

I. LEGAL STANDARD

A motion that seeks to challenge the merits of a ruling by a district court may be brought under Federal Rule of Civil Procedure 59(e) or 60(b). *Scott v. Bender*, 948 F. Supp. 2d 859, 864 (N.D. Ill. 2013).

Rule 59(e) “grants this Court the power to reconsider its prior rulings and to rectify its own mistakes in the period immediately following the entry of judgment, thereby avoiding unnecessary appeals.” *Sunrise Opportunities, Inc. v. Regier*, No. 05 C 2825, 2006 U.S. Dist. LEXIS 13024, at *13 (N.D. Ill. Mar. 7, 2006) (quotations omitted). Under Rule 59(e), a district court may entertain a “motion to alter or amend a judgment” to correct manifest errors of law or fact. *Scott*, 948 F. Supp. 2d at 865. “A Rule 59(e) motion affords a court a wide range of discretion to correct its own errors, sparing the parties and appellate courts the burden of unnecessary proceedings.” *Minix v. Canarecci*, No. 05-cv-144, 2009 U.S. Dist. LEXIS 6098, at *6 (N.D. Ind. Jan. 26, 2009) (citing *Divane v. Krull Elec. Co., Inc.*, 194 F.3d 845, 848 (7th Cir. 1999)). A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment. Fed. R. Civ. P. 59(e).

Relief provided by Fed. R. Civ. P. 60(b) “is equitable in character and to be administered upon equitable principles.” *Di Vito v. Fid. & Deposit Co.*, 361 F.2d 936, 939 (7th Cir. 1966). Rule 60(b) “was designed to address mistakes attributable to special circumstances and not merely to erroneous applications of law.” *Russell v. Delco Remy*, 51 F.3d 746, 749 (7th Cir. 1995). In considering a motion to reconsider, the “[c]ourt must balance the competing policies of determining cases on their true merits against the desire to preserve res judicata and achieve finality in litigation.” *Dahlk v. Woomer*, No. 12-cv-00556, 2015 U.S. Dist. LEXIS 71101, at *2 (E.D. Wis. June 2, 2015). Courts liberally construe motions for reconsideration. *Scott*, 948 F. Supp. 2d at 866.

Pursuant to Rule 60(b)(1), a court may vacate a prior order in the event of “mistake, inadvertence, surprise or excusable neglect” on the part of the parties, clerk or the court. “An inadvertent ‘mistake’ that might justify relief typically involves a misunderstanding of the surrounding facts and circumstances.” *Eskridge v. Cook County*, 577 F.3d 806, 809 (7th Cir. 2009). Further, Rule 60 includes a “catch-all” provisions whereby a party may be relieved of a judgment for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). “Rule 60(b)(6) is to be liberally applied to ‘accomplish justice’” where there is evidence of extraordinary circumstances or hardship. *U.S. v. McDonald*, 86 F.R.D. 204, 208 (N.D. Ill. 1980); *see also Ervin v. Wilkinson*, 701 F.2d 59, 61 (7th Cir. 1983) (“For the purpose of doing substantial justice, Rule 60(b) motions must be liberally construed.”).

II. ARGUMENT

The Court’s cursory three-page discussion of Plaintiffs’ experts and the conclusion reached does not comport with nor appear to have taken into consideration a large swath of factual and testimonial support in the record as to the reliability of Dr. Hanley’s and Ms. Peluso’s opinions. The Court concluded that both experts are “sufficiently qualified,” Order, at 6, but then held that Plaintiffs failed to articulate how each expert’s qualifications and experiences enabled them to reliably reach their expert conclusions. To the contrary, as set forth here and in their oppositions to Defendants’ motions to exclude Dr. Hanley and Ms. Peluso, Dkt. 124 and 126, Plaintiffs demonstrated that Dr. Hanley’s and Ms. Peluso’s opinions are not based on “anecdotal experience” (Order at 7); their education, extensive experience and demonstrated knowledge are directly foundational, pertinent and supportive of the opinions rendered.

A. Dr. Hanley's Expert Testimony Should Not Have Been Excluded under *Daubert*

1. *Dr. Hanley's Experience and Qualifications Enable Her to Reliably Reach Her Conclusions*

In evaluating the reliability of an expert's opinions, a court must consider "a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given arena." *Amari Co. v. Burgess*, No. 07 C 01425, 2012 U.S. Dist. LEXIS 157229, at *19 (N.D. Ill. Nov. 2, 2012). Notably, "[r]ejection of expert testimony is the exception rather than the rule." *Woods v. Amazon.com, LLC*, No. 17 C 4339, 2019 U.S. Dist. LEXIS 90794, at *47 (N.D. Ill. May 30, 2019) (citing Fed. R. Evid. 702, advisory committee notes (2000 Amendments)).

