IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC MUELLER, *et al.*, :

Plaintiffs-Appellants, :

v. : Appeal No. 11-35351

CITY OF BOISE, *et al.*, :

Defendants-Appellees, :

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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Plaintiffs-appellants petition for rehearing en banc in the above-referenced appeal. The panel opinion[1] ("Op.") in this matter, a copy of which accompanies this petition as Exhibit A, conflicts with other opinions of this Court and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. Further, at least one of the panel's holdings – that a medical expert can testify that a child had a serious infection based on his "clinical instinct" alone, without further explanation – is one of exceptional importance because it opens the floodgates to expert testimony that is *per se* unreliable.

While petitioners believe that the panel opinion has a number of errors, at least three support en banc rehearing.

1. Is unexplained clinical instinct a "reliable methodology" sufficient to support an expert's testimony? The panel's holding that it is conflicts with, for example, *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311 (9th Cir. 1995), which requires district courts to perform a gatekeeping function and experts to explain their opinions.

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[1] It deserves brief mention that it is unlikely that the panel in this case was randomly chosen from among all Ninth Circuit judges. The first appeal in this case was held at a special sitting of this Court in Moscow, Idaho. Appeal No. 07-35554, Doc. Nos. 33, 37. While it is, of course, possible that Judges Trott and Smith, the only two judges on this Circuit who sit in Idaho, were chosen at random to sit on that panel, the odds of that seem low. The panel from that appeal chose to retain jurisdiction for this one.

2. In reviewing an order dismissing a claim under Rule 50(a), should this Court review the evidence in a light favoring the *moving* party? The panel opinion concluded that it should, a view that flatly conflicts with, for example, *Torres v. City of Los Angeles*, 548 F.3d 1197 (9th Cir. 2008) (the very case the panel relied upon).

3. Was the law in this Circuit clearly established in 2002 that a "remote" danger (one with very little chance of happening) of serious injury or death is insufficient to render a child in "imminent danger" of serious bodily injury? Here, the panel's opinion (that it was not) conflicts with this Court's opinion in *Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007), holding that it was.

Background

This case resulted from events that took place after plaintiff Corissa Mueller decided to take her daughter, Taige, into the emergency room at St. Luke's Hospital in Boise, Idaho because her daughter had a modest fever and was not feeding well. The emergency room physician, Richard Macdonald, after examining Taige, recommended a variety of different procedures and tests, including setting up an IV, chest x-rays, and the extraction of blood and urine for various tests, including tests for the presence of bacteria. ER 1445 (¶ 4).[2] Mrs. Mueller agreed to all the recommended procedures but two: a lumbar puncture (in

[2] Cited parts of the Excerpts of Record accompany this petition as Exhibit B.

which spinal fluid is removed and tested for infection) and the prophylactic administration of antibiotics. ER 1445-46 (¶¶ 5-10). She believed that her daughter had not yet shown any signs of serious illness and was concerned about the effects of those procedures. ER 888 (¶ 3).

Over the first several hours of their stay, Taige improved. She began to nurse vigorously and, when her temperature was taken at around 12:30 a.m., it was down to 98.8 degrees. All of the results of the initial screens came back normal (*i.e.*, did not indicate any serious problem). ER 2083-84 (¶¶ 5, 9).

Nonetheless, Dr. Macdonald and others at the hospital, concerned about the small chance that Taige might have a serious illness, contacted various officials. Eventually, Detective Dale Rogers came to the hospital to investigate. Dr. Macdonald told him that (1) as many as 3-5% of children with Taige Mueller's symptoms could have a serious bacterial infection and (2) *if* she had a serious bacterial infection and went home untreated there was a similarly small chance that she could die before effective treatment could be administered. *Mueller v. Auker*, 576 F.3d 979, 984 (9th Cir. 2009). ER 1864-65 (pp. 189, 191).

Rogers also spoke with Mrs. Mueller and, at first, he took no action. At approximately 1:40 a.m., Taige's temperature was taken again. It had gone back up to 101. At this point, Mrs. Mueller was ready to reconsider again Dr. Macdonald's recommendation for additional treatment, and wanted to speak to her own naturopathic physician and her husband about the change in circumstance.

ER 1627, 1948. But Rogers, who apparently also considered the rise in temperature significant, Op. 10856, decided to displace Mrs. Mueller's parental authority and declared Taige in "imminent danger." As Mrs. Mueller tried to use the hospital phone in the room where Taige was being treated, Rogers blocked her from doing so. ER 1948, ER 2045 (¶ 15). She was taken to a different room in the hospital and kept away from her daughter.

Eventually, Dr. Macdonald performed a lumbar puncture on Taige. Like the rest of the tests that had been performed on her, that came back negative for any serious disease. *Mueller v. Auker*, 576 F.3d at 986 ("The spinal tap showed that Taige's spinal fluid was clear, indicating that meningitis was not present. Any possible medical emergency was over.").

