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INDEX No. 23997/2011
CAL No. 201602138MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

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J.T.M., an infant, by his Parents and Natural Guardians, ERICA McSWEENEY and TERRENCE McSWEENEY, and ERICA McSWEENEY, Individually and TERRENCE McSWEENEY, Individually,

Plaintiffs,

-against-

SALVATORE PARRINELLO, WILLIAM R. BRANCACCIO, BARBARA J. CUSUMANO, ROBERT J. GOTTLIEB, ALEXANDRA HALITSKY, JOSEPH B. QUINN, SOUTHAMPTON PEDIATRIC ASSOCIATES, P.C., and SOUTHAMPTON HOSPITAL and SOUTHAMPTON RADIOLOGY, P.C.,

Defendants.

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In this action to recover damages for medical malpractice, Defendants, Barbara J. Cusumano, Robert J. Gottlieb, Alexandra Halitsky, Joseph B. Quinn and Southampton Pediatric Associates, P.C., move for an order precluding the plaintiffs from offering expert testimony in

support of their theory of causation and for a *Frye* hearing.[1] In sum, the defendants claim that the theory of causation proffered by the plaintiffs is novel, lacks a scientific basis and is generally not accepted in field of medicine.

The plaintiffs have opposed this application.

The infant plaintiff, J.T.M., was born with an arachnoid cyst in his brain. It is alleged that the arachnoid cyst was not diagnosed until J.T.M. was 20 months of age and was operated on when he was 22 months of age. The plaintiffs claim that the arachnoid cyst grew in size and as it did the cyst compressed or crushed the adjacent right temporal lobe causing brain injury to J.T.M.. In sum, the plaintiffs contend that the arachnoid cyst should have been diagnosed when a CT scan was performed and interpreted when J.T.M. was two months of age. Further, the plaintiffs claim that the defendant pediatricians who cared for J.T.M. from birth to the age of 17 months should have referred him for evaluation by a child neurologist or for re-imaging of his brain.

Relevant to the application currently before this Court, the plaintiffs served the defendants with an expert witness notice and a report from Dr. Daniel Adler, M.D., both of which are dated April 8, 2019. Dr. Adler opines that the delayed diagnosis and treatment of the arachnoid cyst "was a substantial factor in causing damage to J.T.M.'s brain resulting in developmental delays and severe intellectual impairment accompanied by associated problems in behavior and communication with features of 'Autistic Spectrum Disorder' ('ASD')." (CPLR 3101[d] notice at page 2, paragraph 3).

In support of this motion, the defendants have submitted an affidavit from Dr. Yitzchak Frank, M.D., a Board Certified Neurologist who specializes in pediatric neurology and neurodevelopmental disorders, including ASD.

According to Dr. Frank:

> "Dr. Adler's theory of causation is quite novel and lacks any specific foundation generally accepted in the medical specialties of pediatrics, psychiatry, neurology or neurodevelopmental disabilities. This is so whether one examines the *general* proposition that a growing arachnoid cyst, or any growing tumor or lesion in the brain, can cause autism; or whether one examines the *specific* circumstances of J.T.M.'s condition.
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> I am aware of no school of thought current in the fields of pediatrics, psychiatry,

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[1]At an on the record conference on January 21, 2020, defendants Salvatore Parrinello, William Brancaccio, Southampton Hospital and Southampton Radiology, P.C., orally joined in this application.

> neurology and/or neurodevelopmental disabilities, nor any peer reviewed literature, to support the hypothesis that a brain injury from compression of the right temporal lobe (if such an injury actually existed, see infra), causes a child to have autism. I do not believe that Dr. Adler will be able to point the Court to any such peer reviewed article."

The moving defendants urge that a ***Frye*** is necessary, wherein the plaintiffs are required to call their expert, Dr. Adler, to establish a scientific basis and/or general acceptance of the theories which underlie his opinions regarding causation.

In opposition, the plaintiff's contend that there is nothing novel about Dr. Adler's opinion that the failure of the defendant to properly diagnose J.T.M.'s arachnoid cyst caused permanent brain damage and dysfunction. According to the plaintiffs, the defendants are improperly requesting that this Court go beyond ***Frye*** and narrow its standard by applying a "General v. Specific" standard.

The plaintiffs have submitted an affirmation from Dr. Adler dated January 26, 2020. Dr. Adler states that he is Board Certified in Pediatric Medicine, Neurology with Special Qualification in Child Neurology and Electro-Diagnostic Medicine.

