SIRIA CARIAS, AS MOTHER AND NATURAL GUARDIAN OF M.M., (AN INFANT), Plaintiff-Appellant, v. LAURA DALTON, DO; CHIDINMA AROLE, MD; VIRTUA HEALTH, INC.; VIRTUA WEST JERSEY HEALTH SYSTEMS, INC.; VIRTUA MEDICAL GROUP, PA, AND JANE/JOHN "DOES" (UNIDENTIFIED MEDICAL PROFESSIONALS, Defendants-Respondents.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** DOCKET NO. A-002484-24 CIVIL ACTION On Appeal From: Law Division, Burlington County Docket No. BUR-L-001192-20 Sat Below: Hon. Aimee R. Belgard, P.J.Cv. Hon. Eric G. Fikry, P.J.Cv. Hon. Richard L. Hertzberg, J.S.C.

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PRELIMINARY STATEMENT

Plaintiff, Siria Carias, as mother and natural guardian of M.M., an infant, appeals from the Law Division's April 26, 2024, Order barring plaintiff's medical expert, Richard L. Luciani, M.D., from testifying at trial that excessive traction by defendant Chidinma Arole, M.D. ("Dr. Arole"), caused the brachial plexus injury suffered by M.M., and the March 6, 2025, Order denying reconsideration and dismissing the Complaint with prejudice. The basis for the Court's Orders is flawed. The decision accompanying the Orders cites articles as being relied on by Dr. Luciani that were in fact **considered and refuted** by Dr. Luciani and **not** relied on by him. In his report, Dr. Luciani described in great detail why he disagreed with the conclusions in those articles. Further, Dr. Luciani cited articles and treatises that supported his opinion that an injury of this type and severity results from excessive traction. That opinion was confirmed by M.M.'s treating doctor and foremost expert on injuries of this nature. Dr. Luciani gave the whys and wherefores of how this particular injury cannot be the result of maternal forces of labor alone and must have been caused by excessive lateral traction, once other root causes are ruled out.

Even if Dr. Luciani did not cite to one article that supported his opinion, the lower court's analysis was flawed because it rewrites the rules of evidence and misapplies In re Accutane, 234 N.J. 340 (2018). The court declined to credit Dr.

Luciani's extensive background in delivering babies and delivering babies with shoulder dystocia. As a medical doctor with decades of training and experience, Dr. Luciani was qualified to opine regarding the cause of M.M.'s injury.

Dr. Luciani distinguished between "temporary injuries," which could be caused by maternal forces of labor, and "permanent injuries" of the nature suffered by M.M., a tearing injury that resulted in one of her arms being shorter than the other. He eliminated alternate, pre-labor causes through standard differential diagnosis. There is ample support for Dr. Luciani's opinions. The lower court even cited to an article cited by Dr. Luciani that reinforced Dr. Luciani's opinion: **"the single greatest correlate with neonatal brachial plexus injury after shoulder dystocia is degree of clinician applied traction."** Nonetheless, in an overzealous invocation of its "gatekeeper" role in reviewing the articles cited by Dr. Luciani in his report, the court barred Dr. Luciani's experience-based opinions, concluding – erroneously – that the opinion had no support in the medical literature. If the Court was going to review the articles on which Dr. Luciani relied, it should have given Dr. Luciani the opportunity to explain and to defend his methodology in an Evidence Rule 104 hearing. Plaintiff asked for such relief and was denied both in its opposition to the motion to bar and on reconsideration.

Dr. Luciani's opinion that the permanent brachial plexus injury in this case cannot be caused by maternal forces of labor alone and that excessive lateral

traction is required to create such an injury is supported by treatises, articles, case studies and his experience in delivering 6500 babies over 40+ years in practice as an Ob/Gyn. It also was supported by and consistent with the findings of Scott H. Kozin, M.D., M.M.'s treating orthopedic surgeon and a nationally recognized authority in the treatment of brachial plexus injuries.

Defendant's arguments based on the medical articles refuted by Dr. Luciani in rendering his opinions go to weight and cross-examination, not admissibility. Nor is his opinion a net opinion simply because defendant denies applying excessive traction. That denial serves only to create a credibility issue to be resolved at trial by a factfinder. Moreover, the motion for reconsideration should have been heard by the judge that reviewed the articles and studies provided in Dr. Luciani's report and erroneously concluded that Dr. Luciani relied on a few articles that clearly refuted his analysis and, therefore, rendered his opinion invalid. Those articles cited by the first judge were articles on which Dr. Luciani did **not** rely and were **specifically refuted by the doctor.** The motion for reconsideration was based solely on the first judge's review and her Honor's incorrect conclusion. By having to argue before a second judge that was not involved in that review, plaintiff was prejudiced. Plaintiff respectfully requests that this Court reverse the Orders barring Dr. Luciani's testimony, reinstate the Complaint and remand for further proceedings.

PROCEDURAL HISTORY

The Complaint in this matter was filed on June 16, 2020. Pa14. The Complaint alleges medical malpractice and lack of informed consent. Pa14-19. On October 12, 2020, an Answer was filed on behalf of defendant, Chidinma Arole, M.D. Pa39. The parties engaged in discovery. Before all discovery was completed, defendant Dr. Arole filed a Motion to Bar & Summary Judgment. Pa70. That motion was subsequently withdrawn and became a motion to preclude certain testimony of Dr. Luciani. 1T53:21-23. (The transcript abbreviations are identified in the Table of Transcript Designations included with the Table of Contents.) On April 12 and April 26, 2024, the Honorable Amy R. Belgard, P.J.Cv., held oral argument on the motion. See 1T; 2T. By Order dated April 26, 2024, and accompanied by a Statement of Reasons, the court barred Dr. Luciani from alleging there was excessive traction by defendant Dr. Arole and from testifying at trial that excessive traction by defendant Dr. Arole caused M.M.'s brachial plexus injury. Pa2.

In July 2024, defendant moved for summary judgment. Pa561. In August 2024, plaintiff opposed the motion and cross-moved to reconsider. Pa566. Because Judge Belgard had been re-assigned to the Criminal Division, the matter remained undecided for months. In January 2025, at a conference before the Honorable Eric G. Fikry, P.J.Cv., the court ordered that the pending motions,

including the motion to reconsider, be heard by the Honorable Richard L. Hertzberg, J.S.C. Pa682; 3T14:20-22. After a hearing on February 13, 2025, 4T, Judge Hertzberg issued an Order dated March 6, 2025, accompanied by a Statement of Reasons, denying reconsideration and granting defendant's motion to dismiss the Complaint with prejudice. Pa10.

STATEMENT OF FACTS

Siria Carias, the mother of infant, M.M., is from Honduras. Pa218 at 7:16-17. English is not her primary language; she required an interpreter at her deposition. Pa217 at 5:1-3. Her prenatal care was provided by defendant Virtua Center for Women. Pa219 at 13:8-13. M.M. is her third child. Her second child was delivered by caesarian section ("C-section"). Pa219 at 13:20-23. Ms. Carias was scheduled to have a C-section and tubal ligation on December 30, 2015. Pa239 at 91:9-13. Ms. Carias was told she needed a C-section because her baby was too large to be delivered vaginally. Pa239 at 90:8-11; 90:17-23.

In fact, Ms. Carias had several risk factors in connection with her pregnancy. She had gestational diabetes; she was of an advanced maternal age; she was obese, and she had had a prior C-section. Ca5. Because of those risk factors, the standard of care required an informed discussion with her and her husband about the risks involved in a vaginal birth versus a C-section. Ibid. One of those risks was

shoulder dystocia, a risk that would have been eliminated entirely had a C-section been performed. Ibid.

Ms. Carias testified that no one explained what she was signing in the midst of painful contractions. Pa223 at 29:14-22. She also stated multiple times that she told the doctors and nurses present during the delivery that she was supposed to be having a C-section. Pa222 at 22:20-24; Pa223 at 27:7-13; Pa224 at 29:5-9; Pa239 at 91:9-24. According to defendant Dr. Arole's testimony, she had a resident get Ms. Carias to sign a consent for a vaginal birth while she was in the throes of labor. Pa156 at 72:5-13. That form was signed at 8:35 a.m., but Dr. Arole did not see Ms. Carias until after that time. Pa170 at 86:7-9; Pa171 at 87:14-15. Whether Dr. Arole had any discussion with Ms. Carias about the serious risks she faced having a vaginal birth is decidedly in dispute.

Complications ensued during the delivery when the baby's head and neck delivered but her left anterior shoulder got stuck against Ms. Carias's pubic bone. Dr. Arole had to call for help because her attempts to dislodge the shoulder were "unsuccessful." Pa186-87 at 102:17-103:7. Dr. Arole could not state "specifically what happened when the help came in." Pa189 at 105:1-2.

As a result of the delivery, baby M.M. sustained a permanent brachial plexus injury, specifically, "left brachial plexus birth palsy." Ca47. The injury sustained

at birth affected "the C-5 and C-6 nerve roots or the upper trunk." Ca49. When seen by Dr. Kozin, M.M.'s treating doctor and the foremost expert on these types of injuries, "there had been incomplete recovery consistent with an axonotmesis or **partial tearing of these nerve roots**." Ibid. (emphasis supplied). Shortly before her third birthday, M.M. underwent surgery performed by Dr. Kozin at Shriners Hospital for Children in Philadelphia. Ca51. Her nerve injury had resulted in incomplete regeneration. Ca55. M.M.'s left arm is shorter than her right arm, and her limitations are permanent. Ibid.

Dr. Luciani is Board-certified in obstetrics and gynecology. Pa256 at 6:18-19. He still practices and has delivered over 6500 babies in his 40+ year career. Pa255 at 5:17-21. He has testified "many times" in shoulder dystocia and brachial plexus injury cases. Pa256 at 8:13-16. He based his opinions in this case on the "totality of the evidence" at bar. Pa256 at 9:6-19. That evidence includes Dr. Kozin's report and his treatment of M.M. Specifically, Dr. Luciani bases his opinion on the fact that the baby's nerve roots were torn. Dr. Luciani opines that "it takes traction in order to avulse or rupture a nerve root and the forces of normal uterine contractions will not do that." Pa257 at 11:22-12:4. He has read "tons of literature" on the subject. Id. at 12:12-15. His report details some of the literature he has read. Ca7-17. He also has dealt with upwards of 60 shoulder-dystocia cases during his career. Pa257-58 at 13:25-14:2. Because this case involved an

"anterior shoulder dystocia," the head and the neck have already delivered. Any maternal force has stopped. Pa261 at 27:7-28:7. Simply stated, the injuries occur after laboring so maternal forces of labor cannot be the cause. Id. at 29:17-22. Indeed, Dr. Arole testified that Ms. Carias was no longer pushing at the time of the efforts to remove the shoulder. Pa191 at 107:11-21.

Defendant relies on the opinions of Dr. Michelle Grimm. Dr. Grimm is not a medical doctor. Pa297 at 7:6. She has never delivered a baby. Id. at 7:16-18. She has never examined Ms. Carias or M.M. Id. at 8:2-4. She never performed a pelvic examination of Ms. Carias. Id. at 8:8-10. She is not qualified to provide a medical diagnosis. Id. at 8:20-22. She has no training regarding the identification of symptoms or the formation of a differential diagnosis. Pa298 at 9:16-24.

The opinions Dr. Grimm theorizes in this matter are based on a computer model based on software developed to analyze car crashes. Id. at 10:23-11:1; Pa298-99 at 12:22-13:3. The model was not based on the physiology of Ms. Carias or M.M. Pa299 at 13:8-11. The assumptions she uses for how much stress a human baby's brachial plexus can withstand is extrapolated from data obtained from animal testing. Specifically, she relied on data based on adult rats and now uses data from piglets. Id. at 13:12-22. No tests were conducted on humans. Pa300 at 17:2-6. There is no data on human baby brachial plexus nerves. Id. at 18:15-17. Dr. Grimm's assumptions are based on a mother with a gynecoid-

shaped pelvis although she has no idea what shape pelvis Ms. Carias has. Pa301 at 23:6-10. In fact, Dr. Grimm admits that her model is not used to "specifically indicate what happened in terms of precise amounts of force or stretch in this particular delivery." Id. at 24:3-6. The model is not used to "model the specific mother-baby pair." Id. at 24:14-15. In this case, Dr. Grimm admits that she did not and cannot use the animal-based model to come up with a specific argument with respect to causation. Id. at 24:16-20. She did not use any data from this specific delivery to reach her opinions in this matter. Id. at 24:20-21. Because of the "million different variables in the human anatomy," Dr. Grimm could not opine as to the exact cause of the injury in this case. Pa305 at 39:6-12. Essentially, Dr. Grimm assumes that no excess or lateral traction was used in the birth of M.M. based entirely on Dr. Arole's testimony and then speculates that the injury must have been caused by maternal forces of labor. Pa306 at 44:16-20.

Because Dr. Grimm has no data or experience with childbirth, she has been precluded from testifying a "few times." Pa309 at 55:3-5. She has never been qualified to offer expert testimony in New Jersey. Id. at 55:6-11. Because her studies are solely theoretical, Dr. Grimm has been precluded from offering her opinion on the specific cause of an infant's injury. Pa310 at 58:23-59:8. See, e.g., Pa314 (Huett v. Branson, No. ED110991, Mo. Ct. of Appeals, Eastern District,

Div. Three (July 18, 2023)); Pa332 (Nobre v. Shanahan, 976 N.Y.S.2d 841 (Supreme Court, Orange County, N.Y., Dec. 10, 2013)).

LEGAL ARGUMENT

POINT I

DR. LUCIANI'S OPINION IS RELIABLY BASED ON HIS TRAINING, EXPERIENCE, MEDICAL LITERATURE AND THE FACTS OF THIS CASE AND IS ADMISSIBLE. (PA1; PA10)

A. Standard of Review.

When "a trial court is 'confronted with an evidence determination precedent to ruling on a summary judgment motion,' it 'squarely must address the evidence decision first.'" Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010)). "Appellate review . . . proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid. (quoting Est. of Hanges, 202 N.J. at 385).

A trial court's decision to admit or to exclude evidence generally is entitled to deference absent a showing that the court abused its discretion. In re Accutane Litig., 234 N.J. 340, 392 (2018); E&H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 24-25 (App. Div. 2017). An abuse of discretion arises where a decision "is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." State v. Burney, 255 N.J. 1, 20

(2023); State v. Chavies, 247 N.J. 245, 257 (2021). The trial court's ruling should be reversed "if it 'was so wide off the mark that a manifest denial of justice resulted.'" Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019) (quoting Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016)).

Appellate review of a trial court's summary judgment decision is de novo. DeSimone v. Springpoint Senior Living, Inc., 256 N.J. 172, 180 (2024); see R. 4:46-2(c). "The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Ibid. (alteration in original) (quoting Friedman v. Martinez, 242 N.J. 449, 472 (2020)); see R. 4:46-1 to -6.

To rule on summary judgment, courts must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Vizzoni v. B.M.D., 459 N.J. Super. 554, 567 (App. Div. 2019) (quoting Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007)). "Summary judgment should be granted 'if the discovery and any affidavits show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a

judgment or order as a matter of law.'" DeSimone, 256 N.J. at 180-81 (quoting Perez v. Professionally Green, LLC, 215 N.J. 388, 405 (2013)) (internal quotation marks omitted).

Summary judgment "is an extraordinary measure to be taken only with extreme caution, especially when a cause of action rests upon expert testimony." Kisselbach v. County of Camden, 271 N.J. Super. 558, 569 (App. Div. 1994). Even a "weak" medical report should be presented to a jury and if later found unreliable, may be subject to involuntary dismissal pursuant to Rule 4:37-2(b). Ibid.

Rule 4:42-2 states that interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." "A motion for reconsideration does not require a showing that the challenged order was "palpably incorrect," "irrational," or based on a misapprehension or overlooking of significant material presented on the earlier application. Until entry of final judgment, only "sound discretion" and the "interest of justice" guides the trial court, as Rule 4:42-2 expressly states." Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021).

B. Dr. Luciani's Opinion Is Reliable and Not a Net Opinion.

Dr. Luciani's expert analysis and opinion satisfies the requirements for admission of expert testimony. There are three basic requirements for the

admission of expert testimony: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at least at a state of the art that such an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. State v. Kelly, 97 N.J. 178, 208 (1984). The report and proposed testimony of Dr. Luciani satisfies those three requirements. The only requirement challenged below was the second requirement of reliability.

The question of causation is presumptively a question of fact for a jury, and the facts and opinions of plaintiff's expert are sufficient for a jury to infer a reasonable conclusion, not mere speculation. As stated in N.J.R.E. 703, an expert's opinion must be based on "facts or data * * * perceived by or made known to the expert at or before the hearing." An expert's conclusion is considered to be a "net opinion," and thereby inadmissible, only when it is a bare conclusion unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

N.J.R.E. 703 addresses the foundation for expert testimony. It mandates that expert opinion be grounded in "'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Polzo v. County of Essex, 196 N.J. 569, 583 (2008) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)).

Causation may be established through a differential diagnosis and circumstantial evidence. Creanga v. Jardal, 185 N.J. 345, 357-58 (2005). The sufficiency of circumstantial evidence is a factual determination. An expert's proposed testimony should not be excluded merely "'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Id. at 360 (quoting State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988), certif. denied, 114 N.J. 525 (1989)). The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002) (citing Freeman, 223 N.J. Super. at 115–16). The bases for the expert's opinion are presumptively a proper subject of exploration and cross-examination at a trial. Ibid. (citing Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991)).

The only basis for the defense motion below was that Dr. Luciani would not concede that maternal forces of labor alone could have caused the injury at bar. Dr. Luciani explained in detail why he rejected that theory. Ca7-17. That was sufficient. See Heller v. Shaw Indus., Inc., 167 F.3d 146, 156 (3d Cir. 1999) (expert's methodology is unreliable only where a defendant points to a plausible alternative cause and the expert offers no explanation for why the expert has

concluded that was not the cause) (citing In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 758 n. 27 (3d Cir. 1994)).

The defense may cross-examine Dr. Luciani on his reasoning, but it is not grounds for preclusion and certainly not grounds for summary judgment. Based on decades of experience as an obstetrician and a gynecologist in delivering over 6500 babies, including scores of babies with shoulder dystocia, and in accordance with many articles and publications on the subject of permanent brachial plexus injuries, Dr. Luciani's opinion in this case that the severity of the injury suffered by baby M.M. could have been caused only by excessive or lateral traction is reliable.

