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DANTE WILLIAMS, JOSEPH WILLIAMS, EMMANUEL
BATTLE, DELLENA BATTLE, infants by their mother and
Natural guardian, DEBRA BATTLE, and DEBRA BATTLE,
Individually,

Plaintiffs,

Index No. 9454/96

- against -

THE CITY OF NEW YORK and THE NEW YORK CITY
DEPARTMENT OF HEALTH,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT
OF THE CITY OF NEW YORK'S MOTION IN LIMINE
TO PRECLUDE CERTAIN TESTIMONY OR IN THE ALTERNATIVE
REQUESTING A FRYE HEARING**

PRELIMINARY STATEMENT

Plaintiffs allege that Daniel Williams, Joseph Williams, Emmanuel Battle and Dellena Battle have suffered cognitive and developmental injuries because they were exposed to lead paint between 1984 and 1996. Each of these plaintiffs is a seemingly normal child, who in the real world outside of this courtroom attends (or attended)¹ regular classes and was never diagnosed with any type of developmental or physical disorder because of his or her past lead exposure.

To combat this fact, and for the sole purpose of putting large dollar amounts before the jury, plaintiffs have indicated that they intend to offer "evidence" of two types of highly

¹ Daniel Williams, the oldest infant plaintiff, is now an adult. He graduated from Graphic Arts High School in 1999 and is now gainfully employed.

speculative future damages claims. First, plaintiffs intend to call a "vocational econometrician", Andrew Gluck, to testify that each of the infant plaintiffs will suffer future wage losses because he or she has a "mild vocational disability." Second, plaintiffs intend to have Dr. John Rosen testify that each of the infant plaintiffs needs to be medically monitored over the course of the rest of his or her life. This memorandum of law is submitted by the City in support of its motion *in limine* to preclude such evidence.

Typically, an infant's claim for future wage losses is established with the testimony of an economist who, making assumptions about pre-morbid and post-morbid levels of education, uses Department of Labor statistics to project a future loss in income. See Davis v. City of New York, 264 A.D.2d 379, 380 (2d Dept. 1999). In the present case, this model does not work because plaintiffs acknowledge that all of the infant plaintiffs will attain the same level of education that they would have even if they had never been exposed to lead. So, instead of an economist, they are calling Mr. Gluck, whose *modus operandi* is to arbitrarily classify a plaintiff as "disabled" and then to project a wage loss using a computer program and tables generated by a private company called Vocational Econometrics, Inc. In addition to the fact that there is no evidence that any of the infant plaintiffs is "disabled," Gluck's method of analysis is not generally accepted in the economic field because the United States government's lifework expectancy charts do not categorize workers by disability status. Only Vocational Econometrics, Inc. does, and its tables are hearsay.²

² At least two courts specifically have criticized Dr. Gluck.. See Estevez v. United States of America, 72 F. Supp. 2d 205 (S.D.N.Y. 1999) and Myriak v. Port Authority of New York and New Jersey, 694 A.2d 575 (N.J. 1997). Similar "experts", using the tables invented by Vocational Econometrics, Inc. and its founder A. M. Gamboa, have been criticized by other courts. See, e.g., Elcock v. Kmart Corporation, 228 F.3d 734, 448-750 (3d Cir. 2000) (finding Continued...

With respect to Dr. Rosen's medical monitoring plan, the program he advocates simply is not recognized by any medical or governmental authority. Moreover, while Dr. Rosen asserts that each of the infant plaintiffs is "at risk" for numerous disorders, this is no scientific evidence supporting his assertion and there is no physical evidence that any of the infants have suffered an impairment that puts them "at risk" for these disorders.³

ARGUMENT

POINT I

I. Dr. Gluck's testimony is speculative and should therefore be precluded.

In New York, future damages may not be based on speculation and must be established with reasonable certainty. Cuming v. Brooklyn City R.R. Co., 109 N.Y. 95, 98, 16 N.E. 65 (1888); Bielich v. Winters, 95 A.D.2d 750, 464 N.Y.S.2d 189 (1st Dept. 1983); accord Bunge v. New York City Transit Auth., 216 A.D.2d 264, 627 N.Y.S.2d 769 (2d Dept. 1995); 36 NY Jur. 2d, Damages, § 118. Such damages must be based upon the earning capacity of the injured person before and after his injury. 25A CJS, Damages, § 68.

Generally, a claim for future lost wages can be made on behalf of an infant plaintiff who has no work history. See, e.g., Kavanaugh v. Nussbaum, 129 A.D.2d 559, 514 N.Y.S.2d 55, 59 (2d Dept. 1987), mod. on other grounds, 71 N.Y.2d 535, 528 N.Y.S.2d 8 (1988) (economist

that plaintiff failed to show that the "Gamboa method" was reliable) and Michels v. United States, 815 F. Supp 1244, 1259 (D. Iowa 1993) (criticizing the use of Gamboa's tables).

