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COURT OF APPEALS

STATE OF NEW YORK

MANUEL REIS,

Respondent,

-against-

No. 138

VOLVO CARS OF NORTH AMERICA, L.L.C., et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
June 4, 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

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 138, Reis v. Volvo
2 Cars.

3 We're ready. Counselor, do you want any
4 rebuttal time?

5 MR. REARDON: Yes, I would like three
6 minutes.

7 CHIEF JUDGE LIPPMAN: Three minutes. Go
8 ahead, counselor, you're on.

9 MR. REARDON: Your Honor, please, Roy
10 Reardon for Volvo.

11 We're here today to basically ask the
12 court, if it would, to reverse the decision in the
13 Appellate Division, send it back down for the entry
14 of judgment in favor of Volvo, or in the alternative,
15 give Volvo a new trial. Okay.

16 And in a nutshell - - - and I'm going to
17 try and be - - - be brief. In a nutshell,
18 extraordinary things happened in this case, as you
19 probably noticed from the record, things I've never
20 confronted before. And they require, I think, the
2:1 outcome that we're seeking to make it right, to make
22 it just. In a nutshell, as you know, there's two
23 claims - - -

24 CHIEF JUDGE LIPPMAN: What was unjust,
25 counselor, about the result in this case - - -

1 MR. REARDON: Well - - -

2 CHIEF JUDGE LIPPMAN: - - - from Volvo's
3 perspective, obviously.

4 MR. REARDON: From Volvo's perspective,
5 Volvo won - - - won the case, predicated on thirty
6 years of law coming out of this court, starting with
7 - - -

8 JUDGE GRAFFEO: You mean based on the
9 verdict sheet or - - -

10 MR. REARDON: Based on the verdict sheet,
11 yeah, because the answer to one of the questions on
12 the verdict sheet was that Volvo won, five-zip - - -
13 five-one, a verdict which said it had - - - it had
14 not - - - it was not selling a defective product.

15 CHIEF JUDGE LIPPMAN: So does that go to
16 your argument, counselor, that it's an inconsistent
17 result here?

18 MR. REARDON: No, it doesn't, because - - -
19 it certainly adds to that, Your Honor. I mean,
20 that's part of what went on here, the unfairness.
2:1 But I'm talking about the fact that - - - and - - -
22 and I wrote it down, so I'd try to remember to say
23 it, what I want to say.

24 JUDGE PIGOTT: You have to move pretty fast
25 on an inconsistent verdict ruling, right?

1 MR. REARDON: Yes, I know, and it looks
2 like we got the short strokes on that, and I
3 appreciate that. And - - - and I write - - - I wrote
4 down to myself: Where is Volvo? It won a verdict on
5 the law that this court has developed, over thirty
6 years, starting with Voss, all the way down to - - -

7 JUDGE SMITH: Yeah, but they won one, too.
8 That's the problem; they're inconsistent.

9 MR. REARDON: Yeah, but - - - but they won
10 one on a basis that they shouldn't have. They won it
11 on the basis of negligence, and this court and the -
12 - - if you look at the pattern jury instructions, the
13 things that this case was about all went our way.
14 This case was given to the jury just the way this
15 court wanted it to be. It wanted it to go to the
16 jury on the basis of did they find the product was no
17 good. And the way they answer that question, says
18 this court, you balance what's out there about the
19 product that's under attack, in this case the Volvo,
20 and the alternative solution that's being offered.

2:1 The jury did exactly that, with the
22 plaintiffs entitled to tell them everything they
23 thought was appropriate in terms of why they should
24 win. And Volvo did the same thing. And at the end
25 of that, a question was asked, a very specific

1 question: "Was Defendant Volvo's vehicle not
2 reasonably safe in that it was defective without a
3 starter interlock device?" Answer: "No." No. So
4 Volvo won on the very ground rules that were set up
5 from Voss - - -

6 JUDGE SMITH: But what was the ques - - -
7 what was the other question, the one that they
8 answered in the plaintiff's favor?

9 MR. REARDON: There were a series of
10 questions in which they had favorable answers under -
11 - - under the theory of negligence, under the theory
12 of failure to warn. Failure to warn, incidly (sic) -
13 - - incidently, was taken out of the case.

