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COURT OF APPEALS

STATE OF NEW YORK

CHRISTOPHER HAMILTON,

Appellant,

-against-

No. 113

JOHN MILLER, et al.

Respondents.

SHAWN GILES,

Appellant,

-against-

No. 114

A. GI YI, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
May 7, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 113 and 114, Miller
2 and - - - and Giles.

3 Counselor, do you want any rebuttal time?

4 MR. ATHARI: Yes, Your Honor, please. May
5 I have two minutes?

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.
7 Go ahead.

8 MR. ATHARI: The - - - I believe we're
9 arguing Hamilton first, so I'll - - - I'll address
10 that, but both - - -

11 CHIEF JUDGE LIPPMAN: You are.

12 MR. ATHARI: - - - cases are together.

13 The first issue that comes up in Hamilton
14 is whether the Supreme Court has the power to compel
15 the creation of evidence during discovery. And we're
16 guided by CPLR 3121 which allows for the production
17 of all - - -

18 CHIEF JUDGE LIPPMAN: Doesn't the judge
19 have general supervisory - - -

20 MR. ATHARI: Absolutely.

21 CHIEF JUDGE LIPPMAN: - - - discretion?

22 MR. ATHARI: Absolutely, the judge does,
23 but - - -

24 CHIEF JUDGE LIPPMAN: What makes this an
25 abuse of that discretion?

1 MR. ATHARI: Because - - - well, the way I
2 would refer to it is that he's - - - he's compelling
3 the plaintiff to produce or to create something - - -

4 JUDGE SMITH: An expert - - -

5 MR. ATHARI: - - - that doesn't exist.

6 JUDGE SMITH: You say he's essentially
7 requiring the expert report at an early stage.

8 MR. ATHARI: Absolutely.

9 JUDGE SMITH: And what's wrong - - -

10 MR. ATHARI: And that's - - -

11 JUDGE SMITH: - - - with that? Why should
12 - - - does he - - - where does it say he can't do
13 that?

14 MR. ATHARI: There is nothing that says
15 that he can or that he can't do that. If you look at
16 3101(d), which talks about expert disclosure, it - -
17 - it refers - - - the statute itself refers to in
18 preparation for trial, not - - -

19 JUDGE SMITH: I mean, I - - -

20 MR. ATHARI: - - - for discovery.

21 JUDGE SMITH: I understand that the
22 orthodox way to do it is to get the fact discovery
23 done and then you do the expert reports. But here it
24 looks to me like the Appellate Division is saying
25 you've got a special situation; you've got a - - -

1 the defendant wants to do an IME, and he doesn't have
2 any clue, except your list of 183 different diseases
3 that the man might have, as to what he's supposed to
4 look for. So give - - - give him - - - so if you
5 like, give him - - - give him your expert report - -
6 - report a little early so he can do an efficient
7 IME. Why isn't that a perfectly appropriate exercise
8 of discretion?

9 MR. ATHARI: Two points on that. First is
10 we gave them a bill of particulars that lists the
11 injuries. Two, we gave them - - -

12 JUDGE SMITH: A long list.

13 MR. ATHARI: It is a long list, but
14 essentially, one part of it is the mechanism of
15 injury, the - - - the crux of the claim - - -

16 CHIEF JUDGE LIPPMAN: How do they prepare
17 based on that bill?

18 MR. ATHARI: They prepare, because the bill
19 essentially tells them the - - - the injuries that
20 we're claiming are neurocognitive and neurobehavioral
21 - - -

22 JUDGE PIGOTT: Do you do a lot of these
23 cases?

24 MR. ATHARI: - - - damages? I do.

25 JUDGE PIGOTT: Because this bill of

1 particulars read like it was a stan - - -

2 MR. ATHARI: Somewhat boiler plate.

3 JUDGE PIGOTT: Yes, and - - - and as did
4 their demand. There - - - there were things in the
5 demand that I thought, you know, were - - - were odd.
6 I mean, you know, tell us - - - give us every
7 document that shows that we own the house. I mean,
8 it - - - it looks like this clash has been going on
9 for a while.

10 But when you list - - - why wouldn't you
11 just take your medical and put that in the bill of
12 particulars instead of, you know, I mean, you've got
13 anticipatory neurological left footed dropsy or - - -
14 I mean, it's - - - it's so frustrating and - - - and
15 I'm not sure that you need it. I mean - - -

16 MR. ATHARI: Well - - -

17 JUDGE PIGOTT: - - - everybody knows what
18 happens with a - - - with a lead kid. And - - - and
19 the injuries are not, at least in my experience,
20 everything that you've listed there. And - - - and
21 if they're not there, then they can't complain that -
22 - - that you're not giving them the stuff. If - - -
23 if everything you give them is what the doctors have
24 said, that are - - - that are in there, then you're
25 not getting into the point where you're speculating.

1 And when you start speculating, you're
2 going - - - you're going to need your expert to do
3 it. You're going to need your expert to say, well,
4 it doesn't say in here that he's suffering this
5 particular neurological damage, but I can tell you,
6 as an expert in - - - in lead paint poisoning, that
7 that's one of the sequelae and that's one of the
8 future issues. But it's not now. And - - - and if
9 all you do is give him what your injuries are now, as
10 you say you do in the education things and everything
11 else, this wouldn't be a problem, would it?

12 MR. ATHARI: Well, if I - - - if I may
13 address that. The - - - the injuries in lead are
14 boiler plate.

15 JUDGE PIGOTT: Are what?

16 MR. ATHARI: Are boiler plate.

17 JUDGE PIGOTT: I disagree, but - - -

18 MR. ATHARI: In other words, every child
19 that suffers from an elevated blood lead level,
20 according to the New York Coalition to Lead - - - End
21 Lead Poisoning, says "particularly harmful to brain
22 and nervous system development". So - - -

23 JUDGE PIGOTT: Exactly. But you've got - -

24 -

25 MR. ATHARI: So those would be - - -

1 JUDGE PIGOTT: You've got older kids,
2 you've got younger kids, you've got exposed a lot,
3 you've got not exposed as much. There's a lot of
4 things, and it seems to me if you've got a doctor
5 that said this is - - - this is what I see, they
6 can't do this to you. They can't - - - they can't
7 come in and say, you know, you've got to tell us what
8 you mean, you know, when you say you've got this - -
9 - this boiler plate affliction. Because that's
10 exactly what an expert has to do - - -

11 MR. ATHARI: Well - - -

12 JUDGE PIGOTT: - - - when you're dealing in
13 boiler plates.

14 MR. ATHARI: But we do - - - we do give
15 them what we believe the injuries are. The injuries
16 are neurocognitive and neurobehavioral deficits - - -

17 JUDGE ABDUS-SALAAM: Which means what - - -

18 MR. ATHARI: - - - and disorders.

19 JUDGE ABDUS-SALAAM: - - - that they only
20 have to get a medical exam - - -

21 MR. ATHARI: Of - - -

22 JUDGE ABDUS-SALAAM: - - - from a
23 neurologist - - -

24 MR. ATHARI: A neurol - - -

25 JUDGE ABDUS-SALAAM: - - - or if the

1 neurologist isn't the only or the most appropriate
2 specialist, then the neurologist should say now you
3 need a psychology or psychiatry IME?

