtue of training and experience." [Adler Declaration, ¶ 122, 123].

(d) Next, the Court's decision is based upon a misunderstanding that the PET, MRI, and EEG tests conducted upon Kevin were "normal," and that the qEEG, quantitative PET, and quantitative MRI are inherently unreliable because they use computerized programs that deliver different results.

The Court reached this conclusion on page 11. In our prior filings and at the hearing, we attempted to explain that qMRI, qPET, and qEEG techniques will give different results than conventional MRI, PET, and EEG testing because the provide "a more detailed and quantitative analysis" and "advanced neuroimaging analysis" compared to the testing results than can be obtained by simply looking at an image. *E.g.,* Walton Brief, 8/7/2024, p. 30; p. 39; Brendtro Affidavit, Exh. 27 and 28.

To further expand the Record on this topic, Dr. Adler and Dr. Center address the reliability of quantitative MRI, PET, and EEG analysis. *See,* Adler Declaration, ¶¶ 11, 15; 169; 173-175; Center Declaration, ¶¶ 6-14. Rather than being less reliable than conventional PET, MRI, and EEG testing, these quantitative methods result in

"improved diagnostic accuracy;" "provide additional insight;" and "improved diagnostic efficacy." [Adler Declaration, ¶ 173-175].

All of these quantitative methods are discussed extensively in scientific literature, which gives them reliability sufficient to address their testability, potential error rate, control procedures, general acceptance, and peer review. [Adler Declaration, ¶¶ 204-211 (addressing *Daubert* factors as to qEEG, qMRI, and qPET; Center Declaration, ¶¶ 6-14 (addressing *Daubert* factors as to qEEG).

In short, quantitative imaging techniques are regarded as *more* sensitive and *more* reliable at identifying brain injury than a conventional, naked-eye viewing of the corresponding tests. It is like the difference between listening for enemy planes at night from a watchtower, versus employing doppler radar to find them much faster and with more specific location.

(e) Next, the Court's decision is premised upon a misunderstanding that "the technology [relied upon by Dr. Adler] has [never been] used to diagnose hypoxic brain injury for purposes other than litigation." *See,* Memorandum, p. 13.

Dr. Adler squarely addresses this point in his Declaration: "I note that qEEG, qMRI, and qPET have all been used to identify brain injuries with cerebral hypoxia," and cites numerous articles relating to the use of these technologies outside the realm of litigation. [Adler Declaration, ¶ 180-185]. The NeuroCloud software and qEEG methods are not confined to forensic use.

(f) Next, the Court's decision is premised upon the belief that

Dr. Adler is not qualified to review quantitative reports for MRI, EEG, and PET

The Court had concerns about Dr. Adler's qualifications relating to quantitative imaging.

By experience and training, Dr. Adler is qualified to request quantitative brain image testing, and then incorporate the results into his diagnosis. At best, the Defense experts claim that radiologists are "more" qualified to read an MRI, EEG, or PET scan, than a psychiatrist, but they do not claim or cite any authority that a psychiatrist is forbidden or unqualified from doing so. Dr. Adler explains that he is "qualified to read the qualitative and quantitative reports I obtained and to evaluate in how they contribute to answering the diagnostic questions." [Adler Declaration, ¶ 210]. Dr. Center explains that psychiatrists and other medical professionals are qualified to take qEEG reports into consideration in their diagnoses. [Center Declaration, ¶ 23].

By training, Dr. Adler is a graduate of the Forensic Psychiatry training program at the University of Washington. and he holds an appointment in the Department of Psychiatry at the University. *Adler Report,* p. 1. He has worked extensively in the forensic context to help diagnosis brain injury of all kinds, including rare presentation for which there is little specific published literature. [Adler Declaration, ¶ 22]. It is sufficient for an expert to demonstrate expertise via experience and education.

Impact of Dr. Wu's diagnosis. Within the question of Dr. Adler's qualifications, the Court remarked that it has "significant concerns…particularly considering Plaintiffs'

first expert witness came up with a different diagnosis using the same technology." Memorandum, p. 12. This is incorrect in several ways.

Plaintiffs' first expert (Dr. Joseph Wu) came up with the exact same diagnosis using quantitative PET analysis. Namely, Dr. Wu diagnosed Kevin with a hypoxic brain injury from an opioid overdose on April 11, 2018, at the Huron Hospital.[2] In addition, Dr. Wu also concluded that Kevin's symptoms could not be explained as conversion disorder. Wu Deposition, 181:16. What was different was not the diagnosis, but, instead, differences in the quantitative imaging analysis. Dr. Wu uses a very small data control group (16 people), which is his own proprietary group of subjects, and, comprises a database upon which no hospital or other outside entity relies upon. Wu Deposition,

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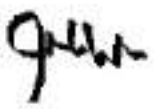
[2] Here is Dr. Wu's diagnosis:

Summary

The most medically probable cause for the PET abnormalities, clinical symptoms such as foreign accent syndrome and right leg weakness and neuropsychological abnormalities and clinical symptoms in Mr. Kevin Walton are due to sequelae from hypoxic brain injury sustained from opiod overdose on 4/11/2018. All opinions expressed herein are to a reasonable degree of medical certainty. In other words, it is my opinion to a reasonable degree of medical certainty that it is more likely than not that Mr. Walton's PET abnormalities and clinical symptoms identified in this report were directly caused by the hypoxic brain injury due to the opiod overdose on or about April 11, 2018.

I reserve the right to amend or modify any opinion based on the discovery of new evidence.



Joseph C. Wu, M.D.
University Neurocognitive Imaging

177:17. In addition, because of the (antiquated) software system upon which he creates and stores data, his data was unable to be shared with Defense Counsel.

In contrast, the quantitative PET analysis used by Dr. Adler (NeuroCloud PET) is relied upon by hospitals in the European Union, and, anyone can load a PET scan into that system and evaluate its operation and results for $350. These are night and day differences.

It is unfounded to conclude that Dr. Adler is unqualified because Dr. Wu's sample size or data-sharing capabilities are in question. That is not a valid syllogism within the scientific process. It would be like saying that a replacement Circuit Judge on a case is issuing unreliable opinions because she incorporates caselaw that she found via computerized legal research from a large national database, yet who reaches the same legal conclusions as the Circuit Judge who retired, but who used only paper-bound copies of the Northwest Reporter.

In short, Dr. Wu (a psychiatrist) came up with the *same* diagnosis using his own version of one of the same technologies, qPET. Dr. Wu's system demonstrated Kevin's brain was injured relative to Dr. Wu's small sample group, in various ways. The NeuroCloud PET system demonstrated that Kevin's brain was injured, by comparing it relative to a larger, European-Union-accepted sample group, which Dr. Adler determined showed injuries, in distinct ways. But, still nonetheless showed injury.

In short, this is not a factor that counts against Dr. Adler or his qualifications.

2. Record sufficient on all of the eight factors, and other factors, too

The *Daubert/Kumho* inquiry provides a Circuit Court with "discretion in choosing the manner of testing expert reliability," but, "not discretion to perform the function inadequately." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158–59 (Scalia, J., concurring).

This means that the Circuit Court must exercise its discretion to affirmatively "choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky. [T]he failure to apply one or another of them may be unreasonable, and hence an abuse of discretion." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158–59 (Scalia, J., concurring) (emphasis in original).

In conducting its analysis, the Memorandum Opinion does not affirmatively choose among any of the various guidelines, and, it overlooked evidence in the Record as to many of them. The additional Declarations provided with this motion offer more factual support on essentially all of the eight guidelines, plus the myriad of others available for consideration, including Professor Hutton's list, as well as the 8th Circuit considerations.

For example, even though the Court was invited to consider other factors from the 8th Circuit (by the Defense, *see,* HRMC Brief, 5/31/2024, p. 25), the Circuit Court did not discuss any of those further considerations (namely: whether the expertise naturally flows from the expert's prior work, *i.e.,* predates the litigation; "whether the proposed

expert ruled out other alternative explanations;" and "whether the proposed expert sufficiently connected the proposed testimony with the facts of the case").

Of these various factors, the Record already contains evidence to support them in favor of admitting Dr. Adler's testimony:

1. **Testable.**

    a. **Adler.** Dr. Adler's method was the differential diagnosis method. It is inherently testable because any other doctor can perform the same analysis. In his Report, Dr. Adler identifies his step-by-step methodology. Anyone can follow it and replicate it. Nobody challenges this.

    b. **Brain Imaging.** Likewise, each of the component testing brain image modalities (qPET, qMRI, and qEEG) are also testable. The Defense's experts can input the same data into NeuroCloud VOL; and, they can input their own data into NeuroCloud PET; and they can take Kevin's EEG data and run their own tests using the qEEG model. It is testable. [Adler Declaration, ¶ 22; Center Declaration, ¶ 6].

2. **Peer Review.**

    a. **Adler.** The differential diagnosis method is so broadly accepted that it is not only peer-reviewed, but embraced by every peer in the medical profession and discussed as a foregone conclusion by courts. *See, Hose*

v. Chicago Nw. Transp. Co., 70 F.3d 968, 973 (8th Cir. 1995) ("Indeed, ruling out alternative explanations for injuries is a valid medical method.")

b. **Brain Imaging**. Each of the modalities (quantitative MRI, quantitative PET, and quantitative EEG) are subject to ongoing peer review. Dr. Adler's and Dr. Center's declarations explain and prove this. These methods are subject to "many thousands of peer-reviewed journal articles." [Adler Declaration, ¶ 205; Center Declaration, ¶ 7].

3. **Known or Potential Error Rate**

a. **Adler**. The differential diagnosis is not the type of method for which a known error rate applies. It is simply accepted as a valid method to test medical questions. It is the type of thing that we view as reliable enough for us to undergo complicated surgery because our physician has ruled out other solutions.

b. **Brain Imaging**. The quantitative modalities are each designed to screen out error by using methods which screen a known database for objective statistical anomalies. [Adler Declaration, ¶ 206; [Center Declaration, ¶ 8-9].

4. **Standards.**

a. **Adler**. The differential diagnosis method is subject to standards for its

use within the ordinary practice of medicine.

b. **Brain Imaging**. Standards exist as to data acquisition and use of the normative databases. [Adler Declaration, ¶ 207; Center Declaration, ¶ 9].

5. **General acceptance.**

a. **Adler**. The differential diagnosis method is generally accepted, as is Dr. Adler's specific approach as a psychiatrist.

b. **Brain Imaging**. Quantitative brain imaging is generally accepted in the field of medicine. [Adler Declaration, ¶ 208; Center Declaration, ¶ 10]. Indeed, some researchers point to it as the next important leap for all doctors to embrace. [Adler Declaration, ¶ 217] ("an inevitable evolution of daily radiology practice in many fields of medicine")

6. **Relationship of Technique to Established Methods**

a. **Adler.** Dr. Adler's technique in using the differential diagnosis is the established method.

b. **Brain Imaging.** Dr. Center's work in obtaining and evaluating the data meets this criteria. [Center Declaration, ¶ 11]. Dr. Adler used "qualified providers" who performed the analyses for qEEG, NeuroCloud PET, qMRI, and NeuroCloud VOL, and, the use of this method is reliably related to obtaining more information about Kevin's

brain. [Adler Declaration, ¶ 209].

7. **Qualifications of the Expert.**

   a. **Adler.** Dr. Adler is qualified to use the differential diagnosis method, and this is not in dispute.

   b. **Brain Imaging.** Via his experience and training, Dr. Adler is qualified to use brain imaging studies from various sources. [Adler Declaration, ¶ 210; Center Declaration, ¶ 25]. Dr. Center is qualified to conduct qEEG studies. [Center Declaration, ¶ 12].

8. **Non-Judicial Uses.**

   a. **Adler.** Dr. Adler's differential diagnosis method is used non-judicially in every doctor's office in the country.

   b. **Brain Imaging.** Likewise, the discipline of qEEG, and quantifying PET scans and MRI scans has broad application beyond simply use in litigation, and "has been in sue for decades both for research and for clinical practice, as well as in forensic practice." [Adler Declaration, ¶ 15]. And, qEEG in particular is put to non-judicial uses, both by Dr. Center and those in his discipline. [Center Declaration, ¶ 13].

9. **Other factors.**

Finally, essentially all other factors on the various "extended" *Daubert* lists likewise indicate toward admission of Dr. Adler's testimony.

As to both the differential diagnosis method and quantitative brain imaging:

- there is a wide body of professional literature as to the process and technique, ensuring widespread attention and critical scrutiny;
- the differential diagnosis method and the quantitative imaging methods arise from independent research that long predates this litigation;
- Dr. Adler has demonstrated that he is extrapolating from an accepted premise (that quantitative brain imaging can identify anomalies in Kevin's brain) and arrived at a founded conclusion (the unremarkable premise that a massive dose of opioids sufficient to cut off Kevin's breathing to a point where a nurse said he sounded like a man taking his last breaths could cause a brain injury);
- Dr. Adler has methodically and appropriately accounted for all alternative explanations, including the Defense's theory of conversion disorder;
- Dr. Adler has directly connected the proposed testimony with the facts of this case;
- Dr. Adler's testimony flows from his prior work that predates this lawsuit;
- Dr. Adler has approached this with a requisite amount of care and study; and,
- the field of forensic psychiatry and the use of quantitative brain imaging within that discipline are regarded as yielding reliable conclusions.

Indeed, on that last point, the Defense Experts are all part of the same discipline: they, too, are using forensic medicine and opinions about brain imaging to offer what *they* deem to be reliable conclusions. Dr. Adler's opinions are not excludable simply because he arrived at a different answer, using more modern techniques.

In short, the *Daubert* factors and the "extended" *Daubert* factors indicate that Dr. Adler's exclusion was in error.

As to questions of reliability, "the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary." *Burley,* 2007 S.D. 82, ¶ 25, 737 N.W.2d at 406. In some instances, reliability must focus simply on " 'knowledge and experience.' " *In re T.A.,* 2003 S.D. 56, ¶ 27, 663 N.W.2d at 234 (quoting *Garland,* 2001 S.D. 42, ¶ 11, 624 N.W.2d at 703).

3. Dr. Adler was able to arrive at his conclusion of hypoxic brain injury *without* reference to the quantitative brain testing, and, thus it is error to exclude his testimony in its entirety

Nowhere in the Defendants' arguments did they lay out the case for excluding Dr. Adler altogether. Nor do the Defense Experts muster such an argument.

Nonetheless, the Court's memorandum decision concludes that Dr. Adler's testimony should be excluded in its entirety. This is error.

Further, Dr. Adler's method rules out the defense's theory of the case. This alone is sufficient to allow his testimony. "In determining the cause of a person's injuries, it is

relevant that other possible sources of his injuries, argued for by defense counsel, have been ruled out by his treating physicians. Indeed, ruling out alternative explanations for injuries is a valid medical method." *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 973 (8th Cir. 1995) (citing *McCullock v. H.B. Fuller, Inc.,* 61 F.3d 1038, 1043-44 (2d Cir.1995)).

It is error to exclude Dr. Adler altogether.

4. The Court should consider each of the quantitative tests in their own right.

Each of these testing modalities stands on a different footing, including quantitative PET, quantitative MRI, and quantitative EEG. Each of them are subject to their own body of research, and we believe we have presented sufficient evidence as to their general acceptance and reliability, as to each of them.

Nonetheless, since each of the quantitative methods independently supported Dr. Adler's conclusions, if there is any question about a single one of these methods, then that modality should be excluded in this case, rather than all of them, and Dr. Adler's testimony can be constrained as to the admissible portions.

5. The Court failed to apply the rule that "the basis of an expert's opinion is generally a matter going to the weight of the testimony rather than the admissibility."

At the core of these Defense arguments, the Hospital and Dr. Miner attack the *basis* of Dr. Adler's opinions. They don't dispute his use of the differential diagnosis method. They dispute whether he is properly considering quantitative brain studies in

forming his conclusions. That is attacking the 'basis' of his opinion.

"The basis of an expert's opinion is generally a matter going to the weight of the testimony rather than the admissibility." *Powers v. Turner Cnty. Bd. of Adjustment*, 2022 S.D. 77, ¶ 9 (quoting *Estate of Dokken,* 2000 S.D. 9, ¶ 41) (emphasis added).

CONCLUSION

Dr. Adler is a forensic expert, routinely admitted to testify and acknowledged by Courts as having specialized expertise in neuroimaging (including QEEG, brain MRI and PET quantification) as a basis upon which to assist the trier of fact to understand brain injuries. If there are questions about the basis for his opinions, he is able to respond to questions posed on cross-examination.

Excluding Dr. Adler whole-cloth would deny the Jury access to relevant and important information about Kevin's injury, and, an opinion which point-by-point dismantles the only theory proffered by the Defense (conversion disorder). Excluding Dr. Adler whole-cloth is not something that even the Defense Experts were able to advocate for.

Dr. Adler is a reasonable, qualified expert. Dr. Adler is offering an opinion which is a direct continuation of the same hypothesis that Kevin's own radiologist arrived at, just one month after Kevin's hospitalization, in May 2018. Dr. Rossing observed Kevin's unusual symptoms and determined they were "suspicious for a form of persistent toxic

metabolic encephalopathy," or, "in other words…already recognizing the need to rule out a hypoxic event, a physical brain injury related to hypoxia due to an opioid overdose." [Adler Declaration, ¶ 106].

It should not be a surprise to anyone that Dr. Miner's and the Hospital's decision to administer an overdose of opioids to Kevin would cause him harm, especially without continuous electronic oxygen monitoring. It is no surprise that this would cause a permanent injury to Kevin.

Dr. Adler's opinion is not novel or unfounded. He is pulling together all of the pieces, to explain what happened to Kevin. His testimony should be admitted.

Dated this 24th day of January, 2025

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PLEASE TAKE NOTICE THAT THIS MOTION WILL BE HEARD AT THE COURT'S HEARING ON FEBRUARY 27, 2025, AT 10:00 AM.

CERTIFICATE OF SERVICE

The undersigned, the attorney for Plaintiffs Kevin and Julie Walton, hereby certifies that a true and correct copy of the foregoing was filed electronically using the Odyssey File and Serve system which will send notification of such filing to the following:

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Due to a planned outage of the Odyssey system at 6:00 pm this evening, the voluminous declarations of Dr. Adler and Dr. Center will be filed after the system is back online, but are being served by email upon counsel.

Dated on this 24th day of January, 2025

/s/ Daniel K. Brendtro
Daniel K. Brendtro

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 31052

KEVIN WALTON and JULIE WALTON,

Plaintiffs/Appellants,

vs.

HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., and JOHN AND JANE DOES,

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

The Honorable Patrick T. Pardy, Presiding Judge

BRIEF OF APPELLEE HURON REGIONAL MEDICAL CENTER, INC.

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PRELIMINARY STATEMENT

Citations to the Certified Record are "R01." or "R02." followed by the applicable page number(s) in the Clerk's Index. Appellees Huron Regional Medical Center, Inc., and William J. Miner, M.D., are referred to collectively as "Defendants." Appellee Huron Regional Medical Center, Inc. is referred to as "HRMC." Appellee William J. Miner, M.D. is referred to as "Dr. Miner." Appellants Kevin Walton and Julie Walton are referred to as "Plaintiffs."

JURISDICTIONAL STATEMENT

The Circuit Court entered Judgment on March 11, 2025, and dismissed Plaintiffs' case with prejudice. Notice of Entry of Judgment was filed in Circuit Court on March 12, 2025. Appellants/Plaintiffs filed their Notice of Appeal on April 8, 2025. This Court has jurisdiction pursuant to SDCL 15-26A-3(1).

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred in excluding the testimony of Dr. Richard Adler based upon SDCL 19-19-702 and the *Daubert* standard.

The Circuit Court correctly excluded the expert opinions of Dr. Richard Adler.

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- *Kostel v. Schwartz*, 2008 S.D. 85, 756 N.W.2d 363.
- *State v. Huber*, 2010 S.D. 63, 789 N.W.2d 283.
- SDCL 19-19-702.

II. Whether the Circuit Court erred in granting Defendant's Motion for Summary Judgment.

The Circuit Court correctly granted summary judgment on Plaintiffs' claims based upon the fact that Plaintiffs failed to produce expert testimony to meet the essential element of causation in this medical malpractice action.

- *Schrader v. Tjarks*, 522 N.W.2d 205 (S.D. 1994).

- *Koeniger v. Eckrich*, 422 N.W.2d 600 (S.D. 1988).
- *Dudley v. U.S.*, 2011 WL 5102274 (D.S.D. October 25, 2011).