14 CHIEF JUDGE LIPPMAN: Right.

15 MR. REARDON: We can talk about that. It -
16 - -

17 CHIEF JUDGE LIPPMAN: But doesn't it all go
18 back to the inconsistency and the answer - - - some
19 answers, as opposed to other answers?

20 MR. REARDON: Your Honor, I - - - I'm not
2:1 trying to walk away and deny this man his day in
22 court. I - - - I am not here - - - I don't have the
23 guts for that, the stomach for it. He was an
24 innocent man. But I do think hammering Volvo for a
25 lot of money on a claim that basically went off on

1 negligence, which the court has said that isn't the
2 way this goes. The cases basically say - - - maybe
3 I'm wrong; I mean, the magic words for me were the
4 words "functionally synonymous". Functionally
5 synonymous. So the two basic concepts that were
6 involved in the case, one basic concept - - -

7 JUDGE SMITH: Yeah, but isn't that - - -
8 but all your - - - yeah, they're functionally
9 synonymous; not reasonably safe and negligent design
10 mean the same thing. The trouble is the jury say - -
11 - said, were they - - - were they not reasonably
12 safe? No, they weren't - - - no, they weren't
13 unsafe; they weren't defective. Was it negligently
14 designed? Yes.

15 MR. REARDON: But the entitlement to get a
16 negligent result, Judge, I suggest to you, is not
17 appropriate. I mean, why should - - -

18 JUDGE SMITH: We didn't say negligence is
19 abolished; we said the two are functionally
20 synonymous.

2:1 MR. REARDON: Yes, but you said that what
22 was before that jury was not - - - was not, in my
23 opinion, negligence. What was before that jury to
24 decide were the two things you just mentioned, the -
25 - - the two basic issues that we won on. We won.

1 JUDGE SMITH: And they won on the question
2 of whether you were negligent in failing to use a
3 starter interlock device in your vehicle.

4 MR. REARDON: When you say "they won on
5 that" - - -

6 JUDGE SMITH: You say that's a synonym for
7 - - - for having a product defect.

8 MR. REARDON: No, I - - -

9 JUDGE SMITH: So you know - - - so you
10 said, you know, do we have - - - is this a hare?
11 Yes. Is it a rabbit? No. And the hare and rabbit
12 mean the same thing; what are you supposed to do?

13 MR. REARDON: I - - - I don't quite
14 understand that question, Your Honor. Forgive me for
15 not doing so. But I do know this, that at the end of
16 the day, Volvo, from the jury's mouth, won the
17 result. And it was taken away through the use of
18 negligence and the concepts of negligence to which
19 that jury was not entitled to consider because
20 basically negligence was pushed in there.

2:1 JUDGE PIGOTT: You're arguing that 2:15 and
22 16 should not have been charged.

23 MR. REARDON: Definitely. Definitely.

24 2:15 - - - 2:16, as - - -

25 JUDGE GRAFFEO: Did they object to those

1 two charges?

2 MR. REARDON: Did - - -

3 JUDGE GRAFFEO: Did Volvo's trial attorney
4 object to those two charges - - -

5 MR. REARDON: Yes, we did, Your Honor.

6 JUDGE GRAFFEO: - - - being given?

7 MR. REARDON: There's some challenge to the
8 validity of our - - - our method in which we
9 challenged it, but I - - - I must say that we had a
10 preliminary charge off the record. There was then a
11 charge on the record, judge giving everybody an
12 opportunity to say what they want to say. And the
13 Volvo lawyer says to the trial judge, Judge, I
14 haven't told you everything I want to tell you about
15 15 and 16; do you want me to do that? And she says,
16 no, that's not necessary. Now, if that's - - - if
17 that's waiving your opportunity to lay out your
18 position, I'll eat my hat. I just don't think it is.
19 So 14 - - - 15 and 16 were - - - were - - -

20 CHIEF JUDGE LIPPMAN: And if it is
2:1 preserved, then that, you think - - - and the - - -
22 and they charge those two sections, end of story?