As a preliminary matter, Dr. Luciani describes in his report why the severity of the injury suffered by M.M. could be caused only by excessive lateral traction and cites various articles for support. Ca8-13. Moreover, Dr. Luciani at his deposition cited to the evidence that supported his opinion. That evidence includes Dr. Kozin's report and his treatment of M.M. **Specifically, Dr. Luciani bases his opinion on the fact that the baby's nerve roots were torn. Dr. Luciani testified that "it takes traction in order to avulse or rupture a nerve root and the forces of normal uterine contractions will not do that."** Pa257 at 11:22-12:4 (emphasis supplied). He has read "tons of literature" on the subject. Id. at 12:12-15. His report details some of the literature he has read. Ca8-17. He has also dealt with upwards of 60 shoulder-dystocia cases during his career. Pa257-58 at 13:25-14:2.

Because the injury here is an "anterior shoulder dystocia," the head and the neck have already delivered. Any maternal force has stopped. Pa261 at 27:7-28:7. Simply stated, the injuries occurred after laboring so maternal forces of labor cannot be the cause. Id. at 29:17-22. Dr. Arole admitted that fact, testifying that Ms. Carias was no longer pushing at the time of the efforts to remove the shoulder. Pa191 at 107:11-21.

Next, as described below, Dr. Luciani's report and the authorities he cites show that there is support in the scientific community for his opinion. Most notably, Dr. Kozin, M.M.'s treating doctor, agrees with Dr. Luciani's opinion. There is also caselaw supporting that opinion. "It has been generally accepted for over 100 years that a permanent brachial plexus injury in an otherwise healthy newborn delivered vaginally is caused by the delivering physician applying lateral traction during a shoulder dystocia." Nobre, 976 N.Y.S.2d at 845 (Pa333). "Indeed, it has been noted in the medical literature that "[b]rachial plexus palsy is commonly attributed to excessive lateral traction applied to the fetal neck by the physician during attempts to free the shoulder from behind the symphysis pubis." Id. at 845, n. 8 (Pa343).

The court's conclusion that there is nothing in Dr. Luciani's report "to suggest that his theories have been scientifically tested or accepted in the scientific community" was clearly mistaken. His report states as follows:

Brachial plexus injuries result from excessive lateral traction on the fetal head in attempting to dislodge the anterior shoulder. This lateral force stretches the C-5 to T-1 nerve roots, resulting in either Erb's or Klumpke's palsy. (Precis Obstetrics: an (iodate in obstetric and gynecology; 1998, American College of Obstetricians and Gynecologists. Pp. 85-101, 95).

The key to preventing fetal injury is avoidance of excess traction on the fetal head. {*Id.*}

[Ca9.]

The permanent injury noted in this case is evidence of the use of excessive force to deliver the shoulder. "Researchers found that increasing the lateral load on the head keeping the shoulders fixed produced the following results:

1. The upper plexus (C5-C6) was always the first to be damaged, followed by C7, C8, and T1, with increasing loads.
2. Injury patterns typically involved ruptures of the upper roots and avulsions of the lower roots."
3. The threshold for visible mechanical injuries varied from 44 to 88 lb." pg. 610

See Allen RH (September 2007). *On the Mechanical Aspects of Shoulder Dystocia and Birth Injury.* Clinical Obstetrics and Gynecology. Volume 50, Number 3, Pp. 607-623 (Plaintiff's Literature Article 24)

And as previously stated these are stretch injuries where the head is pulled away from the impacted shoulder, increasing the angle. The greater the force in direction, the greater the injury4'. Severe permanent brachial plexus injuries are caused when the head has been delivered and the shoulder is impacted and the head is moved forcibly away from the shoulder, or the head is twisted5. It is no coincidence that institutions that have instituted training programs for proper shoulder dystocia delivery techniques have found significant decreases in brachial plexus injuries[6].

[Ca10-11.]

He further supports his opinion with cites to footnotes 4, 5 and 6 of his report, which state as follows:

> [4]"Simply increasing traction on the fetal head will not release the obstruction, and use of greater force acts to increase the stretch on the brachial plexus." Pg. 156.e5. See Crofts JF, Ellis D, James M, Hunt LP, Fox R, Draycott Ti (August 2007). *Pattern and degree of forces applied during simulation of shoulder dystocia.* American Journal of Obstetrics & Gynecology. Pp. 156.e1-156.e6 www.AJOG.org.
>
> [5]"During shoulder dystocia, neonatal brachial plexus injury occurs as a result of increased lateral traction to and/or twist of the head in an attempt to deliver the trunk." (Pp. 257) See Gurewitsch, Edith, MD, Allen, Robert, PhD; *Reducing the Risk of Shoulder Dystocia and Associated Brachial Plexus Injury.* Obstet Gynecol Clin N Am. (2011); 38; pp 247-269.
>
> "In the most severe cases with persistent motor disability at 18 months of age, downward traction was applied in *all* OBPP cases and in most of them a considerable force (>50 points on a 100 point VAS) was applied." Pg. 203. See Mollberg M., Wennergren M., Bager B., Ladfors L., Hagherg H. (2007). *Obstetric Brachial Plexus Palsy: A Prospective Study on Risk Factors Related to Manual Assistance During the Second Stage of Labor,* Acta Obstertricia et. Gvnecologica; Vol. 86, Pg. 198-204.
>
> [6]"After the introduction of training, there was a significant reduction in the proportion of babies born with an obstetric brachial palsy injury." Pg. 18. See Draycott, TJ., Crofts, JF., Ash, JP., Wilson, LV., Yard, E., Sibanda, T., Whitelaw, A. (July 2008). Improving Neonatal Outcome Through Practical Shoulder Dystocia Training. Obstetrics and Gynecology; Vol. 112, No. 1; Pp. 14-20.
>
> [Ca11.]

Dr. Luciani’s report explains in detail why there is a lack of clinical support for the defense theory of the case and why, physically, the permanent injury at bar

is the result of excess lateral traction. Dr. Luciani discusses the "maternal forces of labor" theory and why that could **not** be the cause of the injury at bar.

> On the other hand, the maternal forces of labor which is maternal contractions and pushing, does not cause permanent brachial plexus injuries: these are compressive forces'. **First, these forces push on the baby's rump to move the baby down the birth canal. This is an axial force and there is no downward traction on the fetal head. Second, there is not room within the birth canal sufficient for the head to deviate to the extent necessary to cause permanent brachial plexus injuries[8]. At the time of impact, when the shoulder stops, so does the head and at that time the head is axial. It is only when the baby's head is delivered and the baby's head is moved away from the impacted shoulder that there is both the room and the force necessary to cause a permanent brachial plexus injury.** This distinction is well summarized below:
>
> **"[O]bstetric brachial plexus injuries that are permanent and require neurosurgical treatment universally demonstrate (at the time of surgery) evidence of having undergone forceful stretch." (Pp. 256).**
>
> **"During shoulder dystocia, neonatal brachial plexus injury occurs as a result of increased lateral traction to and/or twist of the head in an attempt to deliver the trunk." (Pp. 257).**
>
> "Based on retrospective studies and limited computer modeling, many investigators have proposed alternative theories about permanent mechanical brachial plexus injury causation. These theories include intrauterine forces, precipitous second stage, and shoulder dystocia itself. However, none of these theories have been proved prospectively, by experimental evidence, or with rigorous computer modeling. Several retrospective and experimental studies exist that counter these theories." (Pp. 257).
>
> "Until recently, the only study measuring the lateral force needed to cause permanent injury has been experimental. Cadaveric work by Metaizeau and colleagues demonstrated that mechanical injury (rupture of the upper roots) only became observable with laterally applied

> traction of 44 pounds; to rupture and/or avulse the middle and lower roots, up to 88 pounds of lateral traction is needed. However, the strongest evidence derives from the only multicenter prospective study on permanent brachial plexus injuries in history, which has recently been completed in Sweden by Mollberg and colleagues." (Pp. 257).
>
> **Thus, the single greatest correlate with neonatal brachial plexus injury after shoulder dystocia is the degree of clinician-applied traction."** (Pp. 257).
>
> Gurewitsch, Edith, MD, Allen, Robert, PhD; *Reducing the Risk of Shoulder Dystocia and Associated Brachial Plexus Injury.* Obstet Gynecol Clin N Am. (2011); 38; pp 247-269.
>
> [Ca11-13.]

He goes on to state that: "Although a hypothesis that maternal forces of labor can cause permanent brachial plexus injuries has been studied and reported in the literature, it remains an unproven hypothesis[9]." Ca13. Footnote 9 states: "'**In utero causation is a manufactured theory based on speculation that contradicts known anatomic and physiologic principles**.' Pg. 147. See O'Leary, James A. *In Utero Causation of Brachial Plexus Injury: Myth or Mystery?* Shoulder Dystocia and Birth Injury: Pg. 147-162." Ca13 (emphasis supplied).

Dr. Luciani further explains, with additional citation to literature accepted in the scientific community, the why and wherefore of how the "maternal forces of labor" theory is contradicted by actual experience in the delivery room.

> An alternative hypothesis, namely, that brachial plexus injury is frequently caused during the labor process by uterine forces, still prevails. However, since the maternal forces mobilized during labor and delivery are expulsive in nature, it is difficult to perceive a natural

> mechanism which could imitate the effect of traction injuries. (Ramieri J and Iffy L (2006). Chapter 21, *Shoulder Dystocia,* Operative Obstetrics; Third Edition, Apuzzio JJ, Vintzileos AM and Iffy L [eds.], Taylor & Francis, Pp. 253-263, 259).
>
> See also Allen, et al. who state: "Although this magnitude of uterine force alone seems to be sufficient to cause brachial plexus injury, because uterine forces are axially transmitted, they normally do not produce the lateral deviation of the head from the shoulders needed to stretch the brachial plexus beyond its elastic limit." (Allen RH (September 2007). *On the Mechanical Aspects of Shoulder Dystocia and Birth Injury.* Clinical Obstetrics and Gynecoloey. Volume 50, Number 3, Pp. 613).
>
> [Ca13.]

In his report, Dr. Luciani sets forth specific criticisms of the researchers who have tried to support the "maternal forces of labor" theory and describes why those studies are unreliable.

> Certain researchers have attempted to use indirect methods in an attempt to support their theory, but in the end, their conclusions are still speculative hypotheses. This theory has been based on:
>
> (a) Statistical studies that retrospectively look at mother and baby charts:
>
> (i) to determine children with brachial plexus injuries;
> (ii) then examine the mother's chart to determine if there is a documentation of a recorded shoulder dystocia;
> (iii) then assign a percentage of brachial plexus injuries where there was a recorded shoulder dystocia in the chart versus where there was no recorded shoulder dystocia in the chart;
> (iv) without looking at the amount of traction;
>
> (b) Mathematical models that do not replicate and are not similar to human mothers' anatomy, fetus' anatomy, or the forces of labor. The

> authors of these models admit that the findings cannot be extrapolated to a particular delivery; and
>
> (c) Anecdotal case reports, many of which are reported not by the obstetrician who delivered the baby, but rather based on retrospective record review.
>
> [Ca14.]

Dr. Luciani reviewed the literature that has advanced the unsupported hypothesis and describes why that literature is flawed. That is the literature the trial court reviewed and termed "medical research relied on by Dr. Luciani." Pa7. As demonstrated herein, Dr. Luciani **discredits** that research in exhaustive detail. The articles relied on by the trial court – the 1999 Gherman article, the Lerner and Salamon article and the 2020 Clark article, referenced in the court's opinion as the Johnson article – were rejected by Dr. Luciani. Dr. Luciani disputes those findings and explains why he disputes them. The highlighted passages reference the articles relied on in the court's opinions. Again, those theories were thoroughly debunked by Dr. Luciani and others, notably Robert H. Allen, Ph.D., discussed infra at 25-27.

> 1. The mathematical models of Michelle Grimm. These models utilize ellipsoids to represent anatomical structures of an average mother (pelvis) and average fetus (head, neck, shoulder, and nerve) and apply data from animal surrogates to make mathematical calculations of force. The studies themselves admit that the conclusions cannot be applied to any particular birth and that they do not use strain rates of a human brachial plexus nerve in its studies but rather a surrogate of rat lumbar nerves. The basic design of the model does not comport to the human birthing process. The studies instead apply an increasing increment of force from behind the fetus (maternal forces) until the impacted shoulder is delivered. But this is not actually what occurs in

the deliveries of human infants where the delivery is complicated by a shoulder dystocia.

2. Single case studies that purport to prove that a permanent brachial plexus injury is caused by maternal forces of labor. For example, the published article by Lerner and Salamon misrepresents that the delivery discussed in the single case report was a vaginal delivery without a shoulder dystocia complication and that no traction was used by the obstetrician. However, the medical records from that delivery in fact documented that a shoulder dystocia was encountered and during discovery conducted during the lawsuit, the obstetrician testified that she in fact used "normal traction." Also, not disclosed in the article was the fact that Dr. Lerner, one of the authors, was the expert witness testifying on behalf of the obstetrician in the lawsuit that was brought concerning the delivery nor was it disclosed that Dr. Salamon, the other author, was the defendant obstetrician in that lawsuit. Despite these facts that contradicted the claims made in the case report, the editors of this ACOG publication have not retracted it.

3. As noted earlier, statistical studies that look at recorded shoulder dystocias and vaginal deliveries without recorded shoulder dystocias and the incident of brachial plexus injury with each are used to state that fifty percent (50%) of brachial plexus injuries occur where there is no shoulder dystocia recorded. These studies acknowledge there is a problem with underreporting and non-recognition of shoulder dystocia by healthcare providers. The vast majority of the brachial plexus injuries in the non-recorded shoulder dystocia cases are temporary injuries as opposed to permanent. The studies do not look at the important variable of the amount of traction utilized by the delivering healthcare provider in each delivery (See for example, Gherman 1999 study'). In addition, many of these studies purport to compare permanent with temporary injuries, but in fact when one looks at the criteria closely, they are measuring temporary to temporary (See Torki and Clark). *In* the Clark article, they define persistent injury as one that existed at the time of discharge from the newborn nursery which only means that the deficit existed for a few days after birth, as

opposed to over a year, which is when an injury to the brachial plexus is determined to be permanent.

4. The published compilation entitled Neonatal Brachial Plexus Palsy published by ACOG in 2014 is a collection of references that were prior publications that fit into the above categories. It provides no new data or studies to support the theory that maternal forces of labor can cause a permanent brachial plexus injury. At best the task force can only state "Maternal forces alone are an accepted cause of at least transient neonatal brachial plexus palsy by most investigators" (See Executive Summary Pg xvi and Pg 24). The task force relies on statistical studies (See Table 1-4, Pg 10), Grimms mathematical models (See generally**) and case reports that misrepresent the true facts, such as Lerner's case report (See Pg 28 Footnote 15). As to the latter, the task force, citing Dr. Lerner's article, states "A single case report describes a case of persistent NBPP in a delivery *in* which no traction was applied by the delivering physician and no delay occurred in the delivering the shoulders (15). Therefore, there is insufficient scientific evidence to support a clear division between the causative factors of transient NBPP versus persistent NBPP (See Pg 28).**

5. Certain authors have postulated that babies delivered by C-section that have evidence of brachial plexus injury and deficits that those injuries are also associated with maternal forces of labor. However, some studies included planned c-sections where there was no labor and therefore, no maternal forces of labor, while others have acknowledged the injuries are from traction applied by the obstetrician on the fetal head and neck during a difficult extraction (due to inadequate incision size) and from in utero positioning due to maternal abnormalities (i.e. intrauterine septum).

6. In Clark's 2020 article cited in Footnote 18, he and others made the baseless claim that nerve root avulsions occurred in deliveries without a shoulder dystocia and c-section deliveries. They stated: "... numerous reports exist both transient and permanent brachial plexus injury, including nerve root avulsion, occurring both at vaginal delivery in the absence of shoulder dystocia and at the time of cesarean delivery" (See Pg. 725). They cite the articles found in footnotes 1-5 as support for that statement,

> **yet none of those publications support the proposition that nerve root avulsions can happen from anything other than clinician applied traction. Their own study had no permanent brachial plexus injuries let alone nerve root avulsions.**
>
> [Ca14-17 (footnotes omitted) (emphasis supplied).]

The articles recited in the April 26, 2024, Order – and **dismissed by Dr. Luciani as unreliable** – are the same articles the Nobre court found to be **unreliable**. Nobre, 976 N.Y.S.2d at 855-56 (Pa340-42). "The Lerner and Salamon case report, on which Defendants rely heavily, provides tepid support for their theory. **Aside from the cloud that remains over it even after the peer review, '[c]ourts have recognized that * * * observational studies or case reports are not generally accepted in the scientific community on questions of causation**.' **Similarly, the case reports of Erb's palsy occurring in cases of a traumatic Cesarean section are also merely observational and two of those reported cases, as noted earlier, involved abnormal uterine cavities, which has no application to this case. Such observational data, which is recognized to be 'of a lesser caliber than controlled clinical studies from which results can be reviewed and verified', is insufficient to fill the analytical gap that exists in this case**." Ibid. (Pa341) (citations omitted) (emphasis supplied).

One of the plaintiff's experts in the Nobre case was Robert H. Allen, Ph.D., on whom Dr. Luciani relies. Dr. Allen opined that "**mechanically, it is not possible for uterine forces to stretch the fetal brachial plexus nerves to cause a**

mechanical permanent injury in a cephalic delivery." 976 N.Y.S.2d at 846 (Pa333). Dr. Allen performed "[c]adaver research on 16 brachial plexi in full term infants." Ibid. The results of Dr. Allen's research "demonstrated that upper brachial plexus ruptures require at least 40 pounds of lateral force on the head, and increasing lateral forces to more than 80 pounds causes lower and middle root ruptures and avulsions." Ibid. (Pa333-34). Dr. Allen stated that "a fetal nerve needs to be stretched 50% or more beyond its original length for it to rupture and thereby cause a permanent injury." Ibid. (Pa334). Dr. Allen conducted an experiment, the results of which he published in 2007, **which is cited by Dr. Luciani in his report**, wherein he simulated the second stage of labor and "measured anterior and posterior brachial plexus stretch as the fetus [was] pushed through the pelvis [using an amount of uterine force comparable to uterine forces in actual labor] * * * for routine and shoulder dystocia deliveries." Ibid. Dr. Allen found that the amount of brachial plexus stretch as the infant moves through the pelvis varies between 0 and 25%, "which is the normal amount of stretch when the head rotates or flexes to one side * * * and is not injurious." Ibid. He also found that the amount of "stretch is significantly less for shoulder dystocia deliveries than for routine deliveries as a result of maternal contractions and pushing." Ibid. **Dr. Allen concluded that a permanent brachial plexus injury "can only result**

from physician applied lateral traction after delivery of the fetal head." Ibid. **That is the same opinion Dr. Luciani gives at bar.**

C. The Court Misperceived the Basis for Dr. Luciani's Opinion.

In its Statement of Reasons accompanying the April 26, 2024, Order, the court stated: "Contrary to his opinions, the medical research relied on by Dr. Luciani is juxtaposed." Pa7. The decision goes on to cite four articles on which Dr. Luciani allegedly relies and how they differ from Dr. Luciani's opinions. Pa7-8. In fact, however, **three of the four articles cited were not relied on by Dr. Luciani –** the 1991 Gherman article (referenced as the Gherman 1999 study in Dr. Luciani's report), the 2008 article by Lerner and Salamon and the 2020 Johnson article (referenced as the Clark article in Dr. Luciani's report). Their findings were **disputed** by Dr. Luciani, who explained thoroughly why he disagrees with their conclusions. Ca13-17.

