No. 113
Christopher Hamilton,
Appellant,
v.
John Miller et al.,
Respondents.

No. 114
Shawn Giles, &c.,
Appellant,
v.
A. Gi Yi, et al.,
Respondents,
et al.,
Defendants.

Case No. 113:
Mo J. Athari, for appellant.
Eric J. Ward, for respondents Musinger et al.
Stanley J. Sliwa, submitted for respondents Miller.

Case No. 114:
Mo J. Athari, for appellant.
Gary H. Abelson, for respondent Gerald Breen.
Debra A. Adler, for respondent A. Gi Yi.

LIPPMAN, Chief Judge:

We hold that, in these personal injury actions, it was an abuse of discretion to order plaintiffs to produce, prior to the defense medical examinations, medical reports detailing a diagnosis of each injury alleged to have been sustained by

plaintiffs and causally relating those injuries to plaintiffs' exposure to lead-based paint.

I

Giles v Yi

In January 2009, plaintiff Shawn Giles commenced this personal injury action against A. Gi Yi and Gerald Breen, the alleged owners of certain rental units in which he lived as a child. Giles alleges that he was exposed to lead-based paint in those rental units and suffered numerous injuries as a result. Giles's bill of particulars lists 35 injuries, including physical, neurological, and psychological problems.

In July 2011, defendant Breen served medical examination notices under CPLR 3121 and requested "copies of any reports of any physicians who have treated or examined the plaintiff" in advance of the examination. Giles disclosed certain medical and educational records that showed that he had lead poisoning as a young child and that he subsequently had academic problems. These records, however, did not substantiate the 35 alleged injuries, nor did they causally relate the documented problems to lead poisoning.

Defendants Breen and Yi then moved to compel Giles to comply with 22 NYCRR 202.17 (b) (1) and produce medical reports detailing a diagnosis of the injuries allegedly caused by exposure to lead-based paint, or be precluded from introducing

proof of these injuries at trial. Without this evidence, they argued, they would be required to pay for multiple medical professionals to examine plaintiff. They requested also that plaintiff be ordered to amend his bill of particulars to reflect those injuries actually sustained. Giles cross-moved for a protective order, arguing that defendants were prematurely requesting expert reports.

Supreme Court granted defendants' motion and denied Giles's motion. It ordered Giles "to produce . . . medical reports of any treating or examining medical service provider detailing a diagnosis of any injuries alleged to have been sustained by the plaintiff . . . and causally relating said injuries to plaintiff's alleged exposure to lead-based paint," and further, to amend his bill of particulars to reflect those injuries actually sustained, or be precluded from offering evidence of those injuries at trial.

The Appellate Division affirmed, holding that "Supreme Court did not abuse its broad discretion in directing plaintiff to produce a medical report containing a diagnosis of the alleged injuries sustained by plaintiff and causally relating such injuries to lead exposure before any CPLR 3121 examinations are conducted" (Giles v Yi, 105 AD3d 1313, 1316 [4th Dept 2013]). Justice Whalen dissented. In his view, the majority's holding imposed unnecessary burdens on plaintiff and was akin to forcing him to retain an expert prior to the defense's medical

examination, something not required at that stage of the litigation (id. at 1319-1321).

The Appellate Division subsequently granted plaintiff leave to appeal and certified the question of whether the order was properly made.

Hamilton v Miller

Plaintiff Christopher Hamilton, represented by the same counsel as Giles, commenced a similar personal injury action in July 2009 against John Miller, David Miller,[1] Jules Musinger, Doug Musinger, and Singer Associates, the alleged owners of properties in which Hamilton lived as a child. Hamilton filed a bill of particulars alleging that he suffered 58 injuries from exposure to lead-based paint at defendants' properties. They included physical, psychological, psychiatric, and developmental problems.

During discovery, Hamilton disclosed certain medical and educational records that showed that he had lead poisoning as a young child and that he subsequently had academic, behavior, and speech problems. Just as in Giles, however, the records did not substantiate the 58 alleged injuries, nor did they causally relate them to lead poisoning.

Defendants' noticed medical examinations and requested

[1] Supreme Court dismissed the complaint as against the Miller defendants during the pendency of this appeal.

that Hamilton comply with 22 NYCRR 202.17 (b) (1) and provide medical reports from his treating or examining medical service providers diagnosing his injuries and causally relating them to lead-based paint. Hamilton claimed that he was not obligated to provide any further records.

