At a Term of the Supreme Court, held in and for the County of Greene, in the Village of Catskill, New York, on the 23rd day of November, 2020.

PRESENT: HON. RAYMOND J. ELLIOTT, III
Justice

SUPREME COURT
COUNTY OF GREENE STATE OF NEW YORK

AMANDA STALKER as Mother and Natural Guardian of H. S., an Infant, and AMANADA STALKER, Individually,

Plaintiffs,

-against-

DECISION AND ORDER
INDEX NO. 17-0073

MARCEL HINDS, M.D., COLUMBIA MEMORIAL HOSPITAL, and COLUMBIA MEMORIAL PHYSICIAN HOSPITAL ORGANIZATION, INC.,

Defendants.

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RAYMOND J. ELLIOTT, III J.S.C.

Before the Court is Plaintiffs' Motion to Preclude, pursuant to *Parker v Mobil Oil Corp.*, (7 NY 3d 434 [2006]), which seeks to prevent Defendants from arguing or introducing evidence regarding the theory that maternal forces of labor caused the Infant Plaintiff's permanent brachial plexus injury.[1] Defendants oppose the Motion, arguing that both the maternal forces of labor theory is relevant and has scientific support as well as that precluding this theory would be "tantamount to concluding, in advance of trial and to a reasonable degree of medical certainty, that excessive or misapplied force by [Defendant Dr. Marcel Hinds] was the proximate cause of the infant's brachial plexus injury."

Facts and Procedural Background

On March 17, 2016, Plaintiff Amanda Stalker (hereinafter "the Mother") was admitted to Columbia Memorial Hospital and ultimately gave birth to Infant Plaintiff. Prior to admission, the Mother was gaining weight, weighing 280 lbs. at time of delivery, and experiencing significant swelling/edema [Defendants' Ex. K, p. 101, 103-104, 110]. Dr. Hinds testified at his deposition that he was concerned with preeclampsia [Defendants' Ex. K, p. 66-67]. Labor was induced due to swelling [Defendants' Ex. K, p. 71, 99]. Also due to swelling, a vacuum was used to expedite delivery [Defendants' Ex. K, p. 82, 87, 113-114]. The record further reflects "poor maternal effort" and that the

[1] The brachial plexus is a series of nerves that come out of the neck and form a network, or a mesh, that supplies the shoulder, arm, and the hand with movement, feeling, and in children, growth.

Mother would "cease pushing" [Defendants' Ex. K, p. 91]. Shoulder dystocia[2] was diagnosed after delivery of the head with turtle sign[3] [Defendants' Ex. K, p. 140]. The Mother was placed in the McRoberts position[4] (notably Dr. Hinds indicated that the Mother would have been in McRoberts through the delivery due to his standard practice) and suprapubic pressure was applied [Defendants' Ex. K, p. 134, 140]. It is undisputed, for the purposes of this Motion, that the Infant Plaintiff was thereafter found to have sustained a permanent brachial plexus injury and has received substantial care for this injury since birth.

Plaintiffs commenced this action, by the filing of a summons and complaint on January 27, 2017, alleging three causes of action: (1) medical malpractice, (2) lack of informed consent, and (3) loss of services. [Defendants' Exhibit A]. Specifically, Plaintiffs allege that Defendants failed to properly respond to the Infant Plaintiff's right shoulder dystocia and used improper techniques and excessive force attempting to deliver the Infant Plaintiff, which caused permanent upper right extremity brachial plexus injury and Erb's palsy [Defendants' Exhibit C, D]. Further, Plaintiffs "allege that the maternal forces of labor (contractions and/or maternal pushing) cannot cause a permanent brachial plexus/Erb's palsy injury and could not have caused the injury in this case" [Defendants'

[2] Shoulder dystocia is a medical emergency in which a child's head was delivered but one or both of the child's shoulders were stuck within the birth canal. Shoulder dystocia is an obstetric emergency because, it is assumed that during a shoulder dystocia there is either decreased or no flow of oxygen to the baby because the umbilical cord is compressed.

[3] "Turtle sign" is where, right after the baby's head emerges, it retracts into the mother. This is evidence of shoulder dystocia.

[4] The "McRoberts position" is where the mother's legs are pulled towards her chest changing the angle of the pubic bone and creating more space through which the baby can pass. The "McRoberts maneuver" is performed to facilitate delivery by pushing the mother's thighs onto the abdomen and simultaneously

Exhibit C, p. 5]. Defendants joined issue by answer on February 22, 2017 [Defendants' Exhibit B].

The Note of Issue was filed by Plaintiffs on July 24, 2019. A pre-trial conference was held, pursuant to 22 NYCRR 202.26 (e), on September 24, 2019. At the conference, parties' counsel acknowledged, and this Court ordered, that "Counsel shall follow the specified time frames as set forth in the Third Judicial District Rules with regarding to expert disclosure. There will be no adjournments or extensions of these dates unless approved by the Court." Defendants were allowed until October 7, 2019, to serve expert disclosures. Trial was set for July 13, 2020, with dispositive motions to be fully submitted by January 31, 2020.

Defendants' filed an initial expert disclosure on October 7, 2019 [Defendants' Exhibit E]. As relevant here, Defendants' Expert A was disclosed to be set to testify regarding the issues of proximate causation, including rebutting any inference or allegation of a casual relation between the treatment and the injury. Specifically, the disclosure stated "[t]he expert is expected to testify that brachial plexus injury can, and does, occur in the absence of negligence and as a result of the maternal forces of labor [Defendants' Exhibit E].

Plaintiffs moved, on February 26, 2020, to preclude Defendants from arguing the theory that maternal forces of labor caused the Infant Plaintiff's permanent brachial plexus injury. Various extensions were granted, the trial was delayed by the COVID State

spreading the patient's legs outward.

of Emergency, and Defendants' opposition was not ultimately filed until May 11, 2020. In the interim, on April 20, 2020, Defendants served a supplemental expert witness disclosure with two new witnesses – Dr. Robert DeMott and Dr. Michele Grimm. In reply, Plaintiffs strenuously object to the new disclosures, noting they are well after the deadline set in the Third District Rules and per the direction of this Court at the conference held on September 24, 2019.

