

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of September 2021.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

-----X
NIEMA BOOKER as Mother and Natural Guardian
of Z.N., an Infant, and NIEMA BOOKER, Individually,

Plaintiffs,

-against-

MARK VAYNKHADLER, M.D.,
Defendant.

DECISION/ORDER

Index No. 517502/16

Mot. Seq. No. 3

-----X¹
The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Cross-Motion, Affirmations (Affidavits), and Exhibits Annexed _____	<u>151-170</u>
Affirmations in Opposition and Exhibits Annexed _____	<u>191-198</u>
Reply Affirmations (Affidavits) and Exhibits Annexed _____	<u>210-232</u>
Defendant’s Letter to the Court, dated May 28, 2021 _____	<u>235</u>

In this action to recover damages for medical malpractice, Niema Booker, as mother and natural guardian of Z.N. (“plaintiff”),² cross-moves *in limine* in Seq. No. 3 for an order: (1) precluding the defense theory of Mark Vaynkhadler, M.D. (“defendant”), that the maternal forces of labor caused Z.N. (the “infant”) to sustain a permanent brachial plexus injury (Erb’s palsy), pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (“*Frye*”), and *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006), *rearg.*

¹ The caption was amended by Stipulation, dated May 6, 2021 (NYSCEF Doc No. 234), to reflect the discontinuance of the action with prejudice as against defendants Alina Fuchs, M.D., and Maimonides Medical Center (collectively, the “former defendants”).

² Plaintiff’s individual claims were withdrawn by Stipulation, dated Apr. 3, 2020 (NYSCEF Doc No. 40).

denied 8 N.Y.3d 828, 828 N.Y.S.2d 289 (2007) (“*Parker*”); or, in the alternative, (2) setting this matter down for a hearing pursuant to *Frye* and *Parker*. Defendant opposes.³

Upon review of the foregoing papers,⁴ this Court *grants* plaintiff’s cross-motion under *Parker* (but not under *Frye*) *to the extent of* precluding defendant’s maternal (endogenous) forces of labor defense (*i.e.*, maternal contractions, maternal pushing, or a combination of the two) on the narrow grounds of *lack of specific causality* as required by *Parker*.⁵

The distinguishing factors of the infant’s delivery in this case (*i.e.*, those factors which either are unaddressed or are inadequately addressed by the affirmations/affidavits,

³ Defendant’s motion for summary judgment in Seq. No. 1 was denied by Decision/Order, dated Mar. 7, 2021 (the “prior order”) (NYSCEF Doc No. 236). The former defendants’ opposition to plaintiff’s cross-motion was withdrawn as part of plaintiff’s discontinuance of this action with prejudice as against them.

⁴ This Court disregarded – for the reasons stated in the prior order – the infant’s father’s post-deposition affidavit, which plaintiff submitted in support of her cross-motion as well as with her opposition to defendant’s motion (NYSCEF Doc No. 155). In addition, this Court disregarded the portion of defendant’s letter submission to the extent it incorporated and attached the expert affirmations of the former defendants’ experts, James Bernasko, M.D., and Walter Molofsky, M.D. (NYSCEF Doc No. 235 at 2). Because the former defendants withdrew, among other things, their expert affirmations in opposition to plaintiff’s cross-motion (NYSCEF Doc No. 234), defendant’s belated incorporation of the former defendants’ expert affirmations in opposition to plaintiff’s cross-motion was in actuality an improper surreply. *See* CPLR 2214 (b); *Flores v. Stankiewicz*, 35 A.D.3d 804, 827 N.Y.S.2d 281 (2d Dept. 2006).

⁵ The Court of Appeals held in *Parker* that:

“It is well-established that an opinion on causation should set forth a plaintiff’s exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (*specific causation*).”

Parker, 7 NY3d 434, 824 N.Y.S.2d 584 (emphasis added). Although issued in the context of toxic injury torts, the *Parker* ruling was made applicable to the brachial plexus injuries by the Fourth Judicial Department in *Muhammad v. Fitzpatrick*, 91 A.D.3d 519, 937 N.Y.S.2d 519 (2012).

medical articles, court decisions, and other materials submitted by defendant and his experts) are as follows:

(1) the *anterior* (as opposed to the *posterior*) version of the infant's shoulder dystocia;⁶

(2) the *permanency* (as opposed to the *persistency*⁷) of the infant's brachial plexus injury in excess of two years after his birth;⁸

⁶ As one court observed:

“The maternal pelvis has different structures on the anterior and posterior side and while anterior shoulder dystocia involves impact with the pubic symphysis, posterior shoulder dystocia involves impact with sacral promontory of the spinal cord. *The difference is significant.* An injury to the posterior shoulder of an infant due to shoulder dystocia implicates a different maternal pelvic architecture from an injury to the anterior shoulder from anterior shoulder dystocia and involves different levels of maternal forces. . . . [T]he maternal forces impacting the posterior side are greater than the anterior side so that injuries to the posterior shoulder from maternal forces would be more prevalent.”