23 MR. REARDON: As to those two sections,
24 yes, I do. If the charge - - - if the protection of
25 opposition to 15 and 16. Another example: During

1 the course of the case there was a request, a very
2 astute request by this jury - - - and incidently, I -
3 - - I love juries; I think they're, collectively, the
4 best. And what this jury said was, basically, we'd
5 like to hear the charge again on negligence, because
6 there's been a suggestion from the dissenters that
7 there was confusion here. And the confusion comes
8 from, basically, the inconsistency, which I'm not
9 arguing today, the inconsistency between what
10 happened when we won and what happened when they won.
11 And it just seems to me that what the - - - the jury
12 was asking for was help in how to understand this
13 negligence aspect, because we showed - - - and the
14 dissent is a two-justice dissent in the Appellate
15 Division, and it's right on 2:16, right on the nose.
16 And 2:16 basically gave them the opportunity to - - -
17 to, in the - - - in the face of the proof in the
18 case, unrefuted admissions by Volvo's experts, to the
19 effect that nobody - - - there's - - - there's no
20 dominant thing going on there about these - - - these
2:1 switches; there simply isn't. Some manufacturers are
22 making them; others are not. The proof was - - -

23 JUDGE SMITH: But the jury was asked to
24 decide: You must first - - - you must first decide,
25 the jury, whether there was a general customer

1 practice by automobile manufacturers selling manual
2 transmission vehicles in the United States in 1987.
3 Why - - - why wasn't it proper to ask the jury
4 whether there was such a custom or not?

5 MR. REARDON: It certainly was. The
6 problem is that was not asked - - - that was not
7 asked in that way, Your Honor. What actually
8 happened - - -

9 JUDGE SMITH: I'm trying to read as close
10 as I can.

11 MR. REARDON: Maybe you're reading the
12 question. I'm not sure what Your Honor is reading.

13 JUDGE SMITH: I'm reading from what my law
14 clerk alleges is the charge.

15 MR. REARDON: Okay.

16 JUDGE SMITH: "You" - - - quote, "You must
17 first decide, from the evidence presented in this
18 case, whether there was a general custom or practice
19 by automobile manufacturers selling manual
20 transmission vehicles in the United States in 1987."
2:1 Then it goes on to say, "If you find that there was a
22 customer practice, you may take that into account."
23 What's wrong with that?

24 MR. REARDON: What's wrong with it,
25 basically, is it has nothing to do with this case.

1 What happened in those circumstances, Your Honor,
2 that question was asked, and the Appellate Division -
3 - - as you noticed from the Appellate Division, when
4 it dealt with that issue, it said, well, maybe it - -
5 - they didn't say - - - use these words; these are my
6 words - - - maybe it wasn't what the charge requires;
7 the charge requires a general custom and practice.
8 And - - - and the dissent says, well, there clearly
9 wasn't. There wasn't a custom and practice. We've
10 got the testimony. We've got the Volvo admissions.
11 Some outfits did it; others didn't. There were
12 twenty-five or -seven manufacturers out there making
13 them. Six put the switches in.

14 JUDGE SMITH: So you're saying that, as a
15 matter of law, the jury could not have found a custom
16 and practice?

17 MR. REARDON: I don't think they could
18 have, Your Honor, on the proof here.

19 CHIEF JUDGE LIPPMAN: Okay, counselor,
20 you'll have your rebuttal. Let's hear from your
2:1 adversary.

22 MR. POUNIAN: May it please the court.
23 Steven Pounian, representing the respondent.

24 CHIEF JUDGE LIPPMAN: Counsel, do you think
25 this is an unusual case?

1 MR. POUNIAN: Not at all, Your Honor; it's
2 a negligence case.

3 CHIEF JUDGE LIPPMAN: You think all
4 negligence cases are unusual?

5 MR. POUNIAN: No, it's - - - it's a
6 negligence case. And Volvo requested a negligence
7 charge. The two main negligence charges were
8 requested by Volvo.