Discussion

DEFENDANTS' DISCLOSURE OF DR. ROBERT DEMOTT AND DR. MICHELE GRIMM AS EXPERTS WAS UNTIMELY AND IN VIOLATION OF THIS COURT'S ORDER; HOWEVER, PRECLUSION IS UNWARRANTED.

A "trial court, under its general authority to supervise disclosure deadlines, and consistent with its discretion to supervise the substance of discovery, may impose a specific deadline (for example, prior to the filing of the note of issue and certificate of readiness or prior to the making of a motion for summary judgment), for the disclosure of experts to be used in support of a motion for summary judgment, or who are expected to testify at trial, or both. Moreover, where a trial court has set a specific deadline for expert disclosure, it has the discretion, pursuant to CPLR 3126, to impose appropriate sanctions if a party fails to comply with the deadline" (*Rivers v Birnbaum*, 102 AD3d 26, 41-42 [2d Dept 2012]).

The New York State Supreme Court, Third Judicial District's Expert Disclosure Rule holds that "Except as otherwise directed by the Court, a party who has the burden of proof on a claim, cause of action, damage or defense shall serve its response to an expert demand pursuant to CPLR 3101(d) on or before the filing of the Note of Issue. Such

party has until the filing of the Note of Issue to serve such response regardless of how early the demand is made . . . Any amended or supplemental expert disclosure shall be allowed only with the permission of the Court. Unless the Court directs otherwise, a party who fails to comply with this rule is precluded from offering the testimony and opinions of the expert for whom a timely response has not been given."

It is undisputed that Defendants' disclosure of Dr. Robert DeMott and Dr. Michele Grimm was well after the deadline in the Third Judicial District's Expert Disclosure Rule and per the direction of this Court at the conference held on September 24, 2019.

Preclusion is unwarranted as a lesser remedy can ensure a more just result. The expert disclosure requirements of CPLR 3101 (d) are "intended to provide timely disclosure of expert witness information between parties for the purpose of adequate and thorough trial preparation" (*McColgan v Brewer*, 84 AD3d 1573, 1576 [3d Dept 2011] [internal quotation marks and citation omitted]). Preclusion is a drastic remedy. Even where an expert disclosure is made within weeks of a scheduled trial and opposing counsel is caught completely by surprise, "a sanction other than the draconian one of preclusion" is encouraged, including in the context of this District's rule (*Gushlaw v Roll*, 290 AD2d 667, 669-670 [3d Dept 2002]; *see Washington v Trustees of Methodist Episcopal Church of Livingston Manor,* 162 AD3d 1368, 1369 [3d Dept 2018]; *Mead v Dr. Rajadhyax' Dental Group*, 34 AD3d 1139, 1141 [3d Dept 2006] [The Appellate Division, Third Department "encourage(s) trial courts to look to less than draconian

measures" such as preclusion]; *Silverberg v Community Gen. Hosp. of Sullivan County*, 290 AD2d 788, 789 [3d Dept 2002]).

While preclusion is unwarranted, a sanction may be appropriate. Defendants' counsel's violation of the Court's Order directing compliance with the Third Judicial District's Expert Disclosure Rule resulted in Plaintiffs expending time and money on a motion that did not anticipate Defendants' additional experts. "A monetary sanction, including costs and counsel fees, may be imposed under the statutory language in CPLR 3126, which permits the court to make such orders with regard to a failure or refusal to disclose information which the court finds ought to have been disclosed as are just" (*Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018] [internal quotation marks, brackets, and citations omitted]; *see also Lucas v Stam*, 147 AD3d 921, 926 [2d Dept 2017] ["the imposition of a monetary sanction under CPLR 3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party's failure to fully and timely comply with court-ordered disclosure"]). "The general rule is that the court will impose a sanction commensurate with the particular disobedience it is designed to punish and go no further than that" (*Chowdhury v Hudson Valley Limousine Serv., LLC*, 162 AD3d 845, 846 [2d Dept 2018]).

Therefore, the Court will consider submissions by Plaintiffs regarding costs incurred directly related to Defendants' failure to comply with the Third Judicial District's Expert Disclosure Rule and this Court's direction. Further, to the extent that

Plaintiffs may request an adjournment of the trial, such a remedy is appropriate to ameliorate any prejudice to Plaintiffs resulting from the belated disclosure (*see Elgart v Berezovsky*, 123 AD3d 970, 972 [2d Dept 2014]).

FRYE* AND *PARKER

In determining the admissibility of expert testimony, New York follows the rule of *Frye v United States*, (293 F 1013, 113-114 [DC Cir 1923]), specifically, "that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has `gained general acceptance' in its specified field" (*see also People v Wesley*, 83 NY2d 417, 422 [1994]). "General acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions'" (*Zito v Zabarsky*, 28 AD3d 42, 44 [2d Dept 2006] [internal brackets, quotation marks, and citations omitted]). "The *Frye* 'general acceptance' test is intended to protect juries from being misled by expert opinions that may be couched in formidable scientific terminology but that are based on fanciful theories" (*Styles v General Motors Corp.*, 20 AD3d 338, 342 [1st Dept 2005, Catterson, J., concurring] [internal quotation marks, brackets, and citations omitted]; *accord Marso v Novak*, 42 AD3d 377, 379 [1st Dept 2007], *lv denied* 12 NY3d 704 [2009]).

"A *Frye* inquiry is directed at the basis for the expert's opinion and does not examine whether the expert's conclusion is sound" (*Munoz v Rubino*, 37 Misc 3d 1216

[A] [Sup Ct, Orange County 2012, Bartlett, J.]). "*Frye* is not concerned with the reliability of a certain expert's conclusions, but instead with whether the experts' deductions are based on principles that are sufficiently established to have gained general acceptance as reliable" (*Nonnon v City of New York*, 32 AD3d 91, 103 [1st Dept 2006] [internal quotation marks and citations omitted], *affd* 9 NY3d 825 [2007]). Put another way, "[t]he court's job is not to decide who is right and who is wrong, but rather to decide whether or not there is sufficient scientific support for the expert's theory" (*Gallegos v Elite Model Mgmt. Corp.*, 195 Misc 2d 223, 225 [Sup Ct, New York County 2003, York, J.]).

