

**Washington v Todd**

2019 NY Slip Op 33833(U)

August 20, 2019

Supreme Court, Queens County

Docket Number: 706940/15

Judge: Darrell L. Gavrin

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## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**  
Justice

IA PART 27

TIFFANY WASHINGTON as Parent and Natural  
Guardian of J.L. an Infant,

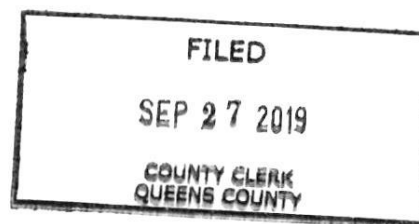
Index No. 706940/15

Plaintiff,

- against-

ANGELA H. TODD, M.D., GEDDIS ABEL-BEY,  
M.D. THE NEW YORK MEDICAL CENTER OF  
QUEENS, DR. GEDDIS ABEL-BEY JR., M.D.,  
P.C., and PHOENIX OB/GYN SERVICES,

Defendants.



On February 28, 2018, this medical malpractice action was sent to Part 27 for trial, however two motions submitted to Justice Peter J. O'Donoghue remained outstanding. Defendants sought an order precluding plaintiff from presenting certain expert evidence and testimony at trial as to the issue of causation of J.L.'s medical complications pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) (*Frye*), or, in the alternative, scheduling a *Frye* hearing on the issue of the admissibility of the anticipated expert testimony on causation. Plaintiff filed opposition to defendants' motions. This court reviewed the submitted motions and granted defendants' motions to the extent that a *Frye* hearing was scheduled for May 2, 2018. On June 28, 2018, the court issued a decision reflecting that the *Frye* hearing was held.

Infant plaintiff, J.L. by his mother, Tiffany Washington and the mother, suing derivatively, commenced this action seeking damages for medical malpractice and for lack of informed consent against defendant-doctors and hospital. Plaintiff alleges that physician defendants failed to provide appropriate prenatal and obstetrical care to Tiffany Washington during her pregnancy with J.L., who was born prematurely at 23-24 weeks of gestation on August 12, 2007. On June 23, 2016, J.L. was started on anti-seizure medication. On June 20, 2017, approximately ten years after his birth, J.L.<sup>1</sup> underwent an MRI of the brain and for the first time, was diagnosed with polymicrogyria ("PMG"), an abnormality in the brain surface organization.

On May 2, 2018, the court held a *Frye* hearing and took testimony to resolve the question of whether the causation theory proffered by plaintiff that, the injury resulting in PMG can

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<sup>1</sup> J.L. was born a twin. J.L.'s twin died after three months and is not a part of this action.

occur postnatally and whether said theory has achieved general acceptance in the medical community so as to make expert testimony on that theory admissible. At the *Frye* hearing, pediatric neurologist, Dr. Adler testified for plaintiff. Pediatric neurologist, Dr. Ingrid Taft testified on behalf of defendants.

After the testimony, the parties submitted post-hearing memoranda. Plaintiff sought leave to continue the hearing and present the testimony via Skype of Dr. Gregory Enns, a specialist in clinical biochemical genetics, as his office is located in California. Defendants opposed plaintiff's motion on the ground that the testimony of Dr. Enns would be cumulative to that of Dr. Daniel Adler. By letter dated October 11, 2018, plaintiff's counsel informed the court that plaintiff will rest on the testimony, exhibits and arguments already presented if the court will not hear via Skype from Dr. Enns. By letter dated October 12, 2018, defense opposed plaintiff's request to allow Dr. Enns to testify. By letter dated October 15, 2018, counsel for plaintiff averred that Dr. Enns's testimony would not be redundant to the testimony proffered by Dr. Adler because in the affirmation dated May 14, 2018, Dr. Enns referred to medical literature that was not mentioned by Dr. Adler at the *Frye* hearing.

On November 9, 2018, counsel for the parties appeared in court and the court heard oral arguments. The court ruled, without objection, that it would accept the affirmations of Dr. Enns on submission and reserved decision on the *Frye* hearing. Counsel for plaintiff requested a trial date in May of 2019.<sup>2</sup> For the reasons outlined below, the court finds that plaintiff's causation theory is not generally accepted in the relevant scientific community under the *Frye* standard.