³ The monitoring program Dr. Rosen will propose is not practiced in any clinical setting. A seasoned witness, however, Dr. Rosen knows how to generate numbers for a jury to consider and has taken to proposing this plan in his court cases. At least one federal court has outright rejected his proposed monitoring because of the "vague and speculative nature" of his plan. See Herrera v. Federal Home Loan Mortgage Corp., CV 94-1818 (E.D.N.Y. March 31, 2000), pp. 35-36 (copy attached as Exh. A)

allowed to assume that plaintiff with traumatic brain damage and an IQ of 60-65 would not graduate from high school.) However, it has been noted that the "computation of damages in a case of . . . stunted development is necessarily speculative and fraught with difficulties." Snow v. State, 98 A.D.2d 442, 469 N.Y.S.2d 959, 964 (2d Dept. 1983), aff'd 64 N.Y.2d 745, (1984). For this reason, projections of future lost wages based solely on mathematical computations have been described as "inherently speculative and prejudicial." Franchell v. Sims, 73 A.D.2d 1, 6 (4th Dept. 1980); see also Merrill v. Albany Medical Ctr. Hosp., 126 A.D.2d 66, 70 (4th Dept. 1978), app. den'd 71 N.Y.2d 990, 529 N.Y.S.2d 272 (1988) (Kane, J., concurring in part and dissenting in part). Similarly, in other jurisdictions where future damages must also be established to a reasonable certainty, courts have dismissed claims for future damages based solely on an infant plaintiff's membership in a statistical class. See, e.g., Chretien v. General Motors, 1992 U.S. App. Lexis 6269 *23 (4th Cir. 1992), quoting Bulala v. Boyd, 389 S.E.2d 670, 677 (Va. 1990) (claim based on actuarial assumptions that plaintiff would have acquired a reasonable education, would have acquired work skills, would not have been hindered by health, economic or other factors was speculative and excluded); Drayton v. Jiffee Chemical Corp., 591 F.2d 352, 362-364 (6th Cir. 1977) (the "highly uncertain factors which went into the computerized projections" compounded the "astronomical projections and assumptions" made by plaintiffs).

In this case, plaintiffs do not claim that they will go any less further in school because of their past exposure to lead; Dr. Gluck's pre- and post-injury projections both assume that all of the children will be high school graduates. (See Gluck's Reports, attached as Ex. B). Indeed, Daniel Williams has all ready graduated from high school and joined the work force. There simply is no reasonable basis to conclude that any of the infant plaintiffs is less likely to

complete school, and thus likely to secure employment in the future because he or she was exposed to lead paint. Davis, 264 A.D.2d 379 (speculation about academic and future employment opportunities insufficient to support award for lost earning capacity); Stoves v. City of New York, slip opinion, at pp. 14-17 (Sup. Ct., Kings Cty., Index No. 10080/95) (evidence did not allow economist to assume a difference in pre- and post-injury levels of education);⁴ and Valencia v. Lee, 123 F. Supp.2d 666, 693 (E.D.N.Y. 2000) (rejecting future wage loss because economist's assumptions were overly speculative). Cf. Altman v. Alpha Obstetrics and Gynecology, 225 A.D.2d 276 (2d Dept. 1998) (economist allowed to make assumptions about education because father had a Ph.D. and brother was in college)

The methodology employed by Dr. Gluck makes his testimony even more problematic. Rather than using a conventional model, which makes projections based on educational attainment, Dr. Gluck creates out of a speculative future wage loss for each infant plaintiff by arbitrarily classifying him or her as "not severely disabled" and then running a computer program that purports to rule out jobs not suitable for whole groups of people in this classification. The program, called Vocational Analysis of Lost Earnings ("VALE"), was created by Anthony Gamboa of Vocational Econometrics, Inc. to be used by plaintiffs in litigation. (Gonzales Tr. pp. 27-28) Dr. Gluck did not create the program. The program and the random characterizations of disabled versus nondisabled were concocted by Mr. Gamboa who will not be testifying at trial. Dr. Gluck, who has no degrees in economics, became "qualified" to use it and opine on lost earnings by attending two seminars held by Vocational Econometrics,

⁴ A copy of the Stoves decision is attached hereto as Exhibit C.

Inc. See portions of Dr. Gluck's testimony from Gonzales v. NYCHHA, at pp. 27-37, which are attached hereto as Ex.D.