A review of the oral arguments before Judge Belgard confirms the misperception of Dr. Luciani's opinion and its basis. Defense counsel grossly misrepresented that Dr. Luciani "ignored" all the peer-reviewed literature and research articles, falsely claiming that he excluded that possibility only because "he didn't believe in it." 1T10:17-20. In fact, Dr. Luciani relied on some of the literature referenced in his report and excluded others based on his extensive personal experience with birth injuries. Ca13-17. He held to the opinion that has

been accepted in the field for 100 years rather than the new theory with no clinical bases but rather extrapolation from rats and pigs. Defense counsel claimed that Dr. Luciani did not cite to scientific bases and publications. Dr. Luciani clearly did. 1T23:1-15. See supra at 17-21. Plaintiff's counsel expressly identified the Gherman article from 1997, containing accepted medical conclusions going back decades. 1T23:3-15. He also expressly identified footnotes 12 and 15 from Dr. Luciani's report for articles supportive of his position. 1T24:17-25:5; Ca16.

Defendant's argument for barring Dr. Luciani, accepted by the court below, turned not on the lack of support in the medical literature or his training and experience but rather turned on the credibility of defendant Dr. Arole. Defendant claims that she didn't pull on the baby, which Dr. Grimm, defendant's expert, then uses to offer the unqualified specific causation conclusion that the injury was from contractions/maternal forces. Dr. Grimm, however, cannot testify to this birth and injury, only to births and brachial plexus injuries generally based on extrapolation from rats, goats and pigs. She is not qualified to testify regarding proximate cause here. She has no clinical experience or training. Dr. Luciani, based on decades of personal and medical training and experiences, says contractions/maternal forces can't cause **lateral permanent** brachial plexus injuries so defendant is not being truthful. That is proper expert testimony and presents an issue of credibility for a jury to decide. 1T26:10-17.

At oral argument, defense counsel conceded that Dr. Luciani's argument is that it must be excessive traction because all other potential causes have been eliminated. In utero and congenital defects have been ruled out and maternal forces won't cause brachial plexus injuries of the extent and permanency documented by Dr. Kozin **in this case**. 1T32:2-8. There is nothing wrong with that methodology, a form of differential diagnosis based on experience and training used every day by medical professionals. See Creanga, 185 N.J. 357-58. Defense counsel conceded that "there's no in utero injury. Nothing happened pre-delivery. We're talking about an injury at delivery." 1T41:6-8. By eliminating those other possible causes, Dr. Luciani is able to testify to a reasonable degree of medical certainty that **this** injury, given its nature, severity and permanence, was caused by excessive lateral traction.

The trial court over-extended Accutane to non-complex, accepted theories of causation. 2T7:16-23. In doing so, the court discounted that Dr. Luciani's opinions have been the prevailing theory for decades, challenged only just recently by unreliable observational studies that were bundled together by the defense bar to give the imprimatur of being scientifically accepted. 2T20:22-21:3. Accutane was not intended to eliminate experience from the Rules of Evidence. Gatekeeper is an important but a limited role. The gatekeeper should not be tallying publications for opposing sides or deciding which publications are "right." The

court's role is to determine if there is evidential support for the expert's opinion within the confines of the Rules of Evidence. If so, subject the opinions to cross-examination and let a jury weigh the evidence and give it the value, if any, that the jury thinks it should. The gatekeeper should not be weighing evidence. Here, the trial court mistakenly stated that Dr. Luciani relied on or cited publications that he did not. He refuted those articles in his report and identified others on which he did rely. In doing so, the court overstepped its role and excluded admissible evidence.

The court also erred by finding that there was no "data" to support Dr. Luciani's opinion. 2T21: 5-8. The data is Dr. Kozin's observations during treatment and the elimination of alternative causes. It is no different than a differential diagnosis performed by doctors every day. 5 possible causes; 1 through 4 are eliminated so it must be 5. The literature speaks generally. Dr. Kozin's report and affidavit speak specifically to this case – a permanent injury caused by traction. 3T11:1-9; 3T14:16-18; Ca46; Pa573. It is based on personal examination and observations, the types of evidence on which experts typically rely. 3T14:20-15:1. See Polzo, 196 N.J. at 583; Townsend, 186 N.J. at 494.

The opinions of Dr. Luciani are based on this mother, this baby, the specific circumstances of this case, the severity of this injury, the permanence of this injury and the type of injury, all of which are documented in the medical records

including but not limited to Dr. Kozin's treatment records and report, and indicate an injury that cannot be caused by maternal forces of labor alone.

Dr. Luciani's opinion is supported by scientific evidence and is a widely held opinion in the medical community. The articles on which Dr. Luciani actually relied support his opinions. Dr. Luciani thoroughly discredited the articles on which defendants rely and at least one court has held the theory contained in those articles to be unreliable. Nobre, 976 N.Y.S.2d at 855-56 (Pa340-42). At best, the credibility of that debunked theory goes to weight and not admissibility. The parties are free to cross-examine the proposed experts' opinions vigorously at trial. At a minimum, the reliability of Dr. Luciani's opinions should have been tested in a Kemp hearing. Reversal and remand are required.

POINT II

THE COURT SHOULD HAVE HELD A KEMP HEARING RATHER THAN RELYING ON ITS OWN OPINION OF THE MEDICAL LITERATURE. (PA1; PA10)

In Kemp ex rel. Wright v. State, 174 N.J. 412, 430 (2002), the Court "expanded Rubanick to all novel medical causation circumstances and **solidified the requirement of a pretrial Rule 104 hearing for assessing an expert's testimony**. Presently, a Kemp hearing is a common pretrial occurrence for resolving the reliability of expert scientific testimony." Accutane, 234 N.J. at 350.

In its opposition to the motion to bar, plaintiff stated: "If there are any questions regarding the reliability of Dr. Luciani's opinion, this Court should hold a Kemp hearing." That, however, was not done. Dr. Luciani could have resolved the mistaken impression that he was claiming to rely on all of the articles mentioned in his report. As stated supra at 22-25, 27, he did **not** rely on the articles the trial court cited. He disagreed with the conclusions made in those articles and gave the reasons why he disagreed with the methodology on which defendants relied. Ca13-17. He also supported his opinion with many scientific articles and his own experience as a doctor who has delivered over 6500 babies and, in particular, has delivered babies with shoulder dystocia. Ibid.

Even *arguendo* if Dr. Luciani did not cite to any treatise, article or research, his vast personal experience delivering babies, his extensive medical training and knowledge are sufficient to support his opinion. See Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002).

> Nor does the fact that Dr. Villa failed to cite any treatises, articles, protocols or the like in support of his opinion render it a net opinion as claimed by defendants. Evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience. Bellardini [v. Krikorian], 222 N.J. Super. [457, 463 (App. Div. 1988)]. "The requirements for expert qualifications are in the disjunctive. The requisite knowledge can be based on either knowledge, training or experience." Ibid.").
>
> [Id. at 403.]

If the court had doubts about the medical literature, a Kemp hearing is warranted. The court overstepped by reviewing the medical literature and relying on its own interpretation of the current state of the medicine of permanent brachial plexus injuries. Respectfully, judges and lawyers may be extremely bright and well-intentioned, but we are not medical doctors. The court below decided how permanent brachial plexus injuries occur by weighing the medical literature and rejected the opinion of a qualified medical doctor based on training, experience, medical articles and literature and the specific facts of this case. That testimony should not have been rejected and particularly should not have barred without a fully developed record. Kisselbach, 271 N.J. Super. at 569.

POINT III

THE COURT ERRED BY FAILING TO HAVE THE MOTION TO RECONSIDER HEARD BY THE SAME JUDGE DESPITE THE REQUESTS OF ALL PARTIES. (PA682)

Because Judge Belgard, who issued the Order barring Dr. Luciani, delved so deeply into the underlying literature associated with Dr. Luciani's opinion and report, both parties requested that the motion to reconsider be heard by Judge Belgard. However, after deciding the initial motion, Judge Belgard was reassigned from the Civil Division to the Criminal Division, although her Honor remained in the same vicinage and courthouse. The motion to reconsider, filed in August 2024, remained unheard through to January 2025. Finally, at a conference on January 16,

2025, the new Presiding Judge for the Civil Division ordered that the motion be heard by the Honorable Richard J. Hertzberg, J.S.C. 3T14:20-23; Pa682.

Plaintiffs relied on the language of Rule 4:42-2(b), which reads as follows: "To the extent possible, application for reconsideration **shall** be made to the trial judge who entered the order." R. 4:42-2(b). The language of the Rule is mandatory, not suggestive, i.e., "shall be made" not should or may. Moreover, there was no indication in the record that the trial judge who entered the order could not hear the motion. Judge Belgard remains on the bench in the same vicinage and courthouse.

The trial court viewed the language of the Rule as optional, subject to an administrative determination of practicality. See 3T13:2-24. Rather than adhering to the mandatory language of Rule 4:42-2, the court looked to a case involving Rule 4:5B-1 and determined that the circumstances did not necessarily require that the motion be assigned to the original judge. Respectfully, the language of Rule 4:5B-1 is significantly different. Rather than "shall be made," that Rule reads as follows: "In Track IV and general equity cases, however, the designated managing judge shall, **insofar as practicable and absent exceptional circumstances**, also preside at trial." R. 4:5B-1. That rule addresses designation for what could be a lengthy and complicated trial in Track IV and general equity cases. It also includes qualifiers that do not exist in the language of Rule 4:42-2(b). Given the mandatory

language of Rule 4:42-2(b), the availability of the original judge, the nature of Judge Belgard's review of the medical literature involved and the specific request of all parties, the failure to enforce the Rule as written was erroneous and prejudicial.

The result was a less than fulsome reconsideration of the original decision. See Pa10-13. Although the court allowed for extensive oral argument, its analysis was essentially that the prior judge was right rather than a full assessment of the record. Pa12 ("The Court agrees with and sees no reason to disturb Judge Belgard's April 26, 2024, decision."). As this Court noted in Lawson, 468 N.J. Super. 128, "[i]f a prior judge has erred or entered an order that has ceased to promote a fair and efficient processing of a particular case, the new judge owes respect but not deference and should correct the error. See McBride v. Minstar, Inc., 283 N.J. Super. 471, 481 (Law Div. 1994), aff'd o.b., McBride v. Raichle Molitor, USA, 283 N.J. Super. 422 (App. Div. 1995). The polestar is always what is best for the pending suit; it is better to risk giving offense to a colleague than to allow a case to veer off course." Lawson, 468 N.J. Super. at 133.

The brevity of the Order denying reconsideration does not allow for a clear understanding of the court's reasons, other than an agreement with the initial judge. Under the circumstances, and in light of the express language of Rule 4:42-2(b), the decision not to assign the motion to reconsider to a sitting judge of the Law

Division was error. The Order denying reconsideration should be vacated and remanded.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this Court reverse the April 26, 2024, Order barring Dr. Luciani's opinions and testimony. Because that evidence should not have been barred, the March 6, 2025, Order dismissing with prejudice, which was based entirely on the denial of reconsideration and the barring of plaintiff's expert, should be vacated, and the matter remand for further proceedings.

Respectfully submitted,

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Dated: August 20, 2025

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Dated: August 20, 2025

FILED, Clerk of the Appellate Division, September 19, 2025, **A-002484-24**, **AMENDED**

SIRIA CARIAS, AS MOTHER AND NATURAL GUARDIAN OF M.M. (INFANT),	:	DOCKET NO. A-002484-24
	:	Civil Action
Plaintiff-Appellants,	:	ON APPEAL FROM ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION: BURLINGTON COUNTY
vs.	:	
LAURA DALTON, DO; CHIDINMA AROLE, MD; VIRUA HEALTH, INC; VIRTUA WEST JERSEY HOSPITAL SYSTEMS, INC; VIRTUA MEDICAL GROUP, PA; AND JANE/JOHN "DOES" (UNIDENTIFIED MEDICAL PROFESSIONALS)	:	DOCKET NO. BUR-L-1192-20
	:	SAT BELOW:
	:	HON. Aimee R. Belgard, P.J.Cv HON. Eric J. Fikry, P.J.Cv HON. Richard L. Hertzberg, J.S.C.
Defendant-Respondents		

BRIEF AND APPENDIX IN SUPPORT OF THE OPPOSITION BY DEFENDANT RESPONDENT CHIDINMA AROLE, MD

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PRELIMINARY STATEMENT

The Plaintiff is appealing the April 24, 2024 order barring Dr. Luciani's opinions as to the standard of care and proximate cause of the injuries to the infant plaintiff M.M. in this matter. The trial court correctly exercised its gatekeeping function under *N.J.R.E.* 702 and the standards articulated in *In re Accutane*, 234 N.J. 340 (2018), in excluding the testimony of Dr. Richard L. Luciani. Contrary to the Plaintiff's assertions, the court's decision was not flawed but grounded in a proper application of evidentiary rules requiring that expert testimony be based on reliable evidence, methodology and generally accepted scientific principles. Dr. Luciani's conclusion, that M.M.'s permanent brachial plexus injury could only have been caused by excessive traction, was not supported by the broader medical literature, which acknowledges that such injuries can result from multiple factors, including maternal forces of labor alone. The fact that Dr. Luciani claimed to "refute" certain articles does not substitute for scientifically sound reasoning; merely disagreeing with prevailing literature does not meet the standard of reliability required for expert testimony. While Dr. Luciani may have decades of obstetrical experience, experience alone cannot replace scientifically valid methodology as well as the direct evidence in this matter. His opinion, lacking empirical support and based heavily on anecdotal experience, constituted a net

opinion and was therefore properly excluded. The Plaintiff's argument that the court misstated which articles Dr. Luciani relied upon is immaterial, as the key issue was the absence of any evidence of excessive traction and, most importantly, Dr. Luciani's own testimony admitting he was not qualified to give a proximate cause opinion. Further Dr. Luciani lacked scientific support for his central premise.

Moreover, the Trial Court's decision to have this matter decided on reconsideration by a different Judge than the Judge originally assigned is of no consequence and did not constitute an error. Finally, Plaintiff's suggestion that the dispute goes to weight rather than admissibility is misplaced. Courts must exclude expert opinions that are not rooted in the evidence or do not meet foundational standards of reliability; such determinations are not left to the jury. Accordingly, the trial court's orders excluding Dr. Luciani's testimony and dismissing the complaint with prejudice should be affirmed.

PROCEDURAL HISTORY

The defendant-respondence does not object to the plaintiff-appellate' s procedural history. The defendant-respondent would only add that the motion for summary judgement was not opposed during the motion for

reconsideration. The only decision asked to be reconsidered was the motion to bar Dr. Luciani's testimony.

STATEMENT OF FACTS

Defendants submit this Counter Statement of Facts to clarify the circumstances surrounding the delivery of Ms. Carias' child and to address the Plaintiff's claims. Ms. Carias, originally from Honduras, received prenatal care at Virtua Center for Women and had several known risk factors, including gestational diabetes, advanced maternal age, obesity, and a prior cesarean section (Pa219 at 13:8-23, Ca5). Ms. Carias was appropriately counseled about the risks and benefits of vaginal birth after cesarean (VBAC) versus repeat cesarean section. Dr. Arole testified that she discussed the higher risk of shoulder dystocia and uterine rupture with Ms. Carias, who communicated and responded in English, denying the need for an interpreter (Pa161:12-77:3). After informed discussion, Ms. Carias elected to attempt a vaginal delivery and signed the required consent forms, including a trial of labor after cesarean section consent upon arrival (Pa157:5-13, Pa163:20-80:3, Pa169:10-22). The medical record reflected no indication that Ms. Carias failed to understand or that she objected to the mode of delivery (Pa161).

Ms. Carias testified that she never saw Dr. Arole or any physician applying pressure or traction to the baby's head (Pa304:5-10, Pa438:20-24, Pa439:27-13).

Ms. Carias did recall a nurse applying pressure to her side prior to delivery (Pa478:15-19, Pa493:9-22). Dr. Arole described the delivery, noting that when the infant's head was delivered but the left anterior shoulder was impacted against the pubic bone, she performed recognized maneuvers; McRoberts positioning, suprapubic pressure, and Woods Screw maneuver; to relieve the dystocia (Pa187:17-Pa188:7). Dr. Arole testified that she did not apply traction to the baby's head at any time during delivery (Pa214:3-12).

Despite this, Plaintiff's expert, Dr. Richard Luciani, concluded that the infant's brachial plexus injury must have resulted from excessive lateral traction applied during delivery (**Ca** 2, 6–7). However, Dr. Luciani admitted that no such traction was documented in the medical records, nor was it referenced in any witness testimony (**Pa** 254 at p. 18:10–14; 19:1–3, 20:1–3, 20:21). He further acknowledged that, if excessive traction had not been applied, then Dr. Arole would have complied with the standard of care (**Pa** 254. at 18:10–14). Dr. Luciani also conceded that his opinion is not based on any specific medical record, but rather on his belief that any permanent brachial plexus injury must result from excessive traction by a physician, so long as other rare causes (such as infection or genetic anomaly) are ruled out (**Pa** 254 at 9:3–19; 10:1–18; 35:23–36:7; 66:10–16). He admitted under oath that he has conducted no original research on this subject, has published no peer-reviewed studies to support

his theory, and cannot identify any literature that definitively states permanent brachial plexus injuries cannot result from the natural forces of labor (**Pa** 254 at 12:12–15; 31:1–6; 30:6–11; 58–60). When questioned about the 2014 American College of Obstetricians and Gynecologists (ACOG) report on Neonatal Brachial Plexus Palsy, which concluded that such injuries may occur from natural uterine forces alone and that their presence does not inherently prove malpractice—Dr. Luciani dismissed the report as “too political” (**Pa** 254 at 14:20–25; 15:8–25). Dr. Luciani’s methodology has previously been rejected by multiple federal courts. In *U.G. v. United States*, the Southern District of New York granted summary judgment for the defense, finding that Dr. Luciani’s opinion lacked a reliable scientific basis (Pa279). The court held that Dr. Luciani failed to present any peer-reviewed evidence showing that all permanent brachial plexus injuries must be due to excessive traction, and that the ACOG study was sufficiently reliable and widely accepted (Id.). Similarly, in *M.D.R. v. Temple University Hospital*, the Eastern District of Pennsylvania rejected similar expert opinions, noting the lack of scientific support and the experts’ disregard for the ACOG study (Pa280). The court emphasized that the presence of a brachial plexus injury alone does not create an inference of negligence absent evidence of traction being applied (Id).

