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COURT OF APPEALS

STATE OF NEW YORK

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RIVERA,

Appellant,

-against-

No. 132

MONTEFIORE MEDICAL CENTER,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
September 07, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on  
2 our calendar this afternoon is appeal number 132,  
3 Rivera v. Montefiore Medical Center.

4 MR. SHOOT: May it please the court, my  
5 name is Brian Shoot. I represent the plaintiff-  
6 appellant here. As you know from the briefs - - -

7 CHIEF JUDGE DIFIORE: Excuse me, counsel.  
8 Would you like to reserve any rebuttal time?

9 MR. SHOOT: Yes, I would, three minutes.

10 CHIEF JUDGE DIFIORE: Three? Please  
11 proceed.

12 MR. SHOOT: As you know from the briefs,  
13 this is a case in which Defendant Montefiore was  
14 allowed, over the plaintiff's strenuous objection, to  
15 adduce proof to the effect that the forty-four-year-  
16 old man, whom the medical examiner had said died of  
17 bronchopneumonia, in fact, died of a heart attack.

18 JUDGE ABDUS-SALAAM: Mr. Shoot, why - - -  
19 Mr. Shoot why - - - why didn't plaintiff's counsel  
20 object to the insufficiency of the 3101(d) response  
21 when it was received or shortly thereafter?

22 MR. SHOOT: Your Honor, this is an  
23 interesting point. And the lesson here is, I think,  
24 from the Appellate Division majority decision, that  
25 if you want to get down - - - the way to avoid the

1           medical exchange rule, the expert exchange rule, is  
2           to exchange even less. If, for example, the - - -  
3           the distinction I'm getting at is there's a  
4           distinction where a claim is made and now the  
5           recipient knows that there's detail lacking, that the  
6           - - - that, for example, the defendant violated the  
7           rules and regulations or that the defendant complied  
8           with the standards of care. And now the other side  
9           knows, okay, what rules and regulations, please tell  
10          me, and can ask for greater detail, but when the  
11          whole subject at all, there's nothing on it.

12                        The example I have in my brief is, for  
13          example, where the plaintiff provides a very detailed  
14          listing of what the defendant did wrong on January  
15          1st and nothing at all as to what the defendant did  
16          wrong on January 3rd but maybe ends with and he'll  
17          testify, the expert, or she'll testify, as to  
18          negligence and causation, ends with something like  
19          that. And then the argument is well, I didn't say  
20          as, Justice Aarons pointed out, you didn't say that  
21          you would not adduce testimony as to something that  
22          occurred on January 3rd, and you left something at  
23          the end, which Mr. Simone called in the Appellate  
24          Division a noncommittal we'll talk about causation.  
25          Now if that was the rule, Judge, if that was the

1 party now has to move whenever you find an opening -  
2 - -

3 JUDGE STEIN: But, counselor, what - - -  
4 let's assume for the moment that this was an obvious  
5 insufficiency. It really - - - it mentions causation  
6 but it says nothing what the causation, what if it's  
7 not so obvious? What if it's a closer case? Isn't  
8 it - - - isn't it up to the opposing party to say I  
9 don't think you gave me enough detail? And then that  
10 can be addressed, either the - - - the disclosing  
11 party can say, oh, yes, I think I did, or, okay, I'll  
12 give you more. I mean isn't that the whole purpose  
13 of this so that it's not a guessing game on either  
14 side?

15 MR. SHOOT: Well, it shouldn't be a  
16 guessing game on either side. I grant you, Judge,  
17 that there are no - - - there's no bright line here.  
18 We're talking about a continuum. And we could change  
19 the hypotheticals and change and change them so you  
20 give more and more notice that something's lacking.

21 JUDGE PIGOTT: But isn't - - - isn't - - -  
22 these medical malpractice cases are - - - are a breed  
23 unto themselves, right? Quite often the plaintiff,  
24 and I think it happened in this case, calls att - - -  
25 calls the defendant doctor or the doctor for the

1           defendant and the - - - the strategy is you want to  
2           freeze that testimony so that that testimony doesn't  
3           get - - - get fashioned to respond to your experts.  
4           So you put him or her on first, then you have your  
5           expert testify.