At trial, Dr. Macdonald called a rebuttal expert, Dr. Peter Rosen, who testified that Taige Mueller probably had a serious – indeed, life-threatening – bacterial infection, and that Dr. Macdonald's administration of antibiotics to her, after he and Boise police seized her from her mother, probably saved her life. Before trial, plaintiffs had moved *in limine* to exclude Dr. Rosen's testimony, and the court denied that motion with respect to these opinions. ER 0033-42. Thereafter, the district court expressed increasing reservations about the denial. ER 0328 at 34-35 (stating before Dr. Rosen's testimony that the court "may have overstated the degree" to which Dr. Rosen's opinion was not an "ipse dixit"); ER 0362 (p. 12), ER 0365 (p. 22) (expressing "grave reservations" about whether Dr.

Rosen had given any explanation of his opinions during his testimony); ER 0363 (pp. 15-16), ER 0368-69 (pp. 36-37) (denying plaintiffs' motion to exclude, stating it would be difficult to "unring the bell" with a curative instruction excluding the testimony and that the court would take up the question posttrial of whether Dr. Rosen had offered anything more than "classic ipse dixit testimony.")

Nonetheless, over plaintiffs' strenuous objections, the court below permitted Dr. Rosen to testify. While conceding that all the medical tests failed to find any serious bacterial disease, Dr. Rosen nonetheless persisted in his opinions that Taige Mueller, in fact, was suffering from a serious bacterial disease and that Dr. Macdonald's antibiotic treatment saved her life. ER 0340 (p. 86), ER 0351 (p. 131). The court below ultimately justified permitting the jury to hear those opinions solely on the basis of Dr. Rosen's "clinical instinct" that Taige was suffering from a serious bacterial disease. ER 0012.[3]

A jury heard claims against Dr. Macdonald, St. Luke's hospital, and the City of Boise. (Individual officers, including Detective Rogers, had been dismissed previously on summary judgment motions based on qualified immunity.) The jury

[3] According to the panel opinion, the court below "reconsidered the admissibility of Dr. Rosen's testimony in the Muellers' post-trial motion for a new trial," and, "[a]s part of that thorough process, Dr. Rosen was recalled as a witness by video, and his trial testimony was again examined in the light of the Muellers' specific objections to it." Op. 10860. It is not clear what led the panel to these observations, since it cited no part of the record, but they are not true. Dr. Rosen was never called by video, and no additional testimony was taken as part of the Muellers' post-trial motion.

concluded that Dr. Macdonald had acted in "bad faith," but nonetheless found for the defendants on all remaining claims. ER 0280-87.

Argument

I. THE PANEL'S CONCLUSION THAT MEDICAL EXPERTS CAN OFFER OPINIONS BASED ON "CLINICAL INSTINCT" CONFLICTS WITH PRECEDENT ON AN ISSUE OF GREAT IMPORTANCE

Like the court below, the panel opinion did not find any non-instinctual basis for Dr. Rosen's opinions, and rejected appellants' argument that unexplained, unsupported clinical instinct cannot be a reliable basis for an expert's opinion. Op. at 10858. The panel defended the reliability of "clinical instinct" as follows:

> Contrary to the presentation of Appellants' counsel at oral argument, clinical instinct is a well-recognized and accepted aspect of current medical practice. The precept (sic) encompasses what experience adds to scientific knowledge and training. Clinical instinct as a diagnostic and treatment tool is not new.

Id. at 10860.

The flaw here is both obvious and serious. Lots of professionals need to use instinct *in their jobs* because of time pressure. A firefighter, for example, might need to make a quick determination of the cause of a fire in order to decide how to fight it. But an expert testifying in court has plenty of time to provide reasons, and cannot justify his total lack of explanation on the ground that he is using his "instinct" to support his testimony. It would be quite odd, for example, for an expert to conclude that arson was the cause of a fire based solely on his

unexplained "instinct." Even if the practice of medicine is not entirely "evidence based," courts of law have to be.

This error has drastic consequences and deserves en banc review. First, the panel's decision that the expert testimony of Dr. Rosen was reliable because it was based on his unexplained "clinical instinct" conflicts with the decisions of this Court that require trial courts to exercise the gatekeeping function of determining the reliability of expert testimony. *E.g., Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Management, Inc.,* 618 F.3d 1025, 1035 (9th Cir. 2010) ("[Federal Rule of Evidence] 702 imposes a 'basic gatekeeping obligation' on district courts to 'ensure that any and all scientific testimony' – including testimony based on 'technical[ ] or other specialized knowledge' – 'is not only relevant, but reliable.'") (quoting *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999) (internal quotation marks omitted)); *Elsayed Mukhtar v. California State University, Hayward,* 299 F.3d 1053, 1063 (9th Cir. 2002) ("The trial court must act as a gatekeeper to exclude junk science that does not meet Rule 702's reliability standards.") (internal quotation marks omitted).