In *Parker v Mobil Oil Corp.,* (7 NY3d at 447-450), the Court of Appeals noted a second related issue regarding expert opinions – evidence must have relevant foundation to establish general and specific causation. In that case, the plaintiff alleged that he developed acute myelogenous leukemia (AML) from 17 years of occupational exposure to gasoline containing benzene while he worked as a gas station attendant (*see id.* at 442). The plaintiff intended to call causation experts without presenting evidence of the concentration level of benzene in the gasoline (*see id.* at 445). The experts employed no other methodology to establish the plaintiff's benzene exposure level (*see id.*). The defendants moved to preclude the plaintiff's experts under *Frye* and for summary judgment since the plaintiff's case would be meritless without expert testimony to establish causation. The trial court denied the defendants' motions and the defendants appealed. The Second Department reversed the trial court's decision and granted

summary judgment to the defendants (*see Parker v Mobil Oil Corp.*, 16 AD3d 648, 654 [2d Dept 2005], *affd on other grounds*, 7 NY3d 434 [2006]). The Court of Appeals ruled that an expert's causation opinion must establish three elements: (1) the plaintiff's level of exposure to the relevant toxin; (2) general causation, such that the toxin could in fact cause the illness and that the level of exposure would engender such illness (dose-response relationship); and (3) specific causation – the likelihood that the specific toxin did cause the plaintiff's injury (*see Parker v Mobil Oil Corp.*, 7 NY3d at 446). Failure to satisfy any of these elements would render an expert opinion inadmissible. However, the Court found that experts could establish chemical exposure causation in many ways, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community (*see id.* at 449). The Court upheld the use of extrapolation methods such as differential diagnosis, mathematical modeling, and qualitative reasoning for causation opinions (*see id.*).

"The *Frye* inquiry is separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case . . . The focus moves from the general reliability concerns of *Frye* to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial" (*Parker v Mobil Oil Corp.*, 7 NY3d at 447; *see Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 776 [2014]; *Buchholz v Trump 767 Fifth Ave., LLC,* 5 NY3d 1, 9 [2005] [New York law does not permit the court to accept

assertions that are "speculative or unsupported by any evidentiary foundation."]; *Ivory v Intl. Bus. Machines Corp.*, 116 AD3d 121, 126 [3d Dept 2014], *lv denied* 23 NY3d 903 [2014]; *Jackson v Nutmeg Tech., Inc.*, 43 AD3d 599, 602 [3d Dept 2007]). "The appropriate question for the court . . . is the somewhat limited question of whether the proffered expert opinion properly relates existing data, studies or literature to the plaintiff's situation, or whether, instead, it is 'connected to existing data only by the *ipse dixit* of the expert'" (*Marsh v Smyth*, 12 AD3d 307, 312 [1st Dept 2004, Saxe, J., concurring], *quoting General Elec. Co. v Joiner*, 522 US 136, 146 [1997]). Notably, determining adequate foundation is limited and "should not include a determination of the court that such evidence is true. That function should be left to the jury" (*People v Wesley*, 83 NY2d at 425; *accord Lugo v New York City Health and Hosps. Corp.*, 89 AD3d 42, 63 [2d Dept 2011]).

PLAINTIFFS' ARGUMENT

Plaintiffs assert that there is no evidence to support the defense expert's hypothesis that the maternal forces of labor in this case were sufficient to cause a permanent brachial plexus injury. Further, they contend that there is no evidence in the record establishing when such force, even if theoretically sufficient, existed. Therefore, Plaintiffs contend that Defendants lack sufficient foundation for expert testimony regarding the theory that maternal forces of labor caused the injury to Infant Plaintiff.

In support of their contention, Plaintiffs' submit the affidavit of Dr. Jeffery Soffer. Soffer swears that "[t]here is no evidence to support the Defendants' unscientific theory

of causation in this case" [Plaintiffs' Ex. C, ¶ 3]. Soffer swears that "contractions and maternal pushing are the natural response of the woman's body to labor. They do not cause brachial plexus injuries to the baby" [Plaintiffs' Ex. C, ¶ 6, 9]. He states that "the amount of force and stretch needed to cause a permanent brachial plexus injury is far more than the maternal forces of labor can produce" [Plaintiffs' Ex. C, ¶ 11]. Soffer further contends that the theory of maternal forces of labor was developed 30 years ago by defense experts and lacks any scientific evidence [Plaintiffs' Ex. C, ¶ 13-15].

Additionally, Soffer notes that, in this particular case, there is significant evidence of risk factors for shoulder dystocia, including obesity, the baby's size (the baby was above the 90th percentile in weight at birth), severe swelling, and operative vaginal delivery (including the use of a vacuum) [Plaintiffs' Ex. C, ¶ 20-27]. Soffer goes on to note that, based on this and the Mother's request, "the failure to perform a c-section was a departure from standards of care under the circumstances. A c-section would have prevented this injury from occurring" [Plaintiffs' Ex. C, ¶ 28-29]. Soffer then states that, within a reasonable degree of medical certainty, excessive downward traction, as documented by the testimony and affidavit of non-party Father Justin Stalker, was the proximate cause of the brachial plexus injury in this case [Plaintiffs' Ex. C, ¶ 31].

Finally, Soffer notes that he has reviewed the hospital chart and the fetal monitoring strips and finds "nothing out of the ordinary in terms of maternal forces. There is no indication of anything to support [Defendants'] thesis in the deposition testimony of any party or witness" [Plaintiffs' Ex. C, ¶ 33]. Soffer notes that the last

nursing assessment was eight minutes before the shoulder dystocia and it stated that contractions were "occurring approximately every 1 to 2 minutes, strong, but irregular in duration" and "[t]he only reference to maternal pushing at that time indicates that [the Mother was] pushing 'effectively' with contractions" [Plaintiffs' Ex. C, ¶ 35]. Further, neither Dr. Hinds or the nurses documented any contractions during the time of the shoulder dystocia nor was there any evidence on the fetal monitoring strips to support Defendants' theory [Plaintiffs' Ex. C, ¶ 36]. Therefore, regardless of whether the maternal forces of labor theory has a scientific basis generally, Soffer asserts, to a reasonable degree of medical certainty, that there is no evidence such force was present in sufficient strength in this case to cause a permeant injury [Plaintiffs' Ex. C, ¶ 39-40].