Sutryk v. Osula, Sup Ct, Steuben County, Dec. 20, 2013, Bradstreet, J., index No. 91904/08, slip op at 12-13 (NYSCEF Doc No. 56) (emphasis added).

The case of *Muhammad v. Fitzpatrick*, 91 A.D.3d 519, 937 N.Y.S.2d 519 (4th Dept. 2012), is *factually* inapposite because the shoulder dystocia in that case was of the posterior (rather than of the anterior) type. See *Muhammad v. Fitzpatrick*, Sup Ct, Erie County, Jan. 28, 2011, Walker, J., index No. 2010-11403, Transcript of Oral Argument at 5 and 10 (statements by Justice Walker) (NYSCEF Doc No. 157).

Also, *factually* inapposite is the case of *Ambrose v. Brown*, 170 A.D.3d 1562, 96 N.Y.S.3d 414 (4th Dept. 2019), which, like *Muhammad v. Fitzpatrick* preceding it, similarly involved a posterior shoulder dystocia. See Record on Appeal in *Ambrose v. Brown*, 170 A.D.3d 1562, 96 N.Y.S.3d 414 (4th Dept. 2019), at 859 (Cross Examination of Plaintiff's Expert: “Q. . . . “[A]re there any mechanisms . . . by which a *posterior* shoulder can be injured? A. In a case like this? Where there is a mechanical disruption of nerves? Either because the *posterior* shoulder passes across the sacral promontory, there is stretching there or after the head delivers and the doctor moves the head in a way to cause stretching.”) (emphasis added).

⁷ The report of the American College of Obstetricians and Gynecologists (ACOG) on Neonatal Brachial Plexus Palsy (NBPP), released in 2014 (the ACOG Report), noted that:

“No published clinical or experimental data exist to support the contention that the presence of *persistent* (as compared to *transient*) NBPP implies the application of excessive force by the birth attendant. . . . ³ Therefore, there is insufficient scientific ^{of 6}

(3) the admitted absence of any *objective* measurements of maternal contractions in the crucial interval between the discovery of the infant's shoulder dystocia (the "turtle sign") at 20:39 hours and his delivery at 20:41 hours on Feb. 29, 2016;⁹ and

(4) defendant's use of a vacuum to assist in the delivery of the infant.¹⁰

evidence to support a clear division between the causative factors of *transient* NBPP versus *persistent* NBPP."

ACOG Report at 28 (emphasis added) (NYSCEF Doc No. 181). Notably, the ACOG Report used an undefined term "persistent" which can be either long-term or short-term, but which obviously cannot be "permanent." In a recent article, Grace J. Johnson, M.D., and her medical team went further than ACOG did in its report by recognizing four types of the brachial plexus injury depending on the duration of its symptoms: (1) "transient"; (2) "short-term persistence"; (3) "long-term persistence"; and (4) "permanent." See Grace J. Johnson, M.D., et al., *Pathophysiologic Origins of Brachial Injury*, *Obstetrics & Gynecology*, Vol. 136, No. 4, Oct. 2020, 725-730, at 728 (NYSCEF Doc No. 186).

⁸ The permanency of the infant's brachial plexus injury is evidenced by, among other things, the "subscapularis slide" operative procedure which he underwent on his left (affected) shoulder under general anesthesia at the age of approximately 3 years and 8 months on Oct. 21, 2019 (NYSCEF Doc No. 109). The intraoperative findings consisted of "[a] dysplastic bimodal glenoid with an abduction contracture," an "internal rotation contracture," and an "overgrowth of the coracoid" (*id.*).

⁹ See Defendant's EBT tr at page 56, line 13 to page 58, line 17 ("Q. So starting from 8:38 [p.m.], do you see contractions? A. Yes. . . . Q. Can you quantify the amount of force, how strong it was specifically? A. You cannot. . . . *At this stage, this is the external monitor which does not measure the strength of the contractions.* Q. Why is it the external monitor? Because once you put the vacuum on, you have to remove the internal monitor? A. Generally when you start pushing, and the head is descending, you remove the monitor anyway. . . . Q. *[W]e have an external monitor – A. Yes. Q. – at around [the] time of the delivery of the head and the delivery of the body, the monitor in place is an external monitor, correct? A. Yes. Q. Not an internal monitor? A. Yes. Q. As you said, with an external monitor, you can't assess the strength of contractions? A. Correct. Q. And it certainly can't assess the strength of internal pushing, it's not designed for that at all, correct? A. Correct.*") (emphasis added) (NYSCEF Doc No. 59).