Dr. Gluck has no principled basis to assume that plaintiffs' disabilities are comparable to the disability suffered by those in the "non-severely disabled" category of the U.S. Government's statistics. See Estevez v. United States of America, 72 F. Supp. 2d 205 (S.D.N.Y. 1999). There is no principled basis upon which to conclude plaintiffs' earning power. Daniel has already graduated from high school and is already gainfully employed in the field of telecommunications. Even Dr. Gluck assumes that Joseph, Emmanuel and Dellena will graduate from high school. (See Id. at 219; Gluck's Reports, attached as Ex. B). The Government has not compiled statistics of lead poisoned children's earning capacity. Plaintiffs' earning futures are uncharted paths at this point with the potential of being influenced by many factors. It is pure speculation to suggest that Plaintiffs will or will not earn a certain annual income, based on their exposure to lead.

Dr. Gluck also relies strictly on statistical probabilities rather than on any specific information regarding the plaintiffs. The question is whether plaintiffs' exposure to lead makes *them* "disabled." Dr. Gluck, however, offers no definition of disabled much less a definition labeling children with low to moderate levels of lead exposure as disabled. Dr. Gluck's testimony as to plaintiffs' earning potential is purely speculative, non-specific as to plaintiffs and should therefore be precluded..

POINT II

I. The Court Should Preclude Plaintiffs' Expert from Rendering Opinions as to the Necessity and Cost of Continued Treatment and Future Medical Monitoring.

Plaintiffs' pediatric expert, Dr. Rosen, purports to offer testimony as to both the necessity of medical monitoring and the costs of future medical monitoring and care (see 3101[d] disclosure for Dr. Rosen, page 2, first full paragraph). Plaintiffs fail to set forth any basis for their opinion that lifetime medical monitoring is necessary in children who have experienced the mildly to moderately elevated blood lead levels that Plaintiffs have experienced. This testimony is speculative, groundless and unfairly prejudicial, and this Court should therefore preclude plaintiffs from offering any opinion as to medical monitoring.

Plaintiffs must demonstrate that medical monitoring of children with low to moderate exposure to lead is "consistent with contemporary scientific principles" and "reasonably necessary." Plaintiffs are required to show that "a doctor prescribe[d] the test for th[ese] plaintiff[s] . . . [and that] a reasonable physician in the area of specialty would order [that test] for a patient similarly situated." Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 980, 218 Utah Adv. Rep. 54 (Utah 1993), quoting Ayers v. Township of Jackson, 106 N.J. 557, 525 A.2d 287, 309 (N.J. 1987); see also Mealy's Litigation Advisor: Trends & Reviews, "Medical Monitoring Claims and Daubert: What Must a Plaintiff Prove Through Expert Testimony," Pinarchick, Cheryl, June 11, 1999 (copy attached as Ex. E). Plaintiffs can not meet these legal requirements. There is no literature that supports lifetime medical monitoring for children with elevated lead levels. In fact, the Centers for Disease Control ("CDC") statement regarding lead poisoning in young children makes no recommendation for medical monitoring for children of any level of exposure, not even in chapter 4 of its 1991 statement, "Roles of Child Health-Care

Providers." (See CDC Statement, Screening Young Children for Lead Poisoning: Guidance for State and Local Public Health Officials, Nov. 1997, Chapter 4, copy attached as Ex. F). Likewise, plaintiffs offer no evidence that their treating physicians prescribed such monitoring or that physicians specializing in lead would have prescribed such monitoring. Dr. Rosen should therefore be precluded from testifying as to medical monitoring of plaintiffs.

It is a well-settled and unquestioned rule of law that opinion evidence must be based on facts in the record or personally known to the witness. Matter of Aetna Cas. & Sur. Co. v. Barile, 86 A.D.2d 362, 450 N.Y.S.2d 10 (1st Dep't 1982) (expert may not speculate, may not guess; expert testimony that is wholly speculative and tailored to meet a desired result is impermissible); Cassano v. Hagstrom, 5 N.Y.2d 643, 187 N.Y.S.2d 1 (1959) (expert cannot reach his conclusion by assuming material facts not supported by the evidence; may not suppose a fact of which [s/h]e could have no knowledge); Gomez v. NYCHA, 217 A.D.2d at 117 ("an expert's opinions may not be founded upon surmise or supposition"); Rosa v. General Motors Corp., 226 A.D.2d 213, 640 N.Y.S.2d 548 (1st Dep't 1996) (expert's opinion impermissibly speculative since it was not based on facts in the record, fairly inferable therefrom, or personally known to the witness). Dr. Rosen does not specify any medical problem for which plaintiffs require continued care. Indeed, when Dr. Rosen briefly saw the infant plaintiffs once in 1999, he did not perform any of the tests he opines are needed to monitor the infant plaintiffs in the future. In fact, Dr. Rosen cannot point to recent treatment for exposure to lead of any of the infant plaintiffs. Paul and Daniel Williams' blood lead levels have not been tested since 1990. Emmanuel Battle was last tested for levels of lead in his blood in 1996; Dellena's blood lead level was last tested in 1997. Plaintiffs have not been required by their physicians to return for screening or treatment and there is no evidence whatsoever that they will require treatment in the

future. Dr. Rosen's proposed testimony that the plaintiffs require continued medical care is groundless and speculative and should therefore be precluded.