6                         And what's why, it seems to me, when you -  
7           - - when the 3101(d) comes in from the defense, they  
8           always have that catch-all in the back - - - in the  
9           bottom that is objectionable, pardon me, from your  
10          point of view. But what happened here, it seems to  
11          me, and - - - and I don't know if you're going to  
12          address timeliness, is there was a timely objection  
13          aft - - - you know, after he testifies on - - - on  
14          cross-examination to his own lawyer, you know, what  
15          happened, that caught, it seems to me, the plaintiffs  
16          by surprise. And then - - - and then they want a  
17          more specific, and it seemed to me they were entitled  
18          to it, but the judge said it was untimely when they  
19          made that objection. Right? Or am I misreading the  
20          record?

21                         MR. SHOOT: Correct, Your Honor.

22                         JUDGE PIGOTT: Okay.

23                         MR. SHOOT: I - - - I agree with the  
24          thought of that - - -

25                         JUDGE FAHEY: So listen - - -

1 MR. SHOOT: I'm sorry.

2 JUDGE FAHEY: - - - why didn't - - - why  
3 didn't they just - - - why didn't plaintiff's counsel  
4 just ask for more time? Usually, that would be the  
5 solution here. The - - - see, your abuse of  
6 discretion argument, I think, would have more  
7 validity and more force if the alternative was not  
8 the court says it was untimely, okay. It's - - -  
9 that's a difficult point for as to argument and it's  
10 also a difficult argument that there is no theory of  
11 negligence or of causation presented in the initial  
12 disclosure. Those are two, it seemed to me, clear  
13 points in the record. But why didn't they just - - -

14 MR. SHOOT: Judge, let me - - -

15 JUDGE FAHEY: - - - ask for more time?

16 MR. SHOOT: - - - answer that and then I  
17 think Judge Stein's question, as well, because I  
18 think they go together.

19 JUDGE FAHEY: The - - - I want you to  
20 answer the quest - - - this question. I want you to  
21 answer - - - answer the question did they ask for  
22 more time, and was that a - - - a conscious decision  
23 or just one that was made in the moment?

24 MR. SHOOT: The answer to that first  
25 question is no, they did not. And the answer to the

1 second question is I don't know whether it was  
2 conscious or unconscious.

3 JUDGE FAHEY: Yeah, yeah, okay.

4 MR. SHOOT: It's not in the record. But  
5 the - - - the gist of your question why shouldn't the  
6 attorney have to ask for more time - - -

7 JUDGE FAHEY: Um-hum.

8 MR. SHOOT: - - - is I think goes along  
9 with Judge Stein's question and goes along with the  
10 purpose of the statute. One purpose of the statute,  
11 I mean back in the day, it was very fair. Ambush,  
12 that's the way we had it. Any side could ambush the  
13 other. That was fair. The idea of the statute was  
14 that, number one, the legislature thought by  
15 disclosing the expert testimony in advance of the  
16 trial each side gets a better feel for the merits of  
17 their case. That's number one.

18 But number two, Your Honor, and there was a  
19 second purpose, not just to move cases but also to be  
20 - - - to decide them correctly. The whole basis of  
21 our civil justice system is we think and we hope in  
22 an adversarial system that if each side gets a  
23 chance, a fair chance, the right side will win, at  
24 least enough a higher percentage of the time to make  
25 the system work.

1                   JUDGE STEIN: But that's my point. If you  
2 had brought this to the fore when - - - when it first  
3 got to you, then the pursuit of justice would have  
4 been furthered because it either would have been  
5 corrected or somebody would have made a determination  
6 that it didn't need to be. So - - -

7                   MR. SHOOT: Not only, Judge, was there no  
8 reason for anyone reading through this to guess, oh,  
9 they're contesting the cause of death, much less  
10 they're claiming it's a heart attack, I suggest to  
11 you, Your Honors, that at the beginning of trial,  
12 defendant didn't even start with that theory.

13                   JUDGE GARCIA: But, counsel, the notice  
14 actually says "possible causes of the decedent's  
15 injuries and contributing factors", right? I mean  
16 doesn't that put you on some notice that they're not  
17 agreeing with your cause of death or at least it's  
18 vague enough that they might leave themselves room  
19 not to?

20                   MR. SHOOT: No, Your Honor.

21                   JUDGE GARCIA: They're going to testify on  
22 the "issue of proximate causation", on the "issue of  
23 causation" and "the possible causes of injuries."

24                   MR. SHOOT: What one expects from that is  
25 exactly what happened in the defense opening - - -



1 get your - - - I take your point on that causation  
2 issue. But to go back to what Judge Fahey said  
3 earlier, isn't our standard of review abuse of  
4 discretion here? So the judge would have been  
5 perfectly okay to say they were precluding this  
6 testimony and we would have reviewed that on abuse of  
7 discretion, but they didn't. So aren't we reviewing  
8 that decision also on an abuse of discretion standard  
9 given what had happened in the course of this trial,  
10 namely the testimony that had already come out at the  
11 point, the fact that there is no request for an  
12 adjournment, and we're looking back now and saying it  
13 was an abuse of discretion as a matter of law to let  
14 this testimony in?