9 CHIEF JUDGE LIPPMAN: Do you agree there
10 are some inconsistencies and - - -

11 MR. POUNIAN: Yes, Your Honor, there's an -
12 - -

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MR. POUNIAN: - - - inconsistency, and
15 Volvo did not object, when it had the opportunity.
16 It made a strategic decision; when it read the - - -
17 the jury verdict sheet, they made a decision at that
18 time, should we object or not. They decided not to
19 object, because they'd been with the jury for four
20 weeks, and they made a decision - - - a litigation
2:1 decision, not to make an objection to the charge.
22 And - - -

23 CHIEF JUDGE LIPPMAN: If they objected - -
24 - if they did object to 2:15 and 2:16, is that a
25 problem for you?

1 MR. POUNIAN: I'm sorry; you're talking
2 about the - - -

3 CHIEF JUDGE LIPPMAN: If they did object.

4 MR. POUNIAN: Well, they made a general
5 objection, Your Honor, to those two sections - - -

6 JUDGE SMITH: And they - - -

7 MR. POUNIAN: - - - but they didn't state -
8 - -

9 JUDGE SMITH: And they asked the judge if
10 she wanted more detail, and she said no.

11 MR. POUNIAN: She - - - they - - - they
12 asked the judge, would you - - - would you like us to
13 discuss the basis for 2:15 and 2:16, and she said
14 it's not necessary.

15 JUDGE SMITH: And you say - - -

16 MR. POUNIAN: But - - -

17 JUDGE SMITH: - - - that's not adequate
18 preservation? What - - - what were they supposed to
19 do?

20 MR. POUNIAN: I think - - -

2:1 JUDGE SMITH: Say I'm going to tell you - -
22 -

23 MR. POUNIAN: I think counsel has an
24 affirmative obligation to put the grounds for the
25 objection on the record - - -

1 CHIEF JUDGE LIPPMAN: To demand to the
2 judge that they put the - - -

3 MR. POUNIAN: The judge didn't - - -

4 CHIEF JUDGE LIPPMAN: - - - put it on the
5 record?

6 MR. POUNIAN: The judge didn't prevent
7 counsel from speaking. The judge - - -

8 JUDGE PIGOTT: Who asked for 2:15 and 16,
9 did you?

10 MR. POUNIAN: The plaintiff did.

11 JUDGE PIGOTT: Plaintiffs?

12 MR. POUNIAN: Yes.

13 JUDGE PIGOTT: Does it make sense to you?
14 I mean, 2:15 is a - - - really a medical malpractice
15 charge. And 2:16, and custom and usage, is not
16 generally used in - - - I guess it can be used in a
17 products case, but as - - - as Mr. Reardon points
18 out, of the twenty-six vehicles that were produced,
19 only seven used the interlock. So it hardly deserved
20 a charge of custom and practice.

2:1 MR. POUNIAN: Well, there is - - - I think
22 there was clearly a proof of a custom and practice in
23 this case, Your Honor. In fact, Volvo itself
24 submitted proof of a custom and practice, and the
25 charge applied not only to the plaintiff's evidence

1 but to Volvo's evidence. Their expert testified to
2 two custom and practices on warnings.

3 CHIEF JUDGE LIPPMAN: Counsel, if they
4 preserved - - - if they preserved that, do you lose,
5 or is there a new trial?

6 MR. POUNIAN: No, Your Honor, not at all.

7 CHIEF JUDGE LIPPMAN: It doesn't matter?

8 MR. POUNIAN: But they didn't preserve it
9 because - - -

10 CHIEF JUDGE LIPPMAN: Assuming they
11 preserved it.

12 MR. POUNIAN: No, Your Honor.

13 CHIEF JUDGE LIPPMAN: Assuming they
14 preserved it.

15 MR. POUNIAN: Assuming they preserved it,
16 the - - -

17 CHIEF JUDGE LIPPMAN: Does it change
18 things?

19 MR. POUNIAN: The charges on custom and
20 skill were perfectly proper in this case. And in
2:1 accordance - - -

22 JUDGE SMITH: I mean, what about 2:15 - - -
23 I mean, I was giving Mr. Reardon a hard time about
24 2:16, but I'm going to give you a hard time about
25 2:15. Isn't that - - - isn't that a malpractice

1 charge?

2 MR. POUNIAN: Well, Your Honor, this case
3 involved engineers, professional engineers at Volvo,
4 and - - - and their designing a product.