Defendants moved to compel Hamilton to disclose the reports and to amend the bill of particulars to reflect those injuries actually sustained, or otherwise be precluded from introducing proof of his alleged injuries at trial. Hamilton cross-moved for a protective order under CPLR 3103 and for the court to take judicial notice under CPLR 4511 of a federal statute codifying Congress's findings justifying the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 USC § 4851).

Supreme Court denied Hamilton's motion and granted defendants' motion, ordering Hamilton to produce medical reports of a treating or examining medical service provider detailing any injuries alleged to have been sustained as a result of defendants' negligence and causally relating them to exposure to lead-based paint. The court further ordered that, should Hamilton fail to produce these records, he would be precluded from introducing proof of his injuries at trial. Finally, the court ordered Hamilton to amend his bill of particulars.

The Appellate Division affirmed (Hamilton v Miller, 106 AD3d 1476, 1478 [4th Dept 2013]), granted plaintiff leave to appeal, and certified the question of whether the order was

properly made.

II

CPLR 3121 (a) provides that when a party's mental or physical condition is in issue, any other party may serve on the party whose condition is in controversy notice "to submit to a physical, mental or blood examination by a designated physician." A noticed party then is obligated under 22 NYCRR 202.17 (b)(1) to deliver:

> "copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery. These shall include a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those X-ray and technicians reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis."

In most personal injury cases, disclosure under this rule is straightforward. The injured plaintiff goes to the doctor for diagnosis and treatment. The doctor drafts a report. The plaintiff turns over the report to the defendant.

This case is more complicated. Plaintiffs allegedly suffered lead poisoning as children. Now adults, plaintiffs allege that their childhood exposure to lead caused them numerous injuries. It appears from the dearth of medical evidence in the record that plaintiffs may never have been treated for or diagnosed with many of the alleged injuries. This raises the

question of what plaintiffs must disclose in order to comply with rule 202.17 (b) (1).

Plaintiffs argue that the rule requires them to turn over only those reports that currently exist from providers who have "previously treated or examined" them. They argue that they are not required to document or create medical evidence of every alleged injury. To the extent that plaintiffs are arguing that the rule does not obligate them to hire a medical provider to examine them and create a report solely for purposes of the litigations, we agree. Requiring a personal injury plaintiff to hire a medical professional to draft a report purely to satisfy 22 NYCRR 202.17 (b) (1) could make it prohibitively expensive for some plaintiffs to bring legitimate personal injury suits. Some plaintiffs may not be able to afford a medical examination or may not even have access to a doctor. Plaintiffs therefore need only produce reports from medical providers who have "previously treated or examined" them.

To the extent, however, that plaintiffs claim that they need to turn over only those medical reports that currently exist, we disagree. The rule obligates plaintiffs to provide comprehensive reports from their treating and examining medical providers -- the reports "shall include a recital of the injuries and conditions as to which testimony will be offered at the trial" (22 NYCRR 202.17 [b] [1]) [emphasis added]). Plaintiffs therefore cannot avoid disclosure simply because their treating

or examining medical providers have not drafted any reports within the meaning of rule 202.17 (b) (1) (see Ciriello v Virgues, 156 AD2d 417, 418 [2d Dept 1989] ["[T]he fact that a report never was prepared does not obviate the party's obligation under the rules"]; Davidson v Steer/Peanut Gallery, 277 AD2d 965, 965 [4th Dept 2000]; Pierson v Yourish, 122 AD2d 202, 203 [2d Dept 1986]). If plaintiffs' medical reports do not contain the information required by the rule, then plaintiffs must have the medical providers draft reports setting forth that information (see id.).[2] If that is not possible, plaintiffs must seek relief from disclosure and explain why they cannot comply with the rule (see 22 NYCRR 202.17 [j]).

We conclude therefore that Supreme Court abused its discretion in requiring plaintiffs to provide medical evidence of

[2] We note that prior to April 17, 1998, rule 202.17 (b) (1), which had required the plaintiff in advance of the examination to serve on all parties reports of physicians who had previously treated or examined the plaintiff, also required the reports to "include a 'detailed recital of the injuries' about which testimony is to be offered at trial, and this was generally construed to require a narrative report rather than the briefer notations found in . . . insurance and workers' compensation forms" (73 Siegel's Prac Rev 1 [July, 1998]). The April 17, 1998 amendment struck out the word "detailed" which, according to a member of the committee that recommended the amendment, would "allow the plaintiff to prosecute his personal injury case from inception through trial without ever obtaining a narrative report if his provider form(s) contains the essential information, i.e., a description of the injuries, a diagnosis and prognosis and, if X-rays or technicians' reports will be offered at trial, a reference to those reports" (id. [emphasis supplied]; see Siegel, NY Prac § 363 [5th ed 2011] [Note: online treatise]).