15 MR. SHOOT: Three points on that, Your  
16 Honor. This court has never interpreted this  
17 statute. There is no Court of Appeals decision for  
18 the lower courts to look for guidance. It doesn't  
19 exist. Number two - - -

20 JUDGE GARCIA: On what point?

21 MR. SHOOT: On construing 301(d) (sic) and  
22 what kind of - - - of specificity need be given and  
23 what to do in a situation like this. This court has  
24 never construed the statute.

25 JUDGE GARCIA: Is that the issue here? Is

1 the issue here was the notice sufficient, or is the  
2 issue here whether or not the judge should have let  
3 the testimony in?

4 MR. SHOOT: Well, yes. The issue is  
5 whether the judge should have let the testimony, but  
6 understand in this case there is no claim that we did  
7 provide notice. There is no claim that this is  
8 something the plaintiff could have gotten from some  
9 other record in the case, should have known. There's  
10 no thing about a heart attack in any record one  
11 couldn't have looked - - - could have looked at. And  
12 the - - -

13 JUDGE FAHEY: So - - - so the rule should  
14 be that when you disclose, you have to tell us what  
15 your theory of causation is then?

16 MR. SHOOT: The rule is you should disclose  
17 such an amount of evidence so that the other party is  
18 not - - - is not surprised or taken by ambush. Which  
19 - - -

20 JUDGE STEIN: Well, the question, to me, is  
21 not whether that should be the rule. I think that is  
22 the rule. The question is who - - - who has to do  
23 what when if - - - if that isn't fulfilled to - - -  
24 to the other side's satisfaction?

25 MR. SHOOT: As to those two points, in my

1           brief I quote Professor Pat Connors, his commentary  
2           on the statute where he says all this case law,  
3           there's ton of case law, just none from this court,  
4           suffers from, he says Corpus Juris Secundum syndrome.  
5           You can find a case for anything, according to him,  
6           from the Appellate Division cases to which this court  
7           has never spoken. And what we don't want to do, I'm  
8           suggesting, Judge Stein, is end up in a system where  
9           a process that was supposed to streamline cases and  
10          make them move faster, as well as end better, the - -  
11          - the side that deserves to win wins more often than  
12          not.

13                        What we don't want to do is have that  
14           created a volume of motion practice, because I  
15           suggest to you that if you have to make a motion  
16           whenever there's a cause which can later be claimed a  
17           reservation of rights, that's every case and that's  
18           every time. It will be the fifth time they come  
19           back. There will always be some phrase which can  
20           later be said to be a reservation of rights and why  
21           did you accept this last version, the fourth version,  
22           the fifth version? And motion practice is not what  
23           you want to create, I'm suggesting.

24                        CHIEF JUDGE DIFIORE: Thank you, Mr. Shoot.

25                        MR. SHOOT: Thank you.

1 CHIEF JUDGE DIFIORE: Counsel.

2 MR. SIMONE: Good afternoon; Christopher  
3 Simone for the - - - for the respondents. I think  
4 that the - - - the issue here is - - - the  
5 overarching issue here is whether the trial court  
6 abused its discretion as a matter of law. And I  
7 think it's important to understand how the  
8 plaintiff's argument has somewhat shifted from an  
9 insufficiency argument to a misleading argument  
10 because they're two different - - - two different  
11 ways to look at it.

12 JUDGE STEIN: Well, do you concede that it  
13 - - - it was insufficient?

14 MR. SIMONE: I don't think it was  
15 insufficient to the extent of - - - I mean - - -

16 JUDGE STEIN: If you - - - if you were on -  
17 - - on the other side of the fence here, you - - -  
18 you wouldn't say what, you're telling me you're going  
19 to discuss causation, what causation?

20 MR. SIMONE: Well, I think the point was  
21 made before that it says, you know, causes of death  
22 and contributing factors. That, to me, says they're  
23 obviously not agreeing with the autopsy, which every  
24 attorney should know is not.