STATEMENT OF THE CASE AND FACTS

Plaintiffs commenced this medical malpractice action against Defendants by Complaint dated March 20, 2020. R01.3-7. Plaintiffs allege that at 7:20 a.m. on April 11, 2018, while a patient at HRMC, Plaintiff Kevin Walton suffered a hypoxic brain injury while under the care of Dr. Miner. R01.4. Despite this case ongoing for five years, Plaintiffs have been unable to produce any credible evidence that Plaintiff Kevin Walton suffered any period of hypoxia, that he has a hypoxic brain injury, or whether the alleged hypoxic brain injury was caused by Defendants.

Kevin Walton has a long and complex health history, including several incidences of perceived modalities where his doctors were unable to determine a specific cause or diagnosis.[1] In 2005, Mr. Walton complained of limb weakness and paresthesia and was hospitalized at Sioux Valley Hospital with "extensive workup while in the hospital with no discernible abnormalities detected by multiple subspecialty evaluations to include Psychiatric consultation." R02.365. In October, 2005, Mr. Walton's symptoms began to include short-term memory loss, headaches and ears ringing. R02.366. In December, 2005, Mr. Walton's was following up for paresthesia, inability to move his legs, headache, and tinnitus. He was seen by Dr. Schapiro at the Schapiro Center for Multiple Sclerosis in Minneapolis. According to Mr. Walton, Dr. Schapiro diagnosed him with Guillain-Barré. R02.367. Although Mr. Walton apparently told his providers that Dr.

[1] Mr. Walton's prior health history is significant to the issues before the court because Plaintiffs assert in their brief that Kevin had no similar issues before his hospitalization at HRMC. This assertion is inconsistent with the record. *See* Plaintiffs' brief at pp. 4, 24.

Schapiro diagnosed him with Guillain-Barré Syndrome, the records obtained from the Schapiro Center for Multiple Sclerosis do not contain a diagnosis of Guillain-Barré Syndrome, but rule out multiple sclerosis and note that Mr. Walton, despite his extensive complaints, had a normal gait, normal reflexes, no muscle weakness, normal muscle tone, and no other notable neurological abnormalities besides abnormal tandem gait. R01.958. *See* also R01.1002. In January, 2006, Mr. Walton complained that his symptoms of muscle weakness, paresthesia, and headache were worsening. R02.368. In February, 2006, Mr. Walton reported a seizure. He underwent an MRI that was read as normal. R01.1697. Also in February, 2006, Mr. Walton's symptoms expanded to include tongue pain, heart racing and pounding, chest pain, burning in his left arm radiating to his neck, and tachycardia. R02.369. According to Mr. Walton's wife, beginning in January, 2006, Mr. Walton declined for probably six and a half months. R01.1607. From 2006 until 2010, Mr. Walton continued to see doctors with various complaints of possible seizure, cardiac issues, knee pain and swelling, while testing revealed no significant abnormalities. R01.1696-98.

Mr. Walton continued to complain of unresolved medical symptoms after 2006. For example, on October 11, 2010, Mr. Walton underwent a CT scan of his kidneys due to complaints of pain, but his CT scan of the kidneys showed no abnormalities. R01.961. By November, 2014, Mr. Walton was undergoing psychiatric evaluation with a diagnosis of Primary Insomnia and Mood Disorder not otherwise specified. R01.962. At the same time, Mr. Walton complained of continued bilateral lower extremity weakness that he had ever since 2006 as well as neuropathy in his lower extremities. R01.1699. However, his providers could find no explanation as to his lower extremity weakness. An EMG was

performed, which was normal. R01.963. Beginning in early 2018, Mr. Walton began complaining of bilateral testicular pain. R01.965. Despite multiple interventions by medical providers, Mr. Walton continued to have ongoing severe testicular pain without explanation of the cause. R01.1702. He was hospitalized between April 3, 2018, and April 5, 2018, for ongoing severe pain. R01.1703. On April 6, 2018, the day after Mr. Walton was discharged from HRMC, the hospital received a phone call from the Huron Police stating that they were bringing Kevin to the police station as he had made suicidal statements to his wife. R01.1703. Mr. Walton denied having suicidal thoughts or feelings when interviewed. *Id.*

On April 9, 2018, Plaintiff Kevin Walton presented to the HRMC emergency room with complaints of pain. His wife noted Plaintiff had been near suicidal due to the pain and he was bent over moaning in pain. R01.2858. Plaintiff was admitted to HRMC on April 9, 2018, for testicular pain and discharged on April 11, 2018. R01.4; R01.2645. During Plaintiff's hospitalization, he was prescribed Dilaudid and other pain medications for his severe testicular pain. R01.4.

Plaintiff Kevin Walton contends that he suffered a hypoxic brain injury during his hospitalization at HRMC; however, he can present no evidence that he suffered a hypoxic brain injury while a patient at HRMC.[2] Plaintiff's oxygen saturations were monitored on a regular basis while he was a patient at HRMC and none of his oxygen saturation readings showed a level below 93%. R01.2644-45. Plaintiffs point to an incident that they contend occurred on the morning of April 11, 2018, the last day of Mr. Walton's

[2] Contrary to the assertions on p. 7 of Plaintiffs' brief, HRMC does contest that Mr. Walton was administered a massive amount of opioids for him as he was a heavy user of opioids before his hospitalization and denies that Mr. Walton was improperly monitored.

hospitalization at HRMC, as an attempt to present some evidence that a hypoxic episode occurred. Although Plaintiffs' version of the events of this alleged hypoxic episode is disputed,[3] Plaintiffs do not dispute that Mr. Walton's oxygen saturations showed a reading of 93% as this alleged hypoxic episode was occurring. R01.1567. In fact, Mr. Walton testified as follows regarding this alleged hypoxic episode on the morning of April 11, 2018:

> Q: Okay. So the first thing you remember is Dawn Johnson was in the room trying to put something on your finger?
> A: Yeah.
> Q: And that's what woke you up?
> A: Yeah.
> Q: And so what she was trying to put on your finger was a pulse oxygen --
> A: Yeah.
> Q: -- reader, right?
> A: Correct.

R02.538.

The oxygen saturation of Mr. Walton at the time he now alleges he was suffering a hypoxic episode was 93%. R01.1567. Mr. Walton alleges that since his hospitalization, he has had symptoms that include confusion and agitation, speaking in a foreign accent, generalized weakness, weakness in his right leg which gives way, and needing support and assistance to walk. R01.1071-73. After Plaintiff's hospitalization, he sought out medical treatment from numerous healthcare providers. Plaintiff had

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[3] While the standard for summary judgment requires the court to consider the facts in the light most favorable to the non-moving party, it does not allow the plaintiff to simply create facts. As an example, Plaintiffs claim on p. 3 of their brief, that Mr. Walton was found "unresponsive." (citing R01.3053). R01.3053 is Plaintiffs' Statement of Undisputed Facts that cites to pp. 65-66 of the deposition of Julie Walton. The deposition of Julie Walton (who was not present during the alleged hypoxic episode) does not state that Mr. Walton was found unresponsive. R01.1597. In fact, Mr. Walton testified in his deposition he was awakened by the nurse as she was placing a pulse oximeter on him. R02.538.

numerous tests to rule out organic brain issues such as hypoxic brain injury. Plaintiff had an MRI of the brain on April 20, 2018, at HRMC which was read as normal. R01.2647. Plaintiff had a second MRI of the brain on July 9, 2018, at Avera McKennan Hospital which was read as normal. R01.2641. Plaintiff had a PET CT of the brain on May 31, 2018, which was normal. R01.2638-39. Plaintiff also had an EEG of the brain taken at Avera McKennan Neurology on May 23, 2018, which was normal, and an EEG taken on July 25, 2018, which was normal. R01.2637; R01.2642-43.

On November 14, 2018, Dr. Joseph Matsumoto of the University of Minnesota Health Clinics and Surgery Center diagnosed Mr. Walton with functional neurological disorder, a psychological condition which is also referred to as conversion disorder.[4] R01.2649. Dr. Matsumoto further noted that "all significant neurological disease has been ruled out." *Id.* Dr. Matsumoto's diagnosis of functional neurological disorder was confirmed by Dr. William Rossing, a neurologist at Avera Health. R01.2632.

No treating physician has diagnosed Mr. Walton with hypoxic brain injury. Despite Dr. Matsumoto's and Dr. Rossing's diagnosis of functional neurological disorder, Plaintiffs continued to pursue their theory that Kevin Walton suffered a hypoxic episode and subsequent brain injury by retaining professional expert witnesses, to diagnose what no treating physician has diagnosed, by running scientifically unsupported tests.

Over nine months after HRMC's disclosures of experts that agreed with the diagnosis of Kevin Walton's treating physicians, Plaintiffs disclosed the opinions of

[4] Functional neurological disorder, or conversion disorder, is a non-structural psychological condition. R01.999-1008.

Richard Adler, M.D. and Wesley D. Center, Ph.D. Dr. Adler is a psychiatrist. R01.1876. Dr. Adler's theory is that the appropriate diagnosis for Mr. Walton is "Mild Neurocognitive Disorder Due to Another Medical Condition (Primarily Hypoxemia)" which he opines is the "direct and proximate result of the subject events which are the focus of the pending lawsuit." R01.1920. He asserts that the focal consultative issue involved the "administration of neuroevaluative testing, done via quantitative electroencephalogram (qEEG), brain magnetic resonance imaging (MRI), including volumetric quantification, review and possible analysis of further testing (such as brain positron emission tomography (PET)), conduct psychological testing, interviews, and integrate this information." R01.3413. In short, Dr. Adler's diagnosis of hypoxic brain injury is based almost exclusively on the use of commercially available internet programs, qEEG, NeuroCloud Vol, and NeuroCloud PET. R01.3413. Dr. Adler admits that he is not an expert in qEEG but relies on the interpretation of psychologist Wesley Center. R01.1905. Dr. Adler also relied on the results of computer programs NeuroCloud Vol and NeuroCloud PET, developed by Qubiotech Health Intelligence, a company based in Coruna, Spain. R01.1142. Notably, Dr. Center testified that qEEG was not to be used for the diagnosis of brain injury. R01.2435. NeuroCloud Vol and NeuroCloud PET both expressly disclaim that their results can be used for diagnostic purposes. R01.719, 1141, 2627.

Although Plaintiffs now apparently claim Dr. Adler can reasonably diagnose Mr. Walton without use of the unreliable qEEG and NeuroCloud programs, he reaches his conclusions based almost solely on these programs. In his analysis, Dr. Adler noted that:

> The qEEG's (Mild) Traumatic Brain Injury Discriminant is consistent with the reported TBI in 2003 – 2004 or so. However, a close and

> nuanced examination of the entirety of the qEEG data (e.g., especially Figures 5 and 6) do not reflect the appearance, indicia typically associated with TBI, but instead with a generalized insult such as hypoxia and widespread cerebral ischemia.

R01.1144.

Later, Dr. Adler concludes that:

> The distribution of abnormalities found – especially on the 2023 brain MRI (NeuroCloud Vol) and 2018 PET (NeuroCloud PET) – are strongly more consistent with the pattern of damage resulting from an extended period of hypoxemia. So is the nature and course of the functional impairments.

R01.1145.

In addition to Dr. Rossing and Dr. Matsumoto, the two treating neurologists who have diagnosed Plaintiff with conversion disorder, HRMC retained Dr. Alan Newman, a psychiatrist who performed an independent psychiatric evaluation of Mr. Walton, and Dr. Mark D'Esposito, a neurologist who reviewed Mr. Walton's medical records and the depositions in this case. Both Dr. Newman and Dr. D'Esposito opined that Mr. Walton has conversion disorder and not hypoxic brain injury, consistent with the diagnosis of his treating physicians. R01.930-44, 951-1062.

PROCEDURAL HISTORY

After the parties had disclosed all experts and Defendants had taken the depositions of Plaintiffs' experts,[5] Defendants moved to exclude Dr. Adler and Dr. Center on the grounds that their opinions failed to meet the requirements of Rule 702 and the *Daubert* standard. The motion was fully briefed and a hearing was held on Wednesday, October 2, 2024. R01.2733. At the hearing, counsel for Plaintiffs advised

[5] Plaintiffs chose not to depose experts identified by Defendants.

the Court that they were not offering disclosed experts Dr. Wu and Dr. Center at their case-in-chief at trial. R01.2738. When further questioned by the Court as to whether they would be called in rebuttal, Plaintiffs' counsel said he was in agreement that any ruling as it related to Dr. Adler and this technology would be the same ruling as it applies to [Dr. Center and Dr. Wu], so we don't have to go back through another *Daubert* hearing. R01.2739. During the hearing, the Court properly focused on the eight factors for assessing an expert's methodology developed by the Supreme Court in *State v. Huber*, 2010 S.D. 63, ¶ 25, 789 N.W.2d 283, 290-91. At the hearing, counsel for Plaintiffs acknowledged that Dr. Adler's methodology did not meet any of the eight *Daubert* factors set forth in *Huber*, and even argued that the *Huber* factors should not apply to the very basis of Dr. Adler's testimony, the qEEG and NeuroCloud (PET and Vol) software. R01.2758. Counsel for Plaintiffs argued: "And so if the Court were to apply those eight -- that list of eight as if it were a checklist, it would be abusing its discretion because that is not what is permitted." *See* argument generally at R01.2733-2810. On October 8, 2024, the trial court issued its Memorandum Decision excluding Dr. Adler's testimony stating that "the Plaintiffs' have failed to meet their burden regarding the *Daubert* factors and therefore the Defendant's Motion to Exclude Expert Testimony of Dr. Adler is GRANTED." R01.2712.

Defendants then moved for summary judgment on the grounds that Plaintiffs had no medical expert to testify that the alleged negligence of Defendants caused Mr. Walton to sustain a hypoxic brain injury or even that Mr. Walton had a hypoxic brain injury. In response to Defendant's Motion for Summary Judgment, Plaintiffs filed a Motion to Reconsider exclusion of Dr. Richard Adler on January 24, 2025, over three months after

the Court's October 8, 2024, Order excluding the testimony of Dr. Adler. R01.2978. In addition to the Brief in support of the Motion to Reconsider, Plaintiffs also filed additional Declarations of Dr. Adler, Dr. Center, and a non-disclosed expert, Dr. Rusty Turner, totaling over 600 additional pages of new materials in support of their Motion to Reconsider. R01.3372. A hearing was held on Plaintiffs' Motion to Reconsider and Defendant's Motion for Summary Judgment on February 22, 2025. In explaining to the Court why the additional material presented in support of the Motion to Reconsider had not been presented earlier, Plaintiffs' counsel candidly admitted that in resisting the first motion, he did not believe it was necessary to provide an affidavit of Dr. Adler in opposition to the motion; that the magnitude of his response was guided by his belief that Dr. Adler had never been previously excluded as a witness;[6] that he had not faced a lot of *Daubert* challenges in the past and in hindsight may have done things differently; that in hindsight he can see some of the parts that he may have missed on the first motion; and that he may not have gotten things right the first time. R02.1234-35. The trial court ruled on the Motion to Reconsider stating:

> In the original *Daubert* hearing, the Plaintiff didn't address most or maybe all -- I don't have the decision in front of me right now -- but the factors. Today, the Plaintiffs call that a misjudgment, or a "tactical failure," is my word. I believe at the beginning -- and I do appreciate your candor but you didn't take this challenge serious -- wishes you had done it differently. These were all, in my opinion, tactical decisions. I believe I even asked you at the hearing, "Would you please address the factors?"
>
> There was no newly discovered evidence presented with the motion, or at least evidence that wasn't -- well, newly discovered or wouldn't have been available at the time of the *Daubert* hearing. There's been no justification for that.
>
> No exceptional circumstances would justify the relief requested.

[6] Dr. Adler testified during his deposition that he has never testified as an expert witness with regard to hypoxic injury. R01.1934.

I don't find any excusable neglect or manifest errors in law or fact based on the record that was before me at the time of the *Daubert* hearing.

I note the issues or factors that the Plaintiff is attempting to address with the new motion or motion to reconsider, were all addressed in the original motion for summary judgment, or at least the brief for summary judgment, identifying the issues that should have been addressed at that time. This matter is a significant matter, that required and deserves a significant amount of time from the parties, as well as the Court.

I find, after reviewing the significant submittal with the motion to reconsider, that likely would require another round of depositions, potentially another expert, all creating significant costs. And, frankly, I don't know where it would end, and how many times does somebody get a chance to add additional information.

This matter deserved, at every step, everybody's serious and significant attention, not only for the Plaintiffs, but for the Defendants. Reputations and resources are all on the line, and as the Supreme Court has addressed in its failure-to-prosecute law.

R02.1277-78. The Court then denied Plaintiffs' Motion to Reconsider and granted Defendant's Motion for Summary Judgment. R02.1279-99.

ARGUMENT

I. The Trial Court correctly excluded the testimony of Dr. Richard Adler as Plaintiffs have not met the requirements of Rule 702 and the *Daubert* standard.

A. *Daubert* Standard

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. SDCL 19-19-702. A party may present expert testimony if the expert's

opinion is scientifically valid and it will assist the jury. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589–93 (1993).

Daubert described the trial court as a gatekeeper. In exercising its gatekeeping function, a trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93. In other words, "[b]efore admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation." *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402-03 (citing SDCL 19-19-702; *Daubert*, 509 U.S. 579 at 597). The risk that a jury would be misled about the reliability of the expert's opinion is great, which is why "the trial court must function as a gatekeeper." *Kostel v. Schwartz*, 2008 S.D. 85, ¶ 85, 756 N.W. 2d 363, 387. The court's gatekeeping role "separates expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge." *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986, 989 (8th Cir. 2001).

"The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence." *Tosh v. Schwab*, 2007 S.D. 132, ¶ 18, 743 N.W.2d 422, 428 (quoting *Burley*, 2007 S.D. 82, ¶ 13). Ultimately, a trial court is responsible for deciding whether an expert's knowledge will "assist the trier of fact to understand the evidence or to determine a fact in issue," under Rule 702. *Burley*, 2007 S.D. 82, ¶ 16, 737 N.W.2d at 404.

1. *Dr. Adler's methodology is not scientifically reliable.*

Plaintiffs cannot establish by a preponderance of the evidence that Dr. Adler's methodology is scientifically reliable. The South Dakota Supreme Court has noted that a trial court may consider the following factors for assessing an expert's methodology:

> (1) whether the method is testable or falsifiable; (2) whether the method was subjected to peer review; (3) the known or potential error rate; (4) whether standards exist to control procedures for the method; (5) whether the method is generally accepted; (6) the relationship of the technique to methods that have been established as reliable; (7) the qualifications of the expert; and (8) the non-judicial uses to which the method has been put.

State v. Huber, 2010 S.D. 63, ¶ 25, 789 N.W.2d 283, 290–91. "Regardless of what factors are evaluated, the main inquiry is whether the proffered expert's testimony is sufficiently reliable." *Allen v. Brown Clinic, P.L.L.P.*, 531 F.3d 568, 574 (8th Cir. 2008). Even Dr. Adler and Dr. Center admit through their deposition testimony that they do not meet the *Daubert* standards for their claim that their testing can diagnose hypoxic brain injury.

2. *Plaintiffs' experts do not meet the Daubert factors.*

a. Dr. Adler's and Dr. Center's testing methods have not been tested for reliability or falsifiability.

Although Dr. Center and Dr. Adler claim that their testing methods can be used for diagnosing certain types of brain injury, they freely admit that the testing methods do not meet the *Daubert* reliability standards. Dr. Adler testified that he was unaware as to whether qEEG had been tested for accuracy with regard to hypoxic brain injury. He deferred that question to Dr. Center. R01.1906. When Dr. Center was asked whether qEEG has been tested for accuracy or reliability regarding hypoxic injury, he testified "I don't know the answer to that because that's typically not the question we ask of qEEG." R01.2458. Regarding his NeuroCloud volume testing, Dr. Adler testified that

NeuroCloud Vol has not been tested for accuracy or reliability with regard to hypoxic brain injury to his knowledge. R01.1907. Dr. Adler testified that he was aware of no testing for accuracy or reliability for the NeuroCloud PET testing that he relied on. R01.1909. While some of the testing used by Dr. Adler to support his opinions may have some scientifically valid methodology for certain conditions, based on Dr. Adler's and Dr. Center's own admissions, none of the tests that Dr. Adler uses to support his opinion that Mr. Walton suffers from a hypoxic brain injury meets the *Daubert* standard.

The Court is not required to make a finding that the testing used by Dr. Adler to support his opinion that Mr. Walton has experienced a hypoxic brain injury has no utility. The NeuroCloud Vol whitepaper submitted by Plaintiffs lists examples of the uses of NeuroCloud Vol to reveal patterns of abnormalities related to Alzheimer Disease, frontal temporal dementia, multiple sclerosis, and temporal lobe epilepsy. R01.2483. Nowhere in the whitepaper materials of NeuroCloud Vol does it suggest that NeuroCloud Vol is a tool for the diagnosis of hypoxic brain injury. R01.2482-95. To the contrary, the NeuroCloud report issued to Dr. Adler contains a disclaimer that it is not a diagnostic report. R01.1141.