New York courts follow the rule of *Frye* "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 [1994], quoting *Frye v United States*, 293 F at 1014). "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." (*Lugo v New York City Health and Hospitals Corp.*, 89 AD3d 42 [2d Dept 2011]) (internal quotation marks and citation omitted). "[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 42 [2d Dept 2006]) (citation omitted).

In plaintiff's proffered causation theory, it is plaintiff who bears the burden of establishing the theory's general acceptance. All experts, who testified, are in agreement that

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<sup>2</sup> After the *Frye* hearing, the court's records reflect the following adjournments on consent: August 28, 2018, September 18, 2018, October 10, 2018, November 9, 2018, November 15, 2018, December 10, 2018, February 5, 2019, April 9, 2019, and June 11, 2019.

PMG can be caused by genetic abnormalities, congenital abnormalities and/or ischemic injury to the immature brain on an intrauterine basis. Further, it is undisputed that, *ordinarily*, PMG occurs before birth (emphasis added). Plaintiff averred that in this case, PMG was the result of white matter injury associated with extreme prematurity and its complications, and that the brain injury suffered by J.L. from brain hemorrhage caused both PMG and periventricular leukomalacia (“PVL”), which is caused by reduction of blood flow to the back of the brain. Defense attorneys contend that premature birth does not cause either PVL nor PMG, but rather that PMG occurs prior to birth as a result of a malformation of the brain while it is developing in the uterus.

Dr. Adler opined that because PMG is caused by injury to the cells that are deep in the brain, which are injured by some stress, either infectious, toxic or hypoxic, the same effect can occur in an infant child after birth. Dr. Adler further opined that postnatal ischemia can cause PMG. Dr. Adler explained that anything that can adversely impact the immature nervous system can result in developmental anomalies of the nerves and cause PMG. In Dr. Adler’s opinion, J.L.’s neurological problems were due to the fact that he was born extremely prematurely and had significant complications during and post delivery, such as respiratory failure, brain hemorrhage and PVL. Dr. Adler stated that a 24-week premature baby in an ICU was the same as a 24-week post gestational age fetus in the mother’s womb and therefore, the location of the baby, whether inside or outside of the uterus, is irrelevant. During cross examination, Dr. Adler acknowledged that within the medical scientific community as well as the field of pediatric neurology, there was no general acceptance of a causative association between extreme prematurity and PMG. Dr. Adler testified about one article from 1999 that discussed a case where PMG was detected in a 27-week premature infant; however, such conclusion was based on a hypothesis. In further support of plaintiff’s theory of development of PMG postnatally in the postmigrational period, Dr. Enns, in his affirmation, opined that neurological migration may continue after a child’s preterm birth at gestational age of 24 weeks.

In opposition, Dr. Taft opined that the insult or exposure at 24 weeks gestation can only happen before a child is delivered and that PMG cannot be caused by conditions that can develop after birth. Dr. Taft testified that there was no scientific basis for the idea that PMG can be secondary to PVL.

The court finds the testimony and/or affirmations of each of the witnesses, all highly qualified and distinguished in their fields, to be credible. Where as here, “an expert seeks to introduce a novel theory of medical causation without relying on a novel test or technique, the proper inquiry begins with whether the opinion is properly founded on generally accepted methodology, rather than whether the causal theory is generally accepted in the relevant scientific community” (*Ratner v McNeil-PPC, Inc.*, 91 AD3d 63 [2d Dept 2011]).


In the case at bar, plaintiff failed to meet that burden (*see id*). The evidence presented by plaintiff, while setting forth limited support for the view that it is possible for PMG to occur outside of the womb or be caused by a post migrational disorder, has failed to establish that

such theory of causation is based on generally accepted scientific principals. Indeed, plaintiff has acknowledged that there is a dearth of literature to support plaintiff's theory.

Accordingly, expert testimony on the theory of causation that PMG can be caused by post-delivery events shall not be admissible at trial herein.

Notwithstanding, defendants' motion for partial summary judgment on the issue of liability, is denied.

Dated: August 20, 2019

  
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DARRELL L. GAVRIN, J.S.C.

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QUEENS COUNTY