4 MR. ATHARI: It could - - -

5 JUDGE ABDUS-SALAAM: Is that - - -

6 MR. ATHARI: It could be.

7 JUDGE ABDUS-SALAAM: Is that basically it?

8 MR. ATHARI: Yes, absolutely.

9 JUDGE ABDUS-SALAAM: But - - - and in any
10 lead poison case - - - and you apparently have
11 handled many - - - are there more than two or three
12 specialties that they would need to - - -

13 MR. ATHARI: No.

14 JUDGE ABDUS-SALAAM: - - - have a medical
15 exam?

16 MR. ATHARI: No. I mean, realistically,
17 you're talking about a psychologist, and you're
18 talking about either a neurologist or a psychiatrist,
19 and that's it. Everything else relating to the body
20 is fear of future injury. You know, I - - - I do
21 talk about - - -

22 JUDGE SMITH: Well, why do they have to
23 hire three doctors before you hire any?

24 MR. ATHARI: Well, when you say why do they
25 have to hire three doctors, they don't have to hire

1 three doctors - - -

2 JUDGE GRAFFEO: No, but why can't - - - why
3 can't the judge, in an attempt to try to clarify the
4 issues for discovery, recommend or order that your
5 client have this exam so that it's - - -

6 MR. ATHARI: Because - - -

7 JUDGE GRAFFEO: - - - so that there's a
8 determination as to what the areas of injury are?

9 MR. ATHARI: Well, aren't we opening up a
10 whole bag of worms there? Because once I - - - once I
11 produce that - - - he called it a report detailing a
12 diagnosis of injuries and causally relating injuries
13 to exposure. That is essentially my expert now,
14 right? But what if I decide just to go to a
15 psychologist and produce a partial report, as opposed
16 to an expert report, and then later on I supplement
17 with a different one, and I don't want to use that
18 person that I produced during discovery. And - - -

19 JUDGE PIGOTT: That's what I mean. You're
20 self - - - this all seems self-inflicted to me. I
21 mean, you've got whatever you've got in terms of the
22 medical when the child - - -

23 MR. ATHARI: Right, you have - - -

24 JUDGE PIGOTT: - - - was examined.

25 MR. ATHARI: - - - you have the bill of

1 particulars, you have the medical school records - -
2 -

3 JUDGE PIGOTT: No, no, no, I'm getting to
4 talk now.

5 MR. ATHARI: - - - and you - - - and you
6 have the dep - - -

7 JUDGE PIGOTT: Or I don't have to talk.

8 MR. ATHARI: I'm sorry. And you have the
9 deposition of the mom.

10 CHIEF JUDGE LIPPMAN: The judge wants to
11 ask you a question.

12 MR. ATHARI: I'm sorry.

13 JUDGE PIGOTT: No, it's all right. Go
14 ahead.

15 MR. ATHARI: No, and - - - and you have the
16 deposition of the mother and the child and the bill
17 of particulars in front of them so they can question
18 about it.

19 JUDGE GRAFFEO: You don't want to get a
20 doctor for this trial? Is that the bottom line?

21 MR. ATHARI: I will get a doctor for the
22 trial if I need to, but I may not need to, because
23 when they do the IME during discovery, and - - - and
24 let's say they do a psych - - - psychol - - -
25 psychological testing, I may agree with their

1 results, and all I may do is hire a doctor that says
2 - - -

3 JUDGE SMITH: So you're actually saying you
4 want them to pay for your case?

5 JUDGE GRAFFEO: I guess your posture is
6 that the plaintiff in this case has such extensive
7 psychological and physiological damage that their IME
8 is going to resolve that, and there - - - is going to
9 produce that proof, and therefore you don't have to
10 pay for your own physician and use your own expert?

11 MR. ATHARI: Well, I - - -

12 JUDGE GRAFFEO: Is that - - - I mean, is
13 that part of the underlying basis here?

14 MR. ATHARI: I - - - I'm - - - I'm probably
15 still going to hire my own expert, but I may not need
16 to do the examination.

17 JUDGE ABDUS-SALAAM: Is that what the rule
18 or the regulation requires? Isn't it experts that
19 have already treated or examined your client, not
20 somebody that you are now going out to hire?

21 MR. ATHARI: That's absolutely right. It's
22 - - -

23 JUDGE ABDUS-SALAAM: So basically, the rule
24 anticipates that there are medical records or other
25 records that would show that.

1 MR. ATHARI: That's absolutely right.

2 JUDGE PIGOTT: Well, that's why you've got
3 stuff in your bill of particulars, it seems to me,
4 that are not in your medical records, because if they
5 were in your medical records, you'd - - - you'd hand
6 over the medical records and there it would be, and
7 then they have their - - - their defense doctor's
8 exam, and you move on.

9 MR. ATHARI: Well, I - - - I mean, I could
10 sit here and pull out the list, and it's a long list,
11 and say, well, this one, this one, this one, this
12 one. But if you generally look at that list in a
13 bill of particulars, it's very clear it talks about
14 neurobehavioral and neurocognitive deficits and
15 disorders. It talks about the mechanism of damage,
16 which is the myelin sheath damage, which is what
17 happens in - - - in the brain.

18 JUDGE PIGOTT: Yeah, but what do you - - -

19 MR. ATHARI: And then it talks about - - -

20 JUDGE PIGOTT: What do you do if you're a
21 defendant and you say things like - - - I mean, some
22 of them are - - - have got to be redundant:
23 diminished cognitive function and intelligence, brain
24 damage, severe emotional and psychological harm, pain
25 and suffering, bone cell damage, lowered IQ, impaired

1 neuropsychological functioning. They sound like the
2 same thing in - - - in so many ways. And I know
3 you've got - - -

4 MR. ATHARI: They are.

5 JUDGE PIGOTT: Pardon me?

6 MR. ATHARI: They are.

7 JUDGE PIGOTT: Exactly. But you list them,
8 to the tune of double Js; I guess we're getting down
9 to triple Fs, and you - - - and you cause your own
10 problem. I mean, if you had five things here, and
11 they - - - and they'd say, well, you know, these are
12 psychological, these are physical, and - - - and we -
13 - - so we're going to send him to a psychologist and
14 to a - - - to our doctor and we'll see where it goes.

15 But - - - but they're trying to cover
16 themselves because you've got apoptosis here, and
17 somebody's got to figure out what the hell that means
18 and - - - and how it relates. And if it's in your
19 medical, then - - - then they've got it; if it's not,
20 they don't. So the judge is saying - - -

21 MR. ATHARI: Your Honor, my time is up - -

22 -

23 CHIEF JUDGE LIPPMAN: Yeah, okay, counsel.

24 MR. ATHARI: May I - - -

25 CHIEF JUDGE LIPPMAN: Do you - - - you have

1 an answer to the judge?

2 MR. ATHARI: May I respond - - - may I
3 respond to the judge?

4 CHIEF JUDGE LIPPMAN: Yes, go ahead.

5 MR. ATHARI: Thank you. I - - - I've had
6 this issue - - - I had this question asked by the
7 Fourth Department judges, by - - - by the lower court
8 judges. Even - - - even if the answer is pare down
9 your bill of particulars and make the motion for the
10 bill of particulars early on, then that's the answer.
11 The answer is not to produce a medical report
12 detailing a diagnosis of injuries and causally
13 relating those injuries to the exposure.

14 CHIEF JUDGE LIPPMAN: Okay, counsel,
15 thanks.

16 MR. ATHARI: I didn't address the second
17 issue, the - - -

18 CHIEF JUDGE LIPPMAN: You're going to have
19 to - - -

20 MR. ATHARI: Thanks.

21 CHIEF JUDGE LIPPMAN: You'll have your
22 rebuttal time.

23 MR. ATHARI: Okay, thank you.

24 CHIEF JUDGE LIPPMAN: Counsel?

25 MR. WARD: Thank you, Your Honor. Good

1 afternoon. May it please the court. I'm Eric Ward.

2 I think the court has - - - by its
3 questioning, has sort of hit on the issue here,
4 because what we have are a series of cases in which
5 with - - - with, in this particular situation, we
6 have allegedly identical injuries in hundreds and
7 hundreds of - - - of plaintiffs, which just can't be
8 the case.

9 CHIEF JUDGE LIPPMAN: But isn't this out of
10 the ordinary structure, the way these kind of things
11 proceed? Is this so unusual that it justifies doing
12 everything, sort of, turned around?

