SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ORANGE

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PATRICE MUNOZ, an infant, by her mother and natural guardian, PEGGY CONKLIN,

Plaintiff,

-against-

BELINDA RUBINO, C.N.M., ORANGE REGIONAL MEDICAL CENTER f/k/a HORTON MEDICAL CENTER, and HORTON MEDICAL CENTER,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 1212/2011
Motion Date: August 31, 2012

The following papers numbered 1 to 11 were read on defendant Belinda Rubino's motion for summary judgment and plaintiff's cross-motion to preclude defendant's expert or for a *Frye* hearing:

Notice of Motion-Affirmation-Memorandum of Law-Exhibits. . . . . 1-4

Notice of Cross-Motion-Affirmations-Exhibits.. . . . . 5-9

Affirmation in Opposition to Cross-Motion and in Reply-Exhibits. . . . . 10-11

Upon the foregoing papers, the application is disposed of as follows:

This is an action sounding in medical malpractice wherein the plaintiff claims, among other allegations, that defendant Belinda Rubino caused the infant plaintiff to suffer a left sided Erb's palsy during her delivery. It should be noted from the outset that the parties stipulated to

discontinue as against all defendants except Rubino, and therefore Rubino is the sole remaining defendant in this action.

Defendant Rubino, in support of her motion for summary judgment, submits among other things, her own affidavit and that of an obstetrician, Dr. Robert H. Dropkin. According to Ms. Rubino's affidavit, the infant plaintiff was positioned so that the right shoulder was higher than the left shoulder with the right shoulder pressing on the pubic bone. She states that a left sided shoulder dystocia would be more likely on the right rather than the left given the child's position, and that it was unlikely that the left shoulder came into contact with the pubic bone. Ms. Rubino further noted that while the infant had decreased left arm movement, there was no evidence of shoulder dystocia which would have been noted in the record either by her or one of the two other physicians attending to the infant's mother. Moreover, there is no indication in the hospital record that any of the delivery maneuvers likely to cause shoulder dystocia were implemented in this case. Ms. Rubino claims there was no shoulder dystocia present at the time of the birth, and there was nothing she either did or did not due to cause the claimed Erb's palsy.

Dr. Dropkin submits an affirmation in support of Rubino's motion for summary judgment. In that affirmation, he concludes that there is nothing in the record to indicate that Rubino did anything wrong, that Erb's palsy can occur due to in utero fetal positioning, that there was no evidence of shoulder dystocia in this case, and that the Erb's palsy "could" have been caused by intrauterine fetal positioning or events at delivery unrelated to anything done by Rubino.

In opposition, plaintiff submits the affirmation of Dr. Bruce L. Halbridge, an obstetrician, concludes that the medical records indicate that Rubino actually applied too much traction to the

infant during delivery. He states that the records indicate that Rubino attempted a McRobert's maneuver which was not properly handled and that the infant exhibited signs of shoulder dystocia at birth. Furthermore, plaintiff submits the affirmation of Dr. Rosario R. Trifiletti, a pediatric neurologist, who opines that Rubino's excessive pulling on the infant's left arm any applying excessive traction to her resulted in the infant's Erb's palsy condition. He refers to several journal articles substantiating the position that traction on a baby's head and neck causes Erb's palsy.

Plaintiff affirmatively moves to preclude defendant's expert, Dr. Dropkin, from testifying concerning the cause of plaintiff's Erb's palsy being an in utero complication or the delivery process unrelated to Rubino's actions since Dr. Dropkin's opinion is novel and not accepted in the medical community. Alternatively, plaintiff moves for a *Frye* hearing to test Dr. Dropkin's theory.