Like the NeuroCloud Vol, a similar disclaimer appears on the NeuroCloud PET studies which states "Disclaimer: The results provided by NeuroCloud PET are not a diagnostic report but a tool for image quantification. Qubiotech Health Intelligence S.L. accepts no responsibility for the use of NeuroCloud PET for uses other than those specified." R01.2627. The NeuroCloud PET whitepaper offers that NeuroCloud PET can be used for "clinical application" of dementia, Alzheimer Disease, Parkinson's Disease, and refractory epilepsy. R01.2499. In addition, contrary to the implications of

Plaintiffs, the makers of NeuroCloud PET admit in their whitepaper that this testing has been validated clinically in only three Spanish hospitals for epilepsy, Parkinson's disease and dementia: (1) Complexo Hospitalario Universitario de Santiago de Compostela for epilepsy; (2) Hospital San Pedro (La Rioja, Spain) for improving Parkinson Disease diagnosis; and (3) Hospital Casa de Salud for dementia. R01.2905-05. The NeuroCloud whitepaper itself does not suggest that NeuroCloud PET should be used for diagnosis of hypoxic brain injury. R01.2497-2506. Despite that, Dr. Adler uses qEEG testing as a primary basis for his opinion that Mr. Walton has a hypoxic brain injury.

Dr. Adler admits that he has never made a claim that qEEG can diagnose hypoxic brain injury nor has he ever testified that it is diagnostic. R01.1905. Dr. Adler further admits that he has never used qEEG to diagnose hypoxic brain injury in his clinical practice and is "not sure" he has ever been allowed by a court to use qEEG to differentiate between traumatic brain injury and a hypoxic brain injury. R01.1905-06. Dr. Adler further admits with regard to the particularities of how to conduct a qEEG you need specialized certification. R01.1904. Dr. Adler did not read the qEEG because he has "zero certification." R01.1905. The EEG is sent to Dr. Center and then he generates a report. *Id.* Dr. Adler was unsure of how many controls Mr. Walton's EEG was compared to and referred the question to Dr. Center because "that is his wheelhouse." *Id.* On specific questions regarding the qEEG, Dr. Adler referred the question to Dr. Center, such as to whether there was any literature regarding the accuracy of qEEG with regard to hypoxic brain injury or any publications that published on the use of qEEG for hypoxia. R01.1906.

Taking Dr. Adler's advice, Defendants' counsel questioned Dr. Center with regard to the use of qEEG to diagnose hypoxic brain injury. During Dr. Center's deposition, he freely admitted that qEEG cannot be used for diagnostic purposes:

> Q: You couldn't come up with a diagnosis?
>
> A: I wouldn't. It's illegitimate use. You cannot use a qEEG diagnostically, and I say this over and over even to people in my field, you cannot use cannot us [sic] it diagnostically. You cannot, must not, should not, under any circumstances, use the qEEG diagnostically. To do so is an illegitimate use.

R01.2435. Dr. Center went on to explain that a qEEG could not be used diagnostically but can only go looking for something that is already known. R01.2444. Dr. Center testified that he cannot diagnose a condition using qEEG because it has an FDA limitation on the use of qEEG. R01.2477. He stated that he can look to see if qEEG patterns are consistent with a specific diagnosis if he is provided the diagnosis. *Id.* Dr. Center explained that as his role he was asked to determine if the qEEG was consistent with a snowmobile accident and a hypoxic event. Dr. Center testified that "I cannot distinguish between those events as to which was responsible for the pattern in the EEG that's commonly present with individuals with a mild traumatic brain injury history." *Id.* Dr. Center's opinion that Mr. Walton's qEEG was consistent with hypoxia was based upon information he had been given that Mr. Walton had been without oxygen for 45 minutes. R01.2450. He was unaware that there was no evidence of any hypoxia, let alone 45 minutes of hypoxia in the record because he had not been provided with any medical records. R01.2472.

b. None of the testing done by Dr. Adler or Dr. Center has been subjected to peer review for hypoxic brain injury.

Dr. Adler testified during his deposition that there were no peer reviewed publications he was aware of regarding the use of qEEG for hypoxia. R01.1906. He also deferred to Dr. Center on this question. When Dr. Center was questioned on this topic, he testified that he was not aware of any specific literature that addresses the reliability of qEEG for accuracy or reliability with regard to hypoxic brain injury and that he was aware of no peer reviewed articles discussing the known rate of error for using qEEG to determine the presence of hypoxic brain injury. R01.2458. Dr. Adler testified that NeuroCloud Vol has not been subjected to peer review and publication for diagnosing hypoxic brain injury. R01.1907. He further testified that he did not believe NeuroCloud PET had been subjected to peer review and publication for diagnosing hypoxia. R01.1909.

c. There is no known or potential error rate with regard to using Dr. Adler's and Dr. Center's testing for hypoxia.

Dr. Adler testified that he did not know the known rate of error for using qEEG to diagnose hypoxic injury. R01.1906. Similarly, when Dr. Center was asked if there was any literature that discussed the known rate of error using qEEG to determine the presence of hypoxic injury, he stated that the answer was no. R01.1320-21. Dr. Adler testified that he was unaware of the known rate of error for NeuroCloud Vol with regard to hypoxic brain injury. R01.1907. Similarly, when asked if he knew the rate of NeuroCloud PET to determine the presence of hypoxic brain injury in humans, he stated "I do not know." R01.1909.

d. There are no known standards to control procedures for the commercial testing programs.

The qEEG, NeuroCloud Vol, and NeuroCloud PET testing use commercial programs found on the internet to provide test results. Plaintiffs have identified no standards that exist to control the procedures for any of the methods of testing. In fact, when asked in discovery to provide the qEEG data from the normative group as well as EEG data from the NeuroGuide lifespan database and NeuroGuide software used by Dr. Center and Dr. Adler, Plaintiffs were either unable to provide that data or objected to providing the data claiming it was proprietary. R01.1323-26. Because Plaintiffs experts are simply using commercial website software to provide test results, there is no way to determine whether standards exist to control procedures for the test methods or even to know the algorithms and processes by which the results are computed.

e. Diagnosing hypoxia through use of qEEG NeuroCloud Vol and NeuroCloud PET is not generally accepted.

Dr. Adler testified during his deposition that he did not know of any hospitals that used qEEG to diagnose hypoxic brain injury. R01.1906. Dr. Center testified that he was unaware of anybody doing qEEG guided Neuro feedback in Sioux Falls and that Mr. Walton had to go to Dr. Adler's office in Seattle to get the qEEG done and then have the results sent to Texas where he analyzed it. R01.2458. Dr. Adler further testified that he was unaware of any hospitals that used NeuroCloud Vol to diagnose hypoxic brain injury, R01.1907, and was aware of no hospitals or clinics that used NeuroCloud PET for diagnosing hypoxic brain injury. R01.1909.

f. There is no relationship between the testing done by Plaintiffs' experts and reliable testing used in hospitals and clinics to diagnose hypoxic injury.

Plaintiff Kevin Walton had a PET scan of his brain that was used by Dr. Adler in the commercial NeuroCloud PET program. Although the PET scan was read as normal by Neuroradiologist Dr. Christopher Gregory, a nuclear radiology specialist at Avera McKennan, the NeuroCloud computer program used by Dr. Adler to examine the PET scan showed alleged abnormalities and therefore was inconsistent with the PET scan which is considered a reliable and established method of determining metabolic function of the brain. R01.1142, 1670. With regard to the EEG of Mr. Walton taken in Seattle, the Plaintiffs had the EEG over-read by a neurologist, Dr. Robert C. Turner. Dr. Turner read the EEG as "not remarkable for any diagnostic abnormality in the awake or drowsy state." R01.2426. Dr. Center said that Dr. Turner did state there was some "mixed activity" but did not characterize it as abnormal. *Id.* In fact, to HRMC's knowledge Mr. Walton has never had an abnormal EEG reading since the subject hospitalization. R01.1074-75. Thus, the qEEG testing of Dr. Center and Dr. Adler are also inconsistent with the established EEG methods which have found Mr. Walton's EEG studies to be normal. With regard to the NeuroCloud Volume analysis, Mr. Walton's MRIs have all been read as normal. The NeuroCloud Volume analysis contradicts the MRI findings and thus the NeuroCloud Volume is also inconsistent with the more reliable and established MRI findings. As explained by Dr. Meyer, it is well known that one needs to correlate the computer report with a visual assessment to determine whether any valid information is provided to aid in diagnosing as the computer may recognize a few areas as being statistically abnormal, but if the actual images are normal the computer-generated result is considered incorrect. R01.720.

g. The qualifications of the expert.

Dr. Adler is a psychiatrist, Board certified in child and adolescent psychiatry. Dr. Adler admits that the specialty of medicine most qualified to read MRIs are radiologists, particularly neuroradiologists. He testified that typically nuclear medicine people are most qualified to read PET scans and that neurologists are typically the most qualified to read EEGs. R01.1876. Dr. Adler is not a neurologist, a radiologist, or nuclear medicine doctor, and does not practice as a radiologist, neurologist or have any training in nuclear medicine. R01.1876-77. Dr. Adler's practice is 70% forensic work and he typically sees only about eight patients a week. R01.1877. He has no hospital privileges and the last time he cared for a patient with a hypoxic brain injury was "probably four or five years ago." *Id.*

h. Non-judicial uses to which the method has been put.

As stated under factor 5 regarding whether the method is established as reliable, neither Dr. Adler nor Dr. Center was able to establish that the types of testing used to support their opinions are used to diagnose patients in hospitals or clinics with hypoxic brain injury. Plaintiffs have identified no non-judicial uses of the testing for the diagnosis of hypoxic brain injury. To the contrary, the testing used by Dr. Adler and Dr. Center is almost entirely based on commercially available internet platforms sold commercially for use in litigation. In Mr. Walton's case, none of the testing methods used by Dr. Adler or Dr. Center were used by any of his treating physicians in an attempt to diagnose the cause of Mr. Walton's condition and it was only during the litigation phase of Mr. Walton's case that these unreliable tests were first presented as a means of attempting to convince a jury that there was indeed a hypoxic brain injury when the well-

established conventional testing such as PET, MRI and EEG ordered by Mr. Walton's treating physicians showed no brain abnormalities.

Dr. Adler's and Dr. Center's opinions and testing methods meet none of the *Daubert* factors for use in diagnosing hypoxic brain injury and, therefore, under the established *Daubert* standards, their opinions should be excluded.

B. Dr. Adler's and Dr. Center's opinions are insufficiently supported to be admissible.

"A district court may exclude an expert's opinion if it is 'so fundamentally unsupported' by its factual basis 'that it can offer no assistance to the jury.'" *In re Bair Hugger Forced Air Warming Devices Prod. Liab. Litig.*, 9 F.4th 768, 777–78 (8th Cir. 2021) (quoting *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988); *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011)). "Speculative [expert] testimony should not be admitted." *Aspro, Inc. v. Comm'r of Internal Revenue*, 32 F.4th 673, 676 (8th Cir. 2022) (quoting *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 448 (8th Cir. 2010)). *See also Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757 (8th Cir. 2006) ("Expert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case."). "When the analytical gap between the data and proffered opinion is too great, the opinion must be excluded." *Marmo*, 457 F.3d at 758; *see also* FED. R. EVID. 702 advisory committee's notes ("The trial court's gatekeeping function requires more than simply 'taking the expert's word for it…").

To summarize, there is nothing to connect Dr. Adler's and Dr. Center's opinion that Kevin Walton suffers from mild neurocognitive disorder due to hypoxemia to the available data other than their own contentions. This does not meet the bar for admission under *Daubert*. *See Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 157 (1999)

("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.") (quotation omitted); *Smith v. Cangieter*, 462 F.3d 920, 924–25 (8th Cir. 2006) (affirming exclusion of opinion connected to the facts by only the expert's *ipse dixit*); FED. R. EVID. 702 advisory committee's notes ("The trial court's gatekeeping function requires more than simply 'taking the expert's word for it…"). In essence, Dr. Adler and Dr. Center have a hypothesis without scientific support. "A hypothesis without support, like the one posited here, is no more than a subjective belief or an exercise in speculation" and is thus, not "based upon sufficient facts or data" for admission under *Daubert* or Rule 702. *United States v. Montgomery*, 635 F.3d 1074, 1091 (8th Cir. 2011) (affirming trial court's exclusion of PET scan data at guilt phase of death penalty trial because expert's opinion that PET scan showed evidence of disorder was insufficiently supported).

C. Because the proffered opinions were developed for litigation and courts have routinely excluded qEEG analysis, Dr. Adler's and Dr. Center's qEEG analysis should likewise be excluded on that basis.

The opinions of Dr. Adler and Dr. Center were developed for litigation and are not based upon research conducted independently. As the Eighth Circuit has explained "[a]n expert's finding that flows from research independent of litigation is less likely to be biased and the expert is limited to the degree to which he can tailor his testimony to serve a party's interests." *Lauzon v. Senco Prod., Inc.*, 270 F.3d 681, 692 (8th Cir. 2001). In other words, "[t]hat an expert testifies based on research he has conducted independent of litigation provides important, objective proof that the research comports with the dictates of good science." *Id.* As set for the above, the testimony of Dr. Adler and Dr. Center fails to meet that benchmark.

A number of courts have questioned the scientific reliability of qEEG and refused to admit it. As the Ninth Circuit observed, the qEEG can be error prone and is not generally accepted for clinical diagnosis:

> Here, the district court held a two-day evidentiary hearing and found the qEEG test to be "error prone" and inadequately subjected to peer review. The court also found that Dr. Krieger's testimony would not be helpful to the jury because Nadell had suffered serious head injuries as a child and Dr. Krieger's qEEG testing could not distinguish between those previous injuries and any injuries incurred during the arrest. The court's conclusions find considerable support in the record of the evidentiary hearing, including testimony by the leader of a joint task force of the American Academy of Neurology and the American Clinical Neurophysiology Society that the qEEG technique's subjectivity and tendency to produce "false positives" have kept it from achieving general acceptance for the clinical diagnosis of closed head injuries.

Nadell v. Las Vegas Metro. Police Dep't, 268 F.3d 924, 928 (9th Cir. 2001), *abrogated on other grounds, Gordon v. County of Orange*, 6 F.4th 961 (9th Cir. 2021); *State v. Lee*, 2022-NCCOA-435, ¶ 22, 873 S.E.2d 444 (N.C. 2022) (affirming exclusion of qEEG examination because evidence presented was insufficient to show "that the methodology or the techniques enjoy general acceptance within the relevant scientific community" and "has real concerns about whether the witness followed the methodology and principles that he described take place before or during a qEEG examination"); *State ex. rel Johnson v. Blair*, 628 S.W.3d 375, 384 (Mis. 2021) (stating that court was not persuaded by Dr. Adler's qEEG testing); *Lebron v. State*, 232 So. 3d 942, 954 (Fla. 2017) ("Lebron failed to carry his burden of proving that qEEG evidence was a reliable and generally accepted means of diagnosing brain damage. Dr. Lambos, who testified that he conducted qEEG tests to generate income, is not the type of impartial expert needed to show the general acceptance of qEEG."); *Hernandez v. State*, 180 So. 3d 978, 1008 (Fla. 2015) (finding that qEEG testing was not sufficiently reliable for admissibility under

Frye because it was not widely accepted by scientific community in 2007, at the time of trial); *Falksen v. Sec'y of Dep't of Health & Hum. Servs.*, No. 01-0317V, 2004 WL 785056, at *10 (Fed. Cl. Mar. 30, 2004) (rejecting qEEG performed by Robert W. Thatcher because "qEEG techniques remain controversial" and "[b]ecause of substantial risk of erroneous interpretations, it is unacceptable for any ... qEEG techniques to be used clinically by those that are not physicians highly skilled in clinical EEG interpretation."); *Feria v. Dynagraphics Co.*, No. 08-00-00078-CV, 2004 WL 500869, at *5 (Tex. App. Mar. 15, 2004) (affirming district court's exclusion of qEEG because plaintiff did not establish its validity as a diagnostic tool); *John v. Im*, 559 S.E.2d 694, 697 (Va. 2002) (affirming exclusion of qEEG performed by Robert W. Thatcher because he could not identify person who performed qEEG test on plaintiff, failed to account for plaintiff's use of certain medications, and gave conflicting responses about the effect of drowsiness on qEEG results); *Craig v. Orkin Exterminating Co.*, No. 99-8931-CIV, 2000 WL 35593214, at *3 (S.D. Fla. Nov. 22, 2000) (excluding qEEG testimony because "qEEG techniques are very predisposed to false-positive errors" and "qEEG is not recommended for use in civil or criminal judicial proceedings") (citations omitted); *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1238 (D. Colo. 1998) ("qEEG is an unreliable, unacceptable methodology for diagnosing cognitive disorders and is not generally accepted by the relevant scientific community for that purpose"); *Tran v. Hilburn*, 948 P.2d 52, 57 (Colo. App. 1997) ("We conclude that qEEG is not generally accepted in the relevant scientific and clinical community for the purposes for which the evidence was offered. Therefore, the trial court erred in admitting the evidence."); *Ross v. Schrantz*, No. C8-94-1729, 1995 WL 254409, at *2 (Minn. Ct. App. May 2, 1995) (affirming exclusion under *Frye*

because "qEEG has not reached the point where the scientific community generally agrees that it provides a reliable, stand-alone diagnostic tool for clinical application. The literature shows that to date, qEEG has primarily been used in research settings and in conjunction with the more accepted diagnostic tools."); *Head v. Lithonia Corp., Inc.*, 881 F.2d 941, 942-944 (10th Cir. 1989) (plaintiff did not meet burden of showing that proffered qEEG test had achieved some scientific acceptability and that the test has a reasonable measure of trustworthiness). The jury should not be permitted to hear similarly unreliable scientific evidence here, given the demonstrated flaws in the conclusions and methodologies employed by Dr. Adler and Dr. Center.

D. Dr. Adler's opinions are based upon unreliable testing and not the diagnostic process.

Plaintiffs suggest that even though the unreliable testing methodology relied upon by Dr. Adler may not meet the *Daubert* standard, Dr. Adler should nonetheless be able to testify with regard to his diagnostic opinions and should not be admissible simply because Dr. Adler states that he used a diagnostic method customarily used in medicine. *See* Plaintiffs' brief at pp. 15-17. However, Dr. Adler's deposition shows that he simply started with the premise that Plaintiffs wanted to prove, that Mr. Walton has a hypoxic brain injury, and then offered testimony to support that. Dr. Adler's method of confirming that Plaintiff had an injury that no other treating physician diagnosed does not meet the *Daubert* standard. In fact, contrary to the assertions made by Plaintiffs (without citations) on p. 16 of their brief, Dr. Adler testified to the following during his deposition:

1. Dr. Adler met Mr. Walton on only one occasion. R01.1878.
2. Dr. Adler did not review Mr. Walton's medical records to see what his medical history was. R01.1896.

3. Dr. Adler did not review the neuropsychological testing done by Plaintiff's treating neuropsychologist, Dr. McGrath (which was normal). R01.1894. Dr. Adler did not review any of Mr. Walton's comprehensive neuropsych testing. R01.1898.

4. Dr. Adler formed a "working diagnosis" that Mr. Walton had a hypoxic brain injury on or before May 12, 2023, before he had seen the patient on June 6, 2023, before he had run any of the psychological testing, and before he had the results of the qEEG, NeuroCloud Vol, and NeuroCloud PET. R01.1869, 1114, 1140, 1142.

5. Dr. Adler was not sent Mr. Walton's deposition and has not reviewed it. R01.1878.

6. Dr. Adler did not read the deposition of Mr. Walton's wife, Julie. R01.1879.

7. Dr. Adler admitted he saw no evidence that Mr. Walton's oxygen saturations were ever below 93% when he was hospitalized. R01.1882. Dr. Adler agreed that an oxygen saturation of 93% is not typically associated with hypoxic brain injury. *Id.*

8. Dr. Adler stated he did not have an opinion as to the time when Mr. Walton suffered hypoxic brain injury. *Id.*

9. Dr. Adler admitted he is not an expert on O2 saturations. *Id.*

10. Dr. Adler has no opinion as to how long Mr. Walton was hypoxic. *Id.*

11. Dr. Adler has no opinion as to what level of oxygen saturations would be needed in order to have hypoxic brain injury. *Id.*

12. Dr. Adler has not treated a patient with a conversion disorder since he was in medical school. R01.1883.

13. Although Dr. Adler based his opinions in part on his interview with Mr. Walton, he admits that Mr. Walton is not a good historian. R01.1887.