Indeed, by holding that instinct alone can be a reliable basis for an expert opinion, the panel's decision makes that gatekeeping task impossible; there simply is no way for courts to evaluate the reliability of an unexplained claim to instinctual knowledge. Rather, contrary to the panel, courts can only exercise their gatekeeper function by excluding such testimony precisely *because* it cannot be

determined to be reliable. *See, e.g., Erickson v. Baxter Healthcare, Inc.,* 131 F. Supp. 2d 995, 999 (N.D. Ill. 2001) ("If an expert offers no support for an opinion, however, it is impossible to evaluate the testimony in terms of the factors laid out in *Daubert* so the testimony is excludable.").

The panel's decision also conflicts with the related principle that an expert must explain the basis for his opinion, and not merely offer an "*ipse dixit*" based generally on his knowledge or experience. *See, e.g.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert,* that's not enough."). As the Advisory Committee to the Federal Rules of Evidence has observed:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."

Fed. R. Evid. 702 advisory committee's note (2000 amends.), *quoted in, e.g., U.S. v. Frazier,* 387 F.3d 1244, 1261 (11th Cir. 2004) ("If admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong"). Clearly, a claim of "clinical instinct" based generally on scientific knowledge and experience, without more, does not constitute the

necessary explanation of an expert's opinion.

In *Primiano v. Cook,* 598 F.3d 558 (9th Cir. 2010), the only case cited by the panel, an expert testified that in his extensive experience with elbow replacements and the literature about them, he had never seen or heard of an elbow replacement that failed as quickly as the one made by defendant, from which he inferred that it was defective. *Id.* at 566. This was a clear explanation of how the witness's opinion was based on his experience and his familiarity with the literature. Thus, *Primiano* held that expert testimony based on medical *experience* may be reliable *if adequately explained*. It did not hold, as the panel did, that mere, unexplained "clinical instinct" is enough.

The principle sanctioned by the panel would open the floodgates to the admission of testimony that is *per se* unreliable, for a number of reasons. If instinct alone were a sufficient basis for an expert opinion, a sufficiently qualified medical expert could testify to *any* otherwise-unsupported opinion, provided he claimed it was based on "clinical instinct." A basis that can justify any opinion cannot be a reliable one. Indeed, unexplained "clinical instinct" of the kind offered by Dr. Rosen is especially likely to be unreliable in a courtroom setting. Given the time for reflection that experts have in preparing their reports and presenting their testimony, they *should* be able to explain their instinctual judgments, that is, to identify the underlying reasons for them. If they cannot do so, it is because there are no such reasons. *See, e.g., Zenith Electronics Corp. v.*

WH-TV Broadcasting Corp., 395 F.3d 416, 418 (7th Cir. 2005) (holding an expert's opinion based on his experience inadmissible: "Asked repeatedly during his deposition what methods he *had* used to generate projections, [expert] repeatedly answered 'my expertise' or some variant ('my industry expertise,' '[my] awareness,' and 'my curriculum vitae') – which is to say that he either had no method or could not describe one. *He was relying on intuition, which won't do.*") (second emphasis added).

II. IN CONTRAVENTION OF CIRCUIT PRECEDENT, THE PANEL INTERPRETED THE EVIDENCE IN FAVOR OF THE MOVING PARTY ON A RULE 50(A) MOTION DISMISSAL

Taige Mueller claimed that St. Luke's and Dr. Macdonald committed battery in that they performed procedures on her without permission. Although an employee of the Idaho Department of Health and Welfare had signed consent forms, the Muellers claimed that that consent was invalid because it was procured by deceptive tactics. *E.g.*, *Neal v. Neal*, 125 Idaho 617, 622, 873 P.2d 871, 876 (1994) (reversing a lower court's summary judgment dismissing a battery claim by a wife against her husband, based upon their sexual relations, where the husband had not disclosed an affair that he had been having; the wife successfully argued that "although she consented to sexual intercourse with her husband during the time of his affair, had she known of his sexual involvement with another woman, she would not have consented" and that the husband's "failure to disclose the fact of the affair rendered her consent ineffective.").