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage (*see Castro v New York City Health & Hosps. Corp.,* 74 AD3d 1005; *Deutsch v Chaglassian,* 71 AD3d 718, 719; *Geffner v North Shore Univ. Hosp.,* 57 AD3d 839, 842). A defendant moving for summary judgment in a medical malpractice action has the initial burden of establishing, prima facie, either the absence of any departure from good and accepted medical practice or that any departure was not the proximate cause of the alleged injuries (*see Shichman v Yasmer,* 74 AD3d 1316; *Larsen v Loychusuk,* 55 AD3d 560, 561; *Sandmann v Shapiro,* 53 AD3d 537).

"Summary judgment is a drastic remedy that 'should not be granted where there is any

doubt as to the existence of a triable issue' (citations omitted). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court (citations omitted)." *Russell v A. Barton Hepburn Hosp.*, 154 AD2d 796, 797 (3rd Dept. 1989); *See also, Moskowitz v Garlock*, 23 AD2d 943, 944 (3rd Dept., 1965).To grant summary judgment it must clearly appear that no material and triable issue of fact is presented . . .This drastic remedy should not be granted where there is any doubt as to the existence of such issues,...or where the issue is 'arguable'...; 'issue finding, rather than issue-determination, is the key to the procedure.'" *Pirrelli v Long Island Railroad,* 226 AD2d 166 (1st Dept. 1996)(quoting *Sillman v Twentieth Century-Fox,* 3 NY2d 395, 404). In making this determination, the court must view the evidence in the light most favorable to the non-moving party, and accord the non-moving party the benefit of every reasonable inference. *See, Negri v Stop and Shop, Inc.,* 65 NY2d 625 (1985); *Rizzo v Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995); *Rose v De ECIB USA,* 259 AD2d 258, 259 (1st Dept. 1999). The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *See, Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

While summary judgment is an available remedy in some cases, its dire effects preclude its use except in "unusually clear" instances. *Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County,1941). "A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a 'day in court.'" *Wanger v Zeh*, 45 Misc2d 93, 94 (Sup. Ct., Albany County, 1965), *aff'd* 26 AD2d 729 (3rd Dept.1966).

Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or "fairly debatable," summary judgment must be denied. *Bakerian v H.F. Horn*, 21 AD2d 714 (1st Dept. 1964); *Jones v County of Herkimer*, 51 Misc2d 130, 135 (Sup. Ct., Herkimer County, 1966); *Town of Preble v Song Mountain, Inc.*, 62 Misc2d 353, 355 (Sup. Ct., Courtland County, 1970); *See also, Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 404 (1957). The drastic remedy of summary judgment is rarely granted in negligence cases since the very question of whether the defendant's conduct was indeed negligent is a jury question except in the most glaring cases. *See, Johannsdottir v Kohn*, 90 AD2d 842 (2nd Dept. 1982).

Courts are not authorized to try issues in a case, but rather to determine whether there is an issue to be tried. *Esteve v Abad*, 271 AD 725, 727 (1st Dept. 1947). "Issue-finding, rather than issue-determination, is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Id.; Sillman*, 3 NY2d at 404.

The first issue to be addressed is whether Rubino is entitled to summary judgment. In support of her motion, her affidavit states that she did not perform any maneuvers which would lead to a brachial plexus injury. She indicates that the infant was positioned such that the left shoulder would not have been subjected to the necessary condition to bring about Erb's palsy, and that there was nothing she did affirmative to cause any injury to the infant plaintiff. The affidavit creates a prima facie case for summary judgment in that there was neither a departure nor a proximate cause for plaintiff's injury.

Dr. Dropkin's affirmation, however, is another issue. His affirmation is nothing other than a conclusory opinion that Rubino did nothing wrong. *See, Johnson v Queens-Long Island Medical Group, P.C.*, 23 AD2d 525, 527 (2nd Dept. 2005). His assertion that the injury "could" have been caused by other factors is unsupported and therefore his affirmation cannot be considered. As such, the Court is left with Rubino's own affidavit which, as previously articulated, made out a prima facie case for summary judgment.