14. Dr. Adler testified that he was unaware that in September of 2005 Mr. Walton was complaining of limb numbness and pain that was getting worse. R01.1890.

15. Dr. Adler's only knowledge of Mr. Walton's significant medical and cognitive issues beginning in 2005 is that there was some concern of sleeplessness. *Id.*

16. Dr. Adler was not aware that in October and November of 2014, Mr. Walton was complaining of fatigue, tingling and numbness in his extremities, tremors, loss of balance, and muscle pain. R01.1892.

17. Dr. Adler agreed that understanding an individual's past psychiatric and medical history would be very important in evaluating the patient. R01.1887.

18. Dr. Adler agreed that he is not aware that anyone came up with the reason for Mr. Walton's lower extremity weakness in 2014. R01.1892.

19. Dr. Adler agreed that there was no definitive diagnosis made concerning Mr. Walton's complaints of extreme pain in his testicles, the reason that he was admitted to the hospital in April, 2018. R01.1893.

20. Dr. Adler believes that Mr. Walton suffered a mild traumatic brain injury as a result of his 2004 snowmobile accident. *Id.*

21. While Dr. Adler admits that the symptoms of hypoxic brain injury and mild traumatic brain injury can be similar, Dr. Adler testified that the way he was able to distinguish his diagnosis of hypoxic brain injury from other potential causes of brain injury such as TBI, is because he interpreted the NeuroCloud testing as showing symmetrical brain injury rather than asymmetrical brain injury as one would see in TBI. R01.1894. This testimony is significant since Plaintiffs now claim that Dr. Adler can make a diagnosis without the qEEG and the NeuroCloud testing.

22. In opining that a patient has a hypoxic brain injury, Dr. Adler considered only two options, conversion disorder and hypoxia. He ruled out conversion disorder and decided it must be hypoxia. R01.1921.

23. Dr. Adler referred to conversion disorder, the only other diagnosis he considered other than hypoxia, as "some cockamamie, made-up psychological voodoo." R01.1920.

24. Dr. Adler has never testified at trial involving hypoxic brain injury. R01.1934.

25. Dr. Adler did not review the report of Dr. D'Esposito, HRMC's expert witness, explaining the basis for his opinion that the Mr. Walton suffers from conversion disorder. R01.1874.

26. Dr. Adler only "skimmed" the report of Dr. Newman, an expert identified by HRMC to determine the basis for his opinion that Mr. Walton suffers from conversion disorder. R01.1883.

27. Dr. Adler has no formal training in reading PET scans, EEGs, or MRI beyond that he received in medical school. R01.1876-77. Dr. Adler spends 70% of his time doing forensic work and sees only eight patients a week. R01.1877.

28. Dr. Adler has no hospital privileges. *Id.*

29. Dr. Adler has no opinion about Kevin Walton's treating neurologist Dr. Matsumoto's opinion that Mr. Walton has conversion disorder. R01.1883.

30. Dr. Adler did not read Dr. Ross[ing]'s medical records, the second treating neurologist of Mr. Walton who diagnosed him with conversion disorder. R01.1883.

31. Dr. Adler agrees that he and Dr. Wu, the initial expert retained by Plaintiffs who has been withdrawn as a testifying witness, are the only ones that have diagnosed Mr. Walton with a hypoxic brain injury. R01.1886.

32. A review of Dr. Adler's report shows that Dr. Adler discusses some neuropsychological testing (even though he is not a neuropsychologist) that he performed. These tests included the following:

    (1) Brief Mental Status Examination.

        Dr. Adler reported the abnormalities in those tests as delayed sleep onset and self-report by Mr. Walton that his memory and concentration were impaired. R01.1117-18.

    (2) Draw a Clock Test (DAC).

        According to Dr. Adler's report, Mr. Walton appropriately completed the DAC test but then asked if he did it wrong because Dr. Adler wrote stuff. R01.1118.

(3) Gudjonsson Suggestibility Scale – 2 (GSS-2).

Dr. Adler reported that Mr. Walton's scores were in line with the comparison group of adults tested. R01.1119.

(4) CNS – Vital Signs (CNS-VS).

Dr. Adler reported that "the majority of the domain scores were in the average range." He reported areas of weakness in visual memory, psychomotor and motor speed but did not attribute this to a hypoxic brain injury in the report. R01.1120-21.

(5) Personality Assessment Inventory (PAI) Plus, Clinical Interpretive Report.

Dr. Adler noted Mr. Walton had a tendency to repress undesirable characteristics but had more than would be expected in the way of frequent physical complaints, concerns about physical functioning, physical signs/symptoms associated with depression, unusual sensory-motor problems, physical manifestations of anxiety, and morbid thoughts concerning death and/or suicide. Dr. Adler noted "the PAI was not consistent with any particular diagnosis." R01.1122.

(6) Impact of Events Scale – Revised (IES-R).

The next test performed by Dr. Adler was an impact of events scale. Dr. Adler's report indicates Mr. Walton had a non-elevated score related to his current impact but an elevated score as to when he was most negatively impacted by the anchor event, but could not identify an exact point in time. R01.1124-25.

(7) Behavior Rating Inventory of Executive Function (Brief-A).

Dr. Adler scored Mr. Walton's response as "entirely acceptable." R01.1125.

(8) Adult Behavior Checklist (ABCL).

This is a computer-generated questionnaire about perceived problems. According to Dr. Adler's report, this test showed Mr. Walton reflected perceived problems concerning TBI, right leg does not work properly, back and hip. His responses in other areas were good. R01.1125-26.

Notably, Dr. Adler did not list in his report that any of this psychological testing was indicative of hypoxic brain injury.

33. Dr. Adler testified that he is not sure if a court has ever allowed him to distinguish between mild traumatic brain injury and hypoxic brain injury. R01.1906.

Dr. Adler's diagnostic approach uses a faulty premise from its start. While it is Plaintiffs' burden of proof to show through expert testimony that Mr. Walton suffered an injury caused by the negligence of Defendants, Dr. Adler assumes there are only two potential diagnoses, conversion disorder and hypoxic brain injury. *See* Plaintiffs' brief at p. 22. Given that Dr. Adler describes conversion disorder as "voodoo," he rules it out based upon his own bias. As recognized by the trial court, Plaintiffs cannot meet their burden on causation simply by ruling out Defendants' theory and ignoring other possibilities such as the snowmobile accident as the cause of his difficulties beginning in 2005. R01.2776-84.

II. The Circuit Court properly granted Defendant's Motion for Summary Judgment.

"A plaintiff must produce expert testimony as to the applicable standard of care, whether the standard of care was breached, and whether the breach of the standard of care caused his injuries." *Dudley v. U.S.*, 2011 WL 5102274 at *5, citing *Koeniger*, 422 N.W.2d 600, 606 (S.D. 1988); *Magbuhat v. Kovarik*, 382 N.W.2d 43, 46 (S.D. 1986). Plaintiffs' attempts to change South Dakota law on this well-established principle should be rejected.

Plaintiffs argue that the court should allow this complex case to move forward without expert medical testimony that negligence of Defendants caused Mr. Walton to

suffer a hypoxic brain injury or even that Mr. Walton has a hypoxic brain injury. Without Dr. Adler's testimony, the jury will have no basis from which to find that Mr. Walton has suffered a hypoxic brain injury. None of his treating physicians have diagnosed Mr. Walton with hypoxic brain injury. There is no evidence in the record that Mr. Walton was ever hypoxic and no evidence as to the length of time a person would need to be without oxygen or without adequate oxygen in order to suffer a hypoxic brain injury.

Plaintiffs first suggest that expert testimony on the complex issues in this case can be overcome by circumstantial evidence. Plaintiffs cite *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 35 as the case they put in their opinion. In *Big Stone Therapies*, the South Dakota Supreme Court recognized that generally expert testimony is required in negligence cases where the defendant is held to a standard of care that is outside the common knowledge and experience of ordinary persons. Unlike this case, where four different doctors – two treating and two experts – have diagnosed Mr. Walton with a conversion disorder, the cause of plaintiff's injury in *Big Stone Therapies* was apparent. Moreover, unlike in *Big Stone Therapies* where it was uncontested that the patient did not have a fractured femur before the incident and had a fractured femur after the incident, in this case, there is no medical evidence of hypoxic brain injury. Mr. Walton has a history of similar abnormalities to those that he is claiming now as well as an explanation for his current condition that two treating doctors and two experts agree on, conversion disorder. This is not the type of case that is within the comprehension of a layperson.

Plaintiffs also attempt to rely on Dr. Stein's testimony to support their causation burden. Dr. Stein, however, testified quite succinctly during his deposition that he was "going to stay out" of the causation issue:

> Q: Okay. So you're not offering an opinion as to whether or not Mr. Walton has a hypoxic brain injury; is that true?
>
> A: Correct. There are several people that are saying that it's functional. Dr. Wu is saying that it's anatomic. I'm going to stay out of that.

R01.3118. Given that Dr. Stein, a medical doctor, is not able to form an opinion as to whether Mr. Walton even has a hypoxic brain injury, it is disingenuous for Plaintiffs to argue that this subject is within the knowledge of an ordinary layperson.[7]

Plaintiffs' next argument is that there are statements within Plaintiff Kevin Walton's medical records that reference brain injury. Plaintiffs apparently argue that references to hypoxic brain injury in the medical records are statements against interests sufficient to meet the requirement of expert evidence to prove the essential element of causation.

Plaintiffs are correct in that there are statements in the medical records referencing a hypoxic brain injury; however, these statements are either based on statements made by Plaintiff Kevin Walton to medical providers that he has a hypoxic brain injury or based on references to diagnosis made by Plaintiffs' former expert, Dr. Wu, that Plaintiff Kevin Walton has a brain injury based upon his quantitative PET scan Z-mapping. No one in the records actually made a diagnosis of hypoxic brain injury; the

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[7] At the trial court level, Plaintiffs offered several other arguments as to why summary judgment should not be granted. Plaintiffs have not made those additional arguments at the appellate level, so they should be considered waived as Defendants would not have a chance to respond to these additional arguments if they are raised for the first time in the reply brief.

information is simply copied along from other medical records based upon statements made by Plaintiff Kevin Walton or records from Dr. Wu. Such records are not a substitute for the required expert testimony on causation because none of the authors of the records are qualified to make a diagnosis of hypoxic brain injury and/or had no independent basis for a diagnosis of a hypoxic brain injury, and are simply a backdoor attempt by Plaintiffs to introduce the opinions of Dr. Wu and Plaintiff Kevin Walton through the medical records.

With regard to Plaintiffs' argument that Dr. Miner's note stating that the patient had a brain injury, Plaintiffs omit Dr. Miner's deposition testimony regarding the note. Dr. Miner testified that although the form was a referral to the Brain Injury Rehabilitation Center, he could not speak to exactly to what the Brain Injury Rehabilitation Center was. R01.172. When asked if he disagreed with the diagnosis that Plaintiff Kevin Walton suffered from hypoxic encephalopathy, Dr. Miner stated "I don't really know." R01.177. Dr. Miner agreed that he does not know what Plaintiff Kevin Walton actually suffered from. Dr. Miner then testified as follows:

Q: You just don't know what Kevin actually suffered from, fair to say?

A: Yes.

Q: And speech-language pathology?

A: Yes.

Q: And you're not offering an opinion as to what actually happened to Kevin, true?

MR. BERNARD: Objection; form of the question.

A: Yeah, I can't – there's too many variables. I can't give a perfect answer to that question.

Q: It's not within your area of expertise to diagnose what actually happened to Kevin?

MR. BERNARD: Objection; form, foundation.

A: It's difficult in every case. Everybody is different I guess.

Q: Are you asserting you have any expertise to be able to opine as to what happened to Kevin regarding his mental status?

A: I missed the first part. I'm sorry.

MR. TRZYNKA: Could you reread that, Kerry.

(Last question read back by the reporter.)

MR. BERNARD: Same objection; foundation.

A: Again, I mean it's hard to say or not say. I can't give you an exact – no, I'm not an expert on everything, but I can't give an opinion as to exactly what happened to him.

Q: Do you have an opinion as to what you believe happened?

A: Not really.

R01.177-78.

In addition to the fact that Dr. Miner admits he is not qualified to diagnose Plaintiff Kevin Walton and does not have an opinion as to what happened to Plaintiff Kevin Walton, Dr. Miner's notes referenced by Plaintiffs were written on December 14, 2018. R01.3229-30. Subsequent to this note, Plaintiff Kevin Walton's treating neurologists, Dr. Rossing and Dr. Matsumoto, diagnosed Plaintiff Kevin Walton with functional movement/conversion disorder. Again, no treating physician of Plaintiff Kevin Walton has diagnosed him with a hypoxic brain injury. The medical records proffered by Plaintiffs do not substitute for an expert witness on causation and, therefore, summary judgment should be granted.

Plaintiffs have failed to present sufficient evidence through the use of expert testimony that the negligence of Defendants caused Kevin Walton to suffer a hypoxic brain injury or even that Kevin Walton has a hypoxic brain injury. Plaintiffs cannot meet the essential elements of a medical malpractice claim and therefore the court's entry of summary judgment should be affirmed.

CONCLUSION

For the reasons set forth above, Defendant HRMC respectfully requests that this Court affirm the Circuit Cout's orders excluding the testimony of Dr. Richard Adler and granting summary judgment for the Defendants.

Dated at Sioux Falls, South Dakota, this 24 day of July, 2025.

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REQUEST FOR ORAL ARGUMENT

Appellee Huron Regional Medical Center, Inc., respectfully requests oral argument on this matter.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee Huron Regional Medical Center, Inc. complies with the type volume limitations set forth in SDCL 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 9,650 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this 24 day of July, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Appellee Huron Regional Medical Center, Inc. was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send e-mail notification of such filing to:

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The undersigned further certifies that the original Brief of Appellee Huron Regional Medical Center, Inc. in the above-entitled action was mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

Dated at Sioux Falls, South Dakota, this 24 day of July, 2025.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

KEVIN WALTON AND JULIE WALTON,

Appellants,

v.

HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND JOHN AND JANE DOES

Appellees.

Appeal No. 31052

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BEADLE COUNTY, SOUTH DAKOTA

THE HONORABLE PATRICK T. PARDY,
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE WILLIAM J. MINER, M.D.

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PRELIMINARY STATEMENT

Plaintiffs/Appellants Kevin Walton and Julie Walton will be referred to collectively as "Plaintiffs" and individually as "Mr. Walton" or "Mrs. Walton" as context warrants. Defendant/Appellee Huron Regional Medical Center, Inc. will be referred to as "HRMC." Defendant/Appellee William J. Miner, M.D. will be referred to as "Dr. Miner." References to the Certified Record on Appeal will be "R01" or "R02" followed by the applicable page number(s).

JURISDICTIONAL STATEMENT

The Plaintiffs appeal three rulings of the Circuit Court: (i) a Memorandum Opinion granting Defendants' Motion to Exclude Dr. Adler; (ii) an Order denying Plaintiffs' Motion to Reconsider Exclusion of Dr. Richard Adler; and (iii) the Circuit Court granting Defendants' Motions for Summary Judgment. The Honorable Patrick T. Pardy, Circuit Court Judge, Third Judicial Circuit, Beadle County, South Dakota, entered Final Judgment on March 11, 2025. R02.1179-1180, 1181-1182. Plaintiffs filed a Notice of Appeal on April 8, 2025. R02.1356-1357. The Judgment is appealable as of right pursuant to SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUES

I. DID THE CIRCUIT COURT ERR BY GRANTING THE MOTION TO EXCLUDE DR. ADLER?

No. The circuit court properly excluded Dr. Adler.

II. DID THE CIRCUIT COURT ERR BY GRANTING HRMC AND DR. MINER'S MOTIONS FOR SUMMARY JUDGMENT?

No. The circuit court properly granted the motions for summary judgment.

- *Schrader v. Tjarks*, 522 N.W.2d 205 (S.D. 1994)

- *Lohr v. Watson*, 2 N.W.2d 6 (S.D. 1942)
- *Koenigner v. Eckrich*, 422 N.W.2d 600 (S.D. 1988)
- *State v. Engesser*, 661 N.W.2d 739 (S.D. 2003)

III. DID THE CIRCUIT COURT ERR BY DENYING PLAINTIFFS' MOTION TO RECONSIDER EXCLUSION OF DR. ADLER?

No. The circuit court properly denied the motion to reconsider.

- *SBS Financial Services, Inc. v. Plouf Family Trust*, 2012 S.D. 67, 821 N.W.2d 842 (2012)
- *Publisher's Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557 (7th Cir 1985)
- *Provisur Technologies, Inc. v. Weber, Inc.*, 2024 WL 4919540, at *1 (W.D. Mo. Oct. 24, 2024).

STATEMENT OF THE CASE AND FACTS

This is a medical malpractice case commenced in April 2020. R01.1-3. The alleged malpractice arises out of Mr. Walton's hospitalization for testicular pain. R01.3, ¶10. Plaintiffs allege that during that hospital stay he was given excessive doses of opioid medications which caused him to suffer a hypoxic brain injury and resulting damage. R01.3.

The facts of his hospital stay do not support such a conclusion. Mr. Walton was admitted to HRMC on April 8, 2018. R01.966. He was admitted for pain control related to testicular pain. R01.967. He was taking a regimen of medication upon his admission and Toradol and Dilaudid were added. *Id.* He was being monitored by the nursing staff per the standing orders of Dr. Miner. *Id.*

At approximately 6:13 a.m. on April 11, 2018, Mr. Walton complained of 10/10 pain but was noted to be awake, alert and with easy-regular respirations. R01.968. He had an oxygen saturation of 98%. *Id.* Mr. Walton then fell asleep. R01.969. He was checked by Nurse Dawn Johnson at 7:20 a.m. *Id.* His respiration rate was 9 and his breathing was

a little shallow. *Id.* Nurse Johnson awoke Mr. Walton out of a sound sleep by placing an oxygen monitor on him and noted his oxygen saturation to be 93%. *Id.* Nurse Johnson testified that after awakening, Mr. Walton talked to her and his respirations became faster. *Id.* He also indicated to Nurse Johnson that his pain was still 5 out of 10 and he requested more pain medication. *Id.* Further, he also called his wife to discuss what Nurse Johnson was doing. R01.2654 (Kevin Walton depo p.111).

Mr. Walton showed no evidence of cardiac or pulmonary arrest and at no time required supplemental oxygen or resuscitative measures. R01.971. He was not placed on naloxone (an opioid antagonist used to reverse the effects of opiate-induced respiratory depression and other consequences of opiate overdose.) *Id.* By 8:05 a.m. that morning he was alert and oriented times three with a sedation level of 2 (slightly drowsy, easily aroused). *Id.* He went to the bathroom without assistance. *Id.* His vitals continued to be stable at this level or improving through the morning. R01.972. He asked to be discharged and was able to eat, dress, and walk to his car without assistance. R01.972-973. In the days and weeks after his discharge from the hospital, Mr. Walton began to complain of a number of neurological issues, including mental status change, stuttering, weakness, gait problems and a new "foreign" accent described as a "Hutterite" accent. R01.973-976.

HRMC's disclosed expert psychiatrist, Dr. Alan Newman, conducted an independent medical examination of Mr. Walton. He noted that Mr. Walton's oxygen saturation at 7:20 a.m. on April 11, 2018 (93%) was no lower than it had been at various times during his hospitalization and in other evaluations. R01.1011. Dr. Newman found

additional evidence inconsistent with suffering a hypoxic brain injury on April 11, 2018, including the following:

1. He recalled interactions with the nurse at the time of the alleged overdose and asked to call his wife;
2. He was able to walk to the bathroom unassisted;
3. He ate most of his breakfast immediately after the incident without assistance;
4. He was able to walk unaided.

Id.

Dr. Newman found that these behaviors are inconsistent with an individual who has experienced a brain injury severe enough to cause irreversible brain injury. *Id.* He opines that Mr. Walton's symptoms are the result of Conversion Disorder or Functional Neurological Disorder.[1] R01.1029-1030. Dr. Newman further opines that those impairments are related to his longstanding history of other somatoform and atypical neurological presentations going back to 2005. *Id.*

Mr. Walton had issues with paresthesia and muscle weakness dating back to 2005. R01.957. He was evaluated for Multiple Sclerosis in December of 2005. R01.958. In December 2005 he also had a reported diagnosis of Guillain-Barre.[2] *Id.* In January of

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[1] Conversion disorder or a functional neurological symptom disorder is a psychiatric illness in which psychological conflicts are manifested as physical symptoms. Common examples of symptoms include blindness, paralysis, dystonia, anesthesia, inability to speak, difficulty swallowing, incontinence, balance problems, tremors, difficulty walking, hallucinations, and psychogenic non-epileptic seizures (PNES). See National Library of Medicine at pmc.ncbi.nih.gov/articles/PMC6424587 last visited on July 24, 2025.