25 JUDGE STEIN: But if you're trying to

1 prepare your case, don't you want to know and don't  
2 you think that the statute requires - - -

3 MR. SIMONE: Yes.

4 JUDGE STEIN: - - - that you tell me what  
5 your expert is going to tell - - -

6 MR. SIMONE: Yes, and if I - - - and if I  
7 received one that I thought was insufficient, I would  
8 immediately make an objection. They did that in this  
9 case with respect to Dr. Silberman's qualifications,  
10 and that was remedied. That - - -

11 JUDGE ABDUS-SALAAM: Does that have to be a  
12 motion?

13 MR. SIMONE: No. It doesn't have to be a  
14 motion.

15 JUDGE ABDUS-SALAAM: No. It could be - - -

16 MR. SIMONE: Attorneys get - - -

17 JUDGE ABDUS-SALAAM: - - - a conference,  
18 right?

19 MR. SIMONE: Yes, you can just write a  
20 letter. And most of the time, I think collegiality,  
21 I think attorneys, they provide that information,  
22 because, you know, as long as you make the objection,  
23 I think you preserved your - - - your complaint about  
24 it. Then it becomes the onus on the other party.  
25 They might be risking - - -

1 JUDGE ABDUS-SALAAM: Where you come into  
2 the trial part on conference day - - -

3 MR. SIMONE: And then get it - - -

4 JUDGE ABDUS-SALAAM: - - - and you raise  
5 it.

6 MR. SIMONE: And then get it precluded on  
7 that basis. But it's not uncommon for an attorney to  
8 get a document, whatever it is, 3101(d) or whatever,  
9 and see that it's insufficient. Say, you know, I  
10 better - - - I'm going to lodge an objection.

11 JUDGE PIGOTT: Yeah, but this is different.  
12 The - - - the key here, it seemed to me, as Judge  
13 Gonzalez said in his dissent, was you got a doctor  
14 who says I don't know what he died of, I think it was  
15 probably, you know, something, but I don't know what.  
16 And miracle of miracles, two months later when he's,  
17 I'm going to suggest, prepared for trial, he then on  
18 cross-examination says he died of a heart attack, and  
19 that wasn't made clear to anybody at any time. It  
20 wasn't in the disclosure. And I get the - - - I get  
21 the cowcatcher wording at - - - at the bottom of  
22 these because you - - - you honestly don't know  
23 everything that's - - - that's going to come out.  
24 But when it's there, I mean, didn't - - - didn't you  
25 have an obligation to say that the - - - the ER

1 doctor is going to testify that he died of a heart  
2 attack because that's what he told us?

3 MR. SIMONE: Well, everybody - - - I think  
4 the - - - it's the sudden - - - the sudden  
5 arrhythmia, to be specific, is the issue. But - - -  
6 but that's what you talk to your expert about. I  
7 mean - - -

8 JUDGE PIGOTT: No, no. This is a fact  
9 witness, as Gonzalez said. And you knew, or should  
10 have known, I - - - I realize these things - - -

11 MR. SIMONE: Right. You could say that.

12 JUDGE PIGOTT: - - - are tough sometimes,  
13 that he was going to testify that the death was not  
14 as a result of the pneumonia but was a result of, let  
15 me stick with my heart attack it's easier to say - -  
16 -

17 MR. SIMONE: Right.

18 JUDGE PIGOTT: - - - than arrhythmia. But  
19 you didn't disclose that and they had no way of  
20 knowing that that could have been a part. They - - -  
21 they could have been satisfied with your disclosure  
22 because of what - - - what you said, but you had  
23 knowledge that you, the argument is, should have put  
24 in a 3101(d) or a supplemental, that you did not.  
25 And then when they found out about it and made an

1 application to the court, the court said, well,  
2 you're untimely.

3 MR. SIMONE: Well, I think they did have  
4 notice, and I'll tell you why. And the other - - -  
5 the other argument - - - the other argument that is -  
6 - - it's not only the insufficiency but it's also the  
7 speculation, okay, of the theory. And just - - -  
8 just so it's clear what plaintiff's objection was, on  
9 page 762 he summed it up to the court, two points,  
10 "One is the 3101(d) - - - is the 3101(d) wasn't  
11 specific enough and two, that it's an improper  
12 question to ask an expert 'Do you have an opinion as  
13 to what the possible cause of death was other than  
14 what's stated in the objective autopsy?'" Well, it's  
15 not improper to ask an expert whether he - - -

16 JUDGE PIGOTT: Well, I don't know - - -

17 MR. SIMONE: No, but the reason that - - -

18 JUDGE PIGOTT: Pardon me. Let me finish my  
19 thought. I - - - I don't know what 762 is. Is this  
20 after the ER doctor testifies that he died of  
21 arrhythmia or is it before that? Because I - - - my  
22 sense of the record was this was a surprise, and it  
23 was a surprise brought on by the defendants who had  
24 been called in the plaintiff's case in these things.