Defendants’ experts provide a more current and well-supported medical perspective. Dr. Quartell highlights recent studies demonstrating that shoulder

dystocia and brachial plexus injuries are multifactorial and not always caused by physician-applied traction, relying on research more recent than Dr. Luciani's (Quartell Report, Ca20). Dr. Quartell cited peer-reviewed studies more recent than those relied upon by Dr. Luciani, including a 2017 article by Dr. Lerner, which demonstrate that not all permanent brachial plexus injuries at vaginal birth are caused by physician traction (Ca32). Dr. Jaspan reviewed medical records and confirmed that Dr. Arole's maneuvers were appropriate and effective, disputing the claim that cesarean delivery would have avoided the injury (Jaspan Report, Ca35). Dr. Michelle Grimm, Ph.D., a biomechanical expert, concluded that the infant's injury resulted from contact of the shoulder with the mother's symphysis pubis rather than excessive traction, relying on studies including a 2014 report by the American College of Obstetricians and Gynecologists (ACOG) (Da1 - 9). Dr. Grimm also criticized the outdated nature of the literature cited by Dr. Luciani (Id. at 7-8).

The 2014 ACOG compendium (reaffirmed in 2019), attached as **Da** 11 – Da136, explicitly recognize that brachial plexus injuries can occur during cesarean delivery and that no clinical or experimental data exist to link such injuries to excessive force by birth attendants (**Da** 44, 52-66). These reports

conclude that neonatal brachial plexus palsy is multifactorial and that maternal expulsive forces can contribute to the injury (Id.).

Based on the totality of the evidence, including the deposition testimony of Dr. Arole and Ms. Carias, the medical records, and the expert opinions, there is no evidence that Dr. Arole applied excessive traction or deviated from the standard of care. Dr. Luciani's theory is speculative and rests entirely on the flawed assumption that a permanent brachial plexus injury always means that excessive traction was applied. This assumption has been rejected by both the relevant medical literature, and by other Courts and has been contradicted by Dr. Luciani's own testimony. Plaintiff's case rests on assumptions rather than facts or medical science. Accordingly, the Lower Court appropriately ruled that Dr. Luciani's opinions were net opinions.

LEGAL ARGUMENT

I. DR. LUCIANI'S OPINIONS WERE APPROPRIATELY DEEMED NET OPINIONS AND UNRELIABLE BY THE LOWER COURT

A. Dr. Luciani's opinion as to the standard of care is not reliable and was a net opinions.

The "net opinion rule" is a corollary of the rule of evidence governing the basis of opinion testimony by experts and forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other

data. *Townsend v. Pierre*, 221 *N.J.* 36, 53–54, 110 *A*.3d 52 (2015). A net opinion is "a bare conclusion unsupported by factual evidence." *Creanga v. Jardal*, 185 *N.J.* 345, 360, 886 *A*.2d 633 (2005). To avoid a net opinion, the expert must " 'give the why and wherefore' that supports the opinion." *Townsend*, *supra*, 221 *N.J.* at 54. The net opinion rule is a "prohibition against speculative testimony." *Harte v. Hand*, 433 *N.J.Super.* 457, 465, 81 *A*.3d 667 (App. Div. 2013).

The Courts have determined that just because a particular injury occurred, does not prove negligence was the cause, and thus is a net opinion without more evidence. See *Gore v. Elevator Co.*, 335 N.J. Super. 296, 303-304 (App. Div. 2000). Further, when an expert relies on a single anecdote to support their conclusion, it is net opinion. See *Kaplan v. Skoloff & Wolfe, Pc.,* 339 N.J. Super 97, 103-104 (App. Div. 2001). The Courts have also ruled that opinions that negligence occurred, without actual evidence, is a net opinion. *Murray v. Plainfield Rescue Squad*, 418 N.J. Super. 574, 590 (App. Div. 2011) (opinion on negligence with no facts to support conclusion was net opinion), See also; *Froom v. Perel*, 377 N.J. Super 298, 316-317 (App. Div. 2005)(bare conclusion that malpractice occurred and caused the damages without any facts to support proximate cause was net opinion)

There is no dispute that Dr. Luciani's opinion as to the standard of care is that excessive traction was applied by Dr. Arole based on the fact there was a permanent brachial plexus injury**.** However, there is no evidence that excessive traction was used by Dr. Arole. Plaintiff, Ms. Carias was specifically asked about Dr. Arole's care during her deposition. Ms. Carias testified that it was her recollection that the nurse applied pressure during the delivery. See Pa216 at p. 46 lines 15-19 and p. 61 lines 9-22. At no point during the deposition did Ms. Carias state that a physician applied any pressure during the labor process. Plaintiff had the opportunity to address this during the deposition of Dr. Arole. Dr. Arole specifically testified that she did not apply traction to the child's head at any point during the delivery. See Pa85 at p. 129.

The lack of evidence that excessive traction was applied by Dr. Arole was mentioned in Dr. Luciani's report. (**Ca** 9). The defense further addressed this at the deposition of Dr. Luciani. See **Pa** 254 at P. 18-19. Dr. Luciani confirmed that the medical records, nor the testimony in the case would prove excessive traction was applied. See id. Dr. Luciani further agreed that the maneuvers used by Dr. Arole during the delivery: McRoberts positioning, suprapubic pressure, and Woods Screw maneuver; were within the standard of care. See id. at p. 20-21. Dr. Luciani ultimately agreed that if no excessive traction was applied, then Dr. Arole met the standard of care. See id.

The Lower Court ultimately agreed that there was no data relied on by Dr. Luciani when making his opinion. The Court noted that "while Dr. Luciani opined that [Dr. Arole] exerted excessive traction, torque or force, there was no evidence to support this opinion. As admitted by Dr. Luciani at his deposition, the medical records do not indicate that excessive force was applied and there are no witnesses who make such a suggestion." See **Pa** 9 and **Pa** 254 at p. 35 lines 16-22. Thus, it was clear after the original motion that Dr. Luciani had no actual evidence of excessive traction.

The first alleged evidence of excessive traction was brought forth in an affidavit by the Plaintiff's birth father, Mr. Turcios, after the original motion for summary judgment was granted. The affidavit was filed five days after the motion for reconsideration was filed. The Court ultimately ruled that this was a shame affidavit. See Pa10-13. This decision by the Lower Court is not being appealed here and any argument that the Court should have given this affidavit any weight should be disregarded. Moreover, Dr. Luciani never acknowledged this affidavit nor did he rely upon it in forming his opinions.

It is clear that Dr. Luciani's standard of care opinions against Dr. Arole is a net opinion because Dr. Luciani cannot and has not supported his opinions factually in any way. There can be no dispute that there is a lack of direct evidence of excessive traction by Dr. Arole. Instead, Dr. Luciani tries to work around this lack

of evidence by alleging that excessive traction had to have occurred based on the injury itself. For these reasons, the Court appropriately determined that the Plaintiff has failed to set forth a deviation of the standard of care by Dr. Arole through reliable expert testimony. It is clear that the Lower Court, in part, properly relied on the lack of evidence when determining these opinions were net opinions.

B. Dr. Luciani's opinions regarding the cause of the brachial plexus injury are likewise net opinions

Even if the Court were not to consider the *Daubert* factors, Dr. Luciani's opinions would be barred under *Rules* 702 & 703 as a net opinion. Dr. Luciani's opinion as to causation is solely rooted in the opinion that Dr. Arole applied excessive traction in this case based entirely on the occurrence of a permanent injury. This was confirmed by Dr. Luciani when he stated at deposition, "the permanent injury can only be caused by excessive lateral traction by the delivering provider, which is exactly my position in this case" **Pa** 254 at p. 9 lines 3-19. The Courts have consistently ruled that opinions that negligence occurred due to the injury itself, and based on no actual evidence, are net opinions. See *Gore v. Elevator Co.*, 335 N.J. Super. 296, 303-304 (App. Div. 2000)("a plaintiff has the burden of producing evidence that reduces the likelihood of other causes so 'that the greater probability [of fault] lies at defendants' door.'"); see also, Khan v. Singh, 200 N.J. 82, 94; 975 A.2d 389 (2009)(every time an expert advances an unsupported claim that an injury would not have occurred in the

absence of negligence . . . the expert must provide, and must be qualified to provide, the opinion that the relevant medical community agrees that the injury ordinarily does not occur in the absence of negligence." (citing *Buckelew, supra,* 87 *N.J.* at 528–29, 435 *A.*2d 1150)); see also*, Saks v. Ng,* 383 *N.J.Super.* 76, 91–92, 890 *A.*2d 983 (App.Div.) (affirming trial court's decision because plaintiff's expert "did not state that the medical community recognizes that [plaintiff's injury] does not ordinarily occur in the absence of negligence"), *certif. denied,* 186 *N.J.* 605, 897 *A.*2d 1059 (2006)).

While the Plaintiff now attempts to revive Dr. Luciani's opinions by over analyzing the studies vaguely referenced in Dr. Luciani's report, the Plaintiff ignores the crucial testimony of Dr. Luciani at his deposition, which the Lower Court directly mentioned in their order. Dr. Luciani was asked about his basis for giving his opinions as to the mechanism of the forces of labor causing brachial plexus injuries not being responsible for the injury. In response, Dr. Luciani stated "yeah. I think that that's – you know that's a little bit out of my lane." See **Pa** 254 at p. 40-41. Thus, "the only attempt by Dr. Luciani to provide a basis for his opinion admittedly falls outside his expertise." See court order at **Pa** 9. Continuously, Dr. Luciani rested on the same mantra that permanent injury is the result of excessive traction. The lower court used this direct testimony when ruling

that Dr. Luciani failed to provide the why and wherefore to support his opinions. See id.

Dr. Luciani was specifically asked if he had ever come to a conclusion that maternal forces of labor could cause a brachial plexus injury. Dr. Luciani testified that based on his own review of literature, maternal forces of labor could not cause a brachial plexus injury. See **Pa** 254 p. 10-11 lines 13-25; 1-18). However, when Dr. Luciani was questioned on his research, he admitted that he has not conducted any peer review studies, never authored an article on the topic, nor planned to do any independent research to prove this claim. See **Pa** 254 at p. 12 12-24. Instead, Dr. Luciani's opinions are solely rooted in his own interpretation of literature he has reviewed. These opinions by Dr. Luciani are not widely accepted in the medical community.

Thus, the decision to deem Dr. Luciani's opinions as a net opinion was based on the Court's own review of his deposition testimony. This is within the trial court's discretion and was appropriately made in this matter.

C. Dr. Luciani's opinions regarding the cause of the brachial plexus injury and whether Dr. Arole violated the standard of care are unreliable

The trial court appropriately decided that Dr. Luciani's opinions are unreliable, which is within their discretion. The trial court is the gatekeeper of expert witness testimony. *In re Accutane Litigatio*n, 234 N.J. 340, 390 (2018). "The trial court is

the spigot that allows novel expert testimony in areas of evolving medical causation science, provided the proponent of the expert can demonstrate that the expert adheres to scientific norms in distinct ways that we have identified." See *id*. In, *In Re Accutane Litigation,* the Court decided to adopt the factors set out by the United States Supreme Court when assessing expert testimony under R, 702. *In re Accutane Litigation*, 234 N.J. at 397 (Importantly, both our law and the *Daubert* trilogy are aligned in their general approach to a methodology-based test for reliability). The United States Supreme Court addressed the admissibility of expert testimony under Rule 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 113 S.Ct. 2786 (1993). Under *Rule* 702 "A Witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

i. Whether the scientific theory can be, or at any time has been, tested;
ii. Whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review but is not a "sine qua non";
iii. Whether there is any known or potential rate of error and whether there exist any standards for maintaining or controlling the technique's operation; and
iv. Whether there does exist a general acceptance in the scientific community about the scientific theory.

See I*n re Accutane Litigation,* 234 N.J. at 398 (Quoting *Daubert*)

Like in *Daubert*, the *In re Accutane Litigation* Court emphasized that the last factor has more weigh due to the identification of a "particular degree of acceptance within that community or contrarily permits a technique with minimal support to be viewed with skepticism. See *Id* (quoting *Daubert* at 594). "When a proponent does not demonstrate the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable." *Id* at 400.

In the Accutane matter, the trial court excluded testimony for two experts' testimony. This was because the trial court found that the expert disregarded case reports that were "at the bottom of the evidence hierarchy." See Id at 392-93. The Court went on to say that other Courts had doubted the reliability of the opinions as well. See Id. The main criticism was the fact that the experts relied on two smaller studies conducted on the topic of causation and ignored larger, more reliable studies, which showed the opposite of their conclusions. The Court was concerned by the experts disregarding the other studies, and the fact that the expert's opinion was based on an alternative opinion based on lesser forms of evidence. See Id at 395. The Court was not convinced that the experts did anything other than "cherry pick" studies for a result driven analysis in the face of larger and more reliable

studies. See Id. The Court went on to point out that the experts' acknowledged the scientific community's acceptance of other evidence, but they disagreed. See Id. The Court also found issue with the expert's refusal to submit their findings to peer review boards. See Id.

The widely accepted literature on the cause of the brachial plexus injuries is the 2014 ACOG compendium. (**Da 11-136**). This study, which was re-certified in 2019, found that maternal forces can cause brachial plexus injuries. This statement was based on multiple different clinical studies and models regarding brachial plexus injuries. The study is peer reviewed and widely seen as reliable. Dr. Luciani admits he has read the study. When asked why he disagrees with the study, Dr. Luciani states that too much "politics" are in play at the ACOG. See **Da**254 at 14. From the testimony, this opinion on the reliability of the ACOG seems to stem from a personal issue with the ACOG due to an investigation by the ACOG into a prior expert opinion held by Dr. Luciani. This type of personal opinion, not rooted in fact, is exactly what Rules 702 seeks to avoid.

Courts have also recognized the 2014 ACOG study as controlling literature when considering Dr. Luciani's opinion that a permanent brachial plexus injury means the physician was negligent in applying excessive traction. In the attached *U.G. v. U.S.A.*, No. 21-cv-2615 (S.D.N.Y. Oct. 13, 2022) opinion (Pa273), the New York District Court pointed out that the ACOG study was peer reviewed and

widely accepted. The New York District Court went on to show how Dr. Luciani's opinions have no foundation in the literature. Dr. Luciani was found to be asserting his own personal opinions with no actual reliable sources or evidence to support it. The facts of *U.G*. mirror the present matter. Dr. Luciani made the same opinion as in this case, that absent underlying medical causes, a permanent brachial plexus injury is only caused by an obstetrician's excessive traction. See Pa273 at p. 2 of the *U.G.* decision. fails to point to any testimony or entry in the medical record that would show his opinion rises above speculation. Dr. Luciani is expressing his mere conclusion that is based on unfounded speculation and unfounded possibilities. By asserting these opinions without any factual evidence to point to or reliable medical literature to rely on, Dr. Luciani no longer aids the Court in determining the real cause of the alleged injury. Instead, Dr. Luciani "cherry picks" studies from over thirty years ago to support his claim.

Here, Plaintiff attempts to do their own analysis of the studies referenced by Dr. Luciani to determine their reliability. In doing so, Plaintiff ignores the deposition testimony of Dr. Luciani. Dr. Luciani was asked "Do you agree that a conclusion that inappropriate delivery techniques must be the cause of transient or permanent brachial plexus injury is not justified?" Dr. Luciani responded "Yeah, because you have to look at the totality of the evidence in every particular delivery. So a simple statement that, well this is a permanent injury, so it had to be caused by excessive

lateral traction, I don't think that's fair to anybody to just say that right off the gate…" See **Pa** 254 at p. 33 lines 13-22. Dr. Luciani further stated "So to give a blanket statement like that just by looking, and somebody calling you and saying this baby has a permanent brachial plexus injury, it would be inappropriate for me to say, well, then it has to be excessive lateral traction." See **Pa** 254 at p. 34 lines 1-7. However, when asked "Do you leave open the possibility that maternal forces of labor can cause shoulder – brachial plexus injuries when a should dystocia is encountered" Dr. Luciani responded "Not on a permanent basis." See **Pa** 254 at p. 11 lines 19-22. Dr. Luciani was given the opportunity to testify as to the information he relied upon when coming to his conclusions in this matter. Dr. Luciani testified that he was relying on nothing specific to support his opinions. See **Pa** 254 at p. 30 lines 6-11. Dr. Luciani instead noted it was based on "pretty much everything that I've read and the compilation of everything I read." Id. Dr. Luciani was given another chance to elaborate on his opinion when he was asked "which article are you aware of that you cited to that you're relying upon in this case to say that it is not physiologically possible for maternal forces of labor to cause a permanent brachial plexus injury." Dr. Luciani responded "In those words, I have not read those words." See id at p. 31 line 25 and 32 lines 1-6. Thus, Dr. Luciani himself testified that he was not relying on nothing specific when giving his opinions. Rather, these opinions are rooted in his own personal observations,

which have no scientific backing. The Lower Court understood this issue well, recognized it and decided based upon the medical literature, particularly the articles published most recently by Grace Johnson, that the medical community recognized that it cannot be said with scientific certainty that a permanent brachial plexus injury must be caused by excessive traction. (**Pa** 1) For this reason and because Dr. Luciani recognized this principle but maintained the opposite position in this case – the Court correctly barred the opinion.

Further, Plaintiff attempts to attack the opinions of defense expert Dr. Grimm. The opinions of Dr. Grimm have no bearing on the reliability of Dr. Luciani's opinions. She is a defense expert and her opinions do not inform this Court on the reliability of Dr. Luciani's opinions. Nonetheless, Dr. Grimm's groundbreaking studies have helped revolutionize how brachial plexus injuries are understood. Plaintiff heavily relies on a decision from New York titled *Nobre (***Pa** 332*)* when attacking Dr. Grimm. The *Nobre* opinion involved the Court analyzing the opinions of Dr. Grimm. When reviewing the *Nobre* matter, the decision was authored in December of 2013, which was before the 2014 ACOG study. The Court in *Nobre* considered the argument that maternal forces of labor can cause permanent brachial plexus injuries. While the Court noted that the studies were not yet there to further this opinion. The following year, the ACOG published the groundbreaking study confirming Dr. Grimm's conclusions. This study was then

reaffirmed in 2019. Thus, the *Nobre* decision is neither controlling in this jurisdiction, nor is it applicable to this matter since the decision was made before the 2014 ACOG study became the standard reference for the cause of brachial plexus injuries.