[2] Guillain-Barre (gee-YAHN-buh-RAY) syndrome is a condition in which the body's immune system attacks the nerves. It can cause weakness, numbness or paralysis. See Mayo Clinic at mayoclinic.org/diseases-conditions/Guillain-barre-syndrome/symptoms-causes/syc-20362793 last visited on July 24, 2025.

2006, he was evaluated for complaints of moderate immediate memory loss and his ability to recall what he did during the day was characterized as "severely impaired." *Id.* An MRI of Mr. Walton's brain was performed in February of 2006 in connection with a reported seizure. R01.960. In March of 2006, he reported a history of cardiac dysrhythmia, but the results of his evaluation were normal. *Id.*

Mr. Walton had a plethora of other physical and neurological complaints from 2005 to 2015. R01.957-964. With a few exceptions, no medical reason for these complaints and reported symptoms were identified. *Id.* Dr. Newman noted that beginning in October of 2014, Mr. Walton had an increase in complaints for insomnia and somatic symptoms. R01.961.

After the alleged incident of April 11, 2018, Mr. Walton underwent an MRI of the brain on April 20, 2018. R01.974. Other than moderate fluid in left mastoid cells and mild chronic ethmoid sinusitis, the MRI was normal. *Id.* On May 31, 2018, he underwent a PET-CT scan of the brain which was unremarkable. R01.979. Likewise, on July 9, 2018, he had a whole-body PET-CT scan and another MRI of the brain, his third, both of which were again normal. R01.980. In September of 2018, he underwent a psychiatric evaluation in which a psychiatrist, Dr. Christopherson, who was familiar with Mr. Walton and who had treated him for insomnia since 2014, indicated that he met the criteria for conversion disorder and diagnosed Unspecified Mood Disorder, Insomnia, unspecified, and Adjustment Disorder, unspecified. R01.982.

In November 2018, Mr. Walton was referred to Dr. Matsumoto, a neurologist at the University of Minnesota, for evaluation. R01.2649. The diagnoses of Dr. Matsumoto were functional neurological deficits, functional right leg weakness, and functional

speech disorder. *Id.* On January 18, 2019, Mr. Walton's treating neurologist in Sioux Falls, Dr. Rossing, diagnosed Mr. Walton with a functional movement disorder. R01.2632-2636.

In late 2019, Mr. Walton began rehabilitation services at The Brain Rehabilitation Center in Rapid City, South Dakota. R01.988. The reason for the services was listed as hypoxia occurring on April 11, 2018, but that information came solely from the Plaintiffs. *Id.* The word "hypoxic" only appears three times in his Brain Injury Rehabilitation Center records and are only history reports from Mr. Walton; there is no independent confirmation or validation of that diagnosis. R01.989.

Part of his treatment at the Brain Injury Rehabilitation Center included neuropsychological testing by Dr. Huxford, Ph.D. R01.989. Dr. Huxford never reviewed Mr. Walton's past medical records and instead accepted the history provided by Mr. Walton. *Id.* Based on his testing, Dr. Huxford did not find evidence of a hypoxic brain injury, but instead diagnosed Mild Neurocognitive Disorder and Adjustment Disorder, unspecified. R01.990-991. Mr. Walton was also administered the Montreal Cognitive Assessment and scored in the normal range. R01.995.

On February 1, 2021, Plaintiffs designated Dr. Joseph Wu, psychiatrist, as one of their expert witnesses. R01.1078. However, after disclosure of expert reports and Dr. Wu's deposition, Plaintiffs withdrew Dr. Wu as a testifying expert. R01.1287. Plaintiffs later retained Dr. Adler and Dr. Center as experts. Dr. Center is a psychologist who issued opinions in this case. R01.1157-1167. Like Dr. Wu, Plaintiffs also withdrew Dr. Center as a testifying expert. R01.1943.

Dr. Adler is a psychiatrist, board certified in child and adolescent psychiatry. R01.1113. He authored a detailed report concluding that Mr. Walton has a diagnosis of Mild Neurocognitive Disorder Due to Another Medical Condition (Primarily Hypoxemia). *Id.* He further opined that such injury was the direct and proximate result of the subject events which are the focus of the pending lawsuit. *Id.* He asserts that the scope of his review involved overseeing the "administration of neuroevaluative testing, (e.g., quantitative electroencephalogram (QEEG), brain magnetic resonance imaging (MRI) including volumetric quantification, review, and possible further analysis of prior testing (such as brain positron emission tomography (PET)), conduct psychological testing, interviews and integrate this information." R01.1113. Dr. Adler's office did the psychological testing and interviews, but relied upon Dr. Center to interpret the QEEG, MRI and PET scans in his report. R01.1140. The scans utilize a proprietary software package from NeuroCloud, specifically NeuroCloud Vol, to analyze a June 6, 2023, MRI of Kevin Walton's brain and NeuroCloud PET to analyze a May 31, 2018, PET scan of Mr. Walton's brain. R01.1140-1142. These are commercial products from Qubiotech Health Intelligence, a company based in A Coruna, Spain. *Id.*

Defendant HRMC brought a Motion to Exclude Dr. Adler, filed May 31, 2024.[3] R01.726-728. This Motion was supported by extensive briefing detailing the methods and analysis utilized by Dr. Adler. R01.729-770. This included the criticisms of Dr. Adler's methods and conclusions by HMRC's experts. *Id.* This was all analyzed in a detailed application of the *Daubert* factors and additional factors or considerations utilized under

[3] The Motion included Dr. Center and his opinions, but Plaintiffs subsequently withdrew Dr. Center as a testifying expert.

South Dakota law on the admissibility and reliability of expert testimony. *Id.* Dr. Miner joined in HRMC's Motion to Exclude Dr. Adler and its arguments in support thereof. R01.1412.

Plaintiffs resisted the motion, seeking to preserve Dr. Adler as a qualified testifying expert. R01.1937-1978. Plaintiffs argued in their opposition that Dr. Adler was qualified to perform all the testing and analysis he did, that the methodologies used are generally accepted in the scientific community, and that HRMC's experts' criticisms of his methods and analysis used were misplaced. *Id.* Plaintiffs spent most of their opposition trying to argue the merits of Dr. Adler's analysis, but featured little argument on whether Dr. Adler's opinions and methods meet the *Daubert* standard and other South Dakota law on the admissibility of expert testimony. *Id.*

HRMC filed a Reply Brief in Support of Motion to Exclude Testimony of Dr. Adler on September 6, 2024. R01.2539. Dr. Miner filed a joinder in HRMC's Reply Brief. R01.2669. HRMC pointed out to the Circuit Court that Plaintiffs failed entirely to address the eight (8) factors utilized in a *Daubert* analysis. R01.2540.

The Circuit Court held a hearing on the Motion to Exclude Dr. Adler on October 2, 2024, and allowed all parties to fully argue their positions. R01.2733-2811. On October 8, 2024, the Circuit Court issued a Memorandum Opinion ruling on the Motion to Exclude Dr. Adler. R01.2715-2727. The Circuit Court laid out a detailed summary of the law surrounding the admissibility of expert opinions and a detailed analysis of each of the factors under the *Daubert* standard. *Id.* Based on the totality of the record, the Circuit Court ruled that Plaintiffs failed to meet their burden regarding the *Daubert* factors and granted the Defendants' motions to exclude Dr. Adler. *Id.* at 2727.

Following this ruling, both HRMC and Dr. Miner moved for summary judgment. R01.2837, 2904. The basis of both motions was the same, namely, that Plaintiffs did not have necessary expert testimony to establish that any breach of the standard of care legally caused any injury or damage to Plaintiffs. *Id.*

After the Defendants filed their respective summary judgment motions, Plaintiffs filed a Motion to Reconsider wherein they asked the Circuit Court to reconsider its exclusion of Dr. Adler. R01.2978. The motion was based on the Plaintiffs' assertion that the Court misunderstood or mischaracterized the underlying evidence leading to a misapplication of the *Daubert* factors. At that time, for the first time in the case, Plaintiffs attempted to address the *Daubert* factors and made arguments that had not been previously advanced to the Circuit Court. R01.2978-3007. Additionally, Plaintiffs submitted hundreds of pages of new documentation along with Declarations from their experts that likewise had not been previously provided to the Court.[4] *Id.* These Declarations were accompanied by hundreds of pages of documents, much of which had never been provided to the Court.[5] *Id.*

Both Defendants opposed the Motion to Reconsider. R02.559, 721. Both Defendants argued that the new evidence and arguments were inappropriate and could

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[4] Plaintiffs' new materials included the Affidavit of Dr. Rusty Turner. R01.3370. Dr. Turner was an entirely new witness revealed to the Defendants and the Court upon Plaintiffs' Motion for Reconsideration. Dr. Turner was not disclosed as an expert nor a person with knowledge prior to the Circuit Court's exclusion of Dr. Adler.

[5] Importantly, when HRMC made its motion to exclude Dr. Adler, the expert disclosure deadlines for both Plaintiffs and Defendants had passed. Both sides had disclosed their experts and Dr. Adler had been deposed. Dr. Adler's new opinions and new materials submitted with Plaintiffs' Motion for Reconsideration were not disclosed as part of Dr. Adler's expert disclosure, nor were they known to the Defendants at Dr. Adler's deposition.

not be considered. R02.560-562, 723-724. Both Defendants also argued that the Circuit Court did not misunderstand or mischaracterize anything and its ruling to exclude Dr. Adler was factually and legally correct. R02.559, 584, 721-731.

Plaintiffs filed a Reply Brief in support of their motion to reconsider. R02.735. Plaintiffs argued that the Defendants had applied the wrong reconsideration standard and that South Dakota law does not preclude introduction of new evidence in a motion to reconsider context. R02.735-737. Notably, Plaintiffs admitted in their Reply that Dr. Adler and Dr. Center's Declarations should have been submitted sooner, but that it was a tactical decision by Plaintiffs' counsel not to do so. R02.737-738. The remainder of the Reply is an attempted rebuttal of the arguments raised by the Defendants. R02.735-756.

On February 27, 2025, the Circuit Court heard argument on both the Plaintiffs' Motion to Reconsider and the Summary Judgment Motions filed by the Defendants. R02.1231-1232. Plaintiffs started their argument on the Motion to Reconsider by again emphasizing that they had not felt it was necessary to submit the additional Declarations and evidence, nor the additional arguments. R02.1233-1234. The Circuit Court allowed all parties to fully argue their positions on the Motion to Reconsider. R02.1231-1277. The Circuit Court then ruled from the bench denying the Motion to Reconsider. R02.1277-1279. In ruling, the Circuit Court made several key findings:

(i) It pointed out that in the initial hearing the Plaintiffs addressed few, if any, of the *Daubert* factors. *Id.* at 1277.

(ii) It observed that Plaintiffs did not take the *Daubert* challenge seriously, which the Circuit Court characterized as a "tactical error." *Id.*

(iii) It found that all of the factors the Plaintiffs were trying to address in the motion to reconsider had been raised in the original *Daubert* hearing. *Id.* at 1278.

(iv) It found no excusable neglect or manifest errors in law or fact based on the record that was before the Court at the time of the original *Daubert* hearing. *Id.*

(v) It indicated that granting the Motion to Reconsider would result in significant delays and costs to all parties. *Id.*

Based on these findings, the Circuit Court denied the Motion to Reconsider and refused any additions to the record. *Id.* at 1279.

During the same hearing, the Circuit Court heard argument on the summary judgment motions. R02.1279. After allowing all parties to fully argue their positions, the Court took the matter under advisement. R02.1279-1301. On March 11, 2025, the Circuit Court entered Summary Judgment in favor of both Defendants, dismissing the Plaintiffs' case in its entirety. R02.1181-1182. This appeal followed.

STANDARD OF REVIEW

There are three different standards of review raised by the issues on appeal. First, with regard to the admissibility of expert opinions or testimony, trial courts retain broad discretion in ruling on the admissibility of expert opinions. *State v. Edelman* 1999 SD 52 ¶4, 593 N.W.2d 419, 421. Decisions to admit or deny opinion evidence will not be reversed absent a clear showing of abuse of discretion. *State v. Guthrie* 2001 SD 61 ¶ 30, 627 N.W.2d 401. A court's ruling on reliability receives the same deference as its decision on ultimate admissibility. *Id.* Abuse of discretion has been defined by this Court

to mean "discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *State v. Carter* 2023 SD 67 ¶24, 1 N.W. 3d 674. The trial court's evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion. *State v. Yuel* 2013 S.D. 84 ¶8, 840 N.W.2d 680.

Second, this Court reviews a circuit court's entry of summary judgment under the de novo standard of review." *Harrieux v. Progressive N. Ins. Co.*, 2018 S.D. 52, ¶ 9, 915 N.W.2d 697, 700 (citation omitted). The rules for reviewing the entry "of summary judgment under SDCL 15-6-56(c) [are] well settled." *Garrido v. Team Auto Sales, Inc.*, 2018 S.D. 41, ¶ 15, 913 N.W.2d 95, 100 (quoting *McKie Ford Lincoln, Inc. v. Hanna*, 2018 S.D. 14, 907 N.W.2d 795, 798).

> Summary judgment is proper where, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. We will affirm only when no genuine issues of material fact exist, and the law was applied correctly. We make all reasonable inferences drawn from the facts in the light most favorable to the non-moving party. In addition, the moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.

Id. (quoting *McKie Ford Lincoln, Inc.*, 2018 S.D. 14, ¶ 8, 907 N.W.2d at 798).

"When a motion for summary judgment is made and supported as provided in §15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading[.]" SDCL 15-6-56(e). The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Sheard v. Hattum*, 2021 S.D. 55, ¶ 28, 965 N.W.2d 134, 143 (citation omitted). "It is well settled that '[w]hen challenging a summary judgment, the nonmoving party must substantiate [their] allegations with sufficient

probative evidence that would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.'" *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 29, 916 N.W.2d 151, 159 (alterations in original) (citation omitted).

Lastly, regarding the Motion for Reconsideration, a trial court has the inherent power to reconsider and modify an Order any time prior to the entry of judgment. *Moore v. Michelin Tire Co. Inc.* 1999 S.D 152 ¶46, 603 N.W.2d 513. Thus, the trial Court may depart from an earlier holding if it is convinced that the holding is incorrect. *Id.* Whether a court reconsiders an earlier decision is discretionary with the court, and a denial of a motion for reconsideration is reviewed for an abuse of discretion. *See Jenco, Inc. v. United Fire Group*, 2003 S.D. 79, ¶ 22, 666 N.W.2d 763, 768.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR WHEN IT GRANTED THE DEFENDANTS' MOTION TO EXCLUDE DR. ADLER.

Dr. Miner believes the arguments and authority detailed in HRMC's Appellee Brief filed on July 24, 2025, thoroughly and accurately state Dr. Miner's position on the issue of the Circuit Court's exclusion of Dr. Adler. Therefore, no further argument or authority is submitted here; but instead, Dr. Miner joins in and adopts the argument and authority submitted by HRMC on this issue.

II. THE CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS.

To prevail on a claim for malpractice, a plaintiff must prove four essential elements: (1) a legal duty to act according to a recognized standard of care; (2) a breach of the applicable standard of care; (3) an injury; and (4) a causal connection between the breach of care and the injury. *Schrader v. Tjarks*, 522 N.W.2d 205, 210 (S.D. 1994). In

South Dakota, "the general rule in medical malpractice cases is that negligence must be established by the testimony of medical experts." *Magbuhat v. Kovark*, 382 N.W.2d 43, 46 (S.D. 1986). This expert testimony requirement applies not only when establishing alleged deviations from the standard of care, but also when proving the element of causation. *Koeniguer v. Eckrich*, 422 N.W.2d 600, 601 (S.D. 1988) ("The Plaintiff has the burden of proving causation in a malpractice action and generally must present expert testimony to meet this burden."). As early as 1942, this Court discussed the quantum of proof necessary to create a submissible jury malpractice case:

> Because the central issues of this case, viz., (a) negligence, and (b) if causal connection with the injuries suffered by plaintiff, turn upon scientific questions laymen are not qualified by learning or experience to answer, plaintiff was required to establish those elements by the testimony of experts. *Wigmore on Evidence*, 3rd Ed., § 2090.

Lohr v. Watson, 2 N.W.2d 6, 7 (S.D. 1942).

"The opinions and testimony of such experts are indispensable in determining questions which are unfamiliar to ordinary witnesses and, within that field the opinions of lay witnesses are not admissible." *Lenius v. King*, 294 N.W.2d 912, 914 (S.D. 1980) (citing *Shearn v. Anderson*, 48 N.W.2d 821 (S.D. 1951)). A verdict in a malpractice case, lacking the required expert testimony is "based on inferences and conjecture [and] cannot stand." *Lenius*, 194 N.W.2d at 914 (citing *Lohr v. Watson, supra*). Plaintiffs' attempts to change these well-established principles of law should be rejected.

A. Circumstantial evidence and evidence "consistent with" plaintiffs' theory of causation do not dispense with the requirement of expert testimony.

Here, Plaintiffs have disclosed experts on the alleged breach of the standard of care. However, after Plaintiffs withdrew Dr. Wu and Dr. Center as witnesses, Dr. Adler was the Plaintiffs' sole expert witness on causation. Therefore, after the proper exclusion

of Dr. Adler, Plaintiffs have no expert testimony to establish causation in this case. Plaintiffs' remaining physician expert[6], internal medicine physician Dr. Kenneth Stein, specifically denied having any opinions regarding the cause of Mr. Walton's alleged injuries:

> Q. Okay. So you're not offering an opinion as to whether or not Mr. Walton has a hypoxic brain injury; is that true?
>
> A. Correct. There are several people that are saying that it's functional. Dr. Wu is saying that it's anatomic. I'm going to stay out of that.

R01.2937 (Stein depo. p.143-144).

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> Q. Are you going to testify that Mr. Walton has a hypoxic brain injury?
>
> A. Asked and answered.
>
> Q. Unfortunately, you don't get to object.
>
> A. No. I don't get to object. I get to say the words asked and answered. It's not an official objection. I – once again, I am not going to be giving the opinions on whether it's a functional problem or an organic brain injury. If there is a hypoxic brain injury, that's for Dr. Wu to state, so I'll leave it at that.

Id. at 2938 (Stein depo. p.149-150).

Plaintiffs argue that Dr. Stein may nevertheless testify that Mr. Walton's alleged injuries are "consistent with" a hypoxic brain injury and that such testimony is sufficient proof of causation for the jury to decide the issue. An opinion that an injury is consistent with one from among multiple possible causes is insufficient to carry the plaintiffs'

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[6] Plaintiffs disclosed nurse Ajimol Lukos as their expert on the standard of care of HRMC's nurses. Nurse Lukose is not qualified to offer opinions that Mr. Walton suffered a hypoxic injury. Plaintiffs have not argued that she is so qualified, or that she is offering such opinions.

burden of proving causation, and invites the jury to engage in speculation and conjecture as to the cause of the injury. In *Lohr*, supra, the plaintiff appealed the trial court's directed verdict for the defendant physician at the close of plaintiff's evidence. 2 N.W.2d at 6. The case involved the defendant's treatment of an infection in plaintiff's hip. At issue was the trial testimony of two expert physicians on the element of causation. *Id.* at 8. For purposes of its analysis, this Court assumed without deciding that the defendant was negligent in failing to establish drainage of the infection from the plaintiff's hip earlier in the treatment than he did. *Id.* at 7-8. The question was whether the plaintiff established that the failure to drain the infection earlier caused his subsequent fused hip joint and impaired knee. The Plaintiffs' experts established two theories of causation—one that was not attributable to the negligence of the defendant (there was "little hope" the joint would be preserved even if earlier drainage had occurred), and one that was attributable to Plaintiff's negligence (early drainage of the joint and exact classification of the "attacking organism" would have improved plaintiff's prognosis). *Id.* at 8. This Court affirmed the trial court's directed verdict for the defendant, holding:

> In negligence cases and especially in malpractice cases, proof of causal connection must be something more than consistent with the plaintiff's theory of how the claimed injury was caused. The burden is on the plaintiff to show that it is more probable that the harm resulted from some negligence for which defendant was responsible than in consequence of something for which he was not responsible.

*Id. (*quoting *Yates v. Gamble et al.* 198 Minn. 7, 268 N.W. 670, 674 (1936).