25 MR. SIMONE: Well, it - - - it - - -

1 JUDGE PIGOTT: Cross-examination.

2 MR. SIMONE: One, Dr. Mukherji, who was an  
3 ER doctor - - -

4 JUDGE PIGOTT: Yeah.

5 MR. SIMONE: - - - the plaintiff called,  
6 the next witness on this subject was their expert,  
7 Dr. Schiffer - - -

8 JUDGE PIGOTT: Right.

9 MR. SIMONE: - - - the objection was made  
10 after those two witness - - -

11 JUDGE PIGOTT: Right.

12 MR. SIMONE: - - - after plaintiff's expert  
13 conceded it's possible.

14 JUDGE PIGOTT: But in the middle - - - but  
15 in the middle of trial is my point. And - - -

16 MR. SIMONE: Right, but - - -

17 JUDGE PIGOTT: - - - the doctor said - - -  
18 or, excuse me, the judge said that's untimely. I'm  
19 not sure that's untimely. That's what I'm kind of  
20 driving at.

21 MR. SIMONE: Well - - - well, I'll tell you  
22 why it's untimely, and it's important to understand  
23 that the issue is insufficiency, not misleading. We  
24 didn't say theory A and then present theory B. If  
25 it's insufficient - - - well, it - - - it goes back

1 to your earlier questions weren't - - - were they on  
2 notice? Yes. And the reason they were on notice is  
3 the court also found that the testimony by Silberman  
4 was not speculative because there was a clinical  
5 presentation here. You know, a pathology report on  
6 an autopsy is a gross pathology of whatever they're  
7 examining.

8 JUDGE FAHEY: But doesn't the notice - - -

9 MR. SIMONE: It's clinical.

10 JUDGE FAHEY: - - - issue goes back to the  
11 3101(d) notice, not the notice of what - - - what  
12 testimony was given at trial?

13 MR. SIMONE: Well, it said contributing  
14 factors so you're on notice that, okay, what was the  
15 clinical presentation here because - - -

16 JUDGE PIGOTT: No, but see what you're - -  
17 -

18 MR. SIMONE: - - - could the autopsy have  
19 been wrong.

20 JUDGE PIGOTT: Well, I hate to you  
21 interrupt you on that, but let's - - - let's forget  
22 what - - - or you can include what the autopsy said.  
23 You're saying, you know, it says various things.

24 MR. SIMONE: Right.

25 JUDGE PIGOTT: Right. But you've got a

1           legal requirement to disclose what your experts are  
2           going to say, and your experts ultimately said heart  
3           attack and that was not in the 3101(d). And they  
4           objected and they said it was untimely. I keep going  
5           back to this untimely because I think in the middle  
6           of a trial, depending on the facts, it may not be  
7           untimely. And whether this one is one or not, I  
8           don't know.

9                       MR. SIMONE: Well, I don't think it was  
10           untimely - - - I think it was untimely in the sense  
11           that you could have examined what contributing  
12           factors could have caused this with your own expert  
13           who ultimately agreed with us.

14                      JUDGE PIGOTT: You've got to disclose.  
15           This is - - - this is my point.

16                      MR. SIMONE: Right. But that's what the  
17           notice was.

18                      JUDGE PIGOTT: I'm not - - - I'm not going  
19           to talk to my expert. I'm not going to talk to  
20           anybody. I am just going to go in and wing it. I  
21           can do that as a lawyer, right. But you have an  
22           obligation as a defense lawyer, and one of them is to  
23           say he died from a car accident, he didn't die from a  
24           gunshot. And you can't go in the middle of the trial  
25           and say it wasn't a gunshot, it was a car accident

1 and then say, well, even though we didn't disclose  
2 that it's untimely for him to now complain about  
3 that.

4 MR. SIMONE: But we didn't - - - that's - -  
5 - that's a misleading theory.

6 JUDGE PIGOTT: Well, I know, but - - -

7 MR. SIMONE: This is an insufficiency  
8 theory. That's - - - that's why I was trying to make  
9 a distinction. It's different. If it's  
10 insufficient, object to it. Otherwise, presumably,  
11 you've done your homework and you know what those  
12 theories can be because we elicited this information  
13 from their own expert.