Further, the Court should preclude Dr. Rosen from testifying that plaintiffs will require medical monitoring for kidney disease, cancer, hypertension and peripheral neuropathy. The New York Court of Appeals has not yet recognized a cause of action for medical monitoring. Some Courts, however, have required that when plaintiffs want to introduce to the jury evidence of the cost of future medical monitoring and screening, they must prove that "medical monitoring is probably, not just possibly necessary" for plaintiffs. Gibbs v. E.I. DuPont De Nemours & Co., Inc. et al., 876 F. Supp. 475, 478 (W.D.N.Y. 1995), Askey v. Occidental Chemical Corporation et al. 102 AD2d 130; 477 NYS2d 242 (2nd Dept. 1984) (requiring reasonable probability) ; Patton v. General Signal Corporation and Robert Hyland & Sons Inc., 984 F. Supp. 666, 673; citing In re Paoli R.R. Yard PCB Lit., 916 F.2d 829, 852 (3d Cir. 1990). Dr. Rosen will testify that plaintiffs should receive lifelong medical monitoring for latent conditions including kidney disease, hypertension, peripheral neuropathy, and cancer, as a result of their exposure to lead paint hazards. Dr. Rosen, however, does not and cannot offer evidence that plaintiffs have increased risks for such medical conditions, as a result of their previous exposure to lead. He can not cite any evidence that such medical monitoring is "probably" necessary. Dr. Rosen cites no controlled studies or other scientific authorities regarding the relationship between moderate levels of lead poisoning in children and hypertension, peripheral neuropathy, kidney disease and cancer. See Herrera v. Federal Home Loan Mortgage Corp. CV 94-1818 (E.D.N.Y. March 31, 2000), pp. 35-36 (copy attached as Ex. A)(rejecting the vague and speculative opinion that plaintiffs in a lead paint poisoning case required medical monitoring due to increased risks of hypertension, kidney disease and peripheral neuropathy).

Specifically, no studies exist that link hypertension or cancer to children with these levels of lead exposure. The only studies linking lead exposure to resultant cancer are in cases of high, long-term occupational exposures for adults. Dr. Rosen does not rely on these studies, as they are inapplicable to the infant lead exposure at issue in this lawsuit.

Likewise Dr. Rosen cites no studies linking children with low to moderate lead exposure to kidney disease. At least one study of children suggests that lead exposure as high as 100 ug/dl or greater had no increased risk of kidney disease in children. See "Renal Function 9 to 17 Years After Childhood Lead Poisoning", The Journal of Pediatrics, May 1985 (copy attached as Ex. G). Of the four infant plaintiffs, Paul Williams was diagnosed with the highest lead level, at 48 ug/dl. There is no evidence that he is at risk of future kidney disease as a result of his lead exposure. Dr. Rosen cites any medical examinations of infant plaintiffs demonstrating any possible, much less probable, impairment in kidney functioning.⁵ Plaintiffs present no medical test results suggesting that infant plaintiffs have any impairment of renal integrity. Thus, plaintiffs cannot claim that any of the infant plaintiffs are at risk of future kidney disease.

Likewise, Plaintiffs have no neurological evidence of an increased risk of peripheral neuropathy. Although one study suggests a possible connection, this study relies upon *physical measures* of neurological dysfunction such as weakness or paralysis of the wrist and ankle muscles, near or at the time of lead exposure. See "Threshold effect in lead-induced peripheral neuropathy," Journal of Pediatrics, Vol. 112, No. 1, Jan. 1988 (copy attached as Ex. H). Here plaintiffs present no physical evidence of current neurological impairment. Dr. Rosen's reports

⁵ Studies about lead exposure and kidney disease perform specific urine and blood tests to demonstrate impairment in kidney functioning concurrent with and/or shortly following exposure.

of the respective plaintiffs neither indicate that he performed a neurological examination on the plaintiffs, nor that he detected any such neurological impairment. Dr. Rosen's testimony as to medical monitoring with respect to hypertension, peripheral neuropathy, cancer and kidney disease should therefore be precluded.

In short, plaintiffs have failed to meet the formidable proof requirements to submit a claim of medical monitoring to the jury.

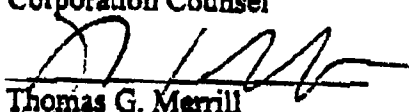
CONCLUSION

For all of the above reasons, defendant's motion *in limine* must be granted in its entirety, together with what other and further relief this Court deems appropriate.

Dated: New York, New York
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