In support of their Motion, Plaintiffs' rely primarily on three court decisions. In *Muhammad v Fitzpatrick,* the Appellate Division, Fourth Department affirmed a trial court decision finding that, in that case, the theory that the infant plaintiff's injuries "were sustained as the result of the birthing process was a novel theory subject to a *Frye* analysis, and that defendants failed to rebut plaintiff's showing that their theory was not generally accepted within the relevant medical community" (91 AD3d 1353, 1354 [4th Dept 2012]). Further, the Court held that the defendants' theory on causation was subject to *Parker*; the Court stated that "the opinion of defendants' experts on causation should set forth the 'exposure [of plaintiff's daughter] to a [harmful in utero event], that the [event] is capable of causing the particular [injury] (general causation) and that plaintiff['s daughter] was exposed to [a sufficiently harmful event] to cause the [injury]

(specific causation)'" (*id.*, quoting *Parker v Mobil Oil Corp.*, 7 NY3d at 448). Therefore, even if defendants had met *Frye*, the trial "court properly determined that defendants failed to meet both the specific causation and general causation prongs of the test set forth in *Parker* and thus that the court properly refused to admit the testimony at issue" (*Muhammad v Fitzpatrick*, 91 AD3d at 1354).

Plaintiffs further rely on *Nobre v Shanahan,* (42 Misc3d 909 [Sup Ct, Orange County 2013, Marx, J.]). In that case, the court found, in contrast to *Muhammad v Fitzpatrick (supra),* that defendants met the requirements of *Frye* (*see id* at 925). Turning to the *Parker* analysis, the Court stated that:

> Dr. Grimm admits that she has not applied her computer model to this particular birth and that she could not directly correlate brachial plexus strain to brachial plexus injury in a given individual. It is clear to the court that at the moment when it became necessary to tie their causation theory to this particular case, defendants realized that the theory simply could not hold water on these facts and opted instead for a differential diagnosis. It is plain that Dr. Grimm cannot make the causal connection between the maternal forces of labor at play during [the infant's] birth and the injury he suffered. It is at this point that defendants' theory gives way to sheer speculation (*id.*).

Therefore, upon extensive review of the literature and testimony, the trial court found that "defendants have failed to meet the general and specific prongs of the *Parker* and *Muhammad* causation test" (*id* at 929).

Finally, Plaintiffs cite *Sutryk v Osula,* (Sup Ct, Steuben County, December 20, 2013, Bradstreet, J., index No. 91904). In, *Sutryk v Osula,* the court considered both the earlier *Nobre v Shanahan* and *Muhammad v Fitzpatrick* decisions. The court found that a close question existed regarding the *Frye* issue and that a hearing would be required to

decide the issue; however, such a hearing was moot as defendants' theory failed to meet the *Parker* test (*see id.* at 12). The court noted that "[d]efendants' contentions as to causation are based upon circular reasoning" (*id.*). The court further found that "[t]hese opinions, and the results of the studies of Dr. Grimm, are insufficient to meet the *Parker* test as there is simply too great an analytical gap between the data and the opinions proffered" (*id.* citing *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 75 [2d Dept 2011]). Notably, the Court also found that defendants failed to make the distinction between anterior shoulder injuries and posterior shoulder injuries (*see id.*).

DEFENDANTS' ARGUMENT

Defendants state that they "do not assert that it can be proven with exactitude that the maternal forces of labor was the proximate cause [the Infant Plaintiff's injury]" [Poles Aff. ¶ 3]. Instead, Defendants seek to offer expert witness testimony that the medical profession recognizes more than one sufficient cause of permanent brachial plexus injury, "including both endogenous (fetal/maternal) and exogenous (delivery providers), and that the evidence in this case does not allow it to be stated to a reasonable degree of medical certainty that excessive or misapplied force by [Defendant Hinds] was the proximate cause of" the Infant Plaintiff's injury [Poles Aff. ¶ 3].

Defendants' submit the affirmation of Robert DeMott, M.D. [Defendants' Ex. O]. DeMott is Board Certified in Obstetrics and Gynecology and maintained a practice from 1987-2016 [Defendants' Ex. O, ¶ 1-2]. Most significantly, DeMott swears that "to a reasonable degree of medical certainty . . . a permanent brachial plexus injury can and

does occur as the result of the maternal forces of labor, and in the absence of any negligence on the part of the person or person delivering the infant" [Defendants' Ex. O, ¶ 4]. DeMott further states that there is no foundation for the testimony of Plaintiffs' expert "that a permanent brachial plexus injury can occur only as a result of excessive or misapplied external forces" [Defendants' Ex. O, ¶ 5]. DeMott further states that "Dr. Hinds properly diagnosed shoulder dystocia after the delivery of the head" and directed appropriate care, including suprapublic pressure and McRoberts [Defendants' Ex. O, ¶ 12]. Based on his finding that there is "no evidence in the medical record of any excess traction used to complete this vacuum assisted delivery" and the fact that proper maneuvers were used to resolve the shoulder dystocia, DeMott concludes "[t]here was no action or inaction by Dr. Hinds that caused this child's left shoulder to be stretched and injured as it descended through the pelvis . . . In this case, this is a chance event that no health care provider can predict or prevent, unless no labor was allowed at all by performance of a cesarean delivery" [Defendants' Ex. O, ¶ 13-14].

