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COURT OF APPEALS

STATE OF NEW YORK

PULLMAN,

Appellant,

-against-

No. 151

SILVERMAN,

Respondent.

20 Eagle Street
Albany, New York 12207
September 13, 2016

Before:

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

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next matter on the
2 calendar is appeal number 151, Pullman vs. Silverman.

3 MR. ISAAC: Good afternoon, Your Honors;
4 Brian Isaac, I represent the plaintiff-appellant. If
5 I can, I'd like to reserve three minutes for rebuttal
6 argument.

7 CHIEF JUDGE DIFIORE: How many minutes,
8 sir?

9 MR. ISAAC: Three minutes for rebuttal,
10 please.

11 CHIEF JUDGE DIFIORE: Three, you have
12 three.

13 MR. ISAAC: Your Honors, in my past
14 experiences here, generally, I've been asked a
15 question, because you're the Court of Appeals, what
16 should the law be. And when I was a far younger
17 lawyer, approaching sixty now, unfortunately, but
18 whatever, I didn't really have great answers for it.
19 But now what I try to do is I try to give you exactly
20 what the law should be and not generic.

21 So here's what I want you to hold, I want
22 this court to adopt expressly Judge Saxe's concurring
23 opinion in Marsh against Smyth, which says and I
24 quote, it's quoted on page 16 of my brief, "It is not
25 necessary that the underlying support for the theory

1 consists of cases or studies considering
2 circumstances exactly parallel to those under
3 consideration in the litigation. It is sufficient if
4 the synthesis of various studies or cases reasonably
5 permits the conclusion reached by the expert." As
6 far as my research - - -

7 JUDGE RIVERA: What's the - - - what's the
8 synthesis of - - - of studies here?

9 MR. ISAAC: The synthesis of studies here
10 is the mechanical studies dealing with what happens
11 when somebody who is exceptionally heart fit, heart
12 fit, David Pullman has ridiculously great neurologic
13 scores, has a precipitous drop in cholesterol. I'm
14 not attacking, Judge Rivera - - - and I just want to
15 be clear, I'm not attacking statins, okay. They work
16 great for people who have heart disease. The problem
17 here is that David Pullman never, and I mean never -
18 - -

19 JUDGE RIVERA: But where are the studies
20 that - - - that connect taking this particular drug
21 to - - -

22 MR. ISAAC: The - - -

23 JUDGE RIVERA: - - - the heart ailment he
24 suffered?

25 MR. ISAAC: Yes. The - - -

1 JUDGE RIVERA: Where - - - where are those
2 studies?

3 MR. ISAAC: The studies are - - - there are
4 three studies specifically dealing with athletes, and
5 I can give you the pages of it. The first one is the
6 Donald - - - the Barold and Pedeletti study. It's on
7 1265 to 1269 of the record, specifically 1265. A
8 study in which the authors were, and I'm quoting now,
9 I'm not - - - this is not my words, this is the
10 authors' words, quote "Unable to find" quote "a
11 single case of precisely documented type 2 block in
12 young athletes finding that that theory", this is
13 their - - - this is their conclusion, was quote
14 "counterintuitive because it would imply serious
15 disease where none exists."

16 Second study, the Zehender study, 1798 to
17 1811, specifically, 1800 to 1801. This is again a
18 quote, not Brian Isaac, this is the study 12,000 - -
19 - 12,000 athletes. Here's the quote "AV conduction
20 normalized in all of these individuals with physical
21 exercise and after discontinuation of high-
22 performance sports during a nine-year observation
23 period."

24 Third study is the Tomaselli study in
25 bradycardia in the Harrison Textbook of Medicine

1 need a specific study showing that in that way, what
2 you've done is you've drawn a number of links. Okay.
3 And - - - and you would agree that we said in Cornell
4 that there are - - - there are some gaps that are
5 just too big to - - - to cross. And the - - - and
6 the question in my mind is is that the case here?

7 Because, you know, I agree with you that -
8 - - that we don't need a specific study on every
9 single issue. I don't think that's what Frye calls
10 for; I don't think that's what our case law calls
11 for. But - - - but at some point, it has to go
12 beyond speculation is - - - is not quite the right
13 word, but it has to - - - it has to really be based
14 on something. And that - - - to me, there's a lot of
15 leaps here, and I'm not sure that we cross those
16 gaps.

17 MR. ISAAC: Let me - - - let me try to
18 assuage your concerns if I can, Judge Stein. I agree
19 with you that - - - that Cornell did talk about that.
20 Cornell was a little different because in Cornell
21 there were three under the AAIA report that was
22 considered. There were three methodologies by which
23 the mold could cause the damage, none of which the
24 plaintiff had. We - - -

25 JUDGE STEIN: But here you talk about

1 rhabdomyolysis, or I'm not sure I'm saying that
2 right, but there's no question here that - - - that
3 the plaintiff didn't have that, right?