Plaintiffs' opposition to Defendants' motion to exclude Dr. Hanley discusses at length Dr. Hanley's education and experience in the field as a medical doctor and International Board Certified Lactation Consultant ("IBCLC"). Dkt. 126 ("Hanley Opp."), at 9-11; *see also*, Pages 1-3 of Ex. 21 to February 14, 2020 Declaration of Donaldson-Smith in Support of Class Certification ("Decl. Ex.") filed concurrently herewith.¹

¹ Therein, Dr. Hanley details her background as a practicing physician with a specialty in obstetrics, gynecology and breastfeeding medicine with an appointment with the Massachusetts General Hospital ("MGH") and as an Assistant Professor at Harvard Medical School. She is a Fellow of The American College of Obstetricians and Gynecologists and a Fellow of the Academy of Breastfeeding Medicine. Since 2012, she has served as a co-chairperson of the MGH Baby Friendly Taskforce at her hospital and as Director of Lactation Medicine in the Department of OB/GYN at MGH since 2014. Dr. Hanley also has several leadership roles related to women's health and breastfeeding. For example, she serves as The American College of Obstetricians and Gynecologists ("ACOG") representative to the Project Advisory Committee of the Physician Engagement and Training Focused on Breastfeeding Project, an initiative funded through a grant from the Centers for Disease Control and Prevention to the American Academy of Pediatrics to conduct research, develop a comprehensive staged action plan, and develop resource dissemination ("Physician Engagement and Training Project"). She also co-authored ACOG Committee Opinion No. 756, titled *Optimizing support for breastfeeding as part of obstetric practice*, *Obstet Gynecol* 2018; 132:e187-96.

Plaintiffs also explained how Dr. Hanley’s clinical credentials and experience “are directly foundational, pertinent and supportive of the opinions given by her” with respect to (1) the use of International Classification of Disease (“ICD”) codes used by providers in patients’ records to identify breastfeeding and lactation-related services and (2) the level of training in comprehensive breastfeeding support received by health care professionals and the integration of comprehensive breastfeeding support and counseling into a primary care provider practice. *Id.* at 10-11. Plaintiffs further explain how Dr. Hanley’s opinions are “consistent with industry standards and informed by her extensive experience in the field.” *Id.* at 13. The Court seemingly recognized as much in noting that Dr. Hanley’s report identifies diagnoses codes that indicate the rendering of CLS. Order, at 11. *See also* Decl. Ex. 21, at 14-19.

Dr. Hanley’s experience in the field forms the basis for her testimony on the level of training in CLS received by health care professionals who identify as rendering CLS, testimony which is directly relevant to undercut HCSC’s claims about its “network” of CLS providers. *See* Hanley Opp., at 13-14. Further, Dr. Hanley’s opinions concerning the coding that can be used to indicate lactation and/or breastfeeding support are informed by her clinical background of properly logging procedure and diagnosis codes on patient records for billing purposes. Decl. Ex. 21, at 12-19. Thus, Dr. Hanley uses her relevant experience to support her opinions concerning the practices and procedures employed—or not employed—by HCSC in this matter.

Dr. Hanley’s conclusions do not suffer from the same “analytical gap” present between the data and the opinion offered in *Van v. Ford Motor Co.*, 332 F.R.D. 249, 267 (N.D. Ill. 2019). In *Van*, the plaintiffs had not identified any evidence supporting the conclusion that their expert properly applied the methodology she purported to use, aside from merely extrapolating “unfounded conclusions” as to the prevalence of sexual harassment at defendant’s plants based on

the underlying social science evidence the expert relied upon. *Van*, 332 F.R.D. at 267. The court found there was no “connective reasoning” between the social framework methodology and the process by which the expert reached her conclusions concerning sexual harassment, noting that, under the proposed methodology, testimony is “offered not to prove discrimination in a particular case or cases-that determination is one the fact finder will make in light of all of the evidence-but to offer a backdrop of information about how the phenomenon of stereotyping operates so that the fact finder can assess the specific case in light of that information.” *Id.* at 266-267. Here, to the contrary, Dr. Hanley is not seeking to extrapolate a conclusion based upon a generally accepted methodology in her field; rather, there is a direct link between Dr. Hanley’s experience in the field of lactation services and counseling and her conclusion about the use of provider codes to indicate CLS.

Further, Dr. Hanley was rendered qualified to offer nearly identical opinions in support of class certification in an analogous action against UnitedHealth Group. *Condry v. UnitedHealth Grp., Inc.*, No. 17-cv-00183, 2019 U.S. Dist. LEXIS 106254, at *12 n.2 (N.D. Cal. May 23, 2019). There, as here, Dr. Hanley proffered substantially similar opinions concerning the diagnostic codes that a trained lactation provider may use to reflect services rendered by breastfeeding support and counseling, and the breastfeeding support and counseling services received after birth and post-discharge from the hospital by general practitioners. While this Court is not bound by the court’s decision in *Condry*, there is no sound reason for a different conclusion about the reliability of Dr. Hanley’s opinions issued here on virtually the same subject matters and substantially similar record evidence.