DeMott relies on several studies to support his conclusion that permanent injury to the brachial plexus can result from maternal forces of labor. DeMott points to one article for the proposition that approximately one-third of all cases of brachial plexus injuries occur in the posterior shoulder and these are more likely to be permanent (Gherman, Robert B., Goodwin, T., Ouzounian, J., Miller, D., and Paul, R., "Brachial plexus palsy associated with cesarean section: An in utero injury?", American Journal of Obstetrics and Gynecology [1997]) [Defendants' Ex. O, ¶ 15]. That article further stated

that "[b]rachial plexus palsy has been noted to occur in the absence of shoulder dystocia and in the posterior arm of infants with anterior shoulder dystocia. The strongest support for the position that factors other than lateral traction on the anterior shoulder are etiologic, however, comes from cases of brachial plexus injury noted after atraumatic cesarean delivery" (*Nobre v Shanahan*, (42 Misc3d at 923]). DeMott further relies on another 1997 study identifying "several cases of permanent Erb palsy associated with birth that were not attributable to traction applied at delivery" (Joseph G. Ouzounian, et al., Permanent Erb Palsy: A Traction–Related Injury?, 89 OBSTETRICS & GYNECOLOGY 139, 139 [1997]). Finally, DeMott cites an unsubmitted article by "Doctors G. Stirrat and RW Taylor" from 2002 that states "[d]amage to the plexus of the posterior shoulder can occur and is associated with pressure on the sacral promontory. This is not due to any action of the accoucheur (birth attendant) and is, therefore, not negligent by definition" [Defendants' Ex. O, ¶ 16]. DeMott generally cites several other articles that were not submitted or quoted [Defendants' Ex. O, ¶ 15-17].

Finally, DeMott criticizes Soffer's affidavit in support of the Motion. As critical here, DeMott states that "[t]here is no evidence in this delivery of any traction applied by Dr. Hinds that was anything but axial in direction, i.e., there is no evidence of inappropriate lateral traction" [Defendants' Ex. O, ¶ 17.5].

Ultimately, DeMott states that "lack of proper rotation led to a shoulder dystocia" [Defendants' Ex. O, ¶ 19].

Defendants further submit the affidavit of Dr. Michele Grimm, a biomedical engineer. Grimm asserts she has studied human physiology, gross anatomy, and the biomechanics of both physiological processes and tissue response, as well as written and taught on each of these subjects [Defendants' Ex. P, ¶ 1-6]. Grimm uses Mathematical Dynamic Model, a commercially available software program, used in biomedical research, known by its acronym, "MADYMO."[5] For purposes of her work, Grimm models a 90th percentile newborn by reducing the software's model for a 9 month-old crash test dummy [Defendants' Ex. P, ¶ 7]. The maternal pelvis of the model is built according to the 50th percentile dimension of a female bony pelvis [Defendants' Ex. P, ¶ 7]. Grimm states that "[a]ll of the opinions expressed herein are stated to a reasonable degree of biomedical engineering and scientific certainty" [Defendants' Ex. P, ¶ 9]. Grimm notes that "[t]here is nothing in [the Mother's] records to suggest that the injury to the [Infant Plaintiff]'s right brachial plexus happened before labor began or was due to some condition of the uterus"' [Defendants' Ex. P, ¶ 15].

Grimm concludes that the "injury was due to the forces of labor – resulting from the forces of uterine contraction and the mother pushing - -in combination with the normal, axial traction applied by Dr. Hinds through the vacuum. The stretch that resulted in the injury was due to differential motion between the infant's neck and torso – and consequent widening of the angle between her neck and shoulder – that occurred when the infant's shoulder became impacted behind the symphysis pubis as the shoulder

[5] See *Ruffin ex rel. Sanders v Boler*, (384 Ill App 3d 7, 14-16 [Ill App Ct 2008], *lv denied* 229 Ill.2d 695 [2008]) for a significant discussion of the software.

dystocia occurred" [Defendants' Ex. P, ¶ 16]. Grimm states that while the Mother "was noted to be pushing ineffectively, there is no indication that she was not pushing at all during the application of the vacuum" [Defendants' Ex. P, ¶ 18]. Grimm also asserts that Dr. Hind's deposition[6] indicated the Mother was responding to involuntary pushing [Defendants' Ex. P, ¶ 18]. Grimm also relies on the Mother's statement that she remembers pushing up until the time it "got a little chaotic" to conclude that maternal pushing efforts were present "through the time when the infant's head delivered" [Defendants' Ex. P, ¶ 18]. Based on this, Grimm concludes that maternal forces during the Infant Plaintiff's delivery would have been between 22.5- 38.2 lbf and predicted an 18% stretch [Defendants' Ex. P, ¶ 18]. Additionally, Grimm notes that "[w]hile downward, lateral bending of the infant's neck by the delivering clinician is one possible mechanism through which a permanent injury to the brachial plexus can occur, there is no evidence in this case that such bending was applied to the infant plaintiff's head/neck by Dr. Hinds" [Defendants' Ex. P, ¶ 25].

Defendants rely primarily on three court cases in their opposition to the Motion. In *Munoz v Rubino*, (37 Misc 3d 1216), a trial court found, without a hearing, that the maternal forces of labor theory met the *Frye* standard. In that case, the trial court makes no reference to *Parker* and only passing reference to *Muhammad v Fitzpatrick*, never considering the specific test laid out in *Muhammad v Fitzpatrick* – that defendant's expert

[6] Hinds repeatedly in his deposition stated he had no or only vague memory of the delivery and relied on the records [Defendants' Ex. K p. 22, 142, 151]. Grimm appears to be referring to Hinds' discussion of laboring down and involuntary pushing [Defendants' Ex. K, p. 112-113].

adequately establish that plaintiff was exposed to a sufficiently harmful event to cause the injury.