4 MR. ISAAC: Well, that's - - -

5 JUDGE STEIN: So I mean - - - so there - -
6 -

7 MR. ISAAC: That's actually not correct.

8 JUDGE STEIN: Okay.

9 MR. ISAAC: But let me - - - let me answer
10 that in two parts.

11 JUDGE STEIN: Sure.

12 MR. ISAAC: Okay. What we did was we gave
13 you a med - - - a physiological basis for what
14 happened to him. This is a guy who's in immaculate
15 health. I mean he's got a 110/70 blood pressure,
16 sixty resting heart rate, seventy-five/eighty
17 ejection heartrate fraction, zero calcium score. You
18 can't do better than that. 156 on his cholesterol,
19 he's under no medication, and he's a forty-five-year-
20 old man running sixty-eight second repeat quarter
21 intervals. Anybody who knows - - -

22 JUDGE ABDUS-SALAAM: Why is he going to the
23 doctor so much if he's in such great health? Isn't
24 he basically going to the doctor every - - - you
25 know, like every week, virtually?

1 MR. ISAAC: Judge, there - - -

2 JUDGE ABDUS-SALAAM: I mean that's a slight
3 exaggeration but - - -

4 MR. ISAAC: I don't think he - - - I don't
5 think he's going that much, but some people go to the
6 doctor a fair amount. I should probably go a little
7 more. Some people should probably go a little less,
8 but the objective facts are the objective facts. So
9 we gave you a roadmap for what happened. Here's what
10 happens. High statins, Lipitors work, they reduce
11 the statins, you're okay.

12 If you're - - - and if you have low
13 cholesterol and you have a precipitous reduction of
14 the statins, Q10 enzyme, which is in forty or fifty
15 of the articles, which I apologize, I know you took a
16 look at them and they're very, very hard to read,
17 reduces the aden - - - that in turn reduced aden - -
18 - adenosine triphosphate, ATP. ATP is the building
19 block by which the heart actually functions. Heart
20 block is a misnomer here. There's no blockage at
21 all. It's just the insufficiency of energy, and
22 ATP's responsible, under our expert's analysis, for
23 eighty-five to ninety percent of the heart's
24 generation of energy. So we've given you all
25 alternative that actually works here. It's - - -

1 JUDGE FAHEY: Let me ask you this. Let me
2 ask you this. I - - - I read the science on it, but
3 what I'm wondering about is - - -

4 (Break in audio)

5 MR. ISAAC: - - - they met their burden,
6 and I think that if they did meet their burden, we
7 certainly met our burden. Here's why I say they
8 didn't - - -

9 JUDGE FAHEY: So no, no. I - - - I don't
10 want to leave this yet.

11 MR. ISAAC: Sure.

12 JUDGE FAHEY: I want to stay with this. So
13 you're proceeding under a summary judgment standard,
14 not a Frye standard? Because I think a distinction
15 needs to be drawn here and there's some lack of
16 clarity on that issue. So which is it?

17 MR. ISAAC: Well, I - - - I think that they
18 moved for summary judgment. I don't think it's a
19 Frye issue.

20 JUDGE FAHEY: So it's a - - - so it's a
21 summary judgment issue.

22 MR. ISAAC: It's a summary - - - I think
23 it's a - - - I think it's a summary judgment issue.

24 JUDGE FAHEY: A summary judgment, I
25 understand. So under a summary judgment standard

1 then the defendant would have to come in and say not
2 that you don't have scientific studies but they have
3 scientific studies - - -

4 (Break in audio)

5 MR. ISAAC: - - - that links David
6 Pullman's condition to the ingestion of Lipitor. No
7 doubt because nobody else would have Lipitor in this
8 situation, and he didn't give an answer as to what
9 happened. He used the word idiopathic. Idiopathic
10 just means I don't know. So if - - - Judge Fahey,
11 when you say this is a summary judgment motion - - -

12 (Break in audio)

13 MR. ZUCKER: - - - I believe that's
14 actually incorrect. Certainly, absence the presence
15 of rhabdomyolysis, and I may have pronounced it - - -
16 mispronounced it also - - -

17 JUDGE GARCIA: But that's more of a factual
18 question as to whether this was - - -

19 MR. ZUCKER: Okay.

20 JUDGE GARCIA: Let's put that aside for now
21 also. But to go back to I think what Judge Fahey and
22 Judge Pigott are saying, when you come forward with
23 your summary judgment motion, the plaintiff's claim,
24 at least in part, is it was the combination of
25 Lipitor and azithromycin. And doesn't it seem that

1 your expert really opines as to Lipitor causing AV
2 heart block and then it's more conclusory statements
3 as to the combined effect, one. And two, doesn't
4 that also go to their point that why would you ever
5 conduct a study of giving these people Lipitor and
6 azithromycin if it's contraindicated?

7 MR. ZUCKER: Okay. First of all, I don't
8 really think ours were that conclusory. But more
9 importantly, this isn't really in dispute. If you
10 look at two of their expert affidavits, they admit,
11 forthrightly, that there's no studies linking this
12 combination of drugs to AV blockage.

13 JUDGE GARCIA: But if it's - - - and I
14 think Judge Pigott mentioned it may even be on a
15 warning saying don't combine these two drugs, right?