In opposition, plaintiff submits the affidavits of two physicians who render disparate opinions based upon the testimony of the parties, the hospital records and their expertise in their respective fields which conclude that excessive traction was the cause of the infant's injuries, and that Rubino actually engaged in giving excessive traction. These disparate opinions concerning the ultimate issue in the case creates an issue of fact which may not be resolved on a motion for summary judgment. *Bieman v Thurn*, 295 AD2d 970 (4th Dept. 2002); *Pittman v Rickard*, 295 AD2d 1003, 1004 (4th Dept. 2002); *Peebles v New York City Housing Authority*, 295 AD2d 189, 190-191 (1st Dept. 2002); *Rosenbaum v Camps Rov Tov*, 285 AD2d 894, 895 (3rd Dept. 2001); *Salva v Blum*, 277 AD2d 985, 986 (4th Dept. 2000); *Gleeson-Casey v Otis Elevator Co.*, 268 AD2d 406, 407 (2nd Dept. 2000); *Williams v Lucianatelli*, 259 AD2d 1003 (4th Dept. 1999).

In *Gleeson-Casey*, *supra*, the Court held that " 'the weight to be afforded the conflicting testimony of experts is a matter particularly within the province of the jury [cit. om.].' " *Gleenson-Casey*, 268 AD2d at 407.

In *Peebles, supra*, the New York City Housing Authority was sued, among other defendants, in its capacity as the owner of the subject premises. An infant plaintiff was injured while sliding down a playground slide after the plaintiff's right sleeve of her sweater became

entangled on a protruding bolt. On a motion to renew, the plaintiffs submitted the affidavit of an expert who opined that the slide deviated from accepted industry standards and constituted a catching hazard. The Court held that the plaintiffs' expert affidavit raised a material issue of fact as to the proper design and construction of the slide at issue, presenting a the classic "battle of the experts" scenario as it conflicted with the affidavit from defendant's expert, and therefore it was an error to grant summary judgment. *Peebles*, 295 AD2d at 190-191.

In the case at bar, the conflicting affidavit of the defendant and plaintiffs' expert affirmations raise material issues of fact which require that the motion for summary judgment be denied.

The next issue for determination is plaintiff's cross-motion to preclude defendant's expert or for a *Frye* hearing concerning Dr. Dropkin's theory of causation. New York courts, applying the *Frye* test (*see, Frye v United States*, 293 F 1013 [1923]), permit expert testimony based upon scientific principles, procedures, or theories only after the principles, procedures, or theories have gained general acceptance in the relevant scientific field. *See, People v Wesley*, 83 NY2d 417, 422 (1994).

In the past, *Frye* hearings were rarely conducted in New York courts except where the evidence being presented was novel. In recent years, such hearings have become more commonplace. Generally, the court will allow professional to testify as experts and allow the process of cross-examination to assist the jury in its role to weigh the opinions of competing experts. This is predicated upon attorneys presenting admissible evidence of a novel scientific theory or one which has not gained general acceptance in the scientific community.

Plaintiff submits the affirmations of two physicians and cite to several medical journal

articles noting the cause of brachial plexus injuries which refute Dr. Dropkin's assertions. Plaintiff further relies upon the Fourth Department's decision in *Muhammad v Fitzpatrick*, 91 AD3d 1353 (4th Dept. 2012) which precluded testimony after a *Frye* hearing on brachial plexus injuries.

Defendant opposes the cross-motion, submitting a further affirmation of Dr. Dropkin and the affirmation of Dr. Steven G. Pavlakis, a pediatric neurologist both of whom rely upon multiple medical journal articles noting that brachial plexus injuries may occur in ways other than those claimed by plaintiff's experts, and that members of the scientific community accept those as other causes of such injuries.