Defendants next rely on *Ross v Gerardi,* (Sup Ct, Schenectady County, February 15, 2017, Versaci, J., index No. 2014-2534). In that case, the Court excluded the Lerner Case report, a study that purports to document a case of permeant brachial plexus injury without shoulder dystocia, finding it to be "a flawed study that lacks trustworthiness" and has the "potential to mislead or confuse the jury" (*id.* at 7). The court next considered Grimm's research as well as other research in support of the maternal forces of labor theory (*see id.* at 7-14). The court found that the maternal forces of labor theory met the *Frye* standard (*see id.* at 12). Notably, the court also found a proper foundation had been laid in that case under *Parker* (*see id.* at 13). The court noted that the nurses' notes documented significant delivery forces, "including at least two contractions at the moment the shoulder dystocia was identified" (*id.*). In addition, the infant plaintiff "was born with significant bruising of the face, arms and some bruising of the torso" (*id.*). The court specifically noted this factual distinction from *Nobre v Shanahan* and *Sutryk v Osula* (*see id.*).

Most significantly, Defendants rely upon *Ambrose v Brown*, (170 AD3d 1562 [4th Dept 2019]). The case involved significant procedural complexity that is not at issue here. As relevant here, the Appellate Division, Fourth Department "conclude[d] that the trial court did not abuse its discretion in allowing defendants to set forth a defense that the injuries sustained by the child could have occurred during the birthing process . . .

[and] reject[ed plaintiffs'] contention that defendants failed to lay the proper foundation for their defense under *Parker v Mobil Oil Corp.*, [finding that] [u]nlike in *Muhammad*, defendants [t]here met both the specific and general causation prongs of the *Parker* test" *(Ambrose v Brown* 170 AD3d at 1563 [internal quotation citations omitted]). Critically, the court did not state what facts were present that allowed defendants to meet the specific and general causation prongs of *Parker* and the court did not overrule its earlier ruling in *Muhammad v Fitzpatrick.*

DEFENDANTS' MATERNAL FORCES OF LABOR THEORY MEETS THE *FRYE* STANDARD.

"A court need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony" (*People v LeGrand*, 8 NY3d 449, 458 [2007]; *accord Guerra v Ditta*, 185 AD3d 667, 667 [2d Dept 2020]*; see generally People v Williams,* 35 NY3d 24, 38-39 [2020] [Holding New York appellate cases, and out-of-state case law may be used for assessing the general acceptance without a *Frye* hearing]). Significantly, while Plaintiffs have requested a hearing pursuant to *Parker,* in the alternative to preclusion, they did not request a *Frye* hearing and Defendants have not requested either hearing [Plaintiffs' Notice of Motion; Defendants' Attorney Affirmation ¶ 26].

Muhammad v Fitzpatrick represents an outlier in upholding the exclusion of the maternal forces of labor theory under *Frye*. New York Courts have repeatedly held that "[t]he presence of [a brachial plexus] injury does not [necessarily] mean that there was negligence" (*Landau v Rappaport*, 306 AD2d 446, 447 [2d Dept 2003]; *see Henry v*

Bronx Lebanon Med. Ctr., 53 AD2d 476, 480 [1st Dept 1976]; *see also Johnson v St. Barnabas Hosp.*, 52 AD3d 286, 288 [1st Dept 2008], *lv denied* 11 NY3d 705 [2008]; *Burns v Valencia,* 227 AD2d 511, 511 [2d Dept 1996]; *Abbott v New Rochelle Hosp. Med. Ctr.*, 141 AD2d 589, 591 [2d Dept 1988], *lv denied* 72 NY2d 808 [1988]). Beyond generally rejecting Plaintiffs' premise that the injury means that excessive traction must have been the cause of the injury, courts have specifically held that the theory of maternal forces of labor is not based on novel science (*see Ross v Gerardi,* [Sup Ct, Schenectady County, February 15, 2017, Versaci, J., index No. 2014-2534]; *Nobre v Shanahan*, 42 Misc3d at 925; *Munoz v Rubino*, 37 Misc 3d 1216 [A] [Sup Ct, Orange County 2012, Bartlett, J.]). This is consistent with rulings from courts of other states (*see e.g. L.M. by and through Dussault v Hamilton*, 193 Wash 2d 113, 130, 436 P3d 803, 812 [2019]; *Ruffin ex rel. Sanders v Boler*, 384 Ill App 3d 7, 25 [Ill App Ct 2008], *lv denied* 229 Ill2d 695 [2008]; *cf. Bayer ex rel. Petrucelli v Dobbins*, 2016 WI App 65 [2016] [Applying *Daubert*]; *Estate of Ford v Eicher*, 250 P3d 262, 269 [Colo 2011]; *Taber v Roush*, 316 SW3d 139 [Tex App 2010]; *Salvant v State*, 935 So2d 646, 656–657 [La 2006]; *Clark ex rel. Clark v Heidrick*, 150 F3d 912, 915 [8th Cir 1998]).

Likewise, biomechanical engineering has gained acceptance as a subject of admissible expert testimony in New York courts (*see e.g. Guerra v Ditta*, 185 AD3d 667, 668 [2d Dept 2020]; *Shah v Rahman*, 167 AD3d 671, 672-673 [2d Dept 2018]; *Plate v Palisade Film Delivery Corp.,* 39 AD3d 835, 837 [2d Dept 2007]; *Gonzalez v Palen*, 48 Misc 3d 135 [A] [App Term, 1st Dept 2015]). In various situations, notably not all in the

context of *Frye* challenges, all four Appellate Divisions have allowed or relied upon biomechanical engineering principals (*see Shifrel v Singh*, 61 AD3d 401, 402 [1st Dept 2009] [biomechanical engineer permitted to testify that it was unlikely that plaintiff's left shoulder impacted the steering wheel]; *Valentine v Grossman*, 283 AD2d 571, 572-573 [2d Dept 2001] [biomechanical engineer should have been allowed to testify that the force in the accident was insufficient to cause a herniated disc]; *Cocca v Conway*, 283 AD2d 787, 788 [3rd Dept. 2001], *lv denied*, 96 NY2d 721 [2001] [witness allowed to testify that the impact between the vehicles did not have enough force to cause the injuries claimed by the plaintiff]; *Martell v Chrysler Corp.*, 186 AD2d 1059, 1060 [4th Dept 1992] [plaintiff properly permitted to call biomechanical engineer to testify in products liability action]; *see generally* Debra Silber, *The Use of Biomechanical Engineers in Motor Vehicle Accident Trials*, NY St BJ, February 2016, at 48, 50 [collecting the aforementioned cases]; Loren Peck, Note, *How Sound Is the Science? Applying Daubert to Biomechanical Experts' Injury Causation Opinions*, 73 Wash & Lee L Rev 1063, 1064 [2016]).