Plaintiff now attempts to convince this Court that Dr. Grimm and the ACOG study are unreliable and that Dr. Luciani's opinions are more sound. However, this simply is not what the OB/GYN community as a whole views to be true. Instead, Dr. Luciani is an outlier in the community and revoicing studies of the past, which were authored by unreliable means. Plaintiff is essentially asking the Court to disregard the OB/GYN community as a whole and determine that Dr. Luciani knows better based on his experience and independent review of the literature, while disregarding his admitted bias towards the community. This type of opinion is exactly what the *Daubert* and *In re Accutane Litigation* Courts' set out to prevent. The Lower Court's determination was appropriate and within their discretion.

D. Dr. Kozin's report nor late affidavit establishes a causative opinion nor is it on review.

Plaintiff made mention of Dr. Kozin's late affidavit regarding the injuries in this case. Like Mr. Turcios, Dr. Kozin's affidavit was produced after the case had been dismissed and the Plaintiff had moved for reconsideration. Dr. Kozin's affidavit was vague and only agrees with Dr. Luciani's baseless

opinions based on his "understanding", "experience", and "the current state of literature". (**Pa** 576). Dr. Kozin does not provide any why or wherefore for his late affidavit nor does Dr. Kozin present any new information. Further, Dr. Kozin made no reference to the opinion in his original report. Thus, the Court sufficiently determined this affidavit as being a net opinion. Importantly, this decision is not the subject of this appeal and any arguments that this opinion was in error is time barred.

E. Summary Judgement was appropriate after Dr. Luciani's opinions were barred

New Jersey Court Rule 4:46-2(c) permits a court to dismiss a plaintiff's complaint where the moving party is entitled to a judgment or order as a matter of law. R. 4:46-2(c) provides, in pertinent part:

> (c) [T]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions to file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged that that the moving party is entitled to a judgment or order as a matter of law[.]
>
> [R. 4:46-2(c)].

"[A]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. Further, summary judgment must be granted and judgment entered as a matter of law where there exists no genuine issue with respect

to a material fact challenged. Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520 (1995); see also, Judson v. People's Bank and Trust Co., 17 N.J. 67 (1955).

In evaluating a motion for summary judgment, the court must assess the evidence presented while considering the burden of persuasion and determine what reasonable conclusions a rational jury could reach from the evidence. First, the moving party has the burden of proving the non-existence of any genuine issue of material fact. Judson, supra, 17 N.J. at 74. Next, once the movant has demonstrated that there is no genuine issue of material fact, the burden shifts to the party opposing the motion to clearly establish the existence of a genuine issue of material fact. Brill, supra, 142 N.J. at 529. Failure to do so will entitle the movant to judgment. Judson, supra, 17 N.J. at 75.

To set forth a prima facie case of negligence in a medical malpractice action "a plaintiff must present expert testimony establishing (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury." Gardner v. Pawliw, 150 N.J. 359, 375 (1997) (internal citations omitted). However, unlike an ordinary negligence action, "the standard of practice to which [the defendant-practitioner] failed to adhere must be established by expert testimony." Rosenberg by Rosenberg v. Cahill, 99 N.J. 318, 325 (1985). Further, "the reason that a physician's standard of care, and deviation therefrom, must be established by expert testimony is that a jury generally lacks the requisite special

knowledge, technical training, and background to be able to determine the applicable standard of care without the assistance of an expert." Kelly v. Berlin, 300 N.J. Super. 256, 265 (App. Div. 1997)(quoting Cahill, supra, 99 N.J. at 325).

Since the Plaintiff lacks any reliable testimony as to the standard of care or the cause of the injury, the Lower Court appropriately determined that summary judgment was appropriate. Plaintiff did not oppose the motion for summary judgement. For the above reasons, the Appellate Court should determine that this decision was within the sound discretion of the Lower Court and there was no abuse of discretion.

II. A KEMP HEARING WAS NOT NEEDED NOR WOULD IT HAVE UNCOVERED ANY NEW OPINIONS OR EVIDENCE IN SUPPORT OF DR LUCIANI'S OPINIONS.

A 104 hearing would not unveil any new information regarding Dr. Luciani's opinions. Dr. Luciani sat for a deposition regarding his opinions, which was provided to the Lower Court. The Court recognized that Dr. Luciani was asked about the why and wherefore of his opinions. When confronted about his opinions, Dr. Luciani provided testimony suggesting his own personal bias against the American College of Obstetrics and gynecology. Dr. Luciani admitted that he had a bias against the American College of OB/GYN due to a previous investigation into his opinions. When asked about the findings in the widely accepted 2014 study by the American

College of OB/GYN, Dr. Luciani states the study was unreliable. This was due to a belief that the study was made in an effort to defend doctors in malpractice actions. Dr. Luciani ignores that the study was peer-reviewed and based on reliable medical and biological engineering.

Nonetheless, even if one determines the literature relied upon by Dr. Luciani as being reliable, Dr. Luciani's opinions are still net opinions. Dr. Luciani admitted that his opinions either have no direct evidence to back the claim or are "outside of his lane." Dr. Luciani admitted in his report and in his deposition that there was no evidence of traction by Dr. Arole. When reviewing the evidence, it is clear the only individual identified was a nurse. Plaintiff tried to cure this defect with a late Sham Affidavit. When asked about the mechanism of the injury, Dr. Luciani admitted it was "outside of [his] lane." Thus, it is clear that Dr. Luciani failed to provide the sufficient why and wherefore for his opinions. This was specifically addressed in Judge Belgard's original order. Thus, the lack of a 104 hearing would have not uncovered any new information and would have been a waste of the Lower Court's time and resources. Further, Judge Belgard made her opinion based on the testimony of Dr. Luciani saying that he did not have sufficient knowledge as to the mechanism of the injury nor did he have proof of any excessive traction by Dr. Arole. For these reasons, the Appellate Court should see that there was no need for the 104 hearing and that the lack of one was harmless in this matter.

III. THERE WAS NO ERROR IN THE MOTION TO RECONSIDER BEING HEARD BY JUDGE HERTZBERG

Plaintiffs argue that the wording of New Jersey Court Rule 4:42-2(d) contains express language that the original Judge must hear any reconsideration motion.. This is a misguided argument. Rule 4:42-2(d) emphasizes that, "To the extent possible," motions for reconsideration, should be heard by the same judge who decided the original motion. “To the extent possible” clearly considers circumstances where the original Judge would not be available. The Court has addressed what circumstances may make this not possible. The Court in *Clarkson v. Kelly*, 49 N.J. Super. 10, 138 A.2d 747 (App. Div. 1958) stated:

> there may be exceptional circumstances under which the rule is not to be applied. Such circumstances exist when the judge who made the original decision is not available to consider the application to rehear and reverse his decision. If the judge who made the decision dies or resigns from the court he obviously is no longer available to reconsider it and such reconsideration must perforce be by another judge, if it is to be had at all. Likewise if the decision has been made by a judge temporarily assigned to the court for the hearing of a specified case and his assignment is terminated he is no longer available to entertain an application for rehearing and it must accordingly be considered by another judge.

Clarkson v. Kelly, 49 N.J. Super. 10, 17; 138 A.2d 747 (App. Div. 1958)

Here, Judge Belgard was transferred from the Civil Division to the Criminal Division in Burlington County. The motion for reconsideration was assigned to Judge Belgard for a period of time. However, due to Judge Belgrad’s obligations to

the criminal division, she was unable to hear the motion. After months of delay, the Court decided to assign the motion to Hon. Richard L. Hertzberg of the Civil Division. All counsel had the opportunity to appear before Judge Hertzberg regarding the matter. At the initial oral argument, counsel requested that Judge Belgard hear the motion. Judge Hertzberg considered this request but ultimately made the decision to hear the motion. Judge Hertzberg had the opportunity to review the papers submitted by the parties, sat on the oral argument, and reviewed Judge Belgrad's original opinion. After considering all the evidence, Judge Hertzberg was able to author his decision in March of 2025, which was approximately seven months after the reconsideration motion was filed. Judge Hertzberg decided that the Plaintiff did not show any new basis for why Judge Belgard's original decision be "disturbed." (**Pa** 9). This was within the sound discretion of Judge Hertzberg and the Burlington County Superior Court. This decision was made in the interest of justice for all parties and caused no harm to the plaintiff. For these reasons, the Appellate Court should find no error for the basis of this decision.

CONCLUSION

As established above, the Appellate Court should find there was no abuse of discretion by the Lower Court in the ruling as to the opinions of plaintiff's

expert Dr. Luciani. Without reliable expert testimony as to the standard of care, summary judgement was appropriately granted.

Respectfully submitted,

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Dated: September 19, 2025

SIRIA CARIAS, as mother and natural guardian of, M.M. (an infant), Plaintiff-Appellant, v. LAURA DALTON, DO; DHINDINMA AROLE, MD; VIRTUA HEALTH, INC.; VIRTUA WEST JERSEY HEALTH SYSTEMS, INC.; VIRTUAL MEDICAL GROUP, PA; and JANE/JOHN "DOES" (unidentified medical professionals), Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-002484-24 CIVIL ACTION On Appeal from the SUPERIOR COURT OF NEW JERSEY, BURLINGTON COUNTY, LAW DIVISION DOCKET NO. BELOW: BUR-L-1192-20 Sat Below: Hon. Aimee R. Belgard, P.J.Cv., Hon. Eric G. Fikry, P.J.Cv., Hon. Richard L. Hertzberg, J.S.C.

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"Shoulder dystocia"; Williams Obstetrics 20th Edition, 1997, Appleton & Lang. Stanford, Ct., p. 450) 7

PRELIMINARY STATEMENT

The decision of the court below has dramatically changed how parties may present expert evidence, and usurps the role of the jury, particularly as to causation.[1] New Jersey Association for Justice ("NJAJ") therefore seeks leave to file this brief and to participate in oral argument to explain NJAJ's grave concerns regarding this case.

The decision of the motion judges did not recognize that an expert's opinion may be based upon his education, training, experience, or research, or that an expert may rely upon a differential diagnosis to prove causation. Instead, the court below conducted what is best described as a "mini-bench trial" utilizing only depositions and articles, but without a full record or even a Rule 104 hearing which would have provided the benefit of the examination and cross-examination of the opposing experts. The failure to hold a Rule 104 hearing is particularly important because depositions are one-sided, without direct testimony where an expert fully explains the basis of an opinion.

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[1] The issue of causation is ordinarily for the jury. Townsend v. Pierre, 221 N.J. 36, 59 (2015), Scafidi v. Seiler, 119 N.J. 93, 101 (1990); Martin v. Bengue, Inc., 25 N.J. 359, 374 (1957).

NJAJ therefore respectfully submits this brief in support of its request to appear as *amicus curiae* and to appear at oral argument. If NJAJ's motion is granted, please accept this brief as NJAJ's brief on the merits.

STATEMENT OF INTEREST

NJAJ is an association of trial lawyers whose members primarily represent plaintiffs in personal injury cases and other civil actions. (Harvey Cert. ¶ 4.) Throughout its history, NJAJ has advocated to preserve fundamental rights and to ensure that tort law provides effective legal recourse and remedies. (Harvey Cert. ¶ 5.) In the past, NJAJ has participated as *amicus curiae* in many precedential torts cases including but not limited to Morales-Hurtado v. Reinoso, 241 N.J. 590, 593 (2020); In re Accutane Litigation, 234 N.J. 340, 393 (2018); McCarrell v. Hoffman-LaRoche, Inc., 227 N.J. 569 (2017). (Harvey Cert. ¶ 6.)

NJAJ believes this appeal is particularly important to the public, who all require medical care from time to time, as well as NJAJ's members, clients, and all malpractice litigants. For the reasons set forth in the attached certification of counsel, NJAJ respectfully submits that its participation will benefit the Court.

COMBINED STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

NJAJ accepts the recitation of the facts and procedural history contained in the Appellant's Brief. However, NJAJ wishes to add and highlight some of the most salient facts of this case to the issue before this Court.

1: Dr. Luciani's knowledge and opinion regarding the "standard of care has been learned as result of residency training, CME, review of gynecological journals textbooks and bulletins, interaction with colleagues as well as the continuous active practice of OBGYN for over 43 years." (Ca3.[3])

2: Dr. Luciani's opinions are based upon a thorough and careful review of all medical records as well as the depositions of the key witnesses, including the defendant. Id.

3: Dr. Luciani reviewed the medical records with great care, and observed that on December 21, 2015, the plaintiff was thirty-nine years old and had been admitted to the labor and delivery department at thirty-seven-plus weeks gestation and in labor. Her relevant medical history included she had been pregnant twice previously and had given birth to two children. Dr. Luciani observed that her obstetrical history included a vaginal delivery in 2001, and a

---

[2] Due to the intertwined nature of the facts and procedural history relevant to the issue before this Court, the sections have been combined.

[3] The term "Ca" refers to the Confidential Appendix of Plaintiff-Appellant, and "Pa" refers to Plaintiff-Appellant's Appendix, each filed on August 20, 2025.

C-section in 2014. Dr. Luciani noted that the plaintiff was 247 lbs. and had developed gestational diabetes during this pregnancy. (Ca3-4.)

4: Dr. Luciani opined that the plaintiff was a high-risk patient due to her advanced maternal age, her gestational diabetes, her obesity, and her prior cesarean section. These risks included shoulder dystocia secondary to the potential of a very large baby because of the plaintiff's obesity and diabetes. (Ca5.)

5: The plaintiff's baby was delivered by the defendant on December 21, 2015, at 7:23 p.m. and weighed 9 lbs., 10 oz. Dr. Luciani observed that the baby's left arm became stuck under the pubic bone, a condition known as a shoulder dystocia. (Ca4.)

6: The infant was noted at birth to have sustained an injury to the brachial plexus resulting in significant left arm weakness. The baby was diagnosed with a tear of the brachial plexus nerves and underwent a C5-C6 brachial plexus tendon transfer on October 1st, 2018, but the infant has been left with significant permanent residual disabilities. (Ca4-5.)

7: Dr. Luciani concluded that the infant's injuries were caused by "excessive traction, torque, or force on the baby's head away from the fixed shoulder." (Ca8.)

8: Dr. Luciani concluded "[t]here are no facts surrounding this delivery that indicate another cause exists." Id.

9: Dr. Luciani then provided a very detailed explanation of the "mechanism of injury in this delivery" and Dr. Luciani specifically explained the "how and why" this injury occurred:

> Uterine contractions spread from the fundus toward the cervix gradually creating an expulsive force. The uterine muscle generates no traction force which has clearly been implicated in causing brachial plexus injuries. In the absence of tumor, infection or congenital anomalies permanent injuries are invariably related to the use of excessive traction.
>
> Maternal forces of labor have been implicated in association with transient injuries however if these forces of labor were responsible for permanent brachial plexopathy one would expect a significant percentage of injuries to be seen in patients who have gone through labor and then are ultimately delivered by C-section. Clearly this is not the case as brachial plexus injury associated with C-section is almost nonexistent.
>
> Permanent injuries as seen in this infant are associated with significant brachial plexus damage (neuroma formation, nerve root avulsion and nerve rupture). The injury noted here occurs when the nerves of the brachial plexus are forcibly stretched beyond their plastic limit and are significantly disrupted or torn apart.

(Ca6) (emphasis added). The highlighted sentences provide the specific factual basis for Dr. Luciani's opinion.

10: Dr. Luciani then explained the standard of care, breach therefrom and cited medical literature in support of his opinion regarding the standard of care:

> If the traction on the baby's head by the obstetrician is more than gentle and/or bends the baby's neck, then it is deemed excessive and below the standard of care. This is a known cause of brachial plexus injuries to the baby which obstetricians are trained to avoid. In this case it is clear that Dr. Arole deviated from the standard of care during the delivery on 12/21/15 by utilizing excessive traction on the infant's head and neck.

(Ca7-8.)

11. Dr. Luciani cited portions of two articles and a textbook in support of his opinion, Gurewitsch & Allen, Fetal Manipulation for Management of Shoulder Dystocia, Fetal and Maternal Med. Rev., 2006, at 246; O'Leary, In Utero Causation of Brachial Plexus Injury: Myth or Mystery?, Shoulder Dystocia and Birth Injury, January 2008, at. 147-162; Ramieri & Iffy, *Shoulder Dystocia, in* OPERATIVE OBSTETRICS (Appuzio, Vintzileos & Iffy eds., 3d ed. 2006).

12: Dr. Luciani also eliminated all other potential causes of this injury in this birth, explaining in his report:

> There are no facts surrounding this delivery that indicate another cause exists.
>
> There is no evidence that, at the time of birth, Infant Carias exhibited muscle atrophy or other markers consistent with in utero positioning as a cause. Nor is

> there evidence of infection or cancer making him more susceptible to this type of injury prior to birth.
>
> There is no evidence that Infant Carias was predisposed to have this injury. There is no evidence that the infant had any biological variance to her anatomy.
>
> Nor are there any facts contained in the medical chart or observations by witnesses that maternal contractions and/or pushing caused this injury. There is nothing in the record that reflects contractions or pushing that were abnormal. It is my opinion that, in fact, these contractions and push patterns seen on the electronic monitoring are normal.

(Ca8.)

13: Dr. Luciani also explained how the defendant's deviation from the standard of care caused the infant's injury:

> Injury to the brachial plexus may *be* localized to the upper or lower part of the plexus. It results from downward traction on the brachial plexus during delivery of the anterior shoulder. ("Shoulder dystocia"; <u>Williams Obstetrics 20th Edition</u>, 1997, Appleton & Lang. Stanford, Ct., p. 450).
>
> Brachial plexus injuries result from excessive lateral traction on the fetal head in attempting to dislodge the anterior shoulder. This lateral force stretches the C-S to T-1 nerve roots, resulting in either Erb's or Klumpke's palsy. (Precis Obstetrics: an update in obstetric and gynecology; 1998, American College of Obstetricians and Gynecologists. Pp. 85-101, 95).

(Ca9.)

14. Dr. Luciani further explained his position during his deposition:

> My position is based on the totality of the evidence in the case, which includes the history, what occurred at the time of the delivery and what is going on with the infant, meaning specifically you look to see if there's any evidence of other causes of permanent injury, such as intrauterine malpositioning, tumor in the brachial plexus, infection in the brachial plexus, a genetic syndrome, things of that nature, and when you look at all those things, obviously if nothing else can cause the permanence of the injury, then I oftentimes take the position that the injury -- the permanent injury can only be caused by excessive lateral traction by the delivering provider, which is exactly my position in this case.