5 JUDGE SMITH: This wasn't an engineering
6 malpractice case.

7 MR. POUNIAN: Well, it essentially - - - it
8 essentially is, Your Honor, in the sense that the
9 engineers at Volvo failed to use reasonable care in
10 designing the product. And they had a series of
11 different steps that they were supposed to go through
12 - - -

13 CHIEF JUDGE LIPPMAN: Do you really think
14 2:15 applies to this case?

15 MR. POUNIAN: Yes, Your Honor, I do believe
16 it does, because - - - because in the Micallef case
17 of this court, in 1976, this court said, in a
18 negligence case, you look to the reasonable skill and
19 care of a manufacturer. The degree of - - - of
20 negligence depends on skill and care. And it looks
2:1 at the circumstances. If you read the - - - if you
22 read the skill charge, there's nothing improper or
23 incorrect in the charge - - -

24 JUDGE PIGOTT: Now, you're talking about
25 manufacture, as opposed to design, right?

1 MR. POUNIAN: No, Your Honor - - -

2 JUDGE PIGOTT: Well, that's what you said.

3 MR. POUNIAN: - - - it's talking about
4 design.

5 JUDGE PIGOTT: You said manufacture - - -

6 MR. POUNIAN: Well - - -

7 JUDGE PIGOTT: - - - and you were citing a
8 case about manufacture.

9 MR. POUNIAN: No, the Micallef case was a
10 design case, Your Honor.

11 JUDGE PIGOTT: Well, you said manufacture,
12 so I - - - I misunderstood you.

13 MR. POUNIAN: All right.

14 JUDGE PIGOTT: But didn't she talk about
15 manufacture - - - skill and care, other manufacturers
16 selling cars in the - - - in the U.S., then you must
17 find - - -

18 MR. POUNIAN: Yes, Your Honor, well, the -
19 - - the standard in any negligence case is - - -

20 JUDGE PIGOTT: No, but I - - - I'm just
2:1 picking on you a little bit, but I mean, to design a
22 car is one thing; that's where you get engineers and
23 experts, and they're supposed to use all of their
24 skill and care, I guess.

25 MR. POUNIAN: Of course.

1 JUDGE PIGOTT: Manufacturing, you've got
2 the guys down on the line, you know - - -

3 MR. POUNIAN: Right.

4 JUDGE PIGOTT: - - - punching out the holes
5 and putting in - - -

6 MR. POUNIAN: Well, this is a design case.

7 JUDGE PIGOTT: I know.

8 MR. POUNIAN: This is a design case.

9 JUDGE PIGOTT: I know, but what I'm telling
10 you - - - never mind. Never mind.

11 MR. POUNIAN: No, but - - -

12 JUDGE SMITH: Well, the - - - I mean, going
13 to the same source for what the charge said was a
14 manufacturer like Volvo has a special - - - has
15 special training and experience designing and
16 manufacturing automobiles. And they had a duty to
17 use the same degree of skill and care that others in
18 that - - - in the business of manufacturing and
19 selling automobiles in the United States would
20 reasonably use in the same situation. In other
2:1 words, that's a - - - that's a standard of care in
22 the commun - - - that we're familiar with from
23 medical malpractice cases. It's - - - the standard
24 is that of a doctor in the community.

25 MR. POUNIAN: Well - - -

1 JUDGE SMITH: Isn't that different from the
2 normal negligence standard?

3 MR. POUNIAN: The negligence standard is a
4 reasonable person standard. And the reasonable
5 person in this case is an automobile manufacturer.
6 It's not - - -

7 JUDGE SMITH: You say it comes down to the
8 same thing.

9 MR. POUNIAN: It comes down to the same
10 thing, Your Honor. It's the - - - it's the basic
11 reasonable care test that's - - -

12 JUDGE PIGOTT: Well, then why do we have
13 all of these charges?

14 MR. POUNIAN: Well, that - - - that's a - -
15 - that's a good question, Your Honor, but it doesn't
16 - - - there's no error in the charge. When you read
17 the charge, it fits the law and it fits the case.

18 JUDGE SMITH: Well, I can see your point
19 that they're a lot alike, and I - - - I might be
20 prepared to say the difference is insignificant, only
2:1 how come - - - isn't it a funny coincidence that the
22 jury came up with this inconsistent verdict after
23 hearing this rather weird negligence charge?