In *Nobre v Shanahan*, after a *Frye* hearing with Grimm, the court found that her testimony would be admissible under *Frye* (42 Misc 3d at 925). Other states, also applying *Frye*, have found Grimm's testimony to be admissible (*see e.g. Ruffin ex rel. Sanders v Boler*, 384 Ill App 3d 7, 25 [Ill App Ct 2008], *lv denied* 229 Ill2d 695 [2008]) This Court agrees. Grimm's research relies upon animal studies and retrospective analysis; however, the ethical restraints involved in studying an injury such as this to an

infant prevent many other scientific methods from being possible. "To the extent that [Plaintiffs] challenges the methodology of Dr. [Grimm]'s study . . . , these issues are properly the subject of cross-examination at trial, as they go to credibility and to the weight to be given to the evidence" (*Nonnon v City of NY*, 32 AD3d at 107-108).

DEFENDANTS' MATERNAL FORCES OF LABOR THEORY FAILS TO MEET THE SPECIFIC CAUSATION PRONG OF THE *PARKER* TEST.

The only controlling Appellate Court decision in New York sets forth a specific test - "the opinion of defendants' experts on causation should set forth the 'exposure of plaintiff's daughter to a harmful in utero event, that the event is capable of causing the particular injury (general causation) and that plaintiff's daughter was exposed to a sufficiently harmful event to cause the injury (specific causation)'" (*Muhammad v Fitzpatrick,* 91 AD3d at 1354 [internal quotation marks, brackets, and citation omitted]). Defendants' experts fail to meet that test.

Defendants' expert DeMott states that it is his opinion that the "facts in this case provide sufficient foundation to support the [D]efendants' theory that the [I]nfant [P]laintiff's injury resulted from, and can be explained by, the maternal forces of labor" [Defendants' Ex. O, ¶ 4]. While DeMott meets the first part of *Parker* by supporting his opinion that exposure to maternal forces of labor is capable of causing the injury, DeMott offers no evidence that this Infant Plaintiff was ever sufficiently exposed to such force and thus fails *Parker*'s second prong. Expert testimony is inadmissible where the scientific literature is only connected to the plaintiff's situation "'by the *ipse dixit* of the expert'" (*Marsh v Smyth*, 12 AD3d at 312, quoting *General Electric v Joiner*, 522 US at

146). DeMott never quantifies the maternal forces of labor at issue in this case and never establishes how they would have impacted this Infant Plaintiff in any different manner than they do in every single birth where maternal forces of labor impact a child with shoulder dystocia. Additionally, DeMott identifies the wrong shoulder for the injury. This error is not insignificant[7] as DeMott relies upon evidence regarding posterior shoulders [Defendants' Ex. O, ¶ 15, 16].[8] Critically, DeMott points to nothing in the record to show that Infant Plaintiff was exposed to the maternal forces of labor – a contraction or pushing – during the shoulder dystocia. Here, DeMott uses his belief that the record lacks evidence of excessive traction to deduce that the injury must have been caused by maternal forces of labor, but "there is simply too great an analytical gap between the data and the opinion proffered" (*Ratner v McNeil-PPC, Inc.*, 91 AD3d at 75, quoting *General Electric v Joiner*, 522 US at 146). Therefore, DeMott's assertion that maternal forces of labor caused the Infant Plaintiffs' injuries is inadmissible (*see Nobre v Shanahan,* 42 Misc 3d at 927; *see also Muhammad v Fitzpatrick,* 91 AD3d at 1354; *cf. Ivory v Intl. Bus.*

[7] "During a vaginal delivery, a newborn's shoulder can sometimes get stuck in the birth canal behind parts of the mother's anatomy. This condition is called shoulder dystocia. There are two places where a newborn's shoulder can get stuck. The first is behind the mother's sacral promontory, a part of the tailbone. When a newborn's shoulder gets stuck in this location, the condition is referred to as a posterior shoulder dystocia. A posterior shoulder dystocia occurs before the newborn's head has crowned. The second place a newborn's shoulder can get stuck is behind the mother's pubic symphysis. The pubic symphysis is the fixed joint located at the front of the pelvic girdle, where the two pubic bones meet. It is not actually a bone, but is comprised of cartilage, so is similar to a bone in terms of its rigidity. This location is farther along the birth canal. When a newborn's shoulder gets stuck in this location, the condition is referred to as an anterior shoulder dystocia. An anterior shoulder dystocia occurs after the newborn's head has crowned. In fact, a newborn's head commonly retreats back into the birth canal after initially crowning if there is an anterior shoulder dystocia, a condition known as the turtle sign" (*Lawrey v Good Samaritan Hosp.*, 751 F3d 947, 949 [8th Cir 2014]).

[8] Notably, Defendants' counsel and DeMott submit unauthorized supplemental affirmations seeking to correct this error. DeMott conclusively states that "[t]his error does not change the principles discussed in my earlier affidavit regarding this delivery, nor does it change my previously expressed opinions."

Machines Corp., 116 AD3d at 126; *compare Jackson v Nutmeg Tech., Inc.*, 43 AD3d at 602).

Likewise, Grimm's testimony fails to meet the specific causation prong of *Parker*. Grimm asserts that "there is no indication that she was not pushing at all during the application of the vacuum" [Defendants' Ex. P, ¶ 18]. Grimm further relies on the Mother's testimony that she was pushing up until it "got a little chaotic" [Defendants' Ex. P, ¶ 18]. Neither of these assertions actually show Infant Plaintiff *was*, rather than could possibly have been, exposed to sufficient maternal forces of labor to cause the injury. Grimm then begins to extrapolate from this possibility to conclude other possibilities. She opines that "[e]ffective pushing in a primiparous patient more than doubles the outward force on the infant compared to contractions alone" [Defendants' Ex. P, ¶ 18]. Despite this assertion, she does not point to where the record establishes such "effective pushing" was at work in *this* case. From there, Grimm concludes a stretch of 18% based on a 22.5 lbf [Defendants' Ex. P, ¶ 18]. She goes on to state that "the range of failure thresholds measured indicates that about 13% of the population will experience a nerve root rapture at between 11 and 20% stretch" [Defendants' Ex. P, ¶ 23]. But Grimm again does not connect that alleged fact to this case, as the possibility that the injury *could* have occurred from a certain cause does not create a scientific *probability* that it in fact was caused by such.