Given the preceding, it is not enough for Dr. Stein to simply opine that Mr. Walton's injuries are merely "consistent with" a hypoxic injury. The evidence demonstrates that an equally plausible cause is conversion disorder, which is the cause identified by two of Mr. Walton's treating neurologists (Rossing and Matsumoto), by Dr.

Newman following his IME of Mr. Walton, and by other of the defense experts. Dr. Stein's "consistent with" opinion does not in any way suggest that hypoxia was more probable than any other suspected cause of Mr. Walton's neurological problems—including conversion disorder. Without expert testimony on this critical threshold issue, an inference that hypoxia is the cause merely because it is consistent with Plaintiffs' theory of the case would "rest on speculation and conjecture and a verdict based thereon could not stand." *Id.*

Plaintiffs further argue that a combination of Dr. Stein's "consistent with" opinion along with "circumstantial evidence" are sufficient to prove causation without affirmative expert testimony that Mr. Walton has a hypoxic brain injury. *See* Appellants' Brief at p.49. However, circumstantial evidence is not a sufficient substitute for the required expert testimony. This Court has recognized a narrow exception to the requirement of expert testimony with regard to the essential element of a medical malpractice case, and that is where the subject matter is within the common knowledge and experience of ordinary persons. *Van Zee v. Sioux Valley Hospital*, 315 N.W.2d 489, 492 (S.D. 1982). "Generally, expert testimony is required in negligence cases when the defendant is held to a standard of care that is outside the common knowledge and experience of ordinary persons." *Hanson v. Big Stone Therapies, Inc.*, 916 N.W.2d 151, 160 (S.D. 2018) (quoting 65A C.J.S. Negligence § 930 (Updated March 2018)). This Court in *Van Zee* gave examples of the types of cases where expert testimony may not be required as within the knowledge of lay persons, such as "[W]hen an operation leaves a sponge in the patient's interior, or removes or injures an inappropriate part of his anatomy, or when a tooth is dropped

down his windpipe, or he suffers a serious burn from a hot water bottle, or when instruments are not sterilized, the thing speaks for itself without the aid of any expert's advice." *Van Zee*, 315 N.W.2d at 492. This is a complex case about the care of Mr. Walton's brain injury claims. It is certainly not the type of case that is "within the knowledge of an ordinary layman" exception to the expert witness rule. Specifically with regard to the essential element of causation, the case involves complex medical issues including, but not limited to: (i) the duration and extent of hypoxia required to cause a permanent brain injury; (ii) whether Mr. Walton's condition after the claimed hypoxic episode occurred is consistent with a hypoxic brain injury (iii) the signs and symptoms of a hypoxic brain injury; (iv) whether a patient can have a hypoxic brain injury without evidence on medically-accepted studies; and (v) whether Mr. Walton's condition and extremely complex medical history is consistent with other conditions, such as the conversion disorder that has been diagnosed by at least two of Mr. Walton's treating neurologists.

The two cases cited by Plaintiffs in support of their argument that they do not need an expert witness to testify on the element of causation are *Van Zee v. Sioux Valley Hospital*, 315 N.W.2d 489 (S.D. 1982) and *Hanson v. Big Stone Therapies*, 916 N.W.2d 151 (S.D. 2018). Neither of these cases support Plaintiffs' argument.[7]

[7] Plaintiffs also cite *Garrido v. Team Auto Sales, Inc.*, 2018 S.D. 41, which is not a medical malpractice case, but rather involved strict liability and negligence, among other allegations. In that case, occupants of a vehicle suffered carbon monoxide poisoning. The question was whether plaintiffs generated questions of fact as to whether the carbon monoxide exposure was caused by the absence of a muffler on the car. The Court found that expert medical testimony showing high levels of carbon monoxide poisoning existed and created a fact question for the jury as to the cause of the damage. Here, 1) this is a medical malpractice case and not a standard negligence case, 2) Plaintiffs cannot prove what the damage is, let alone that the alleged breach of the standard of care by Dr. Miner

Van Zee involved a patient who claimed to have been injured in his right arm due to the administration of an IM injection into that arm. 315 N.W.2d at 491. In that case, plaintiffs did have an expert witness to testify on the issue of causation. Dr. James E. Monfore, one of Van Zee's treating physicians, specifically testified that it was his opinion that the administration of an IM injection caused complete destruction of Van Zee's axillary nerve. *Id.* at 493-94. A complete reading of the *Van Zee* case shows that the issue was not whether the case could move forward without expert testimony, but whether an instruction on the theory of *res ipsa loquitur* should have been given to the jury. *Id.* at 495.

In *Big Stone Therapies*, 916 N.W.2d 151, 160 (S.D. 2018) the South Dakota Supreme Court recognized that expert testimony is generally required in negligence cases where the defendant is held to a standard of care that is outside the common knowledge and experience of ordinary persons. The Court found that plaintiffs had presented sufficient expert testimony to support a claim against Big Stone Therapies, one of the two defendants in the case. *Id* at 161. This Court determined that the evidence showed that the plaintiff did not have a fractured femur pursuant to x-rays following her September 8 surgery and that her physical therapist testified that plaintiff did not have a fractured femur during her physical therapy sessions on September 12 and September 13. Plaintiff further testified that she did not have a significant change in pain until after her physical therapy session with PT Batchelor on September 14. During the physical therapy session on September 14, the physical

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was the cause of the unclear/unknown injury. Because there is no expert opinion to tie the alleged breach to damage, summary judgment was appropriate.

therapist forced the footrest down on the geriatric chair which caused the chair to come abruptly to an upright position. Plaintiff testified that after the physical therapist forced the footrest down, her leg dropped quickly and she screamed in pain. *Id.* Dr. Reynolds, a physical therapist expert retained by the plaintiffs offered the opinion that this action could cause flexion of the hip past 90 degrees, a well-known risk for hip dislocation and possible femur fracture following THA surgery. *Id.* In short, in *Big Stone Therapies* the plaintiff did not have a fractured femur, went to a physical therapy treatment where an incident occurred that caused her to scream out in pain, and it was undisputed that she thereafter was diagnosed with a fractured femur. This Court found that under those facts, this was a case that a jury could understand causation without expert assistance. The Court, quoting *Brown v. Baker,* 284 Ill.App.3d 401, 219 Ill.Dec. 754, 672 N.E.2d 69, 71 (1996) stated "if a plaintiff suffers a cut in an accident, the jury can readily determine without expert testimony that the accident caused the cut." *Id* at 162. The Court went on to state "medical opinion on causation of physical injury is unnecessary 'only if the cause and affect are so immediate, direct and natural to common experience as to obviate any need for an expert medical opinion.'" *Id.* quoting *Weaver v. W.C.A.B.* (Pa. Power Co.), 87 Pa. Cmwlth. 428, 487 A.2d 116, 118 (1985). Finally, the Court stated that "other courts have acknowledged that broken bone cases are particularly amenable to lay opinion on causation because the experience is so common." *Id.* at 162-63.

With regard to the second defendant in *Big Stone Therapies,* Milbank Area Hospital, this Court found that plaintiffs' claim against Milbank Area Hospital was properly dismissed because the plaintiffs had failed to present expert testimony on each

of the essential elements—because the standard of care required by the hospital in responding to plaintiffs' complaints of increased pain after the physical therapy session was not within the common knowledge of lay persons. *Id.* at 157.

The present case is dissimilar to *Big Stone Therapies* in several respects. First, this case does not involve a simple broken bone where Mr. Walton had an incident, immediately had pain after the incident, and then was diagnosed with a fractured femur. Notably, none of the parties in *Big Stone Therapies* disputed that plaintiff had suffered a fractured femur which was diagnosed by x-ray. This case presents several complex issues that fall far outside of the scope of the common lay person's knowledge. While in *Big Stone Therapies,* it was undisputed that plaintiff had suffered a fractured femur and the question was what had caused this undisputed injury; in this case, one of the major issues is whether Mr. Walton even suffered a hypoxic brain injury. In this case, unlike in *Big Stone Therapies,* Mr. Walton suffered from similar symptoms to what he is now claiming in 2005-2007. R02.365-370 (Tschetter & Hohm 000009-000014); has had a prior snowmobile accident where he states he suffered head injuries; and has been diagnosed by both of his treating physicians with conversion disorder rather than hypoxic brain injury.

Given that Dr. Stein, a medical doctor, is not able to form an opinion as to whether Mr. Walton even has a hypoxic brain injury, it is disingenuous for Plaintiffs to argue that this subject is within the knowledge of an ordinary lay person.

B. <u>References to hypoxic brain injury in Mr. Walton's medical records do not eliminate the requirement for expert testimony establishing causation.</u>

Plaintiffs further argue that expert testimony on causation is unnecessary because the Defendants have purportedly made admissions in the medical records that Mr. Walton

suffers from a hypoxic brain injury. *See* Appellant's Brief at p.49. Plaintiffs apparently argue that references to hypoxic brain injury in the medical records are statements against interests sufficient to meet the requirement of expert evidence to prove the essential element of causation.

While Mr. Walton's medical records contain references to hypoxic brain injury, no treater in the records actually made a diagnosis of hypoxic brain injury. Instead, the references appear to be primarily from self-reports by Mr. Walton, or references to Plaintiffs' now withdrawn expert, Dr Wu's, diagnosis of brain injury based on his analysis and opinions done for this litigation. For example, Mr. Walton saw Danielle J. Rathjen, DNP, FNP-C, a certified family nurse practitioner at Tschetter & Hohm Clinic. R02.388-389 (Tschetter & Hohm 000189-000190). Within Ms. Rathjen's note, she states "Dr [sic] Wu in California did Z-mapping on Brain scan images. Dx Epilepsy spectrum secondary to hypoxia-want a referral to a neurologist that deals with epilepsy". *Id.* Thus, Ms. Rathjen's statement regarding hypoxic injury are based upon Dr. Wu, an expert witness who has been withdrawn and whose methodology has been excluded. Ms. Rathjen then referred Mr. Walton for a swallow study that was performed by speech pathologist Gohn. R02.373 (Tschetter & Hohm 000346). The referral listed hypoxic brain injury as the diagnosis based on Dr. Wu's testing. *Id.* A swallow study was performed by Ms. Gohn on April 14, 2020, which was normal. R02.374-375 (Huron Regional 000648-000649). Within that swallow study, speech pathologist Gohn noted in the patient's history that he has a previous medical diagnosis of hypoxic brain injury as indicated by Ms. Rathjen in her referral. R02.373 and 374 (Tschetter & Hohm 000346; Huron Regional 000648). There is no indication in the

record that this information came from anywhere other than Mr. Walton or Nurse Practitioner Rathjen's March 11, 2020 note, which is based upon the unreliable studies of Dr. Wu. Nurse Practitioner Rathjen saw Mr. Walton again on June 16, 2020, and on that same day referred Mr. Walton to physical therapist Ketelhut and speech pathologist Gohn. R02.376 (Huron Regional 000651). Within the referral note, Nurse Practitioner Rathjen again refereneed the diagnosis as hypoxic brain injury which again was apparently based upon the opinions of Dr. Wu that she had been provided in March. *Id.* Subsequently, a Speech Pathologist and Physical Therapist provided speech and physical therapy to Mr. Walton presumably with reference to the hypoxic brain injury diagnosis that Nurse Practitioner Rathjen took from Dr. Wu's testing. This is but one example of how the term "hypoxic brain injury" makes its way into Mr. Walton's medical records. There is no evidence that a nurse practitioner, speech pathologist, or physical therapist are qualified to make an independent diagnosis of hypoxic brain injury, yet it is based on this type of records that Plaintiffs would have this Court conclude that the Defendants have admitted Mr. Walton has suffered a hypoxic brain injury such that they can dispense with the need for competent expert testimony on the matter.[8] Indeed, the conflicting information contained in Mr. Walton's medical records themselves offer further reason why the medical records cannot substitute for a causation expert in this case. For example, on August 2, 2018, Mr. Walton was diagnosed with "personal history of other diseases of the nervous system and sense

[8] Even Plaintiffs' expert, Dr. Richard Adler, conceded in his deposition that he was familiar with the practice in medicine where somebody writes down something and it gets transferred on and on and moves down his medical records for the rest of his life. R02.404 (Adler depo. p.90).

organs" with an onset date of July 31, 2018. R02.377 (Huron Regional at 000355). The note further references the patient is being seen for residual symptoms from Guillain-Barre. *Id.* (Huron Regional 000356). On August 13, 2018, speech pathologist Gohn noted that Mr. Walton's primary diagnosis was "encephalitis and encephalomyelitis, unspecified" with an onset date of August 5, 2018. R02.381 (Huron Regional 000956). On November 19, 2018, Mr. Walton's diagnosis was "personal history of other disease of the nervous system and sense organs with an onset date of July 31, 2018." R02.386 (Huron Regional at 000571). The same note states that "patient's wife indicated patient was diagnosed with a functional neurological deficit." *Id.* Plaintiffs have presented no evidence of any doctor other than their withdrawn/excluded expert witnesses who have independently diagnosed Mr. Walton with a hypoxic brain injury. Given the conflicting diagnoses in Mr. Walton's medical records, and the obvious source of hypoxic brain injury as a cause originating in Dr. Wu, references to hypoxic brain injury in Mr. Walton's medical records cannot be a substitute for the required expert testimony on causation.

Plaintiffs also place significance in a note prepared by Dr. Miner to refer Mr. Walton to the Brain Injury Rehabilitation Center, suggesting that this is an admission by Dr. Miner that Mr. Walton has a hypoxic brain injury, thus obviating the need for competent expert testimony on the issue. However, Dr. Miner spoke to the cause of Mr. Walton's diagnosis at his deposition:

> Q: Do [you] disagree with the diagnosis that Kevin suffered from hypoxic encephalopathy?
>
> ***
>
> A: I don't really know.

Q: Would you disagree with a diagnosis of hypoxic encephalopathy for Kevin?

***

A: I can't say that it is or isn't. I – because I can't give you a definitive answer on that. I'm not disagreeing, but I'm not saying that is the only thing that could cause it.

Q: You just don't know what Kevin actually suffered from, fair to say?

A: Yes.

Q: And you're not offering an opinion as to what actually happened to Kevin, true?

***

A: Yeah, I can't - there's too many variables. I can't give a perfect answer to that question.

Q: It's not within your area of expertise to diagnose what actually happened to Kevin?

***

A: It's difficult in every case. Everybody is different I guess.

Q: Are you asserting you have any expertise to be able to opine as to what happened to Kevin regarding his mental status?

***

A: Again, I mean it's hard to say or not say. I can't give you an exact - no, I'm not an expert on everything, but I can't give an opinion as to exactly what happened to him.

Q: Do you have an opinion as to what you believe happened?

A: Not really.

R01.177-78 (Miner depo. p.51-52). And further,

Q: Have you ever diagnosed Mr. Walton with a brain injury?

A: No. That was the diagnosis from other providers.

R01.184 (Miner depo p.58).

By his own admission, Dr. Miner does not have the expertise to diagnose Mr. Walton with a hypoxic brain injury, nor does he have an opinion on what caused Mr. Walton's problems. As demonstrated earlier, the "other provider" who initiated the theory of hypoxic brain injury was Dr. Wu. Clearly, Dr. Miner has not admitted to causing a hypoxic brain injury or even admitted that Mr. Walton has a brain injury; only that Mr. Walton reported being diagnosed with a brain injury by another provider. This is not an admission by a party opponent and is certainly not a substitute for competent expert testimony on the cause of Mr. Walton's neurological problems.

C. An adverse inference is inapplicable here and, in any event, would not establish causation.

Plaintiffs posit that the jury could draw an adverse inference against the Defendants in "that the absence of contemporaneous records of hypoxia is their own fault, and that they cannot benefit from the absence of safety records they failed to create in the first place." *See* Appellants' Brief p.49-50. The "adverse inference" sought here is not the type of evidence (or lack thereof) which would allow an adverse inference instruction to be given to a jury. An adverse inference instruction is allowed when there has been spoliation or destruction of evidence or when a party does not produce documentary evidence which it has within its control.[9] *See Sabhari v. Sapari*, 576 N.W.2d 886 (S.D. 1998); *State v. Engesser*, 661 N.W.2d 739 (S.D. 2003).

[9] It is noteworthy that Plaintiffs' argument for an adverse inference is not that the Defendants destroyed existing evidence, but that they failed to create documentary evidence Plaintiffs believe should have been created.

In this case, the evidence does not exist and has never existed. Plaintiffs' theory of negligence is the Defendants should have ordered continuous oxygen saturation monitoring. Dr. Miner denies the standard of care required such monitoring. R01.21. No continuous monitoring was indicated. Although periodic oxygen saturations were performed and charted, no continuous monitoring was performed and therefore no records of continuous monitoring by the nurses ever existed. There was no affirmative act by Dr. Miner or the hospital to hide evidence or destroy evidence or not put forth evidence which does exist.

The use of an adverse inference or spoliation instruction is inapplicable to this case for two reasons. First, under this Court's precedent, a spoliation or adverse inference instruction is not appropriate where the destruction, if it occurred, is not intentional. *State v. Engesser*, 661 N.W.2d 739, 755 (S.D. 2003) ("An instruction on the inference that may be drawn from the spoliation of evidence is proper only when substantial evidence exists to support a conclusion that the evidence was in existence, that it was in the possession or under the control of the party against whom the inference may be drawn, that the evidence would have been admissible at trial, and that the party responsible for destroying the evidence did so intentionally and in bad faith."). *Id.* Pursuant to *Engesser*, the elements necessary for an adverse inference instruction that may be drawn from the spoliation of evidence requires four elements: (1) that the evidence was in existence; (2) that it was in the possession or under control of the party against whom the inference may be drawn; (3) that the evidence would have been admissible at trial; and (4) that the party responsible for destroying the evidence did so intentionally and in bad faith.

In this case, Plaintiffs do not meet the elements for an adverse inference instruction. It is undisputed that no continuous oxygen saturation monitoring occurred, and therefore, such evidence was never in existence. Under the second element, since there was no evidence of Mr. Walton's continuous oxygen saturations, such evidence was not under the possession or control of the Defendants. Under the third element, it is likely that if such evidence existed, it would have been admissible at trial. Finally, Plaintiffs fail to meet the fourth element for an adverse inference instruction because there is not substantial evidence—in actuality, no evidence—that the Defendants destroyed any evidence, much less did so intentionally or in bad faith. Therefore, an adverse inference instruction is not applicable in this case. *See also Thyen v. Hubbard Feeds, Inc.*, 804 N.W.2d 435,439 (S.D. 2011) (finding that spoliation is the intentional destruction of evidence and that the spoliation standards recognized in *Engesser* apply with "equal force in civil cases."). The *Engesser* court went on to explain:

> "[S]poliation is more than simply the loss of evidence. Our prior cases have never analyzed when precisely an instruction on spoliation is warranted. In *State v. Kietzke*, the Court simply recited the rule and found no prejudice in the trial court's refusal to give the instruction. 85 S.D. 502, 515, 186 N.W.2d 551, 558 (1971). However, it is vital to understand that an adverse inference drawn from the destruction of evidence is predicated only on bad conduct. *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000), *cert denied*, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001). The defendant's argument seems to presuppose that any evidence destroyed at the hands of the police, whether by mistake, inadvertence, oversight, misjudgment, negligence, or ignorance, warrants an adverse inference instruction. That is incorrect. A proper application of the rule requires a showing of an intentional act of destruction. Only intentional destruction will sustain the rule's rationale that the destruction amounts to an admission by conduct of the weakness of one's case. *McCormick* at 660-61; 3 IA CJS Evidence, § 293 at 750-51 (1964)."