13 MR. WARD: I would argue, Your Honor, that
14 it is not turned around. And I would furth - - -

15 CHIEF JUDGE LIPPMAN: It's not unusual that
16 the - - -

17 MR. WARD: I would - - -

18 CHIEF JUDGE LIPPMAN: - - - judge, at this
19 point in the proceeding, would direct a - - -

20 MR. WARD: I would say that is not unusual
21 because for the first - - -

22 CHIEF JUDGE LIPPMAN: Not unusual what, in
23 these kind of actions or in all actions?

24 MR. WARD: No. 202.17 requires that when a
25 physical examination is going to be done, there be an

1 exchange of medical reports, and that the medical
2 reports themselves detail the injuries claimed and a
3 diagnosis and prognosis.

4 JUDGE PIGOTT: So what's wrong - - -

5 MR. WARD: That happens in - - -

6 JUDGE PIGOTT: What's wrong - - -

7 MR. WARD: - - - every case.

8 JUDGE PIGOTT: What's wrong with that? I
9 picked on your opponent here for doing this litany.

10 MR. WARD: Right.

11 JUDGE PIGOTT: But you didn't make any
12 effort to slim it down. I mean, you could have
13 objected to this bill of particulars, because
14 frankly, about two-thirds of it is obtuse. I mean, I
15 don't know how you could - - - I don't know how you can
16 defend yourself against it. I assume you're going to
17 get a doctor and say read this and tell me what the
18 hell they're talking about.

19 MR. WARD: Well, that's exactly right.

20 JUDGE PIGOTT: But isn't Judge Whalen right
21 when he says you're asking them to now generate
22 evidence because they don't have it now. And the
23 problem is they don't have - - - I don't believe - -
24 - they don't have what they say is in their bill of
25 particulars. And you know it, and rather than move

1 against the bill, you're saying you've got to come up
2 with an expert that's going to tell us about all of
3 this, right?

4 MR. WARD: Well, I think that what we're
5 actually trying to prevent, Your Honor, is just the
6 opposite of that, and that is that we go ahead and we
7 do certain examinations; we make certain findings.
8 And then the plaintiff, at the time of expert
9 disclosure, cherry-picks those and decides what it is
10 he wants to claim and what he doesn't want to claim,
11 pursuant to a full-blown expert disclosure.

12 I would take the position, Your Honor, that
13 what Judge Rosenbaum required here, and which was
14 approved by the Fourth Department, is - - - is much,
15 much less than that, and it's simply an
16 identification of what are you claiming the problem
17 here is - - -

18 JUDGE PIGOTT: But this isn't your first
19 lead case either, I'm willing to bet.

20 MR. WARD: That's correct.

21 JUDGE PIGOTT: You guys have been down this
22 road before, and - - -

23 MR. WARD: That's correct.

24 JUDGE PIGOTT: - - - and this - - - this
25 keeps going on. They - - - they do this bill of

1 particulars - - - it's hard to say it with a straight
2 face - - - and then you let it. And then - - - and
3 then you want to say, ah-hah, you're going to say
4 that as a result of the lead paint, you know, this,
5 this, this and this, and so we want you to produce
6 something, when they don't have to. They have to
7 produce their medical records and you have to
8 examine, and then you're done. And half of this
9 stuff's not going to be in there.

10 MR. WARD: Well, you know, what - - - what
11 happens - - - I - - - I agree that, to a certain
12 extent, you could make that argument, Your Honor.
13 But actually, the ah-hah is what we're trying to
14 prevent. You know, the gotcha is what we're trying
15 to prevent, because that's the way that - - - that
16 this proceeds. As I explained, we do the IM - - - we
17 do the IME, which we're entitled to do, or multiple
18 ones, and then, after those reports are issued, then
19 the plaintiff's counsel, who has the burden of proof
20 in this, by the way, from the get-go, says, all
21 right, I see the IME, I don't want to claim this, I
22 don't want to claim that, I don't want to claim this,
23 but this one I'm going to claim, and I'm going to get
24 an IME, particularly from someone from - - - from a -
25 - - from a specialty that you've never seen before.

1 JUDGE PIGOTT: When you say "IME", you're
2 saying an expert?

3 MR. WARD: I'm sorry, an expert report,
4 that's right.

5 JUDGE ABDUS-SALAAM: From a specialty - - -

6 JUDGE GRAFFEO: Was there - - -

7 JUDGE ABDUS-SALAAM: What specialty that
8 you've never seen before? It's - - -

9 MR. WARD: For - - - for example, a
10 vascular surgeon, because one of the claims here is
11 that you can have vasculitis. It's rare. In fact,
12 I'm not even sure that there's any literature that
13 would support such a thing.

14 JUDGE PIGOTT: But if we took that one as
15 an example, and let's assume he - - - he pares this
16 down to, let's make it fifteen, you know, some
17 neuropsych, you know, some physical, et cetera, and -
18 - - and vascul - - - vasculitis is in there, you're
19 going to - - - you're going to examine - - - it's not
20 going to show up. There's no vasculitis in this kid.
21 And that's what you know.

22 Now - - - now, their expert's going - - -
23 when he talks about future damages, is going to come
24 up with all of this stuff, but so is your expert
25 who's going to say it's not true, just like you're

1 saying.

2 MR. WARD: Exactly, but then there we are,
3 either - - - either spending the money to establish
4 their proof or not. I would argue, Your Honor, that
5 when you start one of these cases, you have an
6 obligation to identify how and whether your - - -
7 your client is injured. And it is not by coming up
8 with a laundry list of potential injuries that would
9 be applicable to anyone who has been anywhere near
10 lead.

11 JUDGE PIGOTT: But does it happen that - -
12 - let's take an auto accident case, you know, where
13 somebody's got a broken leg and - - -

14 MR. WARD: Right.

15 JUDGE PIGOTT: - - - you know, he's sick,
16 sore, lame or disabled and were otherwise injured and
17 then when they - - - when they give you your - - -
18 your bill of particulars and you go in, the doctor's
19 going to come in and testify and then an expert's
20 going to say and all of this may be permanent. And
21 you're going to have to have an expert say none of
22 it's going to be permanent because it doesn't show.
23 This is the same thing, isn't it?

24 MR. WARD: True. True, except that in that
25 particular case, there's no doubt that the broken leg

1 that may result in some permanency of a limp, or
2 whatever, is well documented to be caused by the
3 automobile accident.

4 JUDGE PIGOTT: Right.

5 MR. WARD: In our case, we don't have that,
6 be - - -

7 JUDGE PIGOTT: There's nothing in the
8 medical records that you've received to date that
9 shows that stuff.

10 MR. WARD: That's exactly - - - in fact - -
11 -

12 JUDGE ABDUS-SALAAM: So that's causation.

13 MR. WARD: - - - in fact, we're guessing.

14 JUDGE ABDUS-SALAAM: That's causation;
15 that's not a diagnosis. What if - - -

16 MR. WARD: Who - - -

17 JUDGE ABDUS-SALAAM: What if this child
18 never went to a doctor? We're not talking about
19 people who have got, you know, money, who can go to
20 the doctor every time something happens. Probably
21 these kids never go to the hospital until there's - -
22 - or an emergency room until there's something
23 really, really wrong with them.

24 So maybe they - - - after they were
25 diagnosed with - - - with lead poisoning and they get

1 the chelation therapy, or whatever else they can to
2 reduce the levels of lead, they don't go to a doctor
3 after that at all, and they don't have anything but
4 maybe a school psychologist or in some - - - I think
5 in one or two of these cases these young men have
6 been incarcerated, so maybe they have a - - - a
7 prison psychologist who's diagnosed something; that's
8 medical records. And if they're in prison, they're
9 not going to be able to go to some now medical doctor
10 or somebody else to treat them and give you a report
11 because they can't. So you're saying they're out of
12 the box; they can't sue?

13 MR. WARD: I am saying that there is an
14 obligation by their counsel to be able to tie this
15 together in their claims.