¹⁰ See ACOG Practice Bulletin No. 40, Nov. 2002 (Shoulder Dystocia) at 2 ("Associated intrapartum factors [of shoulder dystocia] include labor induction, epidural anesthesia, and operative vaginal delivery (forceps and vacuum-assisted delivery.") (emphasis added). ACOG Practice Bulletin No. 40 is annexed to, and made part of, the ACOG Report (NYSCEF Doc No. 181). ACOG Practice Bulletin No. 178, May 2017, which replaced ACOG Practice Bulletin No. 40, is irrelevant as it was not in effect at the time of infant's birth (NYSCEF Doc No. 195).

See Nobre v. Shanahan, 42 Misc. 3d 909, 976 N.Y.S.2d 841 (Sup Ct, Orange County 2013); *Sutryk v. Osula*, Sup Ct, Steuben County, Dec. 20, 2013, Bradstreet, J., index No. 91904/08, slip op at 14 (NYSCEF Doc No. 56). *Accord Stalker v. Hinds*, Sup Ct, Greene County, Nov. 23, 2020, Elliott, J., index No. 17-0073, slip op at 28-29 (NYSCEF Doc No. 198).¹¹

The Court's ruling does not absolve plaintiff from proving proximate cause of the infant's brachial plexus injury at trial. It is axiomatic that "[t]he presence of an injury does not mean that there was negligence." *Landau v. Rappaport*, 306 A.D.2d 446, 761 N.Y.S.2d 325 (2d Dept. 2003). At trial, plaintiff will bear the burden of proving, insofar as the infant's brachial plexus injury is concerned, that such injury was proximately caused by defendant's alleged departures in one or more of the following categories:

(1) the alleged departures in the *fetal manipulation category*; namely, defendant's allegedly excessive and/or inappropriate pulling (traction)¹² and/or pivoting (twisting) of the infant's head/neck on and after encountering the fetal shoulder dystocia;

(2) the alleged departures in the *maternal manipulation category*, which were admittedly performed under defendant's supervision and direction; namely:

¹¹ *Compare Ross v. Gerardi*, Decision/Order, Sup Ct, Schenectady County, Feb. 15, 2017, Versaci, J., index No. 2014-2534, slip op at 13 (“[T]he infant . . . here was born with significant bruising of the face, arms and some bruising of the torso, which seemingly occurred inside the birth canal during the attempts to dislodge the shoulder. These facts render this case distinguishable from the facts in *Nobre* and *Sutryk*, where there was no proof of any contractions or maternal pushing during the shoulder dystocia period and no significant bruising noted when the infant was delivered.”) (NYSCEF Doc No. 197) (emphasis added). Unlike the baby in *Ross* but similar to the babies in *Nobre* and *Sutryk*, the infant here sustained no bruising during delivery.

¹² *See* RNC Shulman's Late Note, timed at 23:02 hours on Feb. 29, 2016 (“Use of *intermittent* traction observed.”), part of plaintiff's medical records at Maimonides Medical Center, at 120 (emphasis added) (NYSCEF Doc No. 168). “Intermittent” suggests that a series of tractions (rather than a single traction) were applied.

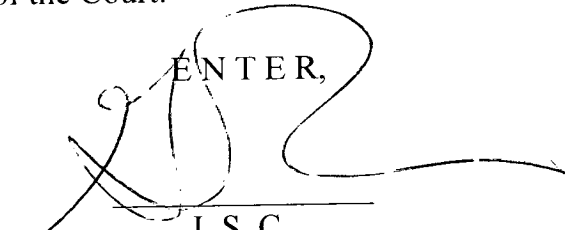
(a) the allegedly improper use and/or misuse of the McRoberts' position (the extent of flexion/hyperflexion, if any, of the mother's legs as well as the overall positioning of her body), and/or (b) the allegedly improper site(s) of the external pushing that was applied to the mother's uterus as part of the infant's delivery (*i.e.*, whether the pressure was "fundal" as claimed by plaintiff, or whether it was "suprapubic" as claimed by defendant, or a combination of the two);

(3) the alleged departures in the *vacuum-assist category*, including whether there were any "pop-offs" of the vacuum cap and, if so, how many; and/or

(4) the alleged departures in the *pre-delivery planning category*; namely, defendant's alleged failure to resort to a C-section notwithstanding, among other things, the maternal predisposing factors for fetal shoulder dystocia in the form of her obesity (BMI of 39.5) and her weight gain during pregnancy (39 pounds).

Plaintiff's counsel is directed to electronically serve a copy of this Decision/Order with notice of entry on defendant's counsel, and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision/Order of the Court.

ENTER,

J. S. C.
6 of 6
HON. GENINE D. EDWARDS