Id. (footnotes omitted). Even if Plaintiffs could somehow meet the *Engesser* elements for an adverse inference instruction, such an instruction would not eliminate Plaintiffs' need for a competent expert witness on causation. Such an instruction would only advise the jury that if it found evidence was destroyed intentionally and in bad faith, they can find that the evidence would have been unfavorable. Such instruction still does not meet the requirement for expert testimony to establish causation.[10]

III. THE CIRCUIT COURT DID NOT ERR IN DENYING THE PLAINTIFFS' MOTION FOR RECONSIDERATION.

Although there is no statutory authority for a motion to reconsider, a circuit court has the inherent authority to reconsider and modify an order at any time during the pendency of the action and prior to entry of judgment. *SBS Financial Services, Inc. v. Plouf Family Trust,* 2012 S.D. 67, ¶ 13, 821 N.W.2d 842, 845 (2012). This power is to be exercised when "[the Court] is convinced that a holding is incorrect." *Id.* (citing *Moore v. Michelin Tire Co., Inc.*, 1999 S.D. 152, ¶ 46, 603 N.W.2d 513, 525). A motion to reconsider serves the limited purpose of allowing a court to correct manifest errors of law

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[10] Plaintiffs cite to *Gotto v. Eusebe-Carter,* 892 N.Y.S.2d 191, 2010 N.Y. Slip Op. 00101 (2010), non-binding precedent from New York, in support of an adverse inference instruction. *Gotto* was a medical malpractice instruction related to the birth of a child. When plaintiffs made a request for the fetal monitoring strips, the hospital informed the plaintiffs' attorney that they "no longer existed." The court noted that the record did not establish whether the hospital negligently lost or intentionally destroyed the fetal heart monitoring strips or whether the central monitoring computer system utilized by the hospital to store fetal data was properly operating or may have malfunctioned at the time of the birth. Although the *Gotto* court allowed an adverse inference instruction in that case, the case is distinguishable because under New York law, "when a party negligently loses or intentionally destroys key evidence, thereby depriving the non responsible party of the ability to prove its claim, the responsible party may be sanctioned by the striking of its pleading." *Id.* at 568. Unlike New York which allows an adverse inference instruction where a party negligently loses evidence, South Dakota requires intentional destruction of existing evidence under the elements set forth in *Engesser.*

or fact. *Calderon v. Reno*, 56 F.Supp.2d 997, 998 (N.D. Ill. 1999) (citing *Publisher's Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985)).

> Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. *Such motions cannot in any case be employed as a vehicle to produce new evidence that could have been adduced during pendency of the summary judgment motion.* The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment … *Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.*

Publishers Resource at 561 (quoting *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665-66 (N.D. Ill. 1982) (citations and footnote omitted) (emphasis added). The reason behind this rule is that a party is obligated to make its arguments at the time of the original motion. *Id.* A motion for reconsideration should not be used to introduce new evidence or legal theories which could have been brought while the *Daubert* motion was pending.

> "Accordingly, [the Court] may reconsider an interlocutory order only if the moving party demonstrates (1) that it did not have a fair opportunity to argue the matter previously, and (2) that granting the motion is necessary to correct a significant error." *Id.* However, a motion for reconsideration cannot be used to introduce new evidence or legal theories that "could have been adduced during pendency of the summary judgment motion." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (internal citations omitted).

Provisur Technologies, Inc. v. Weber, Inc., 2024 WL 4919540, at *1 (W.D. Mo. Oct. 24, 2024).

Here, Plaintiffs had two-plus months to respond to the *Daubert* motion (Defendants' Motions served May 31, 2024, and Plaintiffs' Response served August 7, 2024) and waited several months after the Court's Memorandum Decision to file a Motion to Reconsider (Memorandum Decision filed on October 8, 2024, Motion for

Reconsideration filed on January 24, 2025). With the Motion for Reconsideration, Plaintiffs submitted expert declarations and documents totaling over 600 pages of new material and opinions. These could have been available to Plaintiffs within the two months following the filing of the *Daubert* motion, but Dr. Adler readily admits in his Declaration he was "not asked to provide either a declaration or affidavit but would have if asked to do so." R01.3373 (Adler Declaration p.1, ¶3). When a party moves for reconsideration with new evidence, it must have a "justifiable excuse" for submitting the evidence after the court has issued its order. *See, e.g., Love v. Commerce Bank of St. Louis*, 37 F.3d 1295, 1296 (8th Cir.1994) (denying a motion for reconsideration supported by new affidavits because the moving party "offered no justifiable excuse for failing to oppose the motion for summary judgment with the now-offered affidavits...."). Counsel for Plaintiffs admitted during the hearing on Plaintiffs' Motion to Reconsider that the failure to present all of his evidence was a "misjudgment", described by the Circuit Court as a "tactical failure". R02.1276-1277. Plaintiffs' counsel candidly admitted in "hindsight" he "[did] not get things right the first time" and was seeking reconsideration to address the "empty slots" left at the *Daubert* hearing—presumably by seeding the record with hundreds of pages of new materials and opinions.[11] R02.1235-1236. The Circuit Court had an extensive record before it and allowed all parties to fully address the issue at the *Daubert* hearing. Its opinion on the motion was thorough and consistent with the record and applicable law. The Circuit Court pointed out in its ruling that there was no reason why the Plaintiffs should not have fully resisted the motion

[11] The Circuit Court did not accept Plaintiffs' attempted additions to the record. R02.1279.

originally and that no excusable neglect or manifest errors of law existed. R02.1277-1278. Further, all factors which Plaintiffs argued in their Motion to Reconsider were addressed, or Plaintiffs were given an opportunity to address, in the original motion and hearing. *Id.* The Circuit Court was correct in excluding Dr. Adler, and the Plaintiffs cannot meet their burden of proving otherwise. There was no basis upon which to reverse its decision as being incorrect nor was there any basis for allowing Plaintiffs to introduce new evidence that could have been introduced originally. The Circuit Court's denial of the Motion for Reconsideration was appropriate and not an abuse of its discretion.

CONCLUSION

For all the foregoing reasons, Appellee Dr. William Miner respectfully requests that the Court affirm the Circuit Court's exclusion of Dr. Adler, its denial of Plaintiffs' Motion for Reconsideration, and its grant of Defendants' Motions for Summary Judgment.

REQUEST FOR ORAL ARGUMENT

Oral Argument is hereby requested by Appellee Dr. William Miner.

Dated: July 28, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(4). The font is Times New Roman size 12, which includes serifs. The word count is 9,189 words, exclusive of the Cover, Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, any addendum materials, and any certificates of counsel. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2025, I filed a true and correct copy of the foregoing *Brief of Appellee William J. Miner, M.D.* via Odyssey File & Serve, and that such system effected service of the same on the following individuals:

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The undersigned further certifies that the original *Brief of Appellee William J. Miner, M.D.* in the above-entitled action was mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

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IN THE

Supreme Court

of the

State of South Dakota

No. 31052

KEVIN WALTON AND JULIE WALTON

APPELLANTS/PLAINTIFFS

VS.

HURON REGIONAL MEDICAL CENTER, INC.,
WILLIAM J. MINER, M.D., AND JOHN AND JANE DOES

APPELLEES/DEFENDANTS

An appeal from the Circuit Court, Third Judicial Circuit
Beadle County, South Dakota

The Hon. Patrick T. Pardy
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Hospital offers a haphazard and incomplete response to the *Daubert* inquiry. Dr. Miner, in turn, offers no response and defers to the Hospital's argument.

The Hospital fails to articulate a sufficient basis to uphold the exclusion of Dr. Adler's testimony. In fact, most of the important issues are not even addressed by the Hospital.

ARGUMENT-IN-REPLY

1. Repeated concessions via silence.

There is no more eloquent admission than total silence on an issue. That is the Hospital's approach to the *Daubert* questions…repeatedly avoiding and dodging the crux of the case. This occurs at least six times, leaving the following points unrefuted:

- *Hyper-specific testing is not required.* In Sections 1(a), 1(c), and 1(d) of our opening brief (at pages 35-38), we addressed a fundamental error which infected the Circuit Court's analysis: its assumption that *Daubert* requires the exclusion of medical testing unless it has been specifically proven for the exact injury of the plaintiff. But it is well settled that hyper-specific validation of medical testing is not required

within the practice of medicine, nor by *Daubert*. The Hospital does not devote a single sentence of its brief to counter this.

- *Extrapolation is permitted, including for the purpose of ruling out the Defense's theory of injury.* In Section 1(b) of our opening brief (at page 37), we discussed the principle of proving medical causation with modern technology by "extrapolating" from existing methods to show that a patient's injuries are "consistent with" a particular diagnosis. The Hospital fails to respond, and, fails to distinguish the holding of an analogous case, *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968 (8th Cir. 1995) (affirming admissibility of a novel use of a PET scan for reasons consistent with Kevin's case: (i) PET technology is capable, *generally*, of "measuring brain function;" (ii) extrapolation allowed in spite of "limited scientific experience and literature [for use] in manganese cases;" (iii) its use was relevant for "ruling out alternative explanations for injuries;" and (iv) the expert was permitted to show that the testing methods yielded results which were "consistent with" the diagnosis.) *See State v. Guthrie,* 2001 S.D. 61, ¶ 42 (error to exclude expert who testifies that injuries are consistent with a particular cause).

- *Specialist designations are not required.* In Section 1(e), we pointed out that Dr. Adler does not need a "specialist" designation in order to review and consider quantitative testing modalities. The Hospital dodges this point, too.
- *Quantitative brain imaging is achieving acceptance.* At the Circuit Court level and within our briefing, we explained that during the past decade, new quantitative brain imaging technologies (including qEEG; quantitative PET; and quantitative MRI) have achieved a significant degree of use and acceptance within the medical field, a point which was conceded *even by the Defense's own experts.*[1] The Hospital ignores this point, too.
- *Quantitative brain imaging is derived from "the foundations of science."* In the Record and in our briefing, we also repeatedly explain that quantitative brain imaging technologies are premised upon basic, accepted scientific principles. These new methods take existing, universally established brain measurement technology and quantify it.[2]

[1] We discussed this on p. 18.

[2] A qEEG quantifies an EEG's measurement of *electrical* activity to help identify dysfunction. A qPET quantifies a PET scan's measurement of brain metabolism to

Similar to the underlying technologies, the quantification of the signals is not designed to *specifically* diagnose any malady, but instead, to provide other *measures of brain function*, and thus "provide insight into the condition of human brains, in ways that visual inspection of an MRI, EEG, or PET could not."[3] The Hospital does not refute this premise.[4]

- *There is a dearth of published literature about the diagnosis of hypoxic brain injuries, and no specific test to diagnose them.* The Hospital also fails to challenge two related issues: that there simply isn't a specific test for the diagnosis of hypoxic brain injury, nor is there much published research about the topic because hypoxic injuries are often fatal. *See,* Appellants' Brief, 6-7.

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further assist in identifying dysfunction. A qMRI quantifies existing MRI imagery of brain structures, as a means to further help identify regions of dysfunction.

[3] *See* p. 39; *and, see,* p. 18 ("quantitative analysis of traditional brain testing is a well-established field of medicine"); pp. 18-19; pp. 24 (the qEEG showed "objective signs of injury...*consistent with* a hypoxic event."

[4] The closest that the Hospital comes to a refutation is its claim that a quantitative evaluation is "faulty" if it yields a different result than a visual review. This misses the point of the science underlying quantification, *i.e.*, more nuanced and objective readings than are achieved by the human eye. The Hospital's argument on this is like saying that a microscope is unreliable if it reveals something different than the unaided eye.

- *The diagnostic method for Kevin's injury requires pulling together available information, evaluating its significance, ruling out other causes, and arriving at a diagnosis.* All of this leads to the most critical admission of all. The Hospital does not in any way attempt to refute the basic approach that a medical doctor must use when attempting to diagnose a potential hypoxic brain injury: by "using an array of techniques and testing modalities about an individual to inform an eventual diagnosis, including…testing methods which are *not* indicated explicitly and specifically for…clinical diagnosis of a particular condition. The correct method is to gather information about Kevin that can inform us about the existence of dysregulation in his brain activity; the nature and extent of that dysregulation; the timing of its onset; and whether his symptoms can be explained by other causes." Appellants' Brief, 6-7 (citing and quoting the Record).

* * * * *

So where does the Hospital spend its efforts in responding? In four ways: (a) the Hospital provides the same, hyper-narrow review of the *Daubert* factors performed by the Circuit Court;[5] (b) the Hospital

[5] Hospital's Brief, 13-21

misrepresents the Record by claiming that Kevin's neurocognitive injury is based only upon Dr. Adler's say-so (*i.e.,* "his *ipse dixit*");[6] (c) the Hospital provides a string citation of inapposite qEEG authority;[7] and (d) the Hospital's counsel has developed a laundry list of 33 items—offered with minimal analysis—now claiming that Dr. Adler has misapplied the differential diagnostic method – which is an argument that not even the Hospital's own experts made, and which likewise is contrary to the undisputed Record.[8]

We address each of those four areas below, in Sections 4(a); 4(b); 4(c); and 4(d). In Section 5 we address the summary judgment issue, and in Section 6, we discuss motions for reconsideration (both of which are moot if the Court reverses Dr. Adler's exclusion).

But first, we turn our attention to two other matters: the proper evidentiary standard for Rule 702 inquiries (informed by late authority unavailable at the time of our first brief); and a deeper discussion about the standard of review for Rule 702 cases.

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[6] Hospital's Brief, 21-22.

[7] Hospital's Brief, 22-25.

[8] Hospital's Brief, 25-31.

2. The proper standard of proof in *Daubert* challenges involves application of the preponderance standard to the four subparts of Rule 702 (which the Circuit Court did not do).

The week after we submitted our opening brief, the Evidence Committee of our State Bar circulated a proposal to amend SDCL 19-19-702.[9] Three weeks later, the State Bar voted in favor of submitting the proposal to this Court at an upcoming rules hearing.[10]

The proposal is intended as a "clarification" rather than a "substantive" change. It mimics a 2023 amendment to FRE 702, which adds a 'more-likely-than-not' standard from FRE 104(a) to the four sub-parts, and which adjusts the wording of subpart (d).[11]

We address the proposed amendment for three reasons: *first*, it is likely that this Court may take up consideration of the amendment prior to issuing its decision in this appeal; *second*, our opening brief quoted at least one of the "problematic" authorities;[12] and *third,* the proposal clarifies the

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[9] The Committee's report was included in the June 2025 Bar Newsletter.

[10] *State Bar Newsletter*, Aug. 2025, at 50-51 (approved by voice vote).

[11] In the Appendix to this Reply, we have included a copy of the State Bar report, as well as the federal Advisory Committee note to the 2023 amendment to FRE 702

[12] *See, Powers v. Turner County Board of Adjustment*, 2022 S.D. 77, ¶ 9 (which, according to our Evidence Committee's report, incorrectly held that the "basis of an

correct way that *Daubert* analysis should have been performed all along, but which is not the approach used by the Circuit Court.

Indeed, the Circuit Court's holding makes it clear that it did not apply the preponderance standard to any of the four subparts of Rule 702, and instead, mistakenly applied that standard to "the *Daubert* factors." *See* [R01.2712; Memorandum Opinion, p. 13: "the Plaintiffs have failed to meet their burden *regarding the Daubert factors*...."] (emphasis added).

The *Daubert* factors are instruments of analysis, rather than elements to be "met." Under the four-part test of Rule 702, Dr. Adler should be permitted to testify if it is more likely than not that:

(a) Dr. Adler's knowledge will be helpful to the Jury;
(b) His testimony is based on sufficient facts or data;
(c) Dr. Adler's testimony is the product of reliable principles and methods; and
(d) His opinion reflects a reliable application of the principles and methods to the facts of the case.[13]

See, SDCL 19-19-702(a)-(d). We provide a short overview showing each subpart is adequately supported.

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expert's opinion is generally a matter going to the weight of the testimony rather than the admissibility").

[13] For subpart (d), we use the phrasing of the proposed amendment

(a) ***Would Dr. Adler's knowledge be helpful to the Jury?***

The answer to this element is simple. Dr. Adler, a psychiatrist, is a medical doctor capable of diagnosing head injuries, conducting cognitive testing, ordering and interpreting brain studies, and is familiar with the process of diagnosing mental illnesses, such as conversion disorder. He can help the Jury.

(b) ***Is Dr. Adler's testimony based on sufficient facts or data?***

Dr. Adler spent numerous hours meeting with Kevin and his wife; conducting cognitive testing; ordering and reviewing brain imaging; reviewing quantitative testing; and reviewing records. He also relied on information from other medical experts. The quantity of information and data he incorporated is *sufficient.*

It is important to note that an expert is *not* required to read every study, nor review every scrap of paper within the Record in order to meet this element. "[I]f the court finds it more likely than not that an expert has a *sufficient* basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility." Fed.R.Evid. 702 Advisory Committee note. Here, for

example, Dr. Adler reviewed Dr. Newman's chronology of Kevin's medical records. This is sufficient.

(c) *Is Dr. Adler's opinion the product of reliable methods?*

The diagnostic method employed by Dr. Adler is a permissible technique by which an expert can test theories of causation. "A number of courts...have looked favorably on medical testimony that relies heavily on a temporal relationship between an illness and a causal event." *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 154 (3d Cir. 1999). Further, the process is flexible, rather than onerous:

> [W]e do not believe that *Daubert*...requires a physician to rely on definitive published studies before concluding that [one cause or another] was the most likely cause of a plaintiff's illness. Both a differential diagnosis and a temporal analysis, properly performed, would generally meet the requirements of *Daubert*....[As to the *Daubert* factors], we note that differential diagnosis 'consists of a testable hypothesis,' has been peer reviewed, contains standards for controlling its operation,' is generally accepted, and is used outside of the judicial context.

Id. at 154–55 (citations omitted).

On page 47 of our opening brief, we provided a chart further showing how the *Daubert* factors apply to Dr. Adler. Much like the rest of our argument, the Hospital failed to respond to this chart.

"[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety.... His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.'" *Id.* at 155 (quoting Fed.R.Evid. 703 advisory committee's note).

To inform his decision-making, Dr. Adler employed numerous methods and data sources for his differential diagnosis, along with cutting-edge, quantitative evaluations of those brain studies. Contrary to the Defense's assertions, the science underlying this quantitative analysis was *not* developed for Kevin's lawsuit.

Quantification techniques are widely studied, and their uses continue to evolve. For example, qMRI is used to evaluate hypoxic newborns. [R.01.3639]. The field of qEEG has been around since the 1970's and "is widely integrated into psychophysiology, neuroscience, psychology, psychiatry, and neurology," with "several FDA cleared qEEG databases." [R02.3-4].

Further, Dr. Adler did not claim that quantitative imaging is a magic bullet for diagnosis. But it has a place in his arsenal. And if it was permissible for him to use all of his other sources of data, it is unclear why

Dr. Adler's opinion would be less reliable (and thus thrown out) because he chose to utilize the additional, quantitative analysis. Dr. Adler meets this element.

(d) ***Does Dr. Adler's opinion reflect 'a reliable application of the principles and methods' to the facts of Kevin's case?***

This factor does not require the Court to find "correctness," and instead, that Dr. Adler used these methods upon the facts. He meets this factor. The conclusions of Dr. Adler (and Dr. Center) are unremarkable by any measure, both as to the finding of a neurocognitive disorder, and, a hypoxic cause.

Neurocognitive Disorder. Dr. Adler's neurocognitive testing of Kevin showed him in the single-digit percentile on several components, while in the normal range for others. [R01.1839]. Dr. Adler explained this result is called a "scatter," which is statistically unusual to occur in a person without a central nervous system insult, and also uncharacteristic of conversion disorder. [R01.1898].

Likewise, in 2019, Dr. Huxford, a treating psychologist at the Brain Injury institute, found Kevin's cognitive functioning to be abnormal, and diagnosed him with "Mild Neurocognitive Disorder." [R01.990-991]. So did Dr. Center (who the Circuit Court found to be "well-qualified"), with

findings from a qEEG analysis indicating Kevin's brain has objective signs of brain injury which were consistent with a hypoxic injury, but that a doctor should "clinically correlate" those findings. [R02.9].

Temporally, prior to his hospitalization, Kevin had brief periods of lower-extremity weakness, along with some other, minor ailments such as seizures. But by all accounts, Kevin remained *cognitively* normal during the decade prior to his hospitalization. He lived a vibrant life, he taught Sunday School, and he was a model employee. In short, the evidence shows Kevin did not have cognitive limitations prior to his April 2018 stay at the Hospital. The timing of onset of his neurocognitive disorder is clear.

Hypoxic cause. Dr. Stein testified (unchallenged) that Kevin's symptoms indicated that Mr. Walton suffered a hypoxic brain injury occurring at the Hospital. Dr. Stein also explained that the Hospital's massive overdose of Kevin was consistent with circumstances expected to cause fatal or near-fatal respiratory distress. [R01.3123-3124]. A nurse found Kevin in respiratory distress, "breathing like a man taking his last breaths" [R01.3123, 3300]. Dr. Adler determined that the quantitative testing of Kevin's brain showed a "distribution of abnormalities…more consistent

with the patter of damage resulting from an extended period of hypoxemia." [R01.1145].

But beyond that quantitative imaging, Dr. Adler's report further explains, independently, that "*the nature and course of [Kevin's] functional impairments* [are also] strongly more consistent with the pattern of damage resulting from an extended period of hypoxemia." [R01.1145]. Or, in other words, Dr. Adler's approach was not confined solely to the quantitative data, but also considered the extent and timing of Kevin's impairments. Both pointed to the same result.