16 JUDGE ABDUS-SALAAM: And they could do that
17 with a - - - an expert. But they're precluded if
18 they don't come up with a report in this early stage
19 of discovery - - -

20 MR. WARD: I - - -

21 JUDGE ABDUS-SALAAM: - - - according to the
22 Fourth Department.

23 MR. WARD: I would not agree with you that
24 the only way to do that is through an expert, because
25 as you just said, it may be that there are very few

1 physicians out there that have seen this - - - this
2 child, but there are physicians out there, and it is
3 - - - that have seen the child, and it is not very
4 hard to - - - to pick up the phone and say, on the
5 basis of what you've seen, is this related to lead
6 paint.

7 JUDGE SMITH: I mean, are you - - -

8 MR. WARD: May we claim this as an injury?

9 JUDGE GRAFFEO: Was there a scheduling
10 order in this case initially?

11 MR. WARD: Yeah, well, there is a - - -
12 there is a - - - yes, there is a discovery - - -

13 JUDGE GRAFFEO: Well, why - - - why do they
14 - - - why is it not an abuse of discretion to make
15 them have to retain doctors and make disclosures
16 prior to the date that's set in the scheduling order
17 for them to have to turn over their expert report?

18 MR. WARD: I guess it's - - - again - - -

19 JUDGE GRAFFEO: I mean, is this unique to
20 lead paint, because I certainly - - -

21 MR. WARD: I - - -

22 JUDGE GRAFFEO: - - - didn't see it in
23 other personal injury-type lawsuits.

24 MR. WARD: I don't think it's completely
25 unique to lead paint, but I think that lead paint is

1 probably the - - - the best example of this. I think
2 exposure cases, in general, potentially run into this
3 problem.

4 I would argue, though, Your Honor, first of
5 all, we are not requiring an expert report. That's
6 not what the judge said.

7 JUDGE SMITH: Are you saying that they have
8 to produce a report by someone who has seen the
9 plaintiff already, or can they get somebody else to
10 see him?

11 MR. WARD: They could get someone to see
12 him.

13 JUDGE SMITH: And that would comply with
14 the court's order?

15 MR. WARD: That - - - that would comply
16 with the court's order.

17 JUDGE SMITH: And if, as it happens, there
18 is nobody who has seen him, who is qualified to tell
19 you anything about the causation of this injury, then
20 that's what they have to do.

21 MR. WARD: That - - - I would argue that
22 that's the case - - -

23 JUDGE SMITH: And - - -

24 MR. WARD: - - - and that the court - - -

25 JUDGE SMITH: And I guess - - - I guess

1 you're making the point, and that's not so terrible
2 because we should have that before we do an IME.

3 MR. WARD: I - - - that's - - - that is
4 what I'm saying. And I would say, Your Honor - - -

5 JUDGE GRAFFEO: But isn't the point of the
6 IME for you to find out what the plaintiff's
7 condition is?

8 MR. WARD: True, based on what the claims -
9 - - -

10 JUDGE GRAFFEO: It - - -

11 MR. WARD: - - - of injury in the case are.

12 JUDGE GRAFFEO: It appears to me you're
13 looking for them to help you to assist and to reduce
14 the universe of potential - - -

15 MR. WARD: Right, I - - - I think - - -

16 JUDGE GRAFFEO: - - - damages.

17 MR. WARD: I think it's precisely the
18 opposite, Your Honor. I think that it is the - - -
19 the plaintiff's burden - - -

20 CHIEF JUDGE LIPPMAN: That's exactly what
21 you - - -

22 MR. WARD: - - - to establish their injury.

23 CHIEF JUDGE LIPPMAN: That's exactly what
24 you want to do, right? You think that they're
25 basically - - - you don't want to look into every

1 conceivable symptom of lead poisoning in the world.
2 You want them - - - just what Judge Graffeo said, you
3 want them to limit - - -

4 MR. WARD: We want them to limit - - -

5 CHIEF JUDGE LIPPMAN: - - - the universe.

6 MR. WARD: But - - -

7 CHIEF JUDGE LIPPMAN: But that's - - -
8 that's what you're trying to do. What's wrong with
9 that, if you want to - - - if that's what you're
10 trying to do here?

11 MR. WARD: That - - - that is precisely
12 what we're trying to do, and we - - - it - - - and I
13 think it's very clear that the court has the
14 discretion to order the discovery - - -

15 CHIEF JUDGE LIPPMAN: Well, that's the
16 question.

17 MR. WARD: - - - in that - - -

18 JUDGE RIVERA: Okay.

19 CHIEF JUDGE LIPPMAN: Okay.

20 JUDGE RIVERA: I'm sorry. May I just - - -

21 CHIEF JUDGE LIPPMAN: Oh, Judge Rivera.

22 JUDGE RIVERA: - - - ask a ques - - - so
23 your opponent says it's really two or three doctors,
24 that it's not, sort of, the battery of doctors that
25 you claim has put you in this difficult position that

1 you don't know who to hire to figure out what his
2 client's injuries are. What - - - what's your
3 response to that?

4 MR. WARD: In - - - you can limit the
5 number of - - - of individuals - - - the number of
6 specialties that, in general, would have to examine
7 such a - - - such a patient to a neurologist, a
8 psychologist, perhaps a - - - a psychiatrist. But
9 then we get to the periphery of a vascular surgeon, a
10 geneticist. There are claims that - - - that lead
11 damages bone cell structure. Frankly, I don't even
12 know what specialty that is, but you would - - - you
13 would want to have somebody evaluate that. There - -
14 - there are a limited number of specialties out
15 there; it's not hundreds. But it is way more than
16 ultimately is going to be claimed as an injury in the
17 particular case. And all we're trying to do is
18 narrow that down and - - -

19 JUDGE GRAFFEO: Is there anywhere else in
20 the state that these kinds of orders are being issued
21 - - -

22 MR. WARD: Other than the Fourth
23 Department?

24 JUDGE GRAFFEO: - - - than in the Fourth
25 Department?

1 MR. WARD: I think the - - -

2 JUDGE GRAFFEO: Do you know?

3 MR. WARD: I think the Third Department has
4 - - - has considered this - - - or has looked at
5 something on the periphery. But frankly, I can't
6 cite you the case off the top of my head. It is
7 something that's in the Fourth Department, and I
8 think it depends upon where people are practicing.

9 CHIEF JUDGE LIPPMAN: Okay. Okay,
10 counselor.

11 Let's hear - - - you'll have rebuttal on
12 this case. Go ahead.

13 MR. ATHARI: Yes, Your Honor, thank you. I
14 just want to - - -

15 CHIEF JUDGE LIPPMAN: What's wrong with
16 them trying to narrow the universe? What - - -

17 MR. ATHARI: Well - - -

18 CHIEF JUDGE LIPPMAN: Why is that a
19 problem?

20 MR. ATHARI: It - - - they're already - - -

21 CHIEF JUDGE LIPPMAN: They can't look at
22 every possible symptom of lead poisoning - - - that
23 might come from lead poisoning in the history of the
24 world. They want to narrow it; is that something
25 bad?

1 MR. ATHARI: It's not something bad, and
2 there is no reason why a properly trained medical
3 doctor of - - -

4 CHIEF JUDGE LIPPMAN: You're just saying
5 they didn't go about the right way of doing it?

6 MR. ATHARI: Yeah, any medical doctor can
7 do that. Even a pediatrician can do that.

8 CHIEF JUDGE LIPPMAN: So they should just
9 do an IME and they got - - - they have to narrow it?
10 Is that what it is - - -

11 MR. ATHARI: They - - -

12 CHIEF JUDGE LIPPMAN: - - - the IME?

13 MR. ATHARI: They can do the IME with - - -
14 with any kind of a medical doctor. It can be a
15 pediatrician; it can be a medical - - - it can be a
16 neurologist. It can be a psychiatrist. They're all
17 medically inclined. And - - - and if - - -

18 CHIEF JUDGE LIPPMAN: Isn't that putting a
19 big burden on them?

20 MR. ATHARI: No, because they would - - -
21 they would - - -

22 CHIEF JUDGE LIPPMAN: Why shouldn't you - -
23 -

24 MR. ATHARI: - - - hire them anyway.

25 CHIEF JUDGE LIPPMAN: - - - have the burden

1 of narrowing what you're asking them to look at? Why
2 is that so terrible?