14 JUDGE STEIN: But - - -

15 MR. SIMONE: Why didn't they elicit this  
16 information - - -

17 JUDGE STEIN: But the statute says  
18 reasonable detail, right?

19 MR. SIMONE: Right.

20 JUDGE STEIN: Okay. So let's assume for  
21 the moment that - - - that what your expert said here  
22 was not reasonable detail. So doesn't that sort of  
23 encourage gamesmanship for you to do that and require  
24 the other side to come back every time and say, well,  
25 we don't think this is reasonable?

1 MR. SIMONE: I think - - - I think  
2 reasonable minds can differ on what's reasonable.

3 JUDGE STEIN: But - - -

4 MR. SIMONE: No pun intended but - - -

5 JUDGE PIGOTT: That's for sure.

6 JUDGE STEIN: I agree.

7 MR. SIMONE: But the issue here is still it  
8 was the court's decision - - -

9 JUDGE RIVERA: Well, is - - - is - - -

10 MR. SIMONE: - - - that it was untimely and  
11 abuse of discretion.

12 JUDGE RIVERA: - - - your position if he  
13 had raised an issue about this you would have said I  
14 don't have to give any more detail?

15 MR. SIMONE: Well - - -

16 JUDGE RIVERA: When you say reasonable  
17 minds can differ, is it your position that you would  
18 not have had to have given more detail if he had  
19 requested it?

20 MR. SIMONE: You know, I don't know what we  
21 would have done but we addressed the other objection  
22 and - - - and we addressed it to the plaintiff's  
23 satisfaction. So if somebody had requested it, I - -  
24 - I think generally we do provide more information.  
25 So I - - - my answer to that would be if somebody

1 requested it we - - - we would have done it. I mean  
2 we don't generally engage in a lot of this motion  
3 practice. We generally do it - - - you know, it's -  
4 - - it is an adversarial system but it doesn't mean  
5 there's not - - -

6 JUDGE RIVERA: And is it your position that  
7 your expert really did not know what causation theory  
8 he was going to give until he heard the other - - -  
9 or until the other testimony from Dr., I can't  
10 remember how his name is pronounced, Mukarate - - -

11 MR. SIMONE: Mukherji.

12 JUDGE RIVERA: - - - testify?

13 MR. SIMONE: And then Dr. Schiffer is the  
14 plaintiff's expert.

15 JUDGE RIVERA: Yeah. Yeah.

16 MR. SIMONE: I don't know what - - - I  
17 don't know what Dr. Silberman knew, but I know that -  
18 - -

19 JUDGE RIVERA: You - - - you were going to  
20 have him as an expert and you didn't know?

21 MR. SIMONE: Well - - - I - - - I  
22 personally, I don't know. I - - - I don't know what  
23 he knew. But that doesn't ans - - - that doesn't  
24 mean that it wasn't reasonable detail in 3101(d), but  
25 in any event, we certainly have the right to question

1 - - - to explore an issue with our expert that was  
2 addressed by - - - by plaintiff. Remember, they  
3 never objected to the testimony or moved to strike  
4 the testimony from the other two witnesses, and this  
5 whole - - - this whole appeal has been - - -

6 JUDGE RIVERA: Well, their witness - - -

7 MR. SIMONE: - - - bobbing around the - - -

8 JUDGE RIVERA: Their witness you're - - -  
9 you're not quite presenting accurately that  
10 testimony, right? Because their - - - their other  
11 expert witness says well, any - - - anything's  
12 possible. But then - - -

13 MR. SIMONE: He - - - he also - - -

14 JUDGE RIVERA: But then goes on to say that  
15 the record, the medical records and so forth, did not  
16 support that this was caused - - - death was caused  
17 by an arrhythmia, right?

18 MR. SIMONE: He - - - he agreed with - - -

19 JUDGE RIVERA: No, no. Is that true?

20 MR. SIMONE: No, that's not true. Because

21 - - -

22 JUDGE RIVERA: That's not true?

23 MR. SIMONE: - - - any - - -

24 JUDGE RIVERA: Why is it not true?

25 MR. SIMONE: Because he didn't say anything

1 is poss - - - he said that one place, but it's a long  
2 exchange and a long questioning. And he ultimately  
3 agreed that if he had all these symptoms, these - - -  
4 this clinical presentation, that he could have died  
5 of a sudden arrhythmia. He agreed with that.