In short, multiple experts (including Huxford, a treating psychologist, and Stein, an unchallenged forensic expert) are arriving at conclusions which are similar to each other, and correspond to the conclusions of Drs. Adler and Center…all of which matches what the nurse saw in the early morning hours of April 11, 2018: a man gasping for breath, at the edge of life. These medical observations and conclusions also match what Kevin's wife observed in the days and weeks that followed.

Kevin went in the Hospital as a normal guy, and, in some ways as an *exceptional* guy: very sharp, quick-witted, clever, and always working on a project. Two days later, he was now the kind of guy whose former boss

found him to be like "a mentally challenged man," unable to work, and whose wife now cuts his steak for him and is uncomfortable leaving him home alone.

Dr. Adler and Dr. Center (and Dr. Stein) reliably applied their methodology to the specific facts of this case. The Hospital just doesn't like their conclusions.

These experts meet the more-likely-than-not standard for all four elements. The Circuit Court's failure to make that finding invites additional reflection on the standard of review which will permit this Court to reverse.

3. The tripartite standard of review for Rule 702 admissibility questions involves abuse of discretion, clear error, and *de novo* review.

Upon further study, we discovered our opening brief provided an incomplete discussion of the standard of review for *Daubert* questions. (The Hospital did not address the standard of review in its briefing.)

An appellate court's review of evidentiary questions, including threshold *Daubert* determinations, involves a three-part inquiry, which implicates 'abuse of discretion,' 'clear error,' and 'de novo' review.

Following *General Electric Co. v. Joiner,* "it has been settled that an appellate court reviews the trial judge's Rule 702 admissibility determination

for an abuse of discretion—the same standard that governs most trial court evidentiary decisions." Hon. T. Schroeder, "*Toward a More Apparent Approach to Considering the Admission of Expert Testimony,*" 95 NOTRE DAME L. REV. 2043 (quoting *Joiner,* 522 U.S. 136, 142 (1997)).

However, when a trial judge makes findings of fact as part of the admissibility decision, those "*embedded* findings of fact are reviewed for clear error." *Id.* (quoting *Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 83 (1st Cir. 2010) (emphasis added). And, any questions of law which form part of the inquiry are reviewed *de novo. Id.*[14]

In short, as applied to Rule 702 there is a tripartite review process:

- A trial court is tasked with making 'proponderance' findings on each of the four elements of Rule 702. Since some of this process may involve '*embedded*' factual findings, this portion of its work is reviewed for *clear error.*
- Questions of law are reviewed *de novo.*

[14] Judge Thomas Schroeder is chair of the Advisory Committee's subcommittee on FRE 702, and was instrumental in securing the 2023 amendment.

Following his law review, numerous First Circuit opinions have embraced this formulation in Rule 702 cases. *E.g., United States v. Jackson,* 58 F.4th 541, 550 (1st Cir. 2023).

- And when the trial court then utilizes its findings as part of its ultimate, reasoned decision as to whether to exclude or admit, this stage of the analysis (its 'judgment call') is reviewed for *abuse of discretion.*[15]

It is important, then, for trial judges to be specific and careful to document their decision-making. "Inherent in this highly deferential standard is a certain 'play in the joints' that permits divergent results on the same evidence, *depending on the judge's explanation for the exercise of discretion.*" *Id.*, 2043 (quoting *Joiner*, 522 U.S. at 122). Thus, a trial court is "best served to be as clear as possible in their reasoning and to avoid generalized misstatements...." *Id.*, 2044.

Employing this tripartite standard of review, the Circuit Court's decision is erroneous.

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[15] *See, Jackson*, 58 F.4th at 550 ("Under this rubric [for decisions under Rule 702 and 703]: embedded findings of fact are reviewed for *clear error*, questions of law are reviewed *de novo*, and judgment calls are subjected to classic *abuse-of-discretion review*...[for] a meaningful error in judgment [which] occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.") (quotation omitted) (emphasis added)

This formulation mimics this Court's standard of review in *Olson v. Huron Reg'l Med. Ctr., Inc.*, 2025 S.D. 34, ¶¶ 17-19

The Circuit Court made clearly erroneous 'embedded findings.' As our opening brief points out, the Circuit Court made "clear errors" in its factual findings, which fatally infected any discretion it applied to admissibility. *C.f., State v. Hullinger,* 2002 S.D. 83, ¶ 13 (circuit court abuses discretion when "mistake of fact…[forms] the basis for its conclusion" about admissibility). The Circuit Court got several facts wrong: (i) Kevin's cognitive testing was not "normal;" (ii) Dr. Center did not disavow the use of qEEG for the purposes for which Dr. Adler used it; and, (iii) Dr. Adler used multiple sources of information to inform his decision-making. In addition, it was also error for the Circuit Court to fail to make findings on each of the four subparts of Rule 702.

Abuse of discretion. The Circuit Court's opinion is silent as to an "explanation for the exercise of its discretion." We pointed out three failures in this regard: (i) we attempted to warn the Circuit Court that it should not treat the list of factors like a checklist,[16] and, further, that its exercise of discretion means it had a duty to identify *which* factors it found to

[16] See, [R01.2758]. We also pointed out below that Professor Hutton has identified several other factors available for consideration, depending on the case. *See,* Appellants' Brief, p. 46, n.16; [R.01.2981; 3001-3002]

be pertinent or more important;[17] (ii) we sought reconsideration because the Circuit Court did not address any of the factors as they pertain to Dr. Adler's differential diagnosis method;[18] and (iii) we noted that the Circuit Court's factor analysis "did not address the science underlying it, focusing solely on the narrow question of its use for 'diagnosing hypoxic brain injury.'"[19]

4. The rest of the Hospital's *Daubert* arguments are unpersuasive

(a) *The Hospital conducts the same, hyper-narrow review of the* Daubert *factors as did the Circuit Court.*

On pages 13 to 21, the Hospital conducts a *Daubert* factor analysis which uses the *narrowest* possible formulation of the scientific inquiry, namely, whether quantitative brain technologies are tested, controlled, and approved specifically for the diagnosis of *hypoxic* brain injuries in adults.

But questions like this are a fool's errand. Every tortfeasor would like *Daubert* to be used this way—twisted into a test that is impossible to pass,

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[17] *See*, [R.01.2997] (quoting Justice Scalia for the premise that a trial court must *affirmatively* choose among reasonable means of excluding "junky" science)

[18] We discussed this below, [R01.2998-3002], and on page 46 of our Brief

[19] *Id.*

and unmoored from standards inherent in the medical profession. Such a formulation is guaranteed to allow them to avoid responsibility for their negligence. "In the actual practice of medicine, physicians do not wait for conclusive, or even published and peer-reviewed, studies to make diagnoses to a reasonable degree of medical certainty." *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999). Indeed, these were among the reasons why the Supreme Court issued its *Daubert* decision: to liberalize the use of scientific testimony so long as it has a *basis* in actual science.

(b) *The Hospital misrepresents the Record by claiming that Kevin's neurocognitive injury is proven only upon Dr. Adler's say-so.*

In Section B of its brief, the Hospital offers a muddled string of 11 cases, interspersed with two assertions: that Dr. Adler and Dr. Center offer "a hypothesis without scientific support," and, that "there is nothing to connect Dr. Adler's and Dr. Center's opinion that Kevin suffers from mild neurocognitive disorder due to hypoxemia to the available data *other than their own contentions*." Hospital's Brief, 21-22. (On a similar note, the Hospital has attempted to claim, falsely, that all of Kevin's neurocognitive testing was "normal." *See* Hospital's Brief, 6).

This portion of the Hospital's argument embraces the core question asked by Rule 702(b)-(d), which we addressed above in Section 2.

(c) *The Hospital's string-cite of qEEG cases relies mostly on old, inapposite decisions from Frye states.*

On pages 23 to 25 of its brief, the Hospital gives us a run-on list of thirteen prior qEEG cases, offered for its proposition that "a number of courts have questioned the scientific reliability of qEEG and refused to admit it."

The Hospital apparently did not read these cases. Nine applied the much stricter *Frye* standard, which unlike *Daubert,* requires "general acceptance" of the scientific approach.[20] Those cases have little if any bearing here. "[A] rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert,* at 588–89 (citations and quotation omitted).

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[20] Each of these jurisdictions applied the stricter *Frye* standard at the time of these decisions: *State v. Lee,* 873 S.E.2d 244 (N.C.2022); *Lebron v. State,* 232 So.3d 942 (Fla.2017); *Hernandez v. State,* 180 So.3d 978 (Fla.2015); *Craig v. Orkin,* 2000 WL 35593214 (S.D.Fla. 2000); *Tran v. Hilburn,* 948 P.2d 52 (Colo.App. 1997); *Ross v. Schrantz,* 1995 WL 254409 (Minn.Ct.App. 1995); *Head v. Lithonia Corp.,* 881 F.2d 931 (10th Cir. 1989). Within this same category is *John v. Im,* 559 S.E.2d 694 (Va. 2002), because Virginia uses a test similar to *Frye* that requires "general acceptance."

The next three of the Hospital's cases[21] are twenty years old and rely upon a 1997 paper by the American Academy of Neurology which panned the utility of qEEG in litigation.

Notably, two years later, a committee of experts (including medical doctors) determined that this 1997 paper was "biased and contains factual errors." *See,* Hoffman, *et al*, "*Limitations of the American Academy of Neurology and American Clinical Neurophysiology Society Paper on QEEG*," J. NEUROPSYCHIATRY AND CLINICAL NEUROSCIENCES, Vol. 11, No. 3 (1999), https://doi.org/10.1176/jnp.11.3.40. Meanwhile, in the past twenty years, courts have routinely accepted Dr. Adler's testimony, including his use of qEEG analysis, now totaling several dozen appearances.

That leaves two cases on the Hospital's list. In *Feria v. Dynagraphics,* 2004 WL 500869 (Tex.App. 2004), the court speaks about qEEG in such generalities that it is unclear why it affirmed the trial court's exclusion of qEEG methods. It is not persuasive.

And this leaves one final case: *Johnson v. Blair,* 628 S.W. 375 (Mo. 2021). But in that case, the trial court *admitted* Dr. Adler's testimony, and it

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[21] *Nadell v. Las Vegas Metro*, 268 F.3d 924 (9th Cir. 2001); *Falksen v. Sec'y of HHS*, 2004 WL 785056 (Fed.Cl. 2004); and *In re Breast Implant Litigation*, 11F.Supp.2d 1217, 1238 (D.Colo. 1998).

accepted the premise that qEEG can identify brain abnormalities (there, fetal alcohol syndrome). Instead, his report fell short of proving that the murder defendant's fetal alcohol syndrome caused a cognitive disability sufficient to avoid the death penalty. *Id.* In sum, this was an *endorsement* of Dr. Adler's use of qEEG science, rather than a black mark.

(d) ***Dr. Adler reliably used the diagnostic process.***

On pages 25 to 31, the Hospital's counsel has developed a laundry list of 33 items—offered with minimal analysis—asserting that Dr. Adler has misapplied the differential diagnostic method. This is an argument formulated *by counsel* on appeal, which not even the Hospital's own experts made. It is also contrary to the Record.[22]

From Dr. Adler's report, his deposition, and his affidavits, it is clear that Dr Adler did not simply throw out the idea of a conversion disorder because he thinks the diagnosis is 'voodoo.' Instead, he points out that a conversion disorder diagnosis is one of *exclusion,* meaning it is not a diagnosis that can be given until all other plausible causes are excluded, including organic causes.

[22] Hospital's Brief, pp. 25-31

Dr. Adler then demonstrated why conversion disorder can be ruled out: because Kevin was exposed to a situation which was likely to cause a hypoxic injury; Kevin's nurse found Kevin in a state of respiratory distress and near death; "the nature and course of [Kevin's] functional impairments" and symptoms was "strongly more consistent with…an extended period of hypoxemia;" and, the abnormalities shown by quantitative brain analysis were also consistent with a hypoxic event.

5. Causation can be inferred, including via the use of medical testimony

The summary judgment question is moot if the Court reverses the exclusion of Dr. Alder, so we address it only briefly.

In this case, a Jury would have no trouble using its common understanding of the human body to recognize that Kevin suffered an oxygen deprivation event and then soon thereafter began exhibiting characteristics of brain damage.

But we are not asking a Jury to engage in this process alone. The Jury would be guided by Dr. Stein's opinions; the Hospital's nurse's observations; and, (as we request in this appeal) with Dr. Adler's explanations and conclusions about what conversion disorder is; why it does

match these facts; and what evidence exists that is consistent with hypoxic brain injury.

Direct evidence of a hypoxic event is not available here, but that does not preclude recovery. "[A] causal connection between an event and an injury may be inferred in cases in which a visible injury or a sudden onset of an injury occurs." *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202, 1210 (8th Cir. 2000).

6. Kevin's motion to reconsider was an appropriate attempt to avoid this appeal

Dr. Miner agrees that a motion for reconsideration is available "at any time" and is appropriate when a Circuit Court's "holding is incorrect." Miner Brief, 29. The Circuit Court's initial ruling contains clear errors, which if corrected would have obviated the need for this appeal.

CONCLUSION

We ask the Court to reverse the exclusion of Dr. Adler in its entirety; to reverse the grant of summary judgment; and to remand the case for further proceedings and trial.

Dated this 26th day of August, 2025.

HOVLAND, RASMUS &
BRENDTRO, PROF. LLC

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,999 words, exclusive of the Table of Contents, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2025, the foregoing original was sent by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

I also hereby certify that on this 27th day of August, 2025, I filed the foregoing via Odyssey, with presumptive service upon the parties via counsel:

Appellee:	***Appellee:***
Mark Haigh EVANS HAIGH & ARNDT LLP 225 E 11th St. Suite 201 Sioux Falls, SD 57101 *Attorney for HRMC*	Gregory Bernard THOMAS BRAUN BERNARD & BURKE, LLP 4200 Beach Dr. #1 Rapid City, SD 57702 *Attorney for William Miner*

Daniel K. Brendtro
One of the attorneys for Appellant

APPELLANTS' REPLY APPENDIX - #31052

TABLE OF CONTENTS

RECOMMENDATION: We recommend the full committee vote in favor of amending SDCL 19-19-702 to track FRE 702.

SUMMARY BASIS RECOMMENDATION

1) The change to SDCL 19-19-702 would not alter the substance of how the rule is supposed to have been applied all along. It simply clarifies and reminds judges that SDCL 19-19-104(a) needs to be part of SDCL 19-19-702's analysis at each step. The change will provide practitioners with a strong basis to remind the Courts to apply the rule, not case law interpreting past versions.

2) Making the change would match SDCL 19-19-702 to FRE 702, which is a consistency we have pushed for in the past for a variety of reasons.

Federal Rule of Evidence 702 2023 Amendment

CURRENT SDCL 19-19-702 (Matched the Old FRE 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.

CHANGES TO FRE 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 **the proponent demonstrates to the court that it is more likely than not that**:

(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's opinion reflects a reliable application of the principles and methods to the facts of the case.

The amendment to FRE 702 clarifies that the proponent of the expert witness must show the court by a preponderance of the evidence that proposed expert's testimony satisfies the admissibility requirements set forth in the rule. This change comes after repeated decisions in which courts held that the questions of the sufficiency of the basis of the expert's opinion and questions of the application of an expert's methodology were questions of weight not admissibility. As described in the Advisory Committee Notes to FRE 702, these decisions were an incorrect application of both FRE 702 and FRE 104(a).

Under FRE 104(a), preliminary questions of admissibility are subjected to the judge being satisfied to a "preponderance-of-the-evidence standard." Huddleston v. United States, 485

U.S. 681, 687 n.5 (1988) This standard helps to ensure that, prior to admitting evidence to a fact finder, "the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." Bourjaily v. United States, 483 U.S. 171, 175 (1987) This rule holds across all of the rules of evidence, but, as the Advisory Committee Notes to FRE 702 detail, the emphasis of the preponderance standard under FRE 702 is needed due to repeated misapplications of the reliability requirements of expert testimony. Now, each of the three reliability tests clearly fall under the FRE 104(a) standard test, rather than the more permissive standards under FRE 104(b), conditional relevancy.

This will help when it comes to claims that attacks on any of the three reliability standards. Now, rather than any attack automatically being relegated to an issue of weight and not admissibility, courts have guidance. Now the proponent of the testimony must establish the reliability requirements by that preponderance of the evidence standards before an attack on any one of them can be deemed to go to merely weight rather than admissibility.

When a case contains competing experts who come to different conclusions based upon facts which are contested, the 104(a) standard does not require the exclusion of one's side experts. Rather, the Advisory Committee Notes that when the jury determines which of the contested facts are accurate, they can decide which expert's testimony to credit. The reliability requirement is not intended to be a "correctness" requirement.

Finally, FRE 702(d) has also been amended to clarify the fact that experts' opinions must stay within what can be concluded from reliable application of the basis of said opinion and the methodology used to reach it. The Advisory Committee Notes point out that judges' gatekeeping role here is essential, as they are better equipped to determine if an opinion is within permissible bounds than members of the jury. This is particularly of note to testimony of forensic experts. The Advisory Committee Notes to Rule FRE 702 state: "In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty."

The amended FRE 702 rule does not bring about new procedures or impose any new requirements. Rather, it is a clarification of that previously existing state of the law designed to emphasize that the expert's basis and methods must be reliable AND that they are then reliably applied to the facts of the case. It is different from SDCL 19-19-702 in that it highlights the 104(a) standard's applicability to these factors, though under current South Dakota law the 19-19-104(a) standards already apply to these issues, but the text of the rule is less than clear.

BRIEF ANALYSIS OF SOUTH DAKOTA CASE LAW

Like most jurisdictions, South Dakota's case law appears to contain a history of liberally permitting expert testimony at trial, with admission being the norm or expectation. Old case law, pre-dating SDCL 19-19-702, is still often cited today, however, that law does not necessarily track with the language of the current version SDCL 19-19-702. For example, in its most recent discussion of SDCL 19-19-702 in 2024, the South Dakota Supreme Court cited the current version of SDCL 19-19-702 and then referred to old case law that generally discussed the preponderance of evidence burden that had developed through the case law itself, not with reference to the rules of evidence. *Acuity v. A Mason Company, LLC*, 2024 SD 52, 11 N.W.3d 891 (citing *Tosh v. Schwab*, 2007 S.D. 132, ¶18, 743 N.W.2d 422, 428 (referencing older case law for the preponderance standard)).

This use of outdated case law, blended with SDCL 19-19-702 analysis, showed up recently in *Powers v. Turner County Board of Adjustment*, 2022 SD 77, 983 N.W.2d 594. There, the South Dakota Supreme Court analyzed a 702 issue and started by citing a long line of cases pre-dating the adoption of SDCL 19-19-702, or anything like it. Included in this was the basis for much of the current problems identified by the committees who proposed the 702 change at the federal level: a citation from a 1996 case noting: "[t]he basis of an expert's opinion is generally a matter going to the weight of the testimony rather than its admissibility." *Id.* (citations omitted). This type of statement is *not* consistent with the old FRE 702 (or the current SDCL 19-19-702). However, it is even further in contrast to the updated FRE 702. Ultimately, although the updated FRE 702 did not alter FRE 702's substance, it is an express reminder of the court's obligation to apply the preponderance standard at every stage of the expert process, instead of simply letting all experts through and leaving it to the jury to "weigh" the testimony. In short, it reminds the court to fill its role as a gatekeeper, not as a speed bump.

Optimistically, trial courts would use this change to become emboldened to fulfill the gatekeeping role the rule places upon them. Pessimistically, since the change would not make a substantive alteration and expert admission seems engrained in the current practice, it may not have much of an impact. Realistically, the change would at least provide practitioners with a basis to argue that the trial court should fulfill its gatekeeping role and ignore any outdated case law authority indicating otherwise, including the fallback position that the trial court should pay no attention to the basis of the testimony, leaving it all for the jury to "weigh."

FRE 702. Testimony by Expert Witnesses.

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 the proponent demonstrates to the court that it is more likely than not that:

(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's opinion reflects a reliable application of the principles and methods to the facts of the case.

Committee Notes on Rules—2023 Amendment

Rule 702 has been amended in two respects:

(1) First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. See Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. See Bourjaily v. United States, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); Huddleston v. United States, 485 U.S. 681, 687 n.5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-theevidence standard"). But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule. Nor does the amendment require that the court make a finding of reliability in the absence of objection.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts

have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But it remains the case that other admissibility requirements in the rule (such as that the expert must be qualified and the expert's testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.

Some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds it more likely than not that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the Rule 104(a) standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit. "[P]roponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . .The evidentiary requirement of reliability is lower than the merits standard of correctness.'" Advisory Committee Note to the 2000 amendment to Rule 702, quoting In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994).

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

(2) Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.