3 MR. ATHARI: Because you're - - - you're
4 changing the structure of the CPLR - - -

5 JUDGE PIGOTT: No, you're not.

6 MR. ATHARI: - - - and - - -

7 JUDGE PIGOTT: This bill of particulars is
8 redundant, it's - - - it's obtuse, it - - - it does
9 not fit 2214 in many, many ways. They didn't - - -
10 they didn't complain, so, you know, I don't know why
11 I'm - - -

12 MR. ATHARI: Right, they should have - - -

13 JUDGE PIGOTT: - - - I don't know why I'm
14 complaining, but you - - - you've got to cut this
15 down, and then - - - and then you get three experts
16 and you go to trial. I mean, you're going to - - -
17 you're going to be - - - your child's going to be
18 grown.

19 JUDGE ABDUS-SALAAM: Your child is grown;
20 that's the problem.

21 JUDGE PIGOTT: Yeah. I mean, I just don't
22 know why you want to do this. I - - -

23 MR. ATHARI: Well - - -

24 JUDGE PIGOTT: That's just me.

25 MR. ATHARI: It - - - I - - - I would just

1 add one more thing, less than a minute.

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 MR. ATHARI: And that is if you look at the
4 line of case law, it even says that even after note
5 of issue, if some surprise happens, if something pops
6 out, out of the ordinary, I cited a number of cases
7 in there that say the court has full discretion, at
8 that point, to say the defense can have another IME
9 if they want.

10 CHIEF JUDGE LIPPMAN: But based on the flow
11 of the case and what you're asking for, why is it an
12 abuse of discretion? I mean, let's look at the
13 particular case; why couldn't the judge do what - - -
14 what they did, given the way you're managing the ca -
15 - - he's trying to manage the whole disclosure.
16 Given what you're doing, why is it an abuse for him
17 to do what he did?

18 MR. ATHARI: Because the plaintiff's
19 counsel has to put up, essentially, 15- to 20,000
20 dollars - - -

21 CHIEF JUDGE LIPPMAN: All right. So your
22 main argument is you've got to hire an expert.

23 MR. ATHARI: And that - - - and that really
24 was the - - - the point of the dissent.

25 CHIEF JUDGE LIPPMAN: Okay.

1 JUDGE ABDUS-SALAAM: So why can't - - -

2 MR. ATHARI: - - - two points in - - -

3 JUDGE ABDUS-SALAAM: - - - you have an
4 expert come in and talk about these findings if - - -
5 as opposed to having a court take judicial notice of
6 them?

7 MR. ATHARI: You absolutely can, and we do.
8 The issue is whether the toxin is capable of causing
9 this particular illness. And if the court takes
10 judicial notice of that, that the - - - the toxin is
11 capable of causing a particular illness, and that's
12 exactly what - - - what 42 USC 4851 does - - -

13 CHIEF JUDGE LIPPMAN: So are you saying
14 lead poisoning is different than any other case, and
15 that's why you can have such a broad - - -

16 MR. ATHARI: Well - - -

17 CHIEF JUDGE LIPPMAN: - - - universe? Is
18 that your argument, that - - - that it's lead
19 poisoning and this is different, and that if it was
20 another kind of case, and you were so broad in what
21 you're alleging, the judge would have discretion, but
22 here the judge doesn't? Is that - - - is that your
23 argument, that this is different?

24 MR. ATHARI: I would say - - -

25 CHIEF JUDGE LIPPMAN: Don't let me put

1 words in your mouth; what's your argument?

2 MR. ATHARI: I - - - the way I would say it
3 is that this is beyond it's - - - it's as a matter of
4 law, whereas in a mold case - - -

5 CHIEF JUDGE LIPPMAN: Because of the
6 recognition of everyone as to what lead poisoning can
7 do?

8 MR. ATHARI: Absolutely.

9 JUDGE GRAFFEO: So if you decide not to
10 hire an expert to testify to this topic, that then
11 precludes their ability to engage in any cross-exam,
12 doesn't it? Because you're asking the court to take
13 judicial notice of this aspect that's, I guess, an
14 essential element of what you have to prove for your
15 claim. So if you don't hire the expert to talk about
16 these findings, then they have no one to cross - - -
17 to engage in cross-examination with.

18 MR. ATHARI: Correct. I'm - - - I'm not
19 following - - -

20 JUDGE GRAFFEO: I mean, is that - - - I
21 mean, that's a concern for me. Tell me why we should
22 use judicial notice to substitute for what ought to
23 be the usual process of perhaps battling experts, for
24 all I know.

25 MR. ATHARI: Right, and - - - and here's

1 where I would go with that. The statute, 42 USC
2 4851, specifically in 4851(a), put forth three
3 things. It said that the point of the statute was to
4 eliminate lead-based paint hazards in all housing, to
5 end the current confusion over reasonable standards
6 of care, and to educate the public concerning hazards
7 and sources of lead-based paint poisoning. That's
8 way different than a mold case or - - - or the amount
9 of proof - - -

10 JUDGE PIGOTT: But do they spell out what
11 diseases are directly caused by lead?

12 MR. ATHARI: They absolutely do. They say
13 lead poisoning in children causes IQ deficiencies,
14 reading and learning disabilities, et cetera.

15 JUDGE PIGOTT: But then - - -

16 MR. ATHARI: I didn't write it all down.

17 JUDGE PIGOTT: But then you still have to -
18 - - you still have to prove that that's - - - that
19 that's what your plaintiff is suffering from - - -

20 MR. ATHARI: That the - - - yes.

21 JUDGE PIGOTT: - - - and that the cause is
22 the lead at the house.

23 MR. ATHARI: And yes, that there was
24 exposure to the toxin, so the toxin would be in the
25 house - - -

1 JUDGE PIGOTT: Because you run into - - -

2 MR. ATHARI: - - - at sufficient - - -

3 JUDGE PIGOTT: I'm guessing you run into
4 claims that, you know, there was - - - used to be
5 lead in gasoline and that's in the - - -

6 MR. ATHARI: Sure.

7 JUDGE PIGOTT: - - - that's in the side of
8 the roads, and you know, we don't know where he got
9 the lead, et cetera. We don't know.

10 MR. ATHARI: Yeah, or in cigarettes or, you
11 know - - -

12 JUDGE PIGOTT: Right, so how does - - - I
13 mean, I don't know why we should be arguing it, but
14 so the federal thing doesn't get you anywhere. I
15 mean, all it does is say what everybody knows. And
16 you've still got - - - you've still got your
17 causation problem - - - or issue, I should call it,
18 rather.

19 MR. ATHARI: A proximate causation issue,
20 yes.

21 JUDGE PIGOTT: Right.

22 CHIEF JUDGE LIPPMAN: But - - -

23 JUDGE READ: You're saying that proves
24 general causation?

25 MR. ATHARI: General causation.

1 JUDGE READ: The legislative findings
2 substitute for a Frye hearing, for example?

3 MR. ATHARI: Well, yeah, and the reason why
4 I say that is because if you look at the - - - the
5 Viemeister case - - - it was a 1904 Court of Appeals
6 case - - - it talks about - - - it was talking about
7 vaccines. But it basically said, listen, the people
8 have spoken and this is what the people have said.
9 And - - - and in our case - - -

10 CHIEF JUDGE LIPPMAN: So once you take - -
11 - once the court takes judicial notice of all the
12 ramifications of - - - of lead poisoning, that limits
13 what you have to do up front, in terms of giving them
14 notice, is that what you're saying?