6 JUDGE ABDUS-SALAAM: Counsel - - - counsel,  
7 was - - -

8 MR. SIMONE: So it wasn't just that one  
9 phrase anything is possible.

10 JUDGE ABDUS-SALAAM: Counsel, is - - -

11 MR. SIMONE: It was more than that.

12 JUDGE ABDUS-SALAAM: Was Dr. Muk - - -

13 MR. SIMONE: Mukherji.

14 JUDGE ABDUS-SALAAM: - - - Mukherji, was he  
15 the plaintiff's witness or was he defendant's  
16 witness?

17 MR. SIMONE: He was the plaintiff's  
18 witness.

19 JUDGE ABDUS-SALAAM: He was plaintiff's  
20 witness.

21 MR. SIMONE: He was the ER doctor.

22 JUDGE ABDUS-SALAAM: He was the ER doc.  
23 And so you're - - - the defense - - - defendant  
24 didn't object to him opining on how the decedent died  
25 because the issue was whether he was a fact witness

1 or not.

2 MR. SIMONE: Right.

3 JUDGE ABDUS-SALAAM: So they called him as  
4 a fact witness, but somehow he made an opinion about  
5 causation of death.

6 MR. SIMONE: Right, he was asked - - -  
7 asked - - -

8 JUDGE ABDUS-SALAAM: And you didn't object  
9 to it.

10 MR. SIMONE: Well, we didn't object to it.

11 JUDGE ABDUS-SALAAM: Right.

12 MR. SIMONE: No, he - - - he - - -

13 JUDGE ABDUS-SALAAM: Because it was  
14 favorable to you and you wanted to use it. And you  
15 said in your 3101(d) that you could - - - your expert  
16 would opine on trial testimony.

17 MR. SIMONE: Right, and also contributing  
18 factors to causes of the death.

19 JUDGE ABDUS-SALAAM: So it was the  
20 plaintiff who elicited that opinion - - -

21 MR. SIMONE: Right.

22 JUDGE ABDUS-SALAAM: - - - from Dr.  
23 Mukherji?

24 MR. SIMONE: That's correct.

25 JUDGE PIGOTT: Or no, didn't it come out on

1 cross?

2 JUDGE RIVERA: It was cross.

3 MR. SIMONE: Pardon?

4 JUDGE PIGOTT: Didn't that come out on  
5 cross?

6 MR. SIMONE: It started on - - - on direct  
7 and then it went right into the cross. He - - - he  
8 agreed that it could happen.

9 CHIEF JUDGE DIFIORE: Thank you, Mr.  
10 Simone.

11 MR. SIMONE: Thank you.

12 CHIEF JUDGE DIFIORE: Mr. Shoot.

13 MR. SHOOT: Let me get to Judge Pigott's  
14 point about malpractice cases being a special breed  
15 and how this came about. Yes, they are special. One  
16 way they're special is that all the facts come from  
17 the defendant's employees or the records they made.  
18 That's why the doctor is called first. He's a fact  
19 witness.

20 During the opening address at 103 of the  
21 record, defense counsel says what we're expecting,  
22 people die of pneumonia, sometimes there's nothing  
23 you can do. During the direct examination of Dr.  
24 Mukherji, plaintiff's counsel asks him at page 174 to  
25 175 of the record do you agree with the medical

1           examiner that the number one cause of death is  
2           bronchopneumonia? And the answer is yes. Later,  
3           he's had a change of heart later in the case. And on  
4           cross-examination he tells his counsel, well, I meant  
5           it was contributory in the sense it put him in the  
6           hospital where he got the heart attack. That's what  
7           I meant by being the number one cause of death.

8                         Malpractice cases, this is what you deal  
9           with. You have a fourth-year resident who sees the  
10          patient at 6:00 p.m. who writes patient is very  
11          hypoxic, and who takes the stand and says I didn't  
12          mean very hypoxic then, I meant very hypoxic earlier.

13                        JUDGE GARCIA: Counsel, these - - - this  
14          all was in front of the jury, right?

15                        MR. SHOOT: No, but the point - - -

16                        JUDGE GARCIA: All these arguments about  
17          this story changing and this coming out then and  
18          these people, those are jury arguments. But what  
19          we're really concerned about here is when this judge  
20          makes this determination that they're going to allow  
21          this testimony, is it an abuse of discretion?

22                        MR. SHOOT: What I'm talking about, Judge,  
23          it's a level playing field. That this is the way we  
24          start, and we have a rule about disclosure. And if  
25          we have an interpretation of that rule that penalizes

1 those who play by the rules and rewards those who  
2 withhold information, then the playing field - - -

3 JUDGE RIVERA: What - - -

4 MR. SHOOT: - - - becomes even more unlevel  
5 than you start with.

6 JUDGE RIVERA: What should they - - - what  
7 should they have included? What should this exchange  
8 have said?

9 MR. SHOOT: It should have had reasonable  
10 detail as to the theory, reasonable detail. Now in -  
11 - -

12 JUDGE GARCIA: And if it didn't, shouldn't  
13 you have objected to that?

14 MR. SHOOT: Your - - - if - - - if there's  
15 - - - I think there's a theory there and there's not  
16 reasonable detail, I know to object. But if the  
17 theory's not even there, how do I object to that?