16 MR. ZUCKER: I - - - again, I - - -

17 JUDGE GARCIA: All right. So why would you
18 do a study combining the two drugs?

19 MR. ZUCKER: But again, this - - - these
20 drugs are given to millions of people in worse
21 condition, supposedly, than Mr. Pullman was, okay.

22 JUDGE ABDUS-SALAAM: But are they given - -
23 -

24 MR. ZUCKER: It's got - - - it's - - -

25 JUDGE ABDUS-SALAAM: Counsel, are they

1 given to people in worse condition in combination in
2 the way that plaintiff is claiming they were given to
3 him?

4 MR. ZUCKER: I'm not sure I understand the
5 question.

6 JUDGE PIGOTT: With the Azithromycin.

7 JUDGE ABDUS-SALAAM: Are they given in
8 combination?

9 JUDGE PIGOTT: Yeah.

10 JUDGE ABDUS-SALAAM: Are the two drugs
11 given in combination to people in worse condition
12 than the plaintiff?

13 MR. ZUCKER: There's no - - -

14 JUDGE ABDUS-SALAAM: You're saying Lipitor
15 was - - - is something that 25 million people take a
16 day.

17 MR. ZUCKER: Yes.

18 JUDGE ABDUS-SALAAM: What about a
19 combination - - -

20 MR. ZUCKER: I obviously do not - - - I do
21 not have a statistic about how many people take it as
22 a combination.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. ZUCKER: Thank you.

25 CHIEF JUDGE DIFIORE: Mr. Isaac.

1 MR. ISAAC: Thank you, Your Honor. Judge
2 Fahey, I didn't give you a great answer to your
3 question before. I think I have a little bit of a
4 better answer now. If you look on page 26, it's a
5 straight summary judgment motion. He's not asking
6 for a Frye hearing. He's moving for summary judgment
7 under 3212. So I - - - he gets to set the table
8 under, you know, Alvarez, Zuckerman, it doesn't
9 matter.

10 JUDGE FAHEY: Um-hum.

11 MR. ISAAC: Again, my adversary just made
12 my point. 25 million, 50 million, 100 million people
13 taking Lipitor, you take it if you have heart
14 disease. That's the problem. David Pullman doesn't
15 have heart disease, and guess who said so? Not Brian
16 Isaac, not my adversary, David Silverman. I'm going
17 to read you his quote with all of the adjectives in
18 it as well. It's on page 540 of the record. He's
19 asked "What was the plaintiff's condition when you
20 prescribed Lipitor?" And he said plaintiff had,
21 quote "A 156 cholesterol scan," comma, "optimal", his
22 adjective not mine, "LDL and HDL levels," comma,
23 "fantastic", his adjective, not mine.
24 "Triglycerides", comma, "low", his adjective not
25 mine. "Level sixty pulse, 110 BP, and" quote,

1 "great", his adjective not mine, "exercise fraction
2 differential 35CRP where 190 is - - - is normal."
3 That's the point.

4 JUDGE RIVERA: But - - - but aren't we back
5 to regardless of whether or not that was the correct
6 determination by the doctor to prescribe this
7 particular drug, isn't the question whether or not
8 the drug caused the injury?

9 MR. ISAAC: You are. But - - - but the
10 problem is that he's divorcing the nature of the
11 malpractice from my inability to have a study. I
12 agree that they're completely separate issues.
13 Stukas v. Streiter is the Second Department case,
14 that's my case, where the Second Department said
15 clearly you can split them up. But he can't tell me
16 that I don't have a study that matches this if no
17 doctor, no institution, no medical professional would
18 do this study. Why would anyone - - -

19 JUDGE RIVERA: No, I - - - I understand
20 that. I guess perhaps I'm, again, not fully
21 appreciating the arguments and perhaps not fully
22 understanding what the record represents. But I - -
23 - I thought the argument was that there are some
24 studies, there are - - - it's not that there are no
25 studies. There may not be studies specific to what

1 -

2 JUDGE RIVERA: - - - where we have to zoom
3 in?

4 MR. ISAAC: Yes. You are a hundred percent
5 right. I - - - I was a little too emotional. I'm
6 just responding to his argument. That's all. But
7 there are - - -

8 JUDGE RIVERA: As long as you're the one
9 emotional, not me. Go ahead.

10 MR. ISAAC: There are studies. We think
11 the synthesis of studies, including the temporal
12 relationship, the proximate relevance, the fact that
13 night sweats, inability to sleep, nightmares, all
14 stuff that he doesn't have are recognized side
15 effects, that there's more than enough here. And
16 just two more seconds.

17 One judge, I forgot who, because it's a
18 little hard when you're getting a lot of questions,
19 asked whether or not rhabdomyolysis would actually be
20 something that would have to present. We showed that
21 it wasn't. I just have the study. It's on page 321
22 of the record, and our expert said that you can have
23 myopathy without having any clinical evidence of
24 rhabdo because he discontinued the drug. That's at
25 346. Thank you for listening.

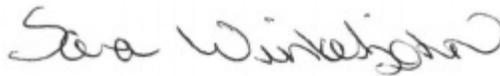
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CHIEF JUDGE DIFIORE: Thank you, counsel.
(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Pullman v. Silverman, No. 151 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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