

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

BRENDA CORNELL,

Respondent,

-against-

No. 16

360 WEST 51ST STREET  
REALTY, LLC, ET AL.,

Appellants.

-----

20 Eagle Street  
Albany, New York 12207  
January 14, 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

Appearances:

MINDY L. JAYNE, ESQ.  
BONNER KIERNAN TREBACH & CROCIATA LLP  
Attorneys for Appellant  
Empire State Building  
350 Fifth Avenue, 59th Floor  
New York, NY 10118

MORRELL I. BERKOWITZ, ESQ.  
GALLET DREYER & BERKEY, LLP  
Attorneys for Respondents  
845 Third Avenue  
8th Floor  
New York, NY 10022

Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's start with  
2 number 16, Cornell v. 360 West 51st Street.

3 Counselor, would you like any rebuttal  
4 time?

5 MS. JAYNE: Two minutes, please, Your  
6 Honor.

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

9 MS. JAYNE: All right. Your Honors, there  
10 is - - - or I apologize. If it please the Court.  
11 There are a number of issues - - -

12 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

13 MS. JAYNE: There are a number of issues  
14 that are upon review today before you. I would like  
15 to start with the issue of - - -

16 CHIEF JUDGE LIPPMAN: Tell me first how you  
17 get past Fraser in the same - - - the same court, the  
18 previous case. What's different about this case or  
19 is there a difference?

20 MS. JAYNE: Your Honor, I don't believe  
21 there really is a material difference. The Fraser  
22 plaintiffs are claiming the same alleged injuries  
23 from exposure to mold. There are - - -

24 CHIEF JUDGE LIPPMAN: But Fraser wasn't  
25 allowed to go forward, though, right?

1 MS. JAYNE: Correct. Right, and we're - -  
2 -

3 CHIEF JUDGE LIPPMAN: So why should this  
4 one be allowed to go forward?

5 MS. JAYNE: Well, Your Honor, we don't  
6 believe the case should go forward.

7 CHIEF JUDGE LIPPMAN: No, then, okay. Go  
8 ahead. Right. Sorry. Keep going.

9 MS. JAYNE: That's okay. Getting back to  
10 that, we believe - - - or going to the proximate  
11 cause issue, Your Honor. The main reason that the  
12 lower court granted appellant 360 West 51st Street,  
13 Corp. summary judgment was because it was the former  
14 building owner and there was no nexus to tie any  
15 action or inaction that they had to the cause of  
16 plaintiff's alleged illness, which is exposure to  
17 mold. Plaintiff - - -

18 JUDGE GRAFFEO: Is there any precedent as  
19 to how we determine whether we should look at this,  
20 that the mold was existing there when your client  
21 owned the building, so therefore it carries - - - it  
22 carries over and the landlord should be a party here?  
23 Or do we look at it that the new owner was the one  
24 who disrupted the basement, caused that construction?

25 MS. JAYNE: I do not believe any precedent

1 was cited by the Appellate Division or by the - - -

2 JUDGE GRAFFEO: So which way should we view  
3 it and why?

4 MS. JAYNE: I believe it's all on the new  
5 owner, Your Honor. While there may have been  
6 conditions that existed in that basement during our  
7 ownership of it, there is no evidence to indicate  
8 that it caused any adverse reaction in plaintiff.

9 JUDGE GRAFFEO: Well, I thought they told  
10 her to use a dehumidifier in the apartment because  
11 she did complain of dampness in the bathroom.

12 MS. JAYNE: That stems from a radiator  
13 issue; a steam pipe broke and there was alleged  
14 transient mold that appeared on a lighting fixture.  
15 She surface cleaned that with bleach. A dehumidifier  
16 was set up in her apartment to address any moisture  
17 that came from that steam pipe. That was - - -

18 JUDGE PIGOTT: But isn't it your burden - -  
19 -

20 MS. JAYNE: - - - an isolated event.

21 JUDGE PIGOTT: Isn't it your burden to show  
22 that she didn't suffer any problems from mold? You  
23 can't simply say she can't prove; you have to  
24 establish you're entitled to judgment as a matter of  
25 law, correct?

1 MS. JAYNE: Well, for the purpose of  
2 general causation, when we have indicated and  
3 provided support that the scientific community does  
4 not generally accept that mold - - -

5 JUDGE PIGOTT: Well, some do and some don't  
6 - - -

7 MS. JAYNE: - - - can cause - - -

8 JUDGE PIGOTT: - - - right?

9 MS. JAYNE: No, I don't believe the  
10 evidence - - -

11 JUDGE PIGOTT: Well, they have an expert  
12 that says that this is the cause.

13 MS. JAYNE: Right, but for the purpose of a  
14 Frye hearing - - - or for the purpose of addressing  
15 the Frye standard, when you're dealing with general  
16 causation, they are looking for general acceptance.

17 CHIEF JUDGE LIPPMAN: What about the - - -

18 MS. JAYNE: It doesn't matter - - -

19 CHIEF JUDGE LIPPMAN: What about the  
20 Appellate Division saying here that some evidence of  
21 acceptance is enough?

22 MS. JAYNE: I believe that's a modification  
23 of the Frye standard. The Frye standard has  
24 historically been general acceptance.

25 JUDGE PIGOTT: Well, he did a differential

1 diagnosis, I guess, right?