24 MR. POUNIAN: Well, Your Honor, I think it
25 is improper for Volvo to attack the verdict, because

1 they had the opportunity, at the trial, with the jury
2 still impaneled - - -

3 JUDGE SMITH: I see your - - - but I think
4 - - - I don't think they're really quarrelling with
5 you. The inconsistent - - - we can't reverse on the
6 inconsistency itself, because they - - - they are
7 supposed to jump up before the jury is dissolved if
8 they - - - if they want to - - - if they want to
9 complain about that. But let's suppose - - - suppose
10 we conclude that - - - that the 2:15 charge should
11 not have been given, and we're trying to figure out
12 whether it prejudiced Volvo or not, isn't it some
13 evidence of prejudice that the jury was sufficiently
14 confused to bring in an inconsistent verdict?

15 MR. POUNIAN: I don't believe so, Your
16 Honor. I think that that issue was waived by Volvo
17 at the time they - - - they didn't allow the jury - -
18 - didn't go back to the jury or didn't ask the - - -

19 CHIEF JUDGE LIPPMAN: What could be better
20 evidence - - -

2:1 MR. POUNIAN: - - - judge to go back to the
22 jury.

23 CHIEF JUDGE LIPPMAN: - - - that they're
24 confused?

25 MR. POUNIAN: I'm sorry?

1 CHIEF JUDGE LIPPMAN: What could be better
2 evidence that they're confused?

3 MR. POUNIAN: Well, to - - - to make the
4 confusion argument is going back to the - - - to an
5 inconsistency argument, which is what they waived at
6 trial. It's not a preserved - - - it's not a claim
7 that's preserved.

8 CHIEF JUDGE LIPPMAN: Yeah, but maybe the
9 charge that - - - that was given confused them, and
10 that's why you got the inconsistent.

11 MR. POUNIAN: But there's nothing confusing
12 about the charge, Your Honor, because it states the
13 negligence - - -

14 JUDGE PIGOTT: Well, I think - - -

15 MR. POUNIAN: - - - principle.

16 JUDGE PIGOTT: I think you're right. I
17 mean, they've lost a couple of legs of the stool with
18 the inconsistency, so they - - - they've got to go
19 with one argument, and the argument is that 2:15 was
20 objected to, it should not have been given, and
2:1 that's the basis of the jury's verdict, and we can -
22 - - and we know that because on the design defect
23 they found no negligence. Therefore - - -

24 MR. POUNIAN: Well, I don't want to - - - I
25 don't think we can speculate about the jury or what

1 the jury did, because they - - - because Volvo made a
2 decision not to object. And now they're trying,
3 through the back door, to overcome the fact that they
4 waived their objection at trial.

5 JUDGE PIGOTT: On consistency.

6 MR. POUNIAN: On consistency. But it - - -
7 but the verdict is the verdict.

8 JUDGE PIGOTT: But on 15, if it's preserved
9 - - - if we go back to that - - - if it's preserved,
10 they're saying 15 should not have been given; that's
11 the basis upon which the verdict was rendered; QED,
12 we get a new trial. They want - - - they want it
13 from now.

14 MR. POUNIAN: Well, that's what they're
15 saying, Your Honor. But I - - - I would like to just
16 go back to the preservation issue just for a moment,
17 because I think the integrity of this court's
18 jurisdiction would be threatened if a party could - -
19 - could rely on unsubstantiated and unspecified
20 arguments that were made, in an off-the-record
2:1 comment, supposedly. We have no proof of it
22 whatsoever.

23 JUDGE SMITH: But - - - I mean, I might
24 agree with you, except that the - - - when the party
25 says on the record, Judge, do you want me to put it

1 on - - - to - - - to put it on the record, and she
2 says no, I mean, most lawyers are not, in that
3 situation, going to say, okay, I'm going to do it
4 anyway.