2. Dr. Hanley Based her Conclusions on a Reliable Methodology

As this Court explained, “just because an expert is qualified, that expert must still show that his or her opinions are based upon a reliable methodology.” Order, at 6. Plaintiffs have done

that on behalf of Dr. Hanley. As set forth in her Expert Report, Dr. Hanley's opinions concerning CLS, the Baby Friendly Hospital Initiative, and the clinical indications and diagnosis codes used by medical providers for billing purposes to indicate CLS are grounded in facts and data and informed by Dr. Hanley's own experiences. Decl. Ex. 21 at 4-19.

Moreover, Dr. Hanley testified extensively during her deposition about and her Report reflects how she compiled the tables of diagnoses codes in her Report, which was informed, in substantial part, by:

- the ICD codes that she personally, actually uses as an IBCLC ([Dkt. 100] HCSC, Ex. A, Transcript of Dr. Hanley's Deposition, Tr. at 40:19-43:11; 47:22-48:18; 48:19-23; 49:4-15; 55:22-56:14);
- her extensive experience providing CLS and counseling, including her understanding of lactation issues termed as complex and not complex (*Id.* Tr. at 78:22-81:12; 83:23-85:22); and
- her work as a Fellow of The American College of Obstetricians and Gynecologists, a Fellow of the Academy of Breastfeeding Medicine, The American College of Obstetricians and Gynecologists representative to the Project Advisory Committee of the Physician Engagement and Training Focused on Breastfeeding Project, and her experience lecturing students and residents at Harvard Medical School on the topics of lactation, benign breast disease and substance use disorders in pregnancy. (Ex. 21, at 1-3).

There is nothing unreliable or "anecdotal" about Dr. Hanley's opinions, which are derived directly from and informed by her extensive experience in the field. *See Gomez v. Palmer*, No. 11 C 1793, 2016 U.S. Dist. LEXIS 5812, at *15 (N.D. Ill. Jan. 19, 2016) (court deemed methodology

sound where expert “based his opinions on medical records, depositions, and his experience and expertise in the medical field”); *Ty Inc. v. Publ'ns Int'l, Ltd.*, No. 99 C 5565, 2004 U.S. Dist. LEXIS 12037, at *18 (N.D. Ill. June 30, 2004) (finding methodology appropriate where expert’s “experience gave him a familiarity with industry standards [], and that this experience formed the foundation for determining the basis for [his opinion]” and any criticisms as to the methodology or opinions “go to credibility and not admissibility”); *Spearman Indus. v. St. Paul Fire & Marine Ins. Co.*, 138 F. Supp. 2d 1088, 1098 (N.D. Ill. 2001) (expert’s “many years of practical roofing experience qualify him as an expert in the field of roofing, and the methodology underlying his opinion -- namely, firsthand observation combined with his extensive roofing experience -- is sufficiently reliable”).

Dr. Hanley’s report and testimony warrant the Court’s reconsideration and reversal of its Order with respect to the reliability of Dr. Hanley’s opinions.

B. Ms. Peluso’s Testimony Should Not Have Been Excluded Under *Daubert*

1. Ms. Peluso’s Experience and Qualifications Enable Her to Reliably Reach her Conclusions

Like Dr. Hanley, Ms. Peluso is also an IBCLC with over 22 years of experience in the field educating families and organizations about human lactation and assisting mothers with their breastfeeding journeys. Decl. Ex. 18 at 3-5. In addition, Ms. Peluso owns and manages two group lactation practices, and owns and manages *two medical billing entities*—one for lactation consultants and one for midwives. *Id.* at 5-6.

It is upon this extensive experience in the field that Ms. Peluso bases her opinions concerning the limited eligible billing codes HCSC identified in its Policy for CLS. *Id.* at 7. In support of these opinions, Ms. Peluso describes the type of training undertaken and CLS provided by trained lactation providers such as IBCLCs and identifies procedure codes that reflect the

provision of CLS that also appropriately allow physician and non-physician providers (the latter of which classifies many IBCLCs), to identify and bill accurately the actual services rendered by trained CLS providers to patients for breastfeeding support and counseling.

As explained in Plaintiffs' opposition to Defendants' motion to exclude Ms. Peluso, Ms. Peluso's actual, practical real-world experience in owning and managing two medical billing entities—one for lactation consultants and one for midwives—renders her sufficiently qualified to serve as an expert witness in this case on the designated subject matter of the deficiencies in HCSC's Policy. *See* Dkt. 124, at 5-6 (“Peluso Opp.”); *see also* Decl. Ex. 18 at 5-6.