(Pa256 at 9:3-19.)

15. Dr. Luciani also explained the scientific basis for this opinion in his deposition:

> Q. Do you leave open the possibility that maternal forces of labor can cause shoulder – brachial plexus injuries when a shoulder dystocia is encountered?
>
> A. Not on a permanent basis. If you look at the physiology of what goes on with contractions, the uterus is a muscular organ that contracts from the fundus down to the pelvis into the vaginal birth canal and has expulsive forces. Those are pushing forces. They are not traction forces. It takes traction in order to avulse or rupture a nerve root, and the forces of normal uterine contractions will not do that.

(Pa257 at 11:19 to 12:4.)

16: Dr. Luciani explained the basis for his disagreement with the medical literature relied upon by the defense:

> Q. And this is what you explained to me before. So it's your opinion that the literature can't be correct

> regarding maternal forces of labor causing permanent brachial plexus injuries because you, in your opinion, would expect to see many more patients with permanent brachial plexus injuries following labor who then had C-sections, and in your experience you don't see that?
>
> A. I don't think anybody's experience sees that, because the incidence of a brachial plexus injury at C-section is miniscule as compared to that associated with vaginal birth. They're two directly opposite incidences.
>
> And if the maternal forces of labor caused that, then the patient who labors and delivers vaginally, as opposed to the patient that labors for the same amount of time and then ten minutes later has a C-section, should really be exactly the same if the maternal forces of labor are what caused this thing.

(Pa270 at 65:6-24.)

17. The motions' judges took note of one statement made by Dr. Luciani during his deposition, quoted by the defense repeatedly, but the reliance on this statement was misunderstood and misplaced. Dr. Luciani testified as follows:

> Q. And pushing the spine can have an effect on creating space or separating the space between the head and neck and the shoulder; right?
>
> A. There's pretty much no room in there to do that kind of thing. It's a pretty tight squeeze trying to get a baby out of there. So I think that that is probably a question that you would better ask to physiologists, those -- you know, those types of people.
>
> You know, I probably do not feel a hundred percent in answering that question. I don't think I would be able to give you a good expert opinion to say anything like that, and one of the reasons is that I've never really even read anything to that effect that has

> even addressed that type of question and what an answer would be.
>
> Q. In other words, it's not within your area of expertise?
>
> A. Yeah, I think that that's -- you know, that's a little bit out of my lane.

(Pa264 at 40:18 to 41:11.) Dr. Luciani was referring to the undisputed medical fact that the human fetopelvic proportions are much tighter than other primates, precluding any side-to-side stretching of the brachial nerves during the birth process. This is depicted in the medical literature in this case in the diagram below found in the Gurewitsch article, Gurewitsch & Allen, Fetal Manipulation for Management of Shoulder Dystocia, Fetal and Maternal Med. Rev., 2006, at 239-80. (Pa487.)

Shoulder Dystocia and Birth Injury **611**

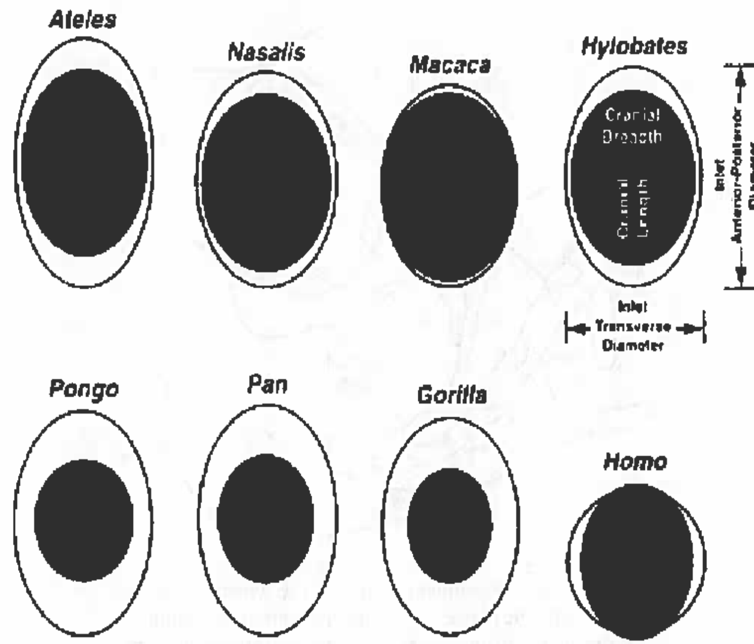

FIGURE 2. Fetopelvic proportions among primates. As depicted in this schematic, the primate pelvis has evolved to accommodate bipedal posture, while the cranium has expanded rapidly to accommodate the enormous growth of the human brain. These conflicting evolutionary pressures have resulted in extremely difficult birth in humans, requiring assistance from birth attendants. Reprinted with permission from *Evol Anthrop.* 1995;4:161–168.[23]

(Pa487.) The point made was that there is insufficient room for the head to move and stretch the brachial nerves while in the birth canal. The above quoted portion of Dr. Luciani’s deposition in no way negates Dr. Luciani’s opinion.

LEGAL ARGUMENT

POINT ONE:
Dr. Luciani's Opinion Was Properly Based Upon His Education, Training, Experience and His Use of a Differential Diagnosis.

Dr. Luciani's opinion was properly based upon his education, training, experience, and his use of a differential diagnosis to prove causation. This is consistent with decades of case law discussing the basis for an expert opinion.

For example, in the leading case of Rosenberg v. Tavorath, 352 N.J. Super. 385, 392 (App. Div. 2002), plaintiff alleged that the defendant, an oncologist, failed to properly monitor her husband's response to chemotherapy, resulting in her husband's death. The plaintiff's expert testified at trial that the decedent had suffered an extremely toxic reaction to the initial course of chemotherapy, and that the defendant was negligent in failing to reduce the dosage of the second course of chemotherapy. Id. at 396. The plaintiff's expert further testified that the defendant's failure to reduce the dosage of the second course of chemotherapy had caused the death of the patient. Ibid.

The defendants moved for an involuntary dismissal, asserting that the testimony of the plaintiff's expert was inadequate because

> (1) he offered only his net opinion on the appropriate standard of care unsupported by reference to any medical literature or case studies; (2) he testified that there was no standard of care regarding dose

> modification, or, that it ranged from a 5 percent to 25 percent modification and, therefore, his testimony was too imprecise and lacking in parameters to assist the jury; and (3) his testimony on proximate cause was lacking because he did not supply "some percent . . . in reasonable medical probabilities" demonstrating that a dose reduction would have influenced the outcome.

Id. at 393-94. The trial court dismissed the case, concluding that the plaintiff's expert did not establish the standard of care or that the alleged deviation was the proximate cause of the death of the plaintiff's decedent. Id. at 403.

In reversing the trial court's dismissal of the case, the Appellate Division rejected the assertion that there was an inadequate foundation for the testimony of the plaintiff's expert or that the expert rendered a net opinion. Id. at 401. The court explained that the plaintiff's expert provided

> adequate, particularized testimony sufficient to establish a standard of care, a deviation from that standard, and a causal link between that deviation and the injury. He had personally administered the chemotherapy drugs in question numerous times over a twenty-year period. He studied and trained in oncology for nearly a decade before becoming board certified, and he served as chief of oncology at two hospitals.

Id. at 402.

The Rosenberg panel acknowledged the fact that the plaintiff's expert did not cite or rely upon any treatises, articles, or protocols in support of his opinion. However, the appellate panel explained that an expert opinion may be based not only on medical literature but also on the expert's training or experience. Id. at

403. Additionally, as to causation, the court reiterated that "[a]n expert's opinion need not be predicated on medical certainty." Id. at 404 (quoting Greene v. Mem'l Hosp. of Burlington Cnty., 304 N.J. Super. 416, 420 (App. Div. 1997)). The court therefore remanded the case for trial. Id. at 406.

Another instructive discussion of the basis for an expert opinion is found in Bellardini v. Krikorian, 222 N.J. Super. 457 (App. Div. 1988). In this case, the Appellate Division explained that the requirements for expert qualifications are listed in the disjunctive, and the expert need not have education and knowledge and experience and training and medical literature – only one is required. Id. at 463. Further, the court instructed that a doctor may express an opinion as to accepted standards of medical care and "the expert is not required to produce a treatise to support his opinion." Ibid.

In Bellardini, the plaintiff alleged that the defendant negligently prescribed medication to the plaintiff's mother while she was pregnant with the plaintiff. Id. at 459. The plaintiff's expert opined that the defendant deviated from generally accepted standards by failing to "take adequate steps to assure that [the] plaintiff's mother was not pregnant when he prescribed the drug, or consider her possible pregnancy thereafter and advise her of the dangers of an adverse reaction from the drug." Ibid. The plaintiff's expert testified during his deposition that the defendant deviated from the standard of medicine at the time,

but the expert could not identify any medical literature establishing the relevant standard of care. Id. at 460. The trial court therefore barred the expert's testimony. Id. at 461.

However, the Appellate Division reversed because the expert may base an opinion based on his experience and is not required to support that opinion with a medical treatise. Id. at 463-64. The Bellardini court explained in language most relevant to this case:

> Obviously, the support for such expert opinion can be based on what the witness has learned from personal experience or from persons with adequate training and experience. . .
>
> Expert testimony may be furnished by a person whose knowledge, training *or* experience are deemed qualified to express their opinions on medical subjects. . . . The requirements for expert qualifications are in the disjunctive. The requisite knowledge can be based on either knowledge, training or experience.

Id. at 462 (citing Carbone v. Warburton, 11 N.J. 418 (1953) and Buckelew v. Grossbard, 87 N.J. 512, 525, 529 (1981)).

Given the above, it is clear that Dr. Luciani's opinion was more than adequately supported by his "residency training, CME, review of gynecological journals textbooks and bulletins, interaction with colleagues as well as the continuous active practice of OBGYN for over 43 years," and his delivery of approximately 6,500 babies, (Ca3), his discussion with colleagues, and his

involvement as an expert in hundreds of medical negligence cases over more than 20 years. (Pa256 at 7:7-24; see also, Ca 2-3.)[4]

Additionally, Dr. Luciani reached this conclusion by employing a differential diagnosis to rule out the probability that the child's brachial plexus injury was due to any other possible factors. This is entirely proper. Our Supreme Court has explained that medical experts may offer causation opinions in malpractice cases using a differential diagnosis. Creanga v. Jardal, 185 N.J. 345, 356 (2005) (citing Lapka v. Porter Hayden Co., 162 N.J. 545, 557 (2000); and then citing Rubanick v. Witco Chem. Corp., 125 N.J. 421, 450–51 (1991)).

In Creanga, the plaintiff claimed that she sustained injuries in an automobile accident, causing premature labor and the death of one of her twins. Id. at 349. The plaintiff's treating obstetrician opined that the automobile accident was the proximate cause of the miscarriage. Ibid. The opinion was

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[4] The defense points out that Dr. Luciani's opinion has been barred in one case. However, in all fairness it should be recognized that as noted above, Dr. Luciani has been qualified as an expert witness for more than 25 years, reviewing approximately 50 cases a year, (Pa257 at 10:15; Pa256 at 7:11), many of which involved allegations of a brachial plexus injury. (Pa256 at 8:11 to 9:2.)

See also, e.g., Fertile v. St. Michaels Med. Ctr., 169 N.J. 481 (App. Div. 2001) (involving a "brachial plexus injury"); Saunders v. Cap. Health Sys. at Mercer, 398 N.J. Super. 500 (App. Div. 2008) (involving a "[s]houlder dystocia (Erb's Palsy)"); Draper v. Jasionowski, 372 N. J. Super. 368 (App. Div. 2004) (involving "bilateral erb's palsy"). Obviously, neither the New Jersey Supreme Court nor the Appellate Division thought Dr. Luciani was not qualified to render the opinions he rendered in these three cases.

based upon the expert's treatment of the plaintiff before, during, and after the delivery, the plaintiff's medical records and the elimination of other causes of the miscarriage. Ibid. The trial court dismissed the complaint, concluding that the plaintiff's expert offered a net opinion, and the Appellate Division affirmed. Ibid. The Supreme Court reversed, holding that "an expert opinion derived from a differential diagnosis is admissible under the New Jersey rules of evidence." Id. at 349. The Court explained:

> [B]ecause of the widespread acceptance of differential diagnosis in the medical community, the recognition of the technique in state and federal courts, and its compatibility with our rules of evidence in prior case law, we conclude that a trial court may admit an expert's differential diagnosis into evidence.

Id. at 357.

The Court observed that the plaintiff's expert had in fact specified the basis for his conclusion. Id. at 362. The expert opined the trauma of the accident initiated the events leading to the miscarriage. Ibid. The expert had considered and rejected alternative causes of the miscarriage. Ibid. The expert considered the temporal relationship between the accident and the miscarriage and supported his conclusion with reference to his pre-accident treatment records, the hospital records, and his post-treatment records. Id. at 359, 362. "Accordingly, [the plaintiff's physician] not only provided his conclusion that

the plaintiff's premature labor was caused by the automobile accident, but he also gave the 'why and wherefore' for that conclusion." Id. at 362.

The defendants' reliance on In re Accutane, 234 N.J. 340 (2018) is grossly misplaced. In the Accutane case, the Supreme Court emphasized that "[t]he gatekeeping role necessitates examination of a methodology espousing a new theory in medical cause-and-effect cases." Id. at 389 (emphasis added). Dr. Luciani did not render anything resembling a new theory about causation. To the contrary, Dr. Luciani rendered the same opinions in Fertile, supra, which was decided 24 years ago.

Moreover, in Townsend, 221 N.J. at 54-55, the Supreme Court cited Creanga and Rosenberg when explaining language most relevant to this case:

> An expert's proposed testimony should not be excluded merely "because it fails to account for some particular condition or fact which the adversary considers relevant." The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion. Such omissions may be "a proper subject of exploration and cross-examination at a trial."

(first quoting Creanga, 185 N.J. at 360; and then quoting Rosenberg, 352 N.J. Super. at 402). Dr. Luciani's rejection of certain medical literature is certainly a fair subject for a vigorous cross-examination. However, the motion judges' rejection of Dr. Luciani's education, training, vast experience, consultation with

colleagues, experience in more than 100 medical negligence cases and his use of a differential diagnosis, in favor of a mini-bench trial based only upon certain medical articles (but not ones positive to Dr. Luciani's own opinion) creates a new, dangerous and erroneously increased burden in medical malpractice cases that must be corrected by this Court.

POINT TWO:

The Trial Court Should Have Held a Rule 104 Hearing Before Barring Dr. Luciani From Testifying.

When a party's claim is at issue due to the validity of an expert opinion, the party is entitled to a Rule 104 hearing regarding the expert's opinion. In this case, the plaintiff was never provided with the opportunity to call Dr. Luciani for direct testimony regarding these issues. In Kemp v. New Jersey, 174 N.J. 412, 427-28 (2002), the Supreme Court explained and instructed:

> The Rule 104 hearing allows the court to assess whether the expert's opinion is based on scientifically sound reasoning or unsubstantiated personal beliefs couched in scientific terminology.
>
> In the course of the Rule 104 hearing, an expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable. The court's role is to "determine whether the expert's opinion is derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field." Support for an expert's methodology may be found in professional journals, texts, conferences, symposia, or judicial opinions accepting the methodology. Courts also may consider testimony from other experts in the field who use similar methodologies.
>
> We also note that the Third Circuit has "long stressed the importance of *in limine* hearings under Rule 104(a) in making the reliability determination required under Rule 702 and Daubert." That court has recognized that the most efficient procedure for determining the reliability of expert testimony is an *in limine* hearing.

(first quoting Landrigan v. Celotex Corp., 127 N.J. 404, 427 (2002); and then quoting Padillas v. Stork Gamco, Inc., 186 F.3d 412, 427 (1999)). In fact, the Kemp Court instructed that "in cases in which the scientific reliability of an expert's opinion is challenged and the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a Rule 104 hearing," id. at 432-33, and suggested it is an abuse of discretion not to conduct such a hearing, explaining as discussed above:

> The adversarial process upon which our legal system is based assumes that a fact finder will give the parties an adequate opportunity to be heard; if it does not, it cannot find facts reliably. Thus, the detailed factual record requirement, firmly entrenched in our jurisprudence, requires adequate process at the evidentiary stage, particularly when a summary judgment may flow from it.

Id. at 432.

Because the trial court found that Dr. Luciani's opinion was a net opinion based merely on his deposition testimony – which is one-sided without giving Plaintiff the opportunity for direct examination – the trial court abused its direction. The remedy is to reverse, and if there is any doubt as to the admissibility of the expert's opinion, permit a Rule 104 hearing.

CONCLUSION

In summation, NJAJ wishes to emphasize the following points:

1: The court below erred in employing a "gatekeeper" analysis. This case does not involve a novel or new scientific theory. To the contrary, this case involves a "battle of the experts" which has been ongoing for decades.

2: The court below erred in becoming the finder of fact instead of the "gatekeeper." As both the Supreme Court and Appellate Division have instructed, the issue of the causation of an injury is particularly within the province of the jury.

3: The court below erred in barring an expert from rendering an opinion without a Rule 104 hearing. The court below made the decisions on a bare record, having only the experts' reports, certain medical articles and the cross-examination of Plaintiff's expert during his deposition. The trial court committed an abuse of discretion because the Court has instructed that a Rule 104 hearing should be held before a dispositive decision is made.

4. The court below erred in accepting the defense's attempts to posit this as only a "res ipsa" case. Plaintiff's expert performed a differential diagnosis, as doctors do when treating patients. Plaintiff's expert based his opinions upon the fact that there was shoulder dystocia and by eliminating the possibility of all other possible causes. The process of determining causation is always a question

of probabilities, and Plaintiff's expert opined that in this specific case involving this specific patient to a reasonable degree of medical probability this injury was caused by the use of excess traction.

NJAJ therefore urges this Court reverse, as Plaintiff's expert's opinion was sufficient to allow a jury to determine the issue of causation. In the alternative, this matter should be remanded for a Rule 104 hearing.