15 MR. ATHARI: Absolut - - - yes - - - yes,
16 Your Honor. And that's exactly why I did it.

17 JUDGE PIGOTT: Are you talking about - - -

18 MR. ATHARI: That's why between Giles and -
19 - -

20 JUDGE PIGOTT: Are you talking about notice
21 to the defendant?

22 MR. ATHARI: I'm sorry?

23 JUDGE PIGOTT: Are you talking about notice
24 to the defendant, that you think the federal law is
25 notice to the defendant for purposes of you bringing

1 a lead paint case against them? They knew or should
2 have known that lead was going to - - -

3 MR. ATHARI: I hope to one day argue that
4 in front of you, yes.

5 JUDGE READ: Well, I thought you said it
6 also showed general causation.

7 MR. ATHARI: Yes, yes. Today I'm here to
8 say that - - - that Section 2 of that statute gives
9 general causation. There's another section that says
10 that lead poisoning - - - that - - - that all old
11 houses built before a certain age have lead paint, et
12 cetera, and yes, and - - -

13 JUDGE SMITH: You know, I don't think
14 anyone's questioning the principle that a court is
15 allowed to take judicial notice of what it says in a
16 statute. It seems that I think the problem that the
17 courts below had is what - - - how - - - how does it
18 help you in this case, when you haven't yet told the
19 - - - the defendant, with any specificity, what your
20 claim is, to take judicial notice of a statute that
21 says lead can cause a lot of problems, which I'm sure
22 it can. How - - - how does that move - - - move
23 things forward?

24 MR. ATHARI: Well, because that's exactly
25 the basis - - - that's the claim.

1 CHIEF JUDGE LIPPMAN: Your claim is that
2 lead causes all of these problems.

3 MR. ATHARI: Lead causes - - -

4 CHIEF JUDGE LIPPMAN: And that once you
5 take notice you can just say that. Is that what
6 you're saying?

7 MR. ATHARI: Lead causes IQ deficiencies,
8 learning - - -

9 JUDGE SMITH: You can try a case that way?

10 MR. ATHARI: - - - learning disabilities.

11 JUDGE SMITH: You can just show up with a
12 plaint - - - you can show up with a plaintiff who had
13 a high lead count and a statute that says lead causes
14 problems, and you can rest? That's a prima facie
15 case?

16 MR. ATHARI: No, I still have to prove that
17 there was exposure to the toxin at the house. I have
18 to prove all of the elements of negligence.

19 JUDGE SMITH: What about causation?

20 MR. ATHARI: But on causation, on - - -
21 specifically on general causation, the legislature
22 has spoken, so - - -

23 JUDGE SMITH: That it's capable - - - that
24 it's capable of causing.

25 MR. ATHARI: It's capable of causing.

1 JUDGE SMITH: Yeah, but don't - - - you
2 still have to have somebody - - - it looks to me - -
3 - I don't know much about lead paint, but it looks to
4 me like the issue here is not whether lead paint can
5 hurt you; of course it can. It's whether these
6 people have problems that are attributable to the
7 lead paint. The statute isn't going to answer that
8 question.

9 MR. ATHARI: Well, that's true. And if
10 there's an alternative causation argument, then the
11 burden on an alternative causation argument is on the
12 defendant.

13 JUDGE SMITH: You mean all you have to show
14 is that your client has, say, developmental delay,
15 and that he was exposed to lead paint, and that's
16 enough for a prima facie case that the - - - the
17 landlord's liable?

18 MR. ATHARI: That - - - yes, that the - - -
19 that the child had lead in his blood or her blood at
20 sufficient - - - under Parker - - - at sufficient
21 exposure levels capable of causing the injury.

22 JUDGE SMITH: You don't have to have an
23 expert who says I've looked at this - - - these
24 records and I've examined this person, and in my
25 opinion, to a reasonable degree of certainty, the - -

1 - one is the cause of the other?

2 MR. ATHARI: Well, on general causation,
3 I'm - - - I'm - - -

4 JUDGE SMITH: Well, don't you have - - -
5 you have to prove specific causation too, don't you?

6 MR. ATHARI: Well, yeah, and so - - - so
7 there could be an argument on the damages. In other
8 words, one expert can say - - -

9 JUDGE SMITH: Well, I - - - can you - - -
10 are you seriously saying you can make a case on - - -
11 I'm not sure this issue's before us, but are you
12 seriously saying you can get to a jury on liability
13 with nothing but the statute, the fact of exposure,
14 and the fact of disease?

15 MR. ATHARI: I - - - in a car accident
16 case, there - - - there is the accident, and - - -
17 and the plaintiff has a broken arm.

18 JUDGE SMITH: Yeah, the car accident - - -

19 MR. ATHARI: The injury is - - -

20 JUDGE SMITH: In a car accident, specific
21 causation is usually not that hard.

22 MR. ATHARI: Well, how is it different
23 here? We have blood lead levels, extremely high
24 blood lead levels.

25 JUDGE SMITH: The immediacy of the - - -

1 the connection between the event and the injury is a
2 little more obvious.

3 JUDGE RIVERA: Well, I think the - - - I
4 think, in part, the argument - - - there are possible
5 arguments. One is, no, he really doesn't have the
6 injury you claim he has. Right? That - - - but that
7 - - -

8 MR. ATHARI: That's a fair - - -

9 JUDGE RIVERA: You concede that.

10 MR. ATHARI: Yes.

11 JUDGE RIVERA: The other one is, that
12 particular injury was not caused by the lead. Lead
13 might cause that - - -

14 MR. ATHARI: Right.

15 JUDGE RIVERA: - - - but that's not what
16 caused it in your client.

17 MR. ATHARI: Correct. And that's another
18 argument.

19 JUDGE RIVERA: But you then concede you
20 would have to establish that, no? Or are you saying
21 he has to show that it's not caused by lead?

22 MR. ATHARI: Well, I looked at the
23 precedent in New York on - - - on the issue. And - -
24 - and I looked at Parker, and specifically there's a
25 footnote 2, in Judge Ciparick's decision, that talks

1 about that. And - - - and if you - - - and if you
2 look at that footnote 2 it says the plaintiff has the
3 burden to show that - - - that it was a substantial
4 factor, but he doesn't have the - - - the burden to -
5 - - to exclude all other possible causes.

6 JUDGE SMITH: What's the answer to Judge
7 Rivera's question? Who has the burden on - - - on
8 the question of whether there's - - - whether it's
9 this - - - the lead paint or something else is a
10 cause?

11 MR. ATHARI: The plaintiff has the burden
12 on all of it.

13 JUDGE SMITH: And can that burden be met by
14 the federal statute alone?

15 MR. ATHARI: I - - - on the issue of
16 general causation, I believe so. I - - - I think
17 we're going to get to a point where when a child has
18 a lead level of 30 - - -

19 JUDGE PIGOTT: Yeah, that isn't seriously
20 argued anymore, is it? I mean - - -

21 MR. ATHARI: No.

22 JUDGE PIGOTT: - - - that lead causes this
23 kind of problem.

24 MR. ATHARI: No.

25 JUDGE PIGOTT: You've got the specific

1 problems and - - - and on top of that I'm - - - I'm
2 betting that if you got people that lived in two or
3 three or four houses, you got - - - you got
4 allocation issues and all kinds of stuff.