18 JUDGE RIVERA: What would have been - - -

19 JUDGE STEIN: You wouldn't have had an  
20 objection - - -

21 JUDGE GARCIA: Right.

22 JUDGE STEIN: - - - if you got the  
23 objection that there's no theory there.

24 MR. SHOOT: Well, that's what I mean. That  
25 was the objection.

1                   JUDGE STEIN: You concede that. You  
2 concede that.

3                   MR. SHOOT: At page 7, the - - - it's seven  
4 pages of discussion, the colloquy, and it's at pages  
5 757 to 764 of the record, where it - - - the record  
6 doesn't show if counsel's being apoplectic or foaming  
7 at the mouth at the time. But he's pretty upset, and  
8 what he keeps on saying is I had no idea.

9                   JUDGE RIVERA: Okay.

10                  MR. SHOOT: Nothing about a heart attack  
11 until - - -

12                  JUDGE RIVERA: Well, you didn't ask. But  
13 let me ask you a different question. When you say  
14 reasonable detail, does that mean that they have to  
15 say here the - - - causation depends on X, Y, Z, and  
16 then specifically say an arrhythmia? Or do they have  
17 to say causation testimony may not be limited to what  
18 the autopsy report concludes?

19                  MR. SHOOT: I think in this case it would  
20 certainly have to be heart attack and/or arrhythmia.  
21 And I think if the tables were turned and we were  
22 looking at the reasonable detail of the plaintiff's  
23 exchange and the plaintiff's exchange said, well,  
24 they've committed malpractice in some way or another,  
25 we'll let you know - - -

1                   JUDGE FAHEY: Mr. Shoot, listen, my own  
2 personal Judge Fahey view is their - - - their  
3 response was inadequate to begin with. You had a  
4 chance to bring a motion, and you didn't bring the  
5 motion. It goes back to Judge Pigott's point, which  
6 is that the issue for us is that their response is  
7 clearly inadequate. You weren't timely. Can an  
8 untimely motion in this context be required or is it  
9 an abuse of discretion? I think it really boils down  
10 to that.

11                   MR. SHOOT: Your Honor, I would commend to  
12 you the article by David Horowitz which was cited in  
13 my - - -

14                   JUDGE FAHEY: I'm glad you didn't give me  
15 one of your articles, anyway. That's good. That's  
16 good. Go ahead.

17                   MR. SHOOT: Who advises everyone now in  
18 every case you get in an exchange, to throw it back  
19 at them and that's so you don't have a waiver.

20                   May I have one second to address the second  
21 issue in the case?

22                   CHIEF JUDGE DIFIORE: Thirty seconds, sir.

23                   MR. SHOOT: Thank you, Your Honor. Mr.  
24 Simone said a couple of times that our expert could  
25 have also gotten the quote "information" that there

1 was a heart attack. There's no information there was  
2 a heart attack. At page 804 to 805 of the record,  
3 their expert said there's nothing in the record about  
4 a heart attack. The proof that there was a heart  
5 attack was that their expert said there was a heart  
6 attack, and that should not be sufficient. It  
7 certainly isn't sufficient in Doomes and all those  
8 cases, I'm an expert, I'm going to tell you what the  
9 cause is, and that's sufficient?

10 There were specific reasons here to think  
11 it was not a heart attack. The medical examiner said  
12 bronchopneumonia. One lung weighs twice as much as  
13 the other. And he's been on a heart machine, a heart  
14 monitor for 12 hours in the emergency room without  
15 any sign of arrhythmia, and the medical examiner  
16 finds nothing on autopsy even though our expert said  
17 at pages 427 to 428 of the record you find it in the  
18 autopsy. Now how could something be more conclusory  
19 than I'm an expert so I'm telling you it's a heart  
20 attack? Thank you, Your Honors.

21 CHIEF JUDGE DIFIORE: You're very welcome.  
22 Thank you, sir.

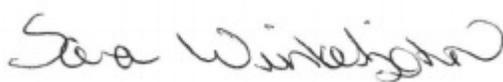
23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Rivera v. Montefiore Medical Center, No. 132 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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