Respectfully submitted,
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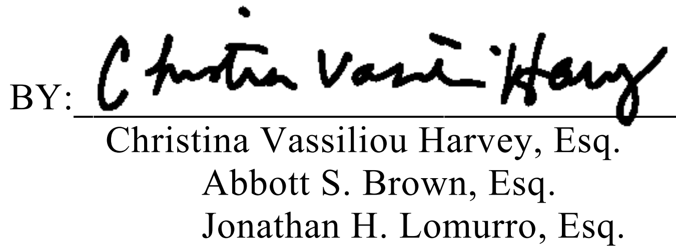

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Dated: October 13, 2025

FILED, Clerk of the Appellate Division, October 14, 2025, **A-002484-24**

SIRIA CARIAS, AS MOTHER AND NATURAL GUARDIAN OF M.M., (AN INFANT), Plaintiff-Appellant, v. LAURA DALTON, DO; CHIDINMA AROLE, MD; VIRTUA HEALTH, INC.; VIRTUA WEST JERSEY HEALTH SYSTEMS, INC.; VIRTUA MEDICAL GROUP, PA, AND JANE/JOHN “DOES” (UNIDENTIFIED MEDICAL PROFESSIONALS, Defendants-Respondents.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** DOCKET NO. A-002484-24 CIVIL ACTION On Appeal From: Law Division, Burlington County Docket No. BUR-L-001192-20 Sat Below: Hon. Aimee R. Belgard, P.J.Cv. Hon. Eric G. Fikry, P.J.Cv. Hon. Richard L. Hertzberg, J.S.C.

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LEGAL ARGUMENT

POINT I

DEFENDANT'S ARGUMENTS THAT THE ERRORS BELOW WERE "IMMATERIAL" OR "OF NO CONSEQUENCE" RING HOLLOW.

As a preliminary matter, defendant does not dispute that Judge Belgard was wrong regarding the articles on which Dr. Luciani relied but terms that error "immaterial." Db2. As that was the basis for the court's opinion, such an error is certainly material. Moreover, defendant's claim that having a different judge hear the reconsideration motion was "of no consequence" is an about-face of the defense position below that the motion had to be heard by Judge Belgard. Ibid. Defendant would surely be raising the same issue if the roles were reversed. Any claim of no or harmless error, therefore, rings hollow.

Contrary to defendant's assertion, there was no showing of exceptional circumstances at bar. The examples from the caselaw – death, retirement, temporary assignment having ended – do not exist in this case. Rule 4:42-2(b) is clear and mandatory. Under the circumstances, and in light of the express language of Rule 4:42-2(b), the decision not to assign the motion to reconsider to a sitting judge of the Law Division was error. The Order denying reconsideration should be vacated and remanded.

POINT II

DEFENDANT'S CLAIMS THAT DR. LUCIANI'S OPINION IS A NET OPINION ARE UNPERSUASIVE AND IN CONFLICT WITH OUR JURISPRUDENCE.

A. Dr. Arole's Credibility Is for a Jury to Decide.

Defendant, Dr. Arole, claims that because she testified that she did not apply excessive lateral traction, Dr. Luciani's opinion is a net opinion. In other words, without the doctor's admission of negligence, plaintiffs have no case. Based on that premise, the only time a plaintiff may prevail in a case such as this is when a doctor admits fault. That is unfair and antithetical to our system of justice. The doctor's credibility is for a jury to decide. "[A] jury would be entitled to reject the truth of the statement in any or all of its particulars just as it would be entitled to reject the credibility of any other unrebutted testimony whose truth is not compelling. See Ferdinand v. Agricultural Ins. Co. of Watertown, 22 N.J. 482, 494 (1956), making clear that '[w]here men of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted, uncontroverted or even disputed, evidence of such a character is for the jury.'" Jeter v. Stevenson, 284 N.J. Super. 229, 235 (App. Div. 1995) (citations omitted); see Model Jury Charge (Civil), 1.12M, "False in One – False in All" (approved Nov. 1998) ("If you believe that any witness deliberately lied to you, on any fact

significant to your decision in this case, you have the right to reject all of that witness's testimony.”).

B. Dr. Luciani Gave the Whys and Wherefores to Support His Opinion.

Next, defendant argues that because Dr. Luciani disagreed that maternal forces of labor alone could cause the injury at bar, his opinion is a net opinion. To be fair, Dr. Luciani agreed that maternal forces of labor alone could cause a shoulder dystocia injury. His opinion concerned the exact nature of the injury to this child. The avulsion or rupturing of the nerves, the injury M.M. suffered at bar, could not be caused by maternal forces of labor alone. Dr. Luciani, in his written report and in his deposition testimony, gave the “whys and wherefores” that are required under our Rules of Evidence to constitute an appropriate expert opinion. That there are other doctors that say otherwise does not render Dr. Luciani’s opinion invalid.

Moreover, he explained in great detail in his report the basis for his disagreement with the articles contained in the 2014 ACOG compendium. Ca12-17. That is all that he is required to do. There are two competing theories here regarding causation. Which theory prevails is for a jury to decide. As discussed in our Opening Brief at 28-30, the trial court erroneously extended its gatekeeping function beyond what is required or appropriate. The judge became the arbiter of the credibility of the articles allegedly cited by Dr. Luciani but actually cited by the

defense. Weighing of the evidence is not the province of the trial court in its gatekeeping function.

C. Dr. Luciani Is Qualified to Give an Opinion in this Matter.

Defendant claims that Dr. Luciani gave testimony admitting that he was not qualified to render an opinion on proximate cause or standard of care. That is untrue. Defendant took a statement Dr. Luciani made, out of context, and the court relied on it in finding his opinion a net opinion. It was a statement regarding a specific question the defense attorney asked Dr. Luciani, to which he somewhat sarcastically remarked it was "out of [his] lane." The "out of my lane" comment heavily emphasized by the defense and cited by the trial court ignores and misrepresents Dr. Luciani's training, experience and testimony.

Dr. Luciani testified to training in human anatomy and 45 years of experience with live childbirth. He clearly explained the physiology of his opinion in depth in his report and in his testimony.

> Q. Now, am I correct that when an obstetrician encounters a shoulder dystocia, that traction to release the shoulder is appropriate as long as it's not excessive traction?
>
> A. No. You're not -- you're not appropriately thinking that way.
>
> Q. Okay. And that's because I've never delivered a baby, so, you know, I –
>
> A. I'll help you out with that one, if you want.

> Q. So let me try it again. Is there ever a time when an obstetrician can use lateral traction to help release a shoulder?
>
> A. Yes. And that time is when that baby had been caught, after the head has been delivered, usually at the six, seven-minute mark, where fetal hypoxia will now start to set in and you're going to run the risk of a brain-damaged baby. So at that point in time, where you've utilized all your maneuvers several times and you cannot deliver the baby, all bets are now off. Pull hard, get that kid out. If you injure the brachial plexus it's very unfortunate, but you save the baby's brain. Obviously, that did not occur in this case.
>
> Traction utilized during the birthing process should not be utilized until, number one, you see or feel a little release of the anterior shoulder if you feel that it's caught, but most importantly, if you're going to utilize any degree of traction, it has to always be in the axial plane, which means it has to be directly in line with the fetal spine. That head cannot come away from the spine, because that increases the distance between the neck -- the head and the neck, and that increases the distance from -- from the nerves, and pulls on the nerves, which can cause the nerves to rupture and/or avulse. That is lateral traction.
>
> So any degree of traction that you utilize during the course of the delivery, especially with a brachial plexus -- I'm sorry, with a shoulder dystocia, number one, has to be extremely gentle. More importantly, it has to be absolutely axial in nature. And if you're doing that, within a reasonable degree of medical certainty you're not going to get a permanent brachial plexus injury.
>
> It's the lateral excessive traction that causes the injury.
>
> [Pa259-60 at 21:2-22:21]

To suggest that a doctor with Dr. Luciani's education, training and experience is not qualified to testify regarding how an injury occurs during childbirth is absurd. When challenged on his criticism of the use of rat models

rather than human studies, Dr. Luciani acknowledged that there are no human studies to support the competing theory that maternal forces can cause permanent brachial plexus injuries. That hypothesis is entirely reliant on studies of rats and pigs. Dr. Luciani then went on to explain again, in depth and detail, the physiology of why a permanent brachial plexus injury cannot occur without excessive lateral traction.

> [A.] I have never found anything that has backed that up, as far as human studies are concerned. They're all animal models.
>
> Q. Well, to be fair, Doctor, you couldn't conduct a human study in this area. You couldn't ethically do it, could you?
>
> A. Not in this country, I hope.
>
> Q. Right. So the best we have is mathematical models, animal models and case studies; right?
>
> A. And that's a good guessing game. If you look at the reality and the pathophysiology of the uterus and its contractions, it physiologically doesn't work that way.
>
> The other thing to remember is that when a shoulder dystocia occurs, that means that the shoulder is caught -- and we're talking about anterior shoulder dystocias, where the shoulder is caught on the pubic bone. The shoulder gets caught on the pubic bone, the uterus will continue to contract, but the head and the neck are now in front of the shoulder, so there is no force being exhibited on the head and the neck that continues to make it move forward. It stops.
>
> So when the shoulder is caught, despite the uterine muscles still pushing from behind, everything comes to a halt. It's not like when a tractor-trailer goes under a bridge and the trailer hits the bridge and the tractor just keeps on going. That's not what happens during labor.

> In labor, that baby stops immediately, because there is no muscle around the head and the neck anymore. The head and the neck have already come through the uterus. They're out of the uterus. They've been delivered. So therefore, the only thing that's still in the mom is the shoulder caught against the pubic bone, therefore contractions from the rear, which are propulsive/expulsive, are not going to exhibit traction in order to pull and destroy nerves. It just physiologically cannot work that way. It doesn't even make any sense.
>
> [Pa261 at 26:19-28:7.]

Asked the basis for his thorough explanation of the physiology of the mechanism of injury, Dr. Luciani replied "I'm referring to natural physiology, okay, that we can obviously look at in every human being. I mean, I studied anatomy during the course of my career in medical school and obviously as I've been practicing medicine for the last 43 years, so from an anatomical perspective and a physiological perspective, that doesn't make any physiological sense." Pa261 at 28:10-16. Clearly, Dr. Luciani was qualified by training and experience to testify to the physiology of childbirth and brachial plexus injuries and provided detailed "whys" and "wherefores" for his opinion. His opinion is not a net opinion.

D. The 2014 ACOG Compendium.

Defendant misled the trial court by claiming that the 2014 American College of Obstetricians and Gynecologists ("ACOG") Compendium, the sole basis for the defense arguments, was (1) a study (it was not), and (2) the only science accepted

by OB/GYN's like Dr. Luciani (also untrue). In actuality, the 2014 ACOG report is a collection of previously written articles that support the goal of the task force, which was to come up with an alternative to negligence by the doctor as the cause of certain types of shoulder dystocia. Da021. Those articles were cherry-picked to support a "maternal forces of labor alone" theory peddled by Dr. Grimm. Moreover, their conclusion was simply that the existence of Neonatal Brachial Plexus Palsy following birth doesn't necessarily "indicate that exogenous forces are the sole cause of the injury." Da018. That does not mean that those forces could not be the sole cause of the injury. It depends on the injury. The compilation fails to distinguish between temporary and permanent injuries.

The defense asserts that Dr. Luciani is expressing nothing more than a personal opinion based on a grudge with the ACOG. Db16. Attacking an expert's credibility should be done before a jury, not on a motion to bar. More importantly, Dr. Luciani's opinion is not merely a personal opinion. It has been the prevailing opinion of the mechanics of a permanent brachial plexus injury, like the one suffered by M.M., for a century. It is based on hands-on experience, training, education, studies and many articles on the subject. It also is the opinion held by plaintiff's treating pediatric orthopedic surgeon, Scott H. Kozin, M.D. Pa573. Dr. Kozin treats these types of injuries and is nationally recognized in the area of pediatric nerve and spinal-cord injuries. Pa574. He has "attained national and

international recognition, publishing [his] works through more than 100 peer-reviewed publications." Ibid.

Dr. Kozin treated and operated on M.M. in October 2018. Pa575. In treating M.M., Dr. Kozin documented that "the infant plaintiff sustained a left brachial plexus birth palsy affecting the C5 and C6 nerve roots" including "partial tearing of these nerve roots." Ibid. Dr. Kozin concluded that "the nature and extent of the injury suffered by infant plaintiff M.M. are due to traction on the fetal head during the course of the delivery of the infant and not maternal forces of labor." Ibid. That is the import of Dr. Kozin's affidavit. Dr. Luciani is not alone in his beliefs and not merely expressing a personal opinion. Just because one organization assembled a series of anecdotal, observational articles into a compendium does not make it the prevailing theory of the medical community or even the sole theory accepted within the medical community. It is akin to citing to the Defense Research Institute for the proposition that the justice system is biased against defendants. As Dr. Luciani detailed in his report:

> The published compilation entitled Neonatal Brachial Plexus Palsy published by ACOG in 2014 is a collection of references that were prior publications that fit into the above categories. It provides no new data or studies to support the theory that maternal forces of labor can cause a permanent brachial plexus injury. At best the task force can only state "Maternal forces alone are an accepted cause of at least transient neonatal brachial plexus palsy by most investigators" (See Executive Summary Pg xvi and Pg 24). The task force relies on statistical studies (See Table 1-4, Pg 10), Grimms mathematical models (See generally**)** and case reports that misrepresent the true facts, such as Lerner's case

> report (See Pg 28 Footnote 15). As to the latter, the task force, citing Dr. Lerner's article, states "A single case report describes a case of persistent NBPP in a delivery *in* which no traction was applied by the delivering physician and no delay occurred in the delivering the shoulders (15). Therefore, there is insufficient scientific evidence to support a clear division between the causative factors of transient NBPP versus persistent NBPP (See Pg 28).
>
> [CA16-17]

E. Actual Studies Support Dr. Luciani's Opinion.

The studies authored by Edith Gurewitsch and Robert Allen also concur with the conclusion expressed by Dr. Luciani that a permanent brachial plexus injury with avulsion of the nerves must be the result of excessive lateral traction during childbirth once pre-existing conditions have been ruled out. Ca11-12. "During shoulder dystocia, neonatal brachial plexus injury occurs as a result of increased lateral traction to and/or twist of the head in an attempt to deliver the trunk." Ca12 at note 5. In fact, studies by the ACOG, the same organization on whose compendium of anecdotal articles the defense relies, also concur with the opinion expressed by Dr. Luciani.

> **Brachial plexus injuries result from excessive lateral traction on the fetal head** in attempting to dislodge the anterior shoulder. This lateral force stretches the C-5 to T-1 nerve roots, resulting in either Erb's or Klumpke's palsy. (Precis Obstetrics: an update in obstetric and gynecology; 1998, American College of Obstetricians and Gynecologists. Pp. 85-101, 95).
>
> [Ca9 (emphasis supplied).]

Dr. Luciani's opinions have support in the medical community, are not merely personal opinions or based on some personal animus and should not have been barred.

F. Experience Alone Can Be the Basis for an Expert's Opinion.

Rule 702 of the New Jersey Rules of Evidence states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by **knowledge, skill, experience, training, or education** may testify in the form of an opinion or otherwise." N.J.R.E. 702. "Evidential support for an expert opinion is not limited to treatises or any type of documentary support, **but may include what the witness has learned from personal experience**." Bellardini v. Krikorian, 222 N.J. Super. 457, 463 (App. Div. 1988) (emphasis supplied). In re Accutane Litigation, 234 N.J. 340 (2018), did not and was not intended to rewrite the Rules of Evidence.

The fact is that live research studies of childbirth injuries cannot ethically be performed. Most "studies" are either compilations of previously published articles like the 2014 ACOG compendium or extrapolations from studies of animals. Neither of those bases, however, supersede actual, hands-on knowledge, training and experience. Moreover, there is one notable exception to the observational articles and extrapolations: the research and publication of Robert H. Allen, Ph.D.,

which involved research on full-term human infant cadavers. Pa483. That study supports Dr. Luciani's conclusion that permanent brachial plexus injuries are caused not by maternal forces of labor alone but by excessive lateral traction. Pa341; Pa483.

G. The Trial Court Exceeded its Gatekeeping Role.

Dr. Luciani testified based on his education and experience and on the medical literature. He thoroughly explained the physiology of the childbirth process, shoulder dystocia and permanent brachial plexus injuries. He relied on the medical records not only of the birth but on the treatment of the injury. His opinions were consistent with those of the treating physician. His opinions also have been the prevailing opinions in the medical community for decades.

They are not novel or untested, as was the case in the Accutane litigation. The analysis below mistakenly turned the proofs 180 degrees. The new, unproven theory based on extrapolation and anecdotal "studies" was embraced and the prevailing theory scrutinized and rejected. Defendant unsuccessfully tries to distinguish Nobre v. Shanahan, 976 N.Y.S.2d 841 (Supreme Court, Orange County, N.Y., Dec. 10, 2013) (Pa332), by stating that it was published in 2013 before the 2014 ACOG compilation but that is incorrect and misleading. In fact, the ACOG report was written in 2013. Da022.

Moreover, the articles on which it was based were published well before 2013 and were the same proofs that the defendant in Nobre used to try to sway the court to accept the novel "maternal forces of labor" theory. That court, nonetheless, remained unpersuaded. 976 N.Y.S.2d at 855. Plaintiff submits that the trial court's analysis at bar far exceeded the trial court's role of gatekeeper. The court weighed evidence and made its own medical determination of causation. That was an abuse of discretion, error and should be reversed.

POINT III

DR. GRIMM IS NOT QUALIFIED TO TESTIFY ABOUT CAUSATION SO HER REPORT AND OPINIONS ARE IRRELEVANT.

Defendant claims that "Dr. Michelle Grimm, Ph.D., a biomechanical expert, concluded that the infant's injury resulted from contact of the shoulder with the mother's symphysis pubis rather than excessive traction." Db6. Dr. Grimm did not render an opinion on causation because she is not qualified to do so. She is not a medical doctor. Her research is purely theoretical and not tied to any facts specific to this case. Dr. Grimm admits that her model is not used to "specifically indicate what happened in terms of precise amounts of force or stretch in this particular delivery." Id. at 24:3-6. The model is not used to "model the specific mother-baby pair." Id. at 24:14-15. In this case, Dr. Grimm admits that she did not and cannot use the animal-based model to come up with a specific argument

with respect to causation. Id. at 24:16-20. She did not use any data from this specific delivery to reach her opinions in this matter. Id. at 24:20-21. Because of the "million different variables in the human anatomy," Dr. Grimm could not opine as to the exact cause of the injury in this case. Pa305 at 39:6-12.

Essentially, Dr. Grimm assumes that no excess or lateral traction was used in the birth of M.M. based entirely on Dr. Arole's testimony and then speculates that the injury must have been caused by maternal forces of labor. Pa306 at 44:16-20. It would be a classic net opinion based solely on defendant's denial of the use of traction. As a result, she has been barred from rendering opinions on causation in the past. See, e.g., Huett v. Branson, No. ED110991, Mo. Ct. of Appeals, Eastern District, Div. Three (July 18, 2023) (Pa314); Nobre, 976 N.Y.S.2d 841 (Pa332). The claim that she offered an opinion on causation, Db6, is incorrect.