The court below granted Dr. Macdonald's motion to dismiss under Rule 50(a). The panel, in determining whether the record supported that dismissal, concluded that "we must view the evidence in the light most favorable to Dr. Macdonald and draw all reasonable inferences in favor of him." Op. 10863 (citing *Torres v. City of Los Angeles*, 548 F.3d 1197, 1205 (9th Cir. 2008)). But *Torres* held *exactly the opposite* of the panel's interpretation of it. *Id.* at 1205-06 ("'The evidence must be viewed in the light most favorable to *the non-moving party*, and all reasonable inferences must be drawn in favor of *that party*.'") (quoting *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000)) (emphasis added). Dr. Macdonald, of course, was the *moving* party on his Rule 50(a) motion.[4]

The panel's legal conclusion concerning the proper review of a Rule 50(a) motion conflicts with *Torres*, *LaLonde*, and numerous other circuit authorities. *E.g.*, *M2 Software Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1086 (9th Cir. 2005). En banc review is appropriate to maintain uniformity of the Court's decisions.

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[4] The panel seemed to rely upon the jury's other findings. Op. 10863. Even assuming that one should resolve a Rule 50(a) motion by examining what the jury found on a *different* question, the jury's findings here were a mixed bag at best. The jury *also* found that Dr. Macdonald acted in "bad faith," which the instructions had defined as "intentional dishonesty in belief or purpose." ER 0269, 0282 (Q. 7). The panel ignored this jury finding.

III THE PANEL'S CONCLUSION THAT THE LAW WAS NOT CLEAR IN 2002 THAT REMOTE RISKS OF SERIOUS INJURY DID NOT CONSTITUTE "IMMINENT DANGER" CREATES AN INTRACIRCUIT CONFLICT

In *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000), this Court held that the "right [of parents and their children to live together without governmental interference] is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency." *Wallis* set forth the two-part test for determining whether the state has properly met this burden: the state may seize a child from the custody of his parents without prior judicial authorization "only if the information [state officials] possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." *Wallis*, 202 F.3d at 1138.

As noted above, the evidence on summary judgment supported the Mueller's contention that Dr. Macdonald told Detective Rogers that there was only a very small chance of anything serious happening to Taige Mueller. In affirming the District Court's grant of qualified immunity at the summary judgment stage to Detective Rogers on the Muellers' claim of parental interference and unreasonable seizure of Taige Mueller, the panel apparently concluded that Ninth Circuit law in 2002 did not clearly establish that such remote risks were insufficient to constitute "imminent danger." That holding conflicts with prior Ninth Circuit law.

In *Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007), this Court rejected qualified immunity for officers who (in 2001) removed children from their parents' custody without a court order, where the parents were about to take their children (three and five years old) to work and lock them in a room. Although this Court recognized that the children could be badly injured there -- indeed, the three-year old had a large scratch on her face from a fall off a chair at the parents' workplace (*id.* at 1292) -- it nonetheless held that "[t]he chances of accidental injury or of a fire breaking out at the Rogerses' workplace during the few hours that it would take [the police officer] to obtain a warrant were very low. So remote a risk does not establish reasonable cause to believe that the children were in immediate danger." *Id.* at 1295.

The panel here held that *Rogers*, because it was decided in 2007, could not itself have created well-established law in 2002. Op. 10856. This misses the point entirely. *Rogers* held that *other cases* clearly established that remote risks did not constitute "imminent danger" in 2001. One of those cases was *Wallis*, first decided in 1999, in which this Court held that information regarding a parent's possible satanic sacrifice of his child did not conclusively demonstrate that the police had a reasonable basis for believing that the child was in imminent danger – although the information surely had some non-zero chance of being true.

Nor were these other cases in *Rogers* cases about locking children in a room at an auto shop. To the contrary, they had nothing to do with that scenario. This

Court nonetheless held that the law was clearly established in 2001. *Rogers*, 487 F.3d at 1297 ("[I]t is not necessary that a case be on 'all fours' with the facts of the instant case").[5] En banc review is needed to reconcile the panel's opinion and *Rogers*.

Conclusion

For the foregoing reasons, the petition should be granted.

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[5] The panel did not even discuss the second part of the *Wallis* test, whether Detective Rogers had a reasonable basis for believing that it was "reasonably necessary" for him to act. The panel asserted that "[w]hen Taige's temperature spiked at 1:40 a.m., time became of the essence, and it was at that point that Detective Rogers made his decision." Op. at 10856. The panel's omission of any analysis under the second part of the *Wallis* test allowed it to ignore the evidence that Mrs. Mueller wanted to consult further with her husband and doctor at precisely that point and the evidence – indeed, Rogers's own admission – that he could not order treatment and did not know whether his actions would lead to any treatment (or when). Reply Brief of Dale Rogers in Appeal No. 07-35554 at 27 ("Rogers *had no idea* what treatments would be performed or when they would be performed.") (emphasis added).

Certificate Of Service

I hereby certify that on September 21, 2012, I electronically filed the foregoing petition for rehearing en banc with the court using the CM/ECF system, which served the following registered participants (representing all other parties to the appeal):

Keely Duke (attorney for defendant MacDonald)

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/s/ Michael E. Rosman
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