each alleged injury or otherwise be precluded from offering evidence of that injury at trial. Supreme Court's motivation for granting that relief is understandable. Plaintiffs' counsel filed boilerplate bills of particulars and then did not disclose medical records substantiating the alleged injuries. To that end, plaintiffs should amend their respective bills of particulars to reflect those injuries actually sustained. Nonetheless, although Supreme Court had wide, inherent discretion to manage discovery, foster orderly proceedings, and limit counsel's gamesmanship (see Kavanagh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954 [1998]), the ordered relief exceeded the court's power.

Supreme Court also granted relief beyond that contemplated by rule 22 NYCRR 202.17 (b) (1) by requiring plaintiffs to produce, prior to the defense examination, a medical report causally relating plaintiffs' injuries to lead paint exposure or be precluded from offering proof of such injuries at trial. The rule requires that the medical reports "include a recital of the injuries and the conditions as to which testimony will be offered at the trial, . . . including a description of the injuries, a diagnosis, and a prognosis." There is no requirement that medical providers causally relate the injury to the defendant's negligence or, in this case, the lead paint exposure.

If determining causation requires evidence from a

medical professional, causation is more appropriately dealt with at the expert discovery phase and pursuant to CPLR 3101 (d). If defendants wish to expedite expert discovery, they can move in Supreme Court for amendment of the scheduling orders. Should plaintiffs fail to produce any evidence of causation, then defendants can move for and obtain summary judgment.

III

Supreme Court properly denied plaintiff Hamilton's CPLR 4511 motion to take judicial notice of 42 USC § 4851. That provision contains Congress's findings justifying legislation aimed at reducing lead -- findings such as: "at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems;" and "the Federal Government must take a leadership role in building the infrastructure--including an informed public, State and local delivery systems, certified inspectors, contractors, and laboratories, trained workers, and available financing and insurance--necessary to ensure that the national goal of eliminating lead-based paint hazards in housing can be achieved as expeditiously as possible" (42 USC § 4851 [2], [8]). Hamilton apparently sought judicial notice of the federal provision in order to avoid having to prove general causation -- that lead paint exposure can cause some or all of his alleged injuries.

CPLR 4511 allows a court to take notice of federal and foreign state law, not facts, that is relevant to a proceeding (CPLR 4511; Pfleuger v Pfleuger, 304 NY 148, 151 [1952]). The congressional findings in support of legislation seeking to reduce amounts of lead in homes, though codified in a federal statute, are not "law" that is relevant to Hamilton's case. Taking judicial notice of them under CPLR 4511 would be inappropriate.

What Hamilton really wanted was to have Supreme Court take judicial notice of the fact that exposure to lead paint can cause injury. "To be sure, a court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" (People v Jones, 73 NY2d 427, 431 [1989] [internal quotation marks omitted]). But general causation, at least in scientifically complex cases, is not such a fact. Hamilton needs to prove, through scientific evidence, that exposure to lead-based paint can cause the injuries of which he complains (see Parker v Mobile Oil Corp., 7 NY3d 434, 448 [2006]). He cannot avoid that burden simply because Congress, in statutory preambles, has opined on the dangers of lead-based paint.

Accordingly, in each case, the order of the Appellate Division should be modified, without costs, by remitting to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed, and the certified question

answered in the negative.

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For Case No. 113: Order modified, without costs, by remitting to Supreme Court, Monroe County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed, and certified question answered in the negative. Opinion by Chief Judge Lippman. Judges Graffeo, Read, Pigott, Rivera and Abdus-Salaam concur. Judge Smith dissents and votes to affirm for the reasons stated in the memorandum of the Appellate Division (106 AD3d 1476 [2013]).

For Case No. 114: Order modified, without costs, by remitting to Supreme Court, Monroe County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed, and certified question answered in the negative. Opinion by Chief Judge Lippman. Judges Graffeo, Read, Pigott, Rivera and Abdus-Salaam concur. Judge Smith dissents and votes to affirm for the reasons stated in the memorandum of the Appellate Division (105 AD3d 1313 [2013]).

Decided June 12, 2014