CONCLUSION

Sometimes an injury itself **is** evidence of wrongdoing. We can prove beyond a reasonable doubt that a person has been shot by a bullet hole through their body regardless of a gun, a bullet or an eyewitness. In cases such as this one, plaintiffs should not be denied justice because the doctor will not admit her wrongdoing. That would be grossly unfair.

Yes, there is no smoking gun, no admission of negligence. The circumstantial evidence, however, the fact of an avulsion, the documented

condition of the child from Dr. Kozin's treatment records, the permanency of the neonatal brachial plexus palsy and the differential diagnosis is consistent with physician negligence. There is ample support from the medical literature and community that the specific injury in this case resulted from excessive traction. Dr. Luciani's testimony should have been admitted under the Rules of Evidence and existing caselaw. The Orders barring his testimony and granting summary judgment should be vacated, and the matter remanded to the trial court.

Respectfully submitted,

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SIRIA CARIAS, AS MOTHER AND NATURAL GUARDIAN OF M.M. (INFANT), Plaintiff-Appellants, vs. LAURA DALTON, DO; CHIDINMA AROLE, MD; VIRUA HEALTH, INC; VIRTUA WEST JERSEY HOSPITAL SYSTEMS, INC; VIRTUA MEDICAL GROUP, PA; AND JANE/JOHN "DOES" (UNIDENTIFIED MEDICAL PROFESSIONALS) Defendant-Respondents	DOCKET NO. A-002484-24 Civil Action ON APPEAL FROM ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION: BURLINGTON COUNTY DOCKET NO. BUR-L-1192-20 SAT BELOW: HON. Aimee R. Belgard, P.J.Cv HON. Eric J. Fikry, P.J.Cv HON. Richard L. Hertzberg, J.S.C.

BRIEF IN SUPPORT OF THE OPPOSITION BY DEFENDANT RESPONDENT CHIDINMA AROLE, MD TO THE AMICUS CURIE BRIEF BY NEW JERSEY ASSOCIATION FOR JUSTICE

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PRELIMINARY STATEMENT

The amicus brief (hereafter Amicus) urges reversal of the trial court's exclusion of Dr. Richard Luciani and entry of summary judgment, asserting that his causation opinion rests on qualifications, experience, use of differential diagnosis, and a permissible rejection of contrary literature, and that a Rule 104/*Kemp* hearing was required. The record and governing standards demonstrate otherwise. The trial court properly exercised its gatekeeping function under N.J.R.E. 702 and *In re Accutane* to exclude Dr. Luciani's unreliable, net opinion untethered to facts, grounded in anecdote rather than a scientifically sound methodology, and inconsistent with the medical literature and the evidentiary record. The exclusion required summary judgment because plaintiff lacked admissible expert proof of standard of care and causation. This Court should affirm.

While Dr. Luciani may have decades of obstetrical experience, that does not mean everything he believes must be taken as reliable. Experience alone cannot replace scientifically valid methodology as well as the direct evidence in this matter. His opinion, lacking empirical support and based heavily on

anecdotal experience, constituted a net opinion due to the unreliability and lack of scientific evidence and was therefore properly excluded.

The appellants have focused on Dr. Luciani making a differential diagnosis to substantiate his opinions. However, Dr. Luciani's opinion is based on science which is not widely accepted in the scientific community. When asked why Dr. Luciani has not embraced the new school of thought, he testified about his bias against the American College of Obstetrics and Gynecology (hereafter ACOG). This bias stems from an investigation by ACOG into Dr. Luciani regarding opinions he made on another legal matter. This showed the Lower Court that Dr. Luciani's opinions were not reliable because among other things his opinions failed to consider any other potential accepted causes. Dr. Luciani was also unable to address the how and why the other reasonably likely causes of brachial plexus injuries did not occur. The Plaintiff's argument that the court misstated which articles Dr. Luciani relied upon is immaterial, as the key issue was the absence of any evidence of excessive traction and, most importantly, Dr. Luciani's own testimony admitting he was not qualified to explain anatomically how an accepted cause of brachial plexus injuries could not occur.

Judge Belgard noted Her Honor's order that Dr. Luciani lacked any actual evidence to support his opinions. Even if Dr. Luciani had the evidence,

Dr. Luciani admitted at deposition that explaining the mechanism of the injury causation would be "out of his lane." The Court did not need any further explanation as Dr. Luciani confirmed that he was not qualified. A Rule 104 hearing would not have uncovered any new information or explanation by Dr. Luciani that was not explained at deposition. Thus, the trial court appropriately used their discretion when determining a Rule 104 hearing was not necessary.

PROCEDURAL HISTORY

The defendant-respondence relies on the procedural history listed in their original brief. The respondent would add that an amicus curie brief was submitted by the New Jersey Association for Justice (hereafter NJAJ), which was accepted by the Court. This brief is the response on behalf of the respondent.

STATEMENT OF FACTS

The moving respondent relies on the statement of facts detailed in their original brief. To respond to Amicus' specific statement of facts, the respondent would re-iterate that the Amicus is attempting to rehabilitate Dr. Luciani's opinions. This is highlighted in number seventeen (17) of their fact where the Amicus attempts to explain what Dr. Luciani meant in his testimony by citing to a specific diagram not previously mentioned by Dr. Luciani or presented to the respondent as something that was to be relied on. Additionally, plaintiff filed an

opposition to our original motion to bar, a motion to reconsider, a motion to leave to appeal and an affidavit from Dr. Luciani himself prior to the Amicus brief. None of these prior documents made any reference to the diagram being mentioned in Amicus's statement of facts. Thus, it is surprising that the Amicus would be able to make an inference as to what Dr. Luciani meant by his testimony when the Amicus was not present at the deposition, did not retain Dr. Luciani to author his report, nor was the Amicus involved in the litigation prior to their brief. So, any attempt to expand on the opinions of Dr. Luciani by the Amicus cannot be seen as reflective of what Dr. Luciani was actually thinking when making the opinions. Simply put, such information is not part of the record.

LEGAL ARGUMENT

Defendants respectfully submit this reply disputing the reliability and admissibility of Plaintiff's proffered expert, Dr. Richard Luciani. As shown below, the record demonstrates that: (1) his qualifications, as presented, do not establish expertise on the causation question at issue; (2) his methodology is an "net opinion" grounded in personal belief rather than scientifically reliable reasoning; (3) his differential diagnosis is conclusory, fails to reliably rule out alternative causes, and rests on mischaracterizations of the medical literature; and (4) his testimony reflects material inconsistencies and concessions that underscore unreliability and potential bias. Plaintiff and amicus cannot

rehabilitate these defects by recasting the dispute as a jury question or by demanding Rule 104 hearing where the proponent has not met foundational reliability requirements on this paper record.

I. DR. LUCIANI'S OPINIONS WERE APPROPRIATELY DEEMED NET OPINIONS AND UNRELIABLE BY THE LOWER COURT

A. Dr. Luciani's qualifications do not establish reliable expertise for the specific causation issue presented.

Amicus relies on Dr. Luciani's involvement "as an expert in hundreds of medical negligence cases over more than 20 years," inviting the Court to infer reliability from frequency of retention rather than from scientifically sound methods. Experience testifying as a witness is not a proxy for methodological rigor. What matters is whether his opinions are grounded in reliable principles and methods applied reliably to the facts, a showing absent from the record excerpts proffered by amicus. Additionally, Dr. Luciani has been barred from presenting this opinion in a neighboring jurisdiction, New York. This opinion has also been barred by a court in Pennsylvania. Plaintiff references a case where Dr. Luciani was able to offer the same opinion, but admitted it was from twenty-four years ago. Additionally, Amicus-movant addressed three cases in a footnote on p. 16 of their brief. These cases were: *Fertile v. St. Michaels*

Med. Ctr., 169 N.J. 481 (App. Div. 2001); *Saunders v. Cap. Health Sys. at Mercer*, 398 N.J. Super. 500 (App. Div. 2008); and *Draper v. Jasionowski*, 372 N. J. Super. 368 (App. Div. 2004). These cases do not address the reliability of Dr. Luciani's opinions and thus, are not persuasive in the current matter. The *Fertile* matter involves the decision to proceed with a vaginal birth as compared to a c-section. Dr. Luciani was involved in the case as an expert for the defense. According to the reading of the case, Dr. Luciani offered the opinion that the OB was appropriate to proceed with a vaginal birth. The opinion as to the cause of the brachial plexus injury was offered by Dr. Adler, who is a pediatric neurologist. The *Saunders* matter involved whether an affidavit of merit by Dr. Luciani was required against a certified nurse mid-wife. There was no detail of any opinions by Dr. Luciani other than authoring the affidavit of merit. Lastly, the *Draper* case questioned whether an infant plaintiff could proceed with a claim against the OB once they reach adulthood. Furthermore, all these cases are from 2008 or earlier, which is six years prior to the initial ACOG study on Brachial Plexus injuries.

The amicus cites to caselaw that suggests an expert may rely on education and experience when making their opinions. However, this does not relieve the expert of the obligation to provide the why and wherefore which links accepted principles to the concrete facts in the case. Without this

explanation, the expert no longer assists the Court and welcomes the Jury to speculate as to the potential cause of the injury. Here, Dr. Luciani simply alleges that since there was a permanent brachial plexus injury, there must have been excess traction. Dr. Luciani mentioned that his understanding of the human anatomy, his review of the literature and attending thousands of other births gives him the basis to offer the opinion. Dr. Luciani fails to explain where this opinion could be backed by medical evidence in the record. Nor does Dr. Luciani explain how the medical community accepts this opinion, other than his belief that ACOG is biased. What Dr. Luciani is attempting to do is further an opinion only backed by himself. This is the exact type of scenario the Court in *In Re Accutane* and *Daubert* set out to exclude from the courtroom.

B. Plaintiff's reliance on *Rosenberg* is misplaced

Plaintiff's reliance on *Rosenberg v. Tavorath,* 352 N.J. Super. 385, 392 (App. Div. 2002) is misplaced. The expert in *Rosenberg* clearly identified how the defendant deviated from accepted standards of practice in treating the plaintiff by mentioning what the correct dose of medications should have been. *Id*. at 403-04. Here, Dr. Luciani's opinion is based on the fact that there was a poor outcome. Dr. Luciani does not point to how Dr. Arole deviated from the standard of care, other than that there must have been excessive traction due to the permanent injury. Dr.

Luciani does not offer any opinion as to what Dr. Arole should have done. In fact, Dr. Luciani agreed that the maneuvers she performed were within the standard of care. Thus, unlike in *Rosenberg*, Dr. Luciani is unable to clearly identify how Dr. Arole allegedly deviated from the standard of care. Instead, Dr. Luciani's opinion is merely an assumption or speculation as to the mechanism.

This case mirrors a case captioned *Smallwood v. Mitchell,* 264 N.J. Super. 295, 624 A.2d 623 (App. Div. 1993). *Smallwood* involved a plaintiff suffering a sciatic nerve injury during hip replacement surgery. *Id*. at 297, 624 A.2d 623. The Court barred the expert there because he only offered the opinion that the result does not occur unless the surgeon was negligent, as opposed to offering an opinion that the "medical community" recognizes that such a result does not occur in the absence of negligence. *Id*. at 298, 624 A.2d 623. Moreover, the Court in *Smallwood*, noted that an inference of negligence is "not meant to be applied in every situation in which a medical procedure has an untoward result with an unknown cause." Id. Here, Dr. Luciani's only opinion is that the injury itself bespeaks of negligence, which is essentially a *res ipsa* claim. Dr. Luciani agreed that the medical community at large recognizes the injury can occur without negligence. However, Dr. Luciani disagrees with the medical community based only on his own review of literature and understanding of the anatomy. Dr. Luciani attempts to prove he knows better than the American College of Obstetrics and Gynecology. Dr.

Luciani further attempts to discredit the entire organization due to a gripe from a previous investigation. Thus, the Court appropriately enacted their duty as the gatekeeper of expert testimony in barring the opinions of Dr. Luciani.

C. Amicus' reliance on *Bellardini* is misplaced.

Plaintiff also heavily relies on *Bellardini v. Krikorian*, 222 N.J. Super. 457 (App. Div. 1988). Amicus cites to *Bellardini* to further their argument that an expert may offer opinions based on their experience alone. The *Bellardini* case involves a physician who gave medications to a pregnant patient. The Court in *Bellardini*, while concerned about the fact that Plaintiff's expert was still in medical school at the time of care, ultimately allowed his opinion since it was common knowledge by the medical community, and the public, that giving the medication in question to a pregnant person could affect the fetus. See *id.* This case, like *Rosenberg,* includes the premise that the opinion being made is widely accepted in the medical community. Here, brachial plexus injuries in infants, while complex and multifactorial with various accepted causes, can be caused by maternal forces of labor. The medical community adopted this opinion first in 2014 and then reaffirmed such in 2019. Dr. Luciani does agree with this statement. Dr. Luciani wrote in his report "maternal forces of labor have been implicated in association with transient injuries."

D. Dr. Luciani's personal beliefs are being disguised as a differential diagnosis.

The Appellant and the amicus brief argues that Dr. Luciani's made a differential diagnosis to determine the mechanism of the injury in this case. However, when reviewing the opinion/differential diagnosis made by Dr. Luciani, it is based on his own personal beliefs and not backed by any reliable science or methodology.

The Supreme Court of New Jersey has recognized differential diagnosis as a widely accepted technique in the medical community and admissible in state and federal courts. However, the court has clarified that merely invoking the term "differential diagnosis" does not automatically render an expert's opinion admissible. *Creanga v. Jardal*, 185 N.J. 345, 358 (2005). The expert must demonstrate adherence to proper diagnostic procedures and provide a scientific basis for ruling out alternative causes. See *id*. Unsupported speculation, subjective beliefs, or improperly performed diagnostic methods render conclusions suspect and inadmissible. See *Id*. In *Creanga v. Jardal*, the court stated that differential diagnosis testimony is admissible only if the expert uses scientific methods and procedures to justify the elimination of alternative causes. The court emphasized that conclusions based on discredited or improperly performed diagnostic tools are unreliable. See *id.* The court stressed that a differential diagnosis must be properly conducted and supported by reliable evidence to be admissible. See id.

Here, Dr. Luciani has failed to reliably use a differential diagnosis to form his opinions. The amicus brief asserts that Dr. Luciani employed a differential diagnosis to “eliminated all other potential causes.” However, the cited text shows only vague conclusions: “There are no facts surrounding this delivery that indicate another cause exists,” with generalized assertions that there was no evidence of in-utero positioning, infection, tumor, genetic syndrome, or abnormal contractions. (Ca2). A reliable differential diagnosis must explain how each plausible alternative is evaluated and ruled out based on data and not by absence of proof or by disagreement with literature. Dr. Luciani admits that he does not leave open the possibility that maternal forces of labor can cause brachial plexus injuries on a permanent basis. See **PA254** at p. 11 lines 19-22. When asked why he refuses to consider this accepted cause, Dr. Luciani stated “As time went on and I reviewed more and more of the medical literature, read more and more reports issued by pediatricians, pediatric neurologist, orthopedic surgeons, and pediatric neurosurgeons, it became very obvious to me that that was not the case, that the maternal forces of labor were capable of causing permanent brachial plexus injuries.” See **id** at p. 10 lines 20-25 & p. 1 line 1. Thus, his differential diagnosis is lacking all of the potential causes and just a subjective opinion by Dr. Luciani.

Dr. Luciani testified that based on his own review of literature, maternal forces of labor could not cause a permanent brachial plexus injury, and thus, why it’s not

on his differential. See **Pa** 254 (p. 10-11 lines 13-25; 1-18). Dr. Luciani was asked about a study he references in footnote 14 of his report. Dr. Luciani agreed at deposition that he saw this article as reliable. See **id** at p. 26. When told the article refers too persistent brachial plexus injuries as being caused by maternal forces of labor, Dr. Luciani dismisses the statement but indicating that "I have never found anything that has backed that up as far as human studies are concerned." See **id**. However, Dr. Luciani agrees that such studies could not be done in this country, or at least he "hoped" this to be the case. See **id.**

Dr. Luciani's primary rationale for excluding maternal forces is a physiological assertion that uterine contractions are "pushing forces," not "traction forces," and "will not" avulse or rupture nerve roots. (Pa254 at p. 11 lines 19 and p. 12 line 4). This is an opinion based in biomedical engineering. Yet, Dr. Luciani simultaneously disclaimed expertise in this field to answer whether maternal pushing can create separation affecting the brachial plexus, acknowledging a lack of familiarity with pertinent literature. Dr. Luciani admits he has not read literature on the topic and admits it would be better suited for a physiologist and is "outside of [his] lane." (Pa254 at p. 40; lines 18 & p. 41 line 11). Thus, a differential diagnosis that rules out maternal forces must rest on the very biomechanical and clinical literature Dr. Luciani disavows.

Moreover, his reliance on select textbook statements that brachial plexus injuries “result from excessive lateral traction on the fetal head” does not convert a general mechanistic possibility into a specific causation conclusion for this birth absent reliable fit between the general proposition and case-specific facts. (Ca2).

II. THE NEED FOR A KEMP HEARING IS AT THE SOUND DISCRETION OF THE TRIAL COURT AND IS NOT A REQUIREMENT.

While Rule 104 hearings can be helpful when the reliability of an expert is challenged, such hearing is not always required. See *Kemp ex rel. Wright v. State*, 174 N.J. 412, 432-33, 809 A.2d 77 (2002) (explaining that the “sounder practice” is to hold a hearing particularly when there is a challenge on the scientific reliability of an expert's opinion but also noting that “the need for a hearing is remitted to the trial court's discretion”).

To re-iterate our prior position, Rule 104/*Kemp* hearing was not required in this case. The appellant and Amicus argue that a Rule 104 hearing is required in every instance where a trial court considers barring an expert. This is simply an overstatement of the ruling in *Kemp*. The decision to hold a Rule 104 hearing is in the sound discretion of the trial court. Here, the trial court had ample sworn deposition testimony, reports, and literature to assess reliability, and it specifically relied on Dr. Luciani’s admissions and the governing literature in finding his opinions as net opinions and unreliable. A hearing would not have supplied new

methodology or case-specific facts; it would only have reiterated the same deficiencies. Under *Kemp*, in-limine hearings are discretionary; where the record suffices and exclusion is warranted. Here, the absence of a 104 hearing is, at most, harmless.

For these reasons, the Appellate Court should see that there was no need for the 104 hearing and that the lack of one was harmless in this matter.

CONCLUSION

As established previously and further detailed above, the Appellate Court should find there was no abuse of discretion by the Lower Court in the ruling as to the opinions of plaintiff's expert Dr. Luciani. Without reliable expert testimony as to the standard of care, summary judgement was appropriately granted.

Respectfully submitted,

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