Dr. Adler opines that genetics testing has failed to reveal any evidence of a genetic abnormality known to cause autism. Dr. Adler disagrees with Dr. Frank with respect to his opinion regarding an arachnoid cyst causing global symptoms without causing focal neurological symptoms on the right side. In Dr. Adler's opinion J.T.M.'s developmental delay and associated problems are attributable to brain injury from delayed treatment of the cyst. In paragraph 19 of his affirmation, Dr. Adler explains why J.T.M.'s ASD diagnosis does not alter that opinion:

> "19. JTM's diagnoses of autism disorder (ASD) does not alter that opinion. ASD is a neurodevelopmental disorder characterized by difficulty in social interaction, language and abnormalities of play. ASD is not diagnosed by a blood test or by imaging studies. The diagnosis of ASD arises from the presence of certain behaviors, which are defined by the American Psychiatric Association ("APA"). Because ASD is a behavior-based diagnosis, the diagnosis itself does not identify or exclude any specific cause of the patient's problems in the same way that a diagnosis of cancer or infection does. The signs of ASD overlap with other diagnoses and can have different causes. The APA qualifies the diagnosis of ASD as occurring with or without intellectual impairment, with or without accompanying language impairment, and acknowledges that autistic behaviors can be caused by a "known medical or genetic condition or environmental factor."

Dr. Adler concludes his affirmation by stating:

> "25. It is my medical opinion, to within a reasonable degree of medical certainty that in this case JTM was brain injured by the progressive enlargement of a right

> middle fossa arachnoid cyst that caused permanent global brain injury that is manifested today by a severe neurological, neurodevelopmental and neurobehavioral disorder. My opinion is not based on any "novel" theory but rather supported by my examination, JTM's records and peer-reviewed medical literature regarding global brain dysfunction attributable to arachnoid cysts, including literature cited below."

Dr. Adler lists the following medical literature in support of his opinions:

Levy, M. *Hydrocephalus in children with middle fossa arachnoid cysts.* J. Neurosurgery (Pediatrics 2) 1001:25-31 (2004)

Sgouros, S and Chapman, *S Congenital Middle Fossa Arachnoid Cysts May Cause Global Brain Ischaemia: A Study with 99Tc-Hexamethylpropylenamineoxime Single Photon Emission Computerized Tomography Scans* Pediatric Neurosurgery 35:188-194 (2001)

Shahinian, H.K., Kim, Christina, *Arachnoid Cysts,* National Organization of Rare Disorders (raredisease.org) 2015

Diagnostic and Statistical Manual of Mental Disorders (DSM-5).

The plaintiffs urge that the motion should be denied in its entirety.

The defendants have submitted reply affirmations that reiterate their request for a *Frye* hearing and argue that the motion is not untimely.

In ***Lugo v NYC Health & Hosps.***, 89 A.D.3d 42 [2d Dept. 2011], Justice Covello, in an detailed and comprehensive opinion, discussed ***Frye*** and its applicability to the issue of causation:

> In determining the admissibility of expert testimony, New York follows the rule of ***Frye v United States*** (293 F 1013 [1923]) "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" (***People v Wesley***, 83 NY2d 417, 422, 633 NE2d 451, 611 NYS2d 97 [1994], quoting ***Frye v United States***, 293 F at 1014; see ***People v Wernick***, 89 NY2d 111, 115, 674 NE2d 322, 651 NYS2d 392 [1996]; ***Lipschitz v Stein***, 65 AD3d 573, 575, 884 NYS2d 442 [2009]; ***Nonnon v City of New York***, 32 AD3d 91, 101, 819 NYS2d 705 [2006], affd on other grounds 9 NY3d 825, 874 NE2d 720, 842 NYS2d 756 [2007]; ***Zito v Zabarsky***, 28 AD3d 42, 44, 812 NYS2d 535 [2006]; see also ***Giordano v Market Am., Inc.,*** 15 NY3d 590, 601, 941 NE2d 727, 915 NYS2d 884 [2010]). In Frye, the United States Court of Appeals for the District of Columbia Circuit concluded that expert testimony as to the results of a "systolic blood pressure deception test" was inadmissible because the test had not yet gained general acceptance and

scientific recognition among physiological and psychological authorities (***Frye v United States***, 293 F at 1014). In so concluding, the Frye court articulated the following holding concerning expert opinion testimony based upon deductive reasoning:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs" (id.).

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 AD3d at 103, quoting ***Marsh v Smyth***, 12 AD3d 307, 308, 785 NYS2d 440 [2004]; see ***Lipschitz v Stein***, 65 AD3d at 576; ***Alston v Sunharbor Manor, LLC***, 48 AD3d 600, 602, 854 NYS2d 402 [2008]; ***DieJoia v Gacioch***, 42 AD3d 977, 979, 839 NYS2d 904 [2007]; see also ***Ellis v Eng***, 70 AD3d 887, 892, 895 NYS2d 462 [2010]). 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, 758 NYS2d 777 [2003]). "'[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 AD3d at 44, quoting ***Beck v Warner-Lambert Co.***, 2002 NY Slip Op 40431[U], *6-7 [2002]).