5 MR. POUNIAN: Well, I think - - - I think
6 the counsel had an affirmative obligation to come
7 forward at that point, Your Honor, and - - - and
8 specify the - - -

9 CHIEF JUDGE LIPPMAN: And say I'm going to
10 do it anyway.

11 MR. POUNIAN: Well, just that that's the
12 lawyer's oblig - - - it's their affirmative - - -

13 JUDGE SMITH: Well, you say the lawyer - -
14 -

15 MR. POUNIAN: It's their affirmative
16 obligation.

17 JUDGE SMITH: You say it was inappropriate
18 for the lawyer to ask the question. You say - - -
19 you're saying, Judge, I - - - he should have said,
20 Your Honor - - -

2:1 MR. POUNIAN: But the - - -

22 JUDGE SMITH: - - - I want to make a
23 record.

24 MR. POUNIAN: It's not the judge's
25 responsibility to make the - - -

1 CHIEF JUDGE LIPPMAN: Well, but lawyers are
2 deferential to judges.

3 MR. POUNIAN: Of course, and - - - and - -
4 - but - - -

5 CHIEF JUDGE LIPPMAN: And if there's an
6 arguable preservation, you know, in a - - - in a case
7 where the lawyer is being deferential to the judge,
8 you know, isn't there an - - - an argument to be made
9 that you err on the side of saying it's preserved?

10 MR. POUNIAN: Well, I think it's the
11 lawyer's responsibility. I think it's - - -

12 CHIEF JUDGE LIPPMAN: I - - -

13 MR. POUNIAN: - - - Lawyering 101 - - -

14 CHIEF JUDGE LIPPMAN: I understand that.

15 MR. POUNIAN: - - - that in a trial - - -

16 CHIEF JUDGE LIPPMAN: I understand what
17 you're saying.

18 MR. POUNIAN: - - - you make sure that on
19 the record - - - you've put your objections on the
20 record. There was - - - there was nothing the judge
2:1 did to prevent the lawyer from putting the objections
22 on the record, and it wasn't done. So that doesn't
23 give them carte blanche to make any argument that - -
24 - that they can come up with, you know - - - you
25 know, three - - - three months after the trial to - -

1 - to upset the verdict. It does not - - - it doesn't
2 make any sense.

3 And I think, going back to the - - - the
4 custom charge, if I may, and just go - - - just to
5 explain the - - - as - - - I think as Judge Smith
6 earlier commented, it was up to the jury to decide
7 whether or not there was a custom, and - - - and
8 whether or not there was any weight, and that the
9 charge on custom looks - - - it looks to see is - - -
10 was the custom fairly well defined in the industry so
11 that you can charge the defendant with knowledge.
12 And here there was proof that wide - - - the use of
13 this interlock was widespread in the industry. A
14 majority of the cars, fifty-five different - - -

15 JUDGE PIGOTT: Wait; who was your expert?

16 MR. POUNIAN: There was an engineering
17 expert, Your Honor - - -

18 JUDGE PIGOTT: Who was it?

19 MR. POUNIAN: - - - from General Motors.

20 JUDGE PIGOTT: Who was it?

2:1 MR. POUNIAN: Mr. Gest.

22 JUDGE PIGOTT: Yeah, because I - - - I was
23 just looking at my notes. He testified there was no
24 industry standard or regulation in 1987 that required
25 installation of a starter interlock switches in

1 manual transmission cars. Carr testified, out of the
2 twenty-six auto manufacturers selling manual
3 transmission vehicles in '87, nineteen did not
4 incorporate starter interlock switches in any of
5 their vehicles, and that of the forty - - - forty-
6 five to fifty million manual transmission vehicles on
7 the road in '87, thirty to forty million were not
8 equipped with the starter interlock.

9 MR. POUNIAN: In 1987 - - -

10 JUDGE PIGOTT: Custom and practice, it
11 seems, is - - -

12 MR. POUNIAN: The custom and practice in
13 1987 was the majority of cars that year had the
14 interlock. It was a growing - - - it was a growing
15 custom and practice.

16 JUDGE SMITH: Well, we're getting confused
17 about the numbers, but let me see if I understand it.
18 They keep talking about only seven manufacturers did
19 it; you keep saying a majority of the cars. I guess
20 those - - -

2:1 MR. POUNIAN: Right.

22 JUDGE SMITH: - - - are consistent if those
23 seven - - -

24 MR. POUNIAN: The largest manu - - -

25 JUDGE SMITH: - - - are the majority of the

1 cars on the road.

2 MR. POUNIAN: The largest manufacturers:
3 General Motors, Ford, Toyota, Nissan, they use - - -
4 they use the interlock starters.