As expressed in *Lugo v New York City Health and Hospitals Corporation*, 89 AD3d 42 (2nd Dept. 2011):

> In accordance with this holding, a *Frye* inquiry is directed at the basis for the expert's opinion and does not examine whether the expert's conclusion is sound. "*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 A.D.3d at 103, 819 N.Y.S.2d 705, quoting *Marsh v. Smyth,* 12 A.D.3d 307, 308, 785 N.Y.S.2d 440; *see Lipschitz v. Stein,* 65 A.D.3d at 576, 884 N.Y.S.2d 442; *Alston v. Sunharbor Manor, LLC,* 48 A.D.3d 600, 602, 854 N.Y.S.2d 402; *DieJoia v. Gacioch,* 42 A.D.3d 977, 979, 839 N.Y.S.2d 904; *see also Ellis v. Eng,* 70 A.D.3d 887, 892, 895 N.Y.S.2d 462). 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 Mgt. Corp.,* 195 Misc.2d 223, 225, 758 N.Y.S.2d 777). " '[G]eneral 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 A.D.3d at 44, 812 N.Y.S.2d 535, quoting *Beck v. Warner–Lambert Co.,* 2002 N.Y. Slip Op. 40431[U], *6–7, 2002 WL 31107923).
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> Thus, the limited purpose of the *Frye* test is to ascertain whether the expert's

> conclusion is based upon accepted scientific principles, rather than simply the expert's own unsupported beliefs (*see DieJoia v. Gacioch,* 42 A.D.3d at 980, 839 N.Y.S.2d 904; *Zito v. Zabarsky,* 28 A.D.3d at 46, 812 N.Y.S.2d 535; *see also Rowe v. Fisher,* 82 A.D.3d 490, 491, 918 N.Y.S.2d 342).

*Lugo*, 89 AD3d at 56. The *Lugo* Court went on to further state:

> New York courts have also applied the *Frye* test to assess the reliability of an expert's theory of causation in a particular case. For this category of expert opinion testimony, "it is not necessary 'that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff's expert' " (*Zito v. Zabarsky,* 28 A.D.3d at 44, 812 N.Y.S.2d 535, quoting *Marsh v. Smyth,* 12 A.D.3d at 312–313, 785 N.Y.S.2d 440 [Saxe, J., concurring]; *see DieJoia v. Gacioch,* 42 A.D.3d at 979, 839 N.Y.S.2d 904). "The fact that there [is] no textual authority directly on point to support the [expert's] opinion is relevant only to the weight to be given the testimony, but does not preclude its admissibility" (*Zito v. Zabarsky,* 28 A.D.3d at 46, 812 N.Y.S.2d 535; *see DieJoia v. Gacioch,* 42 A.D.3d at 979, 839 N.Y.S.2d 904).
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> Accordingly, this Court has affirmed the preclusion of expert testimony as to causation in circumstances where there was a complete absence of any literature or studies supporting the particular causation theory espoused by the expert. For example, in *Cumberbatch v. Blanchette,* 35 A.D.3d 341, 825 N.Y.S.2d 744, the plaintiff's expert could cite to no relevant scientific data or studies to support his causation theory that fetal distress resulting from the compression of the infant plaintiff's head due to labor contractions, augmented by Pitocin, resulted in ischemia, which, in turn, resulted in an infarction, and he could cite to no instance when this type of injury had previously occurred in that manner (*id.* at 342, 825 N.Y.S.2d 744). Thus, this Court concluded that the opinion of the plaintiff's expert was scientifically unreliable (*id.* at 342–343, 825 N.Y.S.2d 744). Similarly, in *Lewin v. County of Suffolk,* 18 A.D.3d 621, 795 N.Y.S.2d 659, the plaintiffs' experts conceded that no scientific organization or national board has expressly recognized a causal relationship between in utero exposure to the pesticide Malathion and birth defects, and the peer-reviewed scientific articles and textbooks relied upon by the plaintiffs' experts did not establish the existence of such a relationship (*id.* at 622, 795 N.Y.S.2d 659). Under those circumstances, this Court concluded that the methodology employed by the plaintiffs' experts in correlating such exposure to birth defects was "fundamentally speculative" and that the Supreme Court had properly precluded the plaintiffs' experts from testifying (*id.*). And in *Hooks v. Court St. Med., P.C.,* 15 A.D.3d 544, 790 N.Y.S.2d 679, the plaintiff's expert could not cite to any relevant scientific data or