Further, Ms. Peluso elaborated upon her experience, as both an IBCLC and a billing practice professional, in her deposition, explaining how the billing practices she employs in her personal business are directly relevant to and rebut the assertions made by HCSC regarding billing practices for CLS in the present matter. *Id.* at 7; [Dkt. 101] HCSC Exhibit S, Transcript of Ms. Peluso's Deposition, Tr. at 22:23-23:8; Tr. at 199:10-200:7; Tr. at 68:19-71:4.

Ms. Peluso need not have had “formal coding training” to reach the conclusions rendered. Ms. Peluso may rely upon her practical experience and training as serving the proper bases for her expertise. *See Haager v. Chi. Rail Link, L.L.C.*, 232 F.R.D. 289, 293 (N.D. Ill. 2005) (“Practical experience and training may serve as proper bases of expertise.”); *United States v. Conn*, 297 F.3d 548, 556 (7th Cir. 2002) (recognizing that “the Advisory Committee notes to Rule 702 specifically note that ‘in certain fields, experience is the predominant, if not the sole, basis for a great deal of reliable expert testimony.’”). Accordingly, there is no “analytical gap” between Ms. Peluso's qualifications and her opinions rendered in this case, and the Court erred in excluding Ms. Peluso's opinions on these grounds.

2. Ms. Peluso Based her Conclusions on a Reliable Methodology

Ms. Peluso's methodology in reaching her conclusions is informed by her experience in the industry and consistent with industry standards. Ms. Peluso's expert report confirms that she rendered her opinions in this case concerning HCSC's procedure codes for breastfeeding support and counseling based upon her expertise as an IBCLC, her knowledge of medical billing for perinatal-related claims, and her review of documents in this case. *See* Decl. Ex. 18, at 7. Ms. Peluso testified extensively during her deposition about how her experience as an IBCLC and in managing two group lactation practices informed her opinions in this case concerning CPT and diagnosis codes ([Dkt. 101] HCSC Ex. S, Tr. at 22:23-23:8) and her review of HCSC's policy concerning procedure codes for breastfeeding support and counseling (*id.*, Tr. at 199:10-200:7). Ms. Peluso's methodology in relying upon her professional experience in rendering such conclusions is sound, and the Court thus had no basis in fact or law to exclude Ms. Peluso's opinions as unreliable. *See Gomez*, 2016 U.S. Dist. LEXIS 5812, at *15 (court deemed methodology sound where expert "based his opinions on medical records, depositions, and his experience and expertise in the medical field"); *Ty Inc.*, 2004 U.S. Dist. LEXIS 12037, at *18 (finding methodology appropriate where expert's "experience gave him a familiarity with industry standards [], and that this experience formed the foundation for determining the basis for [his opinion]" and any criticisms as to the methodology or opinions "go to credibility and not admissibility"); *Spearman Indus.*, 138 F. Supp. 2d at 1098 (expert's "many years of practical roofing experience qualify him as an expert in the field of roofing, and the methodology underlying his opinion -- namely, firsthand observation combined with his extensive roofing experience -- is sufficiently reliable").

III. CONCLUSION

For the foregoing reasons and in the interest of justice, Plaintiffs respectfully request that the Court reconsider and vacate its Order with respect to rulings granting Defendants' motions to exclude Dr. Hanley and Ms. Peluso under *Daubert*.

Dated: February 14, 2020

**CHIMICLES SCHWARTZ KRINER &
DONALDSON-SMITH LLP**

By: /s/ Kimberly Donaldson-Smith

Nicholas E. Chimicles (admitted *pro hac vice*)

Kimberly Donaldson Smith (admitted *pro hac vice*)

Stephanie E. Saunders (admitted *pro hac vice*)

361 W. Lancaster Avenue

Haverford, PA 19041

(610) 642-8500

NEC@Chimicles.com

KMD@Chimicles.com

SES@Chimicles.com

Proposed Class Counsel

Paul D. Malmfeldt, Esq.

BLAU & MALMFELDT

566 West Adams Street, Suite 600

Chicago, Illinois 60661-3632

Phone: (312) 443-1600

Fax: (312) 443-1665

Jonathan W. Cuneo (to seek admission *pro hac vice*)

Pamela B. Gilbert (to seek admission *pro hac vice*)

Monica E. Miller (to seek admission *pro hac vice*)

Katherine Van Dyck (to seek admission *pro hac vice*)

CUNEO GILBERT & LADUCA, LLP

4725 Wisconsin Ave. NW, Suite 200

Washington, DC 20016

Phone: (202) 789-3960

Fax: (202) 789-1813

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Kimberly Donaldson-Smith, an attorney, hereby certify that on February 14, 2020, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.