5 JUDGE SMITH: So they count manufacturers
6 and you count cars.

7 MR. POUNIAN: And if - - - if I can just
8 quickly get to one point here. The point of the
9 whole charge - - - the charge - - -

10 CHIEF JUDGE LIPPMAN: Last point,
11 counselor. Go ahead.

12 MR. POUNIAN: The charge doesn't presume
13 negligence. It doesn't create any higher benefit.

14 JUDGE SMITH: 2:16 now.

15 MR. POUNIAN: It doesn't create any higher
16 benefit to the plaintiff. All it does is presume
17 knowledge. And in this case, Volvo admitted
18 knowledge. So the effect of the charge, which is
19 just that the jury may - - -

20 JUDGE SMITH: Which charge are you talking
2:1 about, 2:16 or 2:15?

22 MR. POUNIAN: The custom charge, yeah.

23 JUDGE SMITH: Huh?

24 MR. POUNIAN: The custom charge, Your
25 Honor, 2:16. The effect of the charge is that the

1 jury may consider the evidence - - - may consider it,
2 just like it can consider any evidence in the case.
3 It doesn't give it any greater weight - - -

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 MR. POUNIAN: All right. Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you, counselor.
7 Counselor, rebuttal?

8 MR. REARDON: Court, please. First, I've
9 tried some cases in my time, and - - - and after a
10 four-week case, if a judge says he or she doesn't
11 want to hear any more from me, I - - - I don't - - -

12 JUDGE PIGOTT: Yeah, but after the jury is
13 retired - - - in other words, they're back in their
14 jury room, she's, you know, winding up, and says,
15 anything else counselor before we break here, I would
16 think you'd say, Judge, I know you didn't want to
17 hear anything about 2:15, that's fine, but let me
18 just put on the record that I don't think it was
19 appropriate and I think this, this, and this, you
20 know, for purposes of future deals.

2:1 MR. REARDON: I hope I would do that, Your
22 Honor.

23 JUDGE PIGOTT: Because everybody's sitting
24 around.

25 MR. REARDON: But I'm - - - I'm not sure

1 I'd do it after the jury is in there deliberating,
2 either, and interrupting them.

3 In any event, what I didn't get a chance to
4 talk about - - - my fault - - - was the - - - the
5 difference between the two basic charges that were
6 given to the jury here. One was 2:120. And that was
7 the charge that basically pulled together all of the
8 things that were allegedly wrong and - - - and had to
9 be fixed. Those were the things that basically were
10 key to the ability of the jury to come to a fair
11 verdict. The other charge, which was 2:125, was way
12 off the charts. It had nothing to do with what was
13 at the heart of the case.

14 JUDGE SMITH: Did you preserve that one?

15 MR. REARDON: I'm assuming I did, Your
16 Honor. If I didn't, I didn't.

17 JUDGE PIGOTT: Well, 120 is negligent
18 design, and you wanted that charge, I assume?

19 MR. REARDON: Yeah.

20 JUDGE PIGOTT: 125 is strict products, and
2:1 I assume you wanted that one?

22 MR. REARDON: Now, 125 was the only way
23 that they could get negligence into the case. Under
24 120, the - - - the two basic problems that were
25 involved with the vehicle fit together with 120 - - -

1 120. They didn't with 125, and with 125 they were
2 able to inject all of this material with respect to
3 negligence. And everything that came in under that
4 category didn't fit because the case had been won on
5 the basis of 120.

6 I don't understand how they could be given
7 the opportunity to come in after that and build a - -
8 - a different claim around 125. This wasn't a
9 negligence case. This had to do - - - if I may just
10 take a second and read the way the pattern jury
11 instructions dealt with this whole thing between the
12 - - - the issues in the case. "The pattern charge" -
13 - - they're talking 125 here now; this is the one
14 that I say had no place. "The pattern charge deals
15 only with liability based on negligence. Claims
16 based on alleged design defects or on a
17 manufacturer's or seller's failure to provide
18 adequate warnings are separately addressed in PJI
19 2:120." 2:120 was the heart of the case. We won on
20 that part of the case.

2:1 Thank you, Your Honor.

22 CHIEF JUDGE LIPPMAN: Thank you, counselor.
23 Thank you both. Appreciate it.

24 (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 Manuel Reis v. Volvo Cars of North America, L.L.C., et al., No. 138, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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