studies showing a causal link between the misuse of an electric muscle-stimulating unit and glossopharyngeal neuralgia to support his theory that the improper placement of electrodes of an electrical muscle-stimulating unit on the anterior neck of a patient can cause permanent nerve damage, and he could cite to no instance when that type of injury had previously occurred in that manner (*id.* at 545, 790 N.Y.S.2d 679). Accordingly, this Court determined that the expert's opinion was scientifically unreliable (*id.*).

Standing in sharp contrast are cases in which the expert's opinion satisfied the *Frye* test because it was deduced from generally accepted scientific principles and supported by existing data or literature, although the expert could not point to a case or study involving circumstances exactly parallel to those at issue in the litigation to support his or her theory of causation. For instance, in *DieJoia v. Gacioch,* 42 A.D.3d 977, 839 N.Y.S.2d 904, the Appellate Division, Fourth Department, concluded that the Supreme Court had applied the *Frye* test too restrictively in precluding the plaintiff's experts from testifying that a cardiac catheterization in the plaintiff's groin was the cause of the plaintiff's aortic thrombosis, which led to an acute spinal cord infarct and paralysis (*id.* at 977–978, 839 N.Y.S.2d 904). Although the experts did not produce medical literature documenting a prior case study in which cardiac catheterization through the groin was the cause of aortic thrombosis that led to an acute spinal cord infarct and paralysis or linking a cardiac catheterization in the groin to these injuries, the conclusions of the plaintiff's experts were nonetheless deemed admissible under *Frye* because they were based on accepted scientific principles involving medicine and the vascular system and were not based solely upon the experts' own unsupported beliefs (*id.* at 979–980, 839 N.Y.S.2d 904). Similarly, in *Zito v. Zabarsky,* 28 A.D.3d 42, 812 N.Y.S.2d 535, the opinion testimony of the plaintiff's expert that there was a causal connection between an allegedly excessive dose of Zocor, a cholesterol-lowering drug, and the onset of polymyositis, was precluded by the Supreme Court, which concluded that the *Frye* test could not be satisfied without medical literature expressly reporting a connection between an excessive dose of Zocor and the onset of the disease (*id.* at 44–45, 812 N.Y.S.2d 535). This Court concluded that the Supreme Court's application of the *Frye* test was “overly restrictive” because the plaintiff's experts had supported their theory of a causal nexus between an excessive dose of Zocor and polymyositis with generally accepted scientific principles and existing data, including a case study documenting a patient who had been diagnosed with polymyositis after being prescribed a generic form of Zocor at a dosage different than that prescribed to the plaintiff (*id.* at 45, 812 N.Y.S.2d 535). This Court held that the theory of causation of the plaintiff's experts “was based upon more than theoretical speculation, or a scientific ‘hunch,’ ” and that the lack of textual authority directly on point pertained to the weight to be given to the experts' testimony, but did not preclude its admissibility (*id.* at 46, 812 N.Y.S.2d 535).

*Lugo*, 89 AD3d at 57-59.

In the instant case, the affirmation of Dr. Dropkin and Pavlakis submitted in opposition to the plaintiff's cross-motion and the medical literature upon which they rely sufficiently satisfy the *Frye* test in this case without the need for a hearing on the issue. Whether their opinions are accepted by a jury is a question which is not for this Court to answer. The sole issue is whether there is sufficient basis for acceptance of those theories in the scientific community. That question has been answered, on this record, in the affirmative. The weight which to give the evidence is within the jury's province. However, its admissibility, is this Court's province. Given the submissions, plaintiff's cross-motion is denied in its entirety.

The foregoing constitutes the decision and order of this Court.

Dated: September 6, 2012 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT,
A.J.S.C.