Grimm's proffered testimony has an additional foundational issues. Grimm states that "[t]he traction that is applied through a vacuum to assist with delivery is limited by

the design of the vacuum. From an engineering point-of-view, if traction is applied that is greater than the vacuum force that is developed between the vacuum cup and the scalp, the vacuum will pop off" [Defendants' Ex. P, ¶ 19]. Grimm lays no foundation as to her knowledge of vacuum assisted delivery or how the mechanism works, no less how it could have been used in this case. Further, Grimm's research is based on the head already being delivered, which is not the case here [Plaintiffs' Reply Ex. D, p. 152].

This lack of foundation for specific causation is characteristic of Grimm's methodology. Grimm has testified that she cannot draw any specific conclusions about any specific delivery based upon her research [Plaintiffs' Reply Ex. D, p. 164]. This fact led the court in *Nobre v Shanahan* to note that "Dr. Grimm admits that she has not applied her computer model to this particular birth and that she could not directly correlate brachial plexus strain to brachial plexus injury in a given individual" (42 Misc 3d at 929).

The record here supports the same conclusion as held by the *Nobre v Shanahan* court, Defendants have failed to meet their burden of establishing specific causation under *Parker* (*see* 42 Misc 3d at 929; *see also Muhammad v Fitzpatrick*, 91 AD3d at 1354; *cf. Guerra v Ditta*, 185 AD3d at 668; *Dovberg v Laubach*, 154 AD3d 810, 813 [2d Dept 2017]).

Precedent does not require a different outcome. *Ambrose v Brown, (supra)* provides no factual basis for affirming the trial court's ruling regarding the *Parker* specific causation test. Notably, the Appellate Division, Fourth Department did not

overrule *Muhammad v Fitzpatrick* (*supra*), therefore, a fact specific test must be applied. *Munoz v Rubino*, (*supra*) did not address *Parker*. Most significantly, *Ross v Gerardi,* (*supra*) presented factual support in the record that does not exist here. In that case, the Court noted that there was documentation of contractions during the shoulder dystocia, the mother continued to push during the shoulder dystocia, and there was "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" (*Ross v Gerardi,* index No. 2014-2534 at *13).

Finally, the Court notes that Defendants state they only wish to assert "that the evidence in this case does not allow it to be stated to a reasonable degree of medical certainty that excessive or misapplied force by [Defendant Dr. Hinds] was the proximate cause of the" Infant Plaintiffs' injury [Defendants' Aff. ¶ 2]. To the extent that this assertion is seeking to justify the introduction of the maternal forces of labor theory through a differential diagnosis, Defendants lack a proper foundation. "A differential diagnosis has been described as a patient-specific process of elimination that medical practitioners use to identify the 'most likely' cause of a set of signs and symptoms from a list of possible causes" (*Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 435 [1st Dept 2008], *lv dismissed* 12 NY3d 847 [2009]). "In short, differential diagnosis requires physicians to both 'rule in' and 'rule out' the possible causes of the patient's symptoms through accepted scientific reasoning and diagnostic tests" (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d at 776). Defendants here have failed to establish that their belief

that the record does not show excessive traction, thereby establishes maternal forces of labor, nor have they shown that maternal forces of labor were sufficient in this case, therefore, they are precluded from offering testimony that the injury was caused by such forces (*see generally Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d at 785). To the extent Plaintiffs seek to offer testimony that the injury can only be caused by excessive traction, rather than a theory that excessive traction is established in this case, Defendants are free to rebut such testimony with evidence regarding the maternal forces of labor. They may not, however, elicit testimony that maternal forces of labor were present in this case or that they were the cause of the injury at issue.

Future Court Dates

The Court will be scheduling the matter for a Teams Part 1 Settlement conference. Parties' counsel are to provide three mutually agreeable dates and times to Part 1 Chambers (fisherchambers@nycourts.gov) or the Supreme Court Clerk. At the proceeding, the Court will hear arguments regarding monetary sanction, including costs and counsel fees, with regards to Defendants failure to disclose expert information (*see Maxim, Inc. v Feifer*, 161 AD3d at 554). Further, the Court will consider any request for an adjournment of the trial to ameliorate any prejudice to Plaintiffs resulting from the belated disclosure (*see Elgart v Berezovsky*, 123 AD3d at 972). Relatedly, the Court notes the Memorandum of Chief Administrative Judge Marks dated November 13, 2020, temporarily suspending jury trials.

Accordingly, it is

ORDERED, Plaintiffs' Motion to Preclude is **granted**.

This shall constitute the Decision, Order and Judgment of the court. This Decision, Order and Judgment is being returned to the attorney for Plaintiffs. All original supporting documentation is being filed with the Greene County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that rule relating to filing, entry and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: November 23, 2020
Catskill, New York

RAYMOND J. ELLIOTT, III
Supreme Court Justice

Papers Considered:

1. Plaintiffs' Notice of Motion dated February 18, 2020; Attorney Affirmation dated February 18, 2020; Annexed Exhibits A-F.
2. Defendants' Attorney Affirmation in Opposition to the Motion dated April 15, 2020; Annexed Exhibits A-P.
3. Defendants' Memorandum of Law in Opposition to the Motion dated April 15, 2020; Annexed Exhibit A.
4. Defendants' Supplemental Attorney Affirmation in Opposition to the Motion dated June 30, 2020; Supplemental Affirmation of Dr. Robert DeMott, M.D., dated June 30, 2020.
5. Plaintiffs' Affirmation in Reply dated July 10, 2020; Annexed Exhibits A-T.