5 MR. ATHARI: Yeah.

6 JUDGE PIGOTT: So this is - - -

7 MR. ATHARI: I mean - - -

8 JUDGE PIGOTT: Well, okay, I got it.

9 MR. ATHARI: Yeah.

10 CHIEF JUDGE LIPPMAN: Okay. Thanks,
11 counsel.

12 MR. ATHARI: Thank you, Your Honor.

13 MR. ABELSON: May it please the court.

14 Gary Abelson for defendant, Breen.

15 Our issue in Giles is simply the IME issue,
16 although plaintiff's counsel appeared to argue at
17 some points in there, issues of causation, et cetera.
18 Our position is - - - is very simple, that this is -
19 - - it goes back to the word "discretion", and that
20 the - - - the trial judge's discretion is - - - is to
21 be reviewed by the Appellate Division which has its
22 own discretionary - - -

23 JUDGE PIGOTT: Did he have - - -

24 MR. ABELSON: - - - powers.

25 JUDGE PIGOTT: Did he have other

1 discretion? In other words, could he tell the
2 plaintiff you've got 183 things here; I want you to
3 come back with 15?

4 MR. ABELSON: Well, he did.

5 JUDGE PIGOTT: I want - - -

6 MR. ABELSON: Part of our motion was that
7 the - - - to amend his bill of particulars.

8 And in response to your - - - to your
9 questions earlier to Mr. Ward, we did move, because
10 once you get through discovery then we say, okay,
11 what - - - what are you really down to now? I mean,
12 we do - - - discovery's broad; we have an opportunity
13 to conduct depositions of the - - - of the mother and
14 the child and so on. Now you get to a point and say,
15 fine, where are we?

16 JUDGE PIGOTT: Did you do that? Have you
17 deposed the - - -

18 MR. ABELSON: Oh, absolutely. This - - -
19 we've all - - - we - - - and again, the - - - the
20 phrase "early stage" that Judge Whalen used is - - -
21 is incorrect. We're - - - we're toward the end.
22 We've deposed - - - we've deposed everybody.

23 JUDGE PIGOTT: Why wouldn't - - -

24 MR. ABELSON: The landlord - - -

25 JUDGE PIGOTT: Why wouldn't it have been in

1 the deposition - - - let's assume with the parent - -
2 - that you would - - - you would have gone through
3 this and said, you know, you're claiming here that
4 you're suffering from - - - you know, have you seen
5 any evidence of that or - - -

6 MR. ABELSON: Well, we asked questions - -
7 - we did ask questions about it. We also asked
8 questions has anybody ever told you - - - I
9 specifically said, and the Appellate Division noted -
10 - - I said has anybody ever told you that lead has
11 affected your child? No.

12 JUDGE PIGOTT: Well, that's a different
13 question, but - - -

14 MR. ABELSON: I - - -

15 JUDGE PIGOTT: What I'm saying is that I
16 just find some of these just almost impossible to
17 figure out what - - -

18 MR. ABELSON: Well, I - - -

19 JUDGE PIGOTT: - - - what the claim is.

20 MR. ABELSON: And I agree with you.

21 JUDGE PIGOTT: And so I would think that
22 you're probably not going to get much out of the
23 child, particularly if it's a young child. The
24 parent either knows or doesn't know. But you've got
25 the medical records, and then why wouldn't you say,

1 you know, we want to strike this bill of particulars
2 because they're making claims for - - - as your co-
3 counsel says, of vascular damage, and there's no
4 evidence of it whatsoever in this record.

5 MR. ABELSON: Right, well, we - - - we have
6 asked them to pare down after we go through the
7 discovery. Now, you ask the mother is there
8 neurocognitive deficits, she's not going to know.
9 And the problem we have in this case, Your Honor, is
10 that there was nothing and there is nothing in this
11 record that in any way connects the claim that lead
12 paint affected Shawn Giles.

13 JUDGE GRAFFEO: I thought there were two
14 hospitalizations here for high blood levels - - -
15 high levels.

16 MR. ABELSON: He was hospitalized, but the
17 question still - - - still becomes, Your Honor, is
18 did that - - - is there something that affects him in
19 some way? This plaintiff's - - -

20 JUDGE ABDUS-SALAAM: What about school
21 records - - -

22 MR. ABELSON: School - - -

23 JUDGE ABDUS-SALAAM: - - - when he was
24 younger? These - - - both of these, your client or
25 his client that is suing you and the other one,

1 they're grown men now. They're - - - they're twenty-
2 four years old. So wouldn't their school records - -
3 -

4 MR. ABELSON: Their - - -

5 JUDGE ABDUS-SALAAM: - - - when they were
6 much younger say something about the deficits that
7 might be related to lead? I - - - I'm sure the
8 records aren't going to say, and they were caused by
9 lead poisoning, because the records won't say that.

10 MR. ABELSON: But that's the point, Your
11 Honor. There is only one reference in - - - I mean,
12 there are certain deficits that he has. Many
13 children have similar deficits that have never been
14 exposed to lead. That's the issue that we come up
15 against.

16 The problem is that Mr. Athari wants every
17 - - - wants it just a very broad situation, that if
18 you've been exposed to lead then you have these
19 things, and - - - and there's no other explanation.
20 That's simply not true, and we've - - - we've gone
21 into the causation issues, and - - - and to this
22 particular plaintiff. And that's where - - - that's
23 where we are, and that's what we argued to Judge
24 Rosenbaum; that's what the Appellate Division looked
25 at. In fact, they said in this unique set of

1 circumstances, there is nothing that says, in this
2 case, that Shawn Giles' exposure to lead necessarily
3 - - - or affected him in any way.

4 JUDGE ABDUS-SALAAM: Is there anything in
5 any other lead case that - - -

6 MR. ABELSON: I'm sorry?

7 JUDGE ABDUS-SALAAM: Is there anything like
8 what you're asking for in any other lead case? I
9 mean, this isn't, obviously, as Judge Pigott
10 indicated, either your first trip to this rodeo or
11 Mr. Athari's first trip to the rodeo, so in other
12 lead cases where simil - - - similar injuries have
13 been alleged, have you also sought IMEs?

14 MR. ABELSON: Yes.

15 JUDGE ABDUS-SALAAM: Have you also sought,
16 you know, these kinds of reports and then have the
17 plaintiff precluded if they don't - - -

18 MR. ABELSON: And have the plaintiff what?

19 JUDGE ABDUS-SALAAM: - - - have the
20 plaintiff precluded from - - - from - - -

21 MR. ABELSON: There are - - -

22 JUDGE ABDUS-SALAAM: - - - putting in any
23 evidence of injuries at trial if they don't come up
24 with these reports?

25 MR. ABELSON: There are a raft of decisions

1 down below that are waiting for this decision, Your
2 Honor.

3 JUDGE ABDUS-SALAAM: I'll bet there are.

4 MR. ABELSON: This - - - this has gone
5 through the west - - - the western New York area.
6 There are - - - I've got - - - I've - - - we've had
7 several with Mr. Athari's office, and I know of
8 others. There's three that were decided within six
9 months, which is why I assume the Fourth Department
10 granted leave on the very same issue. So yes, there
11 are - - - this is a constant issue that - - - to pare
12 down and to find out, with a particular plaintiff,
13 what is the causation.

14 JUDGE RIVERA: Well, I think, in part, he's
15 arguing that the scientific jury is out. At these
16 lead levels, with this kind of a history, this is the
17 cause, right? That's his argument. Now, you may - -
18 - you may have someone who's an expert who's willing
19 to say there are other things that might cause this.
20 But I think his point is that the scientific jury is
21 out and - - - and lead poisoning causes these
22 injuries.

23 MR. ABELSON: It may - - -

24 JUDGE RIVERA: Nothing else can explain
25 this when you have this kind of a level and this kind

1 of a history for this particular adult, based on the
2 childhood record.

3 MR. ABELSON: My - - - my response would
4 be, in a labor law case, if someone fell off a ladder
5 and - - - and claimed a broken arm, if we prove that
6 he walked in with a broken arm before he went up the
7 ladder, there's - - - there's no proof that - - -

8 JUDGE SMITH: No - - -

9 JUDGE RIVERA: But - - -

10 MR. ABELSON: - - - although it could - - -
11 although it could - - - a fall from a ladder could
12 cause a broken arm, he has to prove that the broken
13 arm came from the fall off the ladder. The same
14 thing exhibits here. While lead may - - - may create
15 or cause certain issues, there's a whole bunch of
16 other things that can mimic or cause the same
17 situation. In this plaintiff, where is the
18 causation?