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 AD3d at 980; ***Zito v Zabarsky***, 28 AD3d at 46; see also ***Rowe v Fisher***, 82 AD3d 490, 491, 918 NYS2d 342 [2011]). As Justice Catterson of the Appellate Division, First Department, stated in his concurrence in ***Styles v General Motors Corp***. (20 AD3d 338, 799 NYS2d 38 [2005]), "[t]he 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" (***id***. at 342 [internal quotation marks omitted]). Similarly, as stated by

Justice Saxe of the Appellate Division, First Department, in his concurrence in ***Marsh v Smyth*** (12 AD3d 307, 785 NYS2d 440 [2004]), "[t]he appropriate question for the court at … a [Frye] hearing 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'" (***id***. at 312, quoting ***General Elec. Co. v Joiner***, 522 US 136, 146, 118 S Ct 512, 139 L Ed 2d 508 [1997]).

Since 1923, when Frye was decided, New York courts have applied the Frye test to the results of scientific testing or measurement procedures (see e.g. ***People v Angelo***, 88 NY2d 217, 666 NE2d 1333, 644 NYS2d 460 [1996] [polygraph test results]; ***People v Wesley***, 83 NY2d 417, 633 NE2d 451, 611 NYS2d 97 [1994] [DNA profiling evidence]; ***People v Middleton***, 54 NY2d 42, 429 NE2d 100, 444 NYS2d 581 [1981] [bite mark identification procedure]; ***People v Magri***, 3 NY2d 562, 147 NE2d 728, 170 NYS2d 335 [1958] [use of radar device to measure speed]; ***Styles v General Motors Corp.***, 20 AD3d 338, 799 NYS2d 38 [2005] [procedure combining two separate automobile roof-stress tests]). In addition, the Frye test has been applied to assess the reliability of psychological or physiological theories or syndromes (see e.g. ***People v LeGrand***, 8 NY3d 449, 867 NE2d 374, 835 NYS2d 523 [2007] [expert testimony on the reliability of eyewitness identifications]; ***People v Wernick***, 89 NY2d 111, 674 NE2d 322, 651 NYS2d 392 [1996] [neonaticide syndrome]; ***People v Taylor***, 75 NY2d 277, 552 NE2d 131, 552 NYS2d 883 [1990] [rape trauma syndrome]; ***Oppenheim v United Charities of N.Y.***, 266 AD2d 116, 698 NYS2d 144 [1999] [multiple chemical sensitivity syndrome]).

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 AD3d at 44, quoting ***Marsh v Smyth***, 12 AD3d at 312-313 [Saxe, J., concurring]; see ***DieJoia v Gacioch***, 42 AD3d at 979). "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 AD3d at 46; see ***DieJoia v Gacioch***, 42 AD3d at 979).

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 AD3d 341, 825 NYS2d 744 [2006]), 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). Thus, this Court concluded that the opinion of the plaintiff's expert was scientifically unreliable (***id***. at 342-343). Similarly, in ***Lewin v County of Suffolk*** (18 AD3d 621, 795 NYS2d 659 [2005]), 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). 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 AD3d 544, 790 NYS2d 679 [2005]), 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). 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 AD3d 977, 839 NYS2d 904 [2007]), 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). 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). Similarly, in ***Zito v Zabarsky*** (28 AD3d 42, 812 NYS2d 535 [2006]), 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). 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). 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).

(***Id***. At pp. 55-59; *cf*., ***Ratner v. McNeil-PPC, Inc.***, 91 AD3d 63 [2d Dept. 2011]).

Here, J.T.M. has been diagnosed with autism spectrum disorder (ASD), not autism. According to the Centers for Disease Control and Prevention website ASD homepage:

> "A diagnosis of ASD now includes several conditions that used to be diagnosed separately: autistic disorder, pervasive developmental disorder not otherwise specified (PDD-NOS), and Asperger syndrome. These conditions are now all called autism spectrum disorder."

Based upon a review of the papers before this Court the opinions of Dr. Adler regarding causation are not based upon novel theories and do not warrant a ***Frye*** hearing (***see, generally, Krackmalnik v Maimonides Med. Ctr.***, 142 A.D.3d 1143 [2d Dept. 2016]).

Accordingly, the motion is in all respects denied.

All parties are directed to appear on February 3, 2020, at 9:30 a.m. in the Calendar Control Part, Room A-363, to commence jury selection.

The foregoing shall constitute the decision and order of this Court.

Dated: Suffolk County, New York
January 30, 2020

HON. JOSEPH A. SANTORELLI
J.S.C.