19 JUDGE RIVERA: True, but he's saying if you
20 look at everything this person has - - - we're not
21 talking about one broken arm; we're not talking about
22 one particular injury. He says - - - and you may
23 disagree; you may say it's not all these injuries. I
24 get your point here. I get both of your points. But
25 he's saying when you really look at this record and

1 JUDGE RIVERA: What's your objection to
2 proceeding in that way?

3 MR. ABELSON: Well, there are - - - there
4 are probably three - - - maybe two or three or four
5 disciplines, but there are still a lot of - - -
6 that's more than the normal case. And why - - - the
7 burden should not be upon us to - - - to make the
8 case, if you will, for Mr. - - - for the plaintiff.

9 JUDGE ABDUS-SALAAM: Is this different from
10 brain-damaged baby cases where there are several
11 cognitive deficits alleged and, you know, if you need
12 to get some kind of IME or something like that?

13 MR. ABELSON: I handle a lot of head injury
14 cases, Your Honor, and - - - and there are reports
15 from doctors that say, yes, the - - - the fall, the
16 auto accident, the whatever is the cause of this - -
17 - this person's situation. So there's a tie-in,
18 then, between whatever the event is and the - - - and
19 the injuries that are claimed. We don't have that
20 here in this case. There's nobody - - - and that's
21 all we've asked.

22 JUDGE GRAFFEO: Well, lead cases and toxic
23 exposure cases are a little different from the brain
24 damage cases because there's one event that
25 precipitates, whereas here, this is kind of an

1 accumulation over time. I mean, a five or six year
2 old may not exhibit all the problems that have - - -
3 that are caused with lead congest - - - with - - -
4 with lead consumption, correct? It sometimes takes
5 years for these things to reveal themselves.

6 MR. ABELSON: Well, I - - - I would argue
7 that lead may not - - - it may not take that long.
8 But there are possi - - -

9 JUDGE GRAFFEO: It does in quite a few
10 cases.

11 MR. ABELSON: It may in certain cases, Your
12 Honor, that's true. But again, before - - - and Mr.
13 Ward touched on it as well - - - before commencing a
14 case, there should be some - - - I would assume Mr.
15 Athari consulted somebody to say in this case there
16 is something to indicate that these deficits are tied
17 into the lead exposure. He's signing documents
18 saying - - -

19 JUDGE PIGOTT: Was your plaintiff chelated?

20 MR. ABELSON: I believe he was in - - - he
21 was once, yes.

22 JUDGE PIGOTT: One of the two was a
23 chelation?

24 MR. ABELSON: Yes.

25 CHIEF JUDGE LIPPMAN: Okay.

1 MR. ABELSON: But - - -

2 CHIEF JUDGE LIPPMAN: Okay, go ahead,
3 finish, counsel.

4 MR. ABELSON: But again, Your Honor, that
5 still doesn't show that there's any connection in
6 this case to any of the deficits which they're - - -
7 which they're claiming.

8 CHIEF JUDGE LIPPMAN: Okay, counselor,
9 thanks.

10 MR. ABELSON: Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor?

12 MS. ADLER: Good afternoon. May it please
13 the court. Debra Adler for the defendant, Yi.

14 I just want to point out, in other lead
15 paint cases that we do handle, the plaintiff's
16 counsel does hand us over a neuropsych testing before
17 a IME. And that's with other counsel, other
18 plaintiffs. In this particular case, with Mr. Giles,
19 if you look at the medical records that were provided
20 before the IME and the school records - - -

21 CHIEF JUDGE LIPPMAN: The only one who does
22 this is Mr. Giles?

23 MS. ADLER: Excuse me, Your Honor?

24 CHIEF JUDGE LIPPMAN: The only one - - -
25 you're saying - - -

1 MS. ADLER: This - - - yes, Mr. Athari - -
2 - that - - -

3 CHIEF JUDGE LIPPMAN: Yeah, that's the only
4 one where you get this kind of a broad-based - - -

5 MS. ADLER: In the - - -

6 CHIEF JUDGE LIPPMAN: - - - contentions?

7 MS. ADLER: - - - particular cases that I
8 have dealt with, yes, Your Honor, it's - - - it's
9 with this plaintiff.

10 CHIEF JUDGE LIPPMAN: Okay. In your view.
11 Okay. Go ahead.

12 MS. ADLER: In Mr. Giles' case, if you look
13 at the school records, there's a notation of speech
14 impairment. If you compare that with the bill of
15 particulars, where there's thirty-four injuries
16 listed, one of which may be speech impairment,
17 practically speaking, when defendant - - - when we
18 get the bill of particulars and we're scheduling the
19 IME, we look at the records. Why should we get a
20 neuropsych or a neurologist? He - - - the
21 plaintiff's never been treated by a neuropsych or a
22 neurologist. We get a speech therapist.

23 CHIEF JUDGE LIPPMAN: So you don't want to
24 look for every possible symptom that might - - -

25 MS. ADLER: No, well, why - - - well, why

1 should we, if the - - - if the plaintiff's never
2 treated for these conditions that he's alleging he
3 has?

4 JUDGE PIGOTT: As Judge Abdus-Salaam
5 mentioned, there are plaintiffs who don't get medical
6 care and treatment at the time that they perhaps
7 should have.

8 MS. ADLER: Yes, Your Honor, and so if we
9 proceeded to do that, if we did retain the neuropsych
10 and neurologist, then what happens? The note of
11 issue gets filed, we move for summary judgment, he
12 opts with a - - - or - - - or we go to trial, he opts
13 with his expert, providing the same diagnosis,
14 recitation of injuries and prognosis that he was
15 supposed to provide pursuant to 202. It renders 202
16 meaningless.

17 JUDGE PIGOTT: In 202, if it's an expert,
18 it's pursuant to 3101(d).

19 MS. ADLER: The expert - - - but it's
20 providing the same recitation of injuries. 202 is
21 supposed to provide medical providers and treatments
22 of which is going to be testified at trial.

23 JUDGE PIGOTT: Treaters.

24 MS. ADLER: Treaters; that's right.

25 JUDGE PIGOTT: Well - - -

1 JUDGE SMITH: But this - - - he says this
2 is a case where they say, well, I don't have any
3 medical prov - - - to simplify it, I don't have any
4 medical providers; I've never seen a doctor in my
5 life. 202 doesn't require him, on its face, to go -
6 - - to create records, does it?

7 MS. ADLER: It doesn't require it, but
8 we're asking, well, then you're precluded from
9 testifying at trial as to those injuries that aren't
10 substantiated.

11 JUDGE SMITH: Well, I understand you're
12 asking for that, but isn't - - - isn't this really
13 going - - - and indeed, didn't the Appellate Division
14 say that we're not going - - - 202 doesn't require
15 this, but it doesn't prohibit it either, and we think
16 it's a reasonable idea?

17 MS. ADLER: Absolutely, Your Honor, it
18 doesn't prohibit it. And if you look at 3101, in
19 cases where - - - if the plaintiff fails to disclose
20 a 3101 expert who was a treating physician, that
21 doesn't warrant preclusion on causation, because if -
22 - - if those records were handed over pursuant to
23 202. So there is a causation element already in 202.

24 JUDGE PIGOTT: You guys are fighting
25 battles that you may never see. It's amazing. I

1 mean, obviously you've all been in this for quite a
2 while and you're anticipating what each one is going
3 to do and everything else.

4 MS. ADLER: Yeah - - - yes, Your Honor.
5 And so I would just submit that it was not an abuse
6 of discretion.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MS. ADLER: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks.

10 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Hamilton v. Miller, et al., No. 113, and Giles v. Yi, et al., No. 114, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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