2 MS. JAYNE: I'm sorry?

3 JUDGE PIGOTT: Didn't he go by a  
4 differential diagnosis?

5 MS. JAYNE: Dr. Johanning did use  
6 differential diagnosis.

7 JUDGE PIGOTT: And that's common in ninety  
8 percent of the cases that come in front of courts,  
9 isn't it?

10 MS. JAYNE: Right, but the issue with  
11 differential diagnosis, you're getting into the  
12 question of specific causation.

13 JUDGE PIGOTT: That's right.

14 MS. JAYNE: And the question of  
15 differential diagnosis is, while it may be an  
16 accepted methodology, you have to look at how it was  
17 utilized.

18 JUDGE SMITH: Is the question in  
19 differential diagno - - - Justice Kornreich says that  
20 differential diagnosis is essentially a list and you  
21 cross things off the list. Is that - - - is that a  
22 fair summary?

23 MS. JAYNE: No, it's two parts. You're  
24 also - - - in addition to crossing things off - - -  
25 off the list, which is ruling out potential causes,

1           you also have to demonstrate evidence that would  
2           effectively - - -

3                   JUDGE SMITH: Well, but - - -

4                   MS. JAYNE: - - - rule in - - -

5                   JUDGE SMITH: - - - but I guess what I was  
6           going to suggest is don't you have to preliminarily  
7           determine what goes on the list? That is, if there's  
8           something that there's no evidence that it's a cause,  
9           you can't put it on the list to begin with, right?

10                  MS. JAYNE: True. True. He would have to  
11           have a list of - - - of different potential causes  
12           for her health ailments that you would put there.

13                  JUDGE PIGOTT: But the Frye - - - you want  
14           a Frye hearing to say that a differential diagnosis  
15           can't be used, that this expert - - - this expert is  
16           not qualified to say whether or not she's suffering  
17           from the effects of mold because he used a  
18           differential diagnosis.

19                  MS. JAYNE: No, the differential diagnosis  
20           goes more towards a foundational inquiry for the  
21           specific causation.

22                  JUDGE SMITH: Are you saying the  
23           differential diagnosis is not a generally accepted  
24           technique?

25                  MS. JAYNE: No, I am not, Your Honor. I am

1 saying the way in which it was utilized by  
2 respondent's expert does not lead to a reliable  
3 finding that can be utilized to support specific  
4 causation.

5 JUDGE PIGOTT: That's a question of fact  
6 for a jury, wouldn't it be? I mean, he's going to  
7 come in and say what he says. You're going to have  
8 an expert come in and say what he or she says. And  
9 the jury's going to have to decide who was right.

10 MS. JAYNE: Well, that was an issue on  
11 summary judgment, Your Honor. When there is  
12 absolutely no evidence with which to support that  
13 that finding was reliable, summary judgment is  
14 proper.

15 JUDGE PIGOTT: But don't you have to - - -  
16 if we get by the Frye thing, don't you then have to  
17 say here we are, the defendants, and we are moving  
18 for summary judgment because we can prove, initially,  
19 as a matter of law, that we are entitled to judgment?  
20 You can't - - - you can't say she can't prove; you  
21 have to say we can prove that this is - - - that mold  
22 was not the competent producing cause of her illness.

23 MS. JAYNE: Right, but - - - right, and  
24 that's if you assume that general causation exists.  
25 But then moving past that and doing a specific

1 causation analysis, the lower court determined that  
2 there was no evidence, and that's when you get into  
3 the question of the scientific expression of  
4 exposure. That was completely lacking - - -

5 JUDGE SMITH: Are you saying that there's -  
6 - -

7 MS. JAYNE: - - - from the - - -

8 JUDGE SMITH: Are you saying there's no  
9 evidence that mold causes anything?

10 MS. JAYNE: No, I am not, Your Honor.

11 JUDGE SMITH: You're - - - so - - - and  
12 indeed there's evidence that it causes asthma.

13 MS. JAYNE: Now you're getting into the  
14 three generally accepted areas of what mold can  
15 cause, as accepted by the - - - by the scientific  
16 community, and one of those is allergic responses in  
17 individuals. So - - -

18 JUDGE SMITH: So you're saying it can  
19 cause asthma but only if you're allergic?

20 MS. JAYNE: Not that it causes asthma; it  
21 elicits allergic responses in those that are  
22 asthmatic, if you are - - -

23 CHIEF JUDGE LIPPMAN: This distinction - -  
24 -

25 MS. JAYNE: - - - allergic to mold.

1 CHIEF JUDGE LIPPMAN: - - - between  
2 associated, is that the - - - when you say  
3 something's associated with it, is mold associated  
4 with asthma?

5 MS. JAYNE: There are studies out there  
6 that demonstrate - - -

7 CHIEF JUDGE LIPPMAN: What - - - define  
8 that.

9 MS. JAYNE: - - - that there is an  
10 association - - -

11 CHIEF JUDGE LIPPMAN: What does it mean  
12 when we say association is not - - - when you say  
13 association is not enough?

14 MS. JAYNE: Association is a distinct  
15 concept - - - concept from causation. An association  
16 means that you have studies out there that  
17 demonstrate that there are people and there are  
18 findings of respiratory - - - in this case,  
19 respiratory and asthmatic kind of temporal proximity  
20 to an exposure to mold.

21 CHIEF JUDGE LIPPMAN: Why shouldn't you get  
22 to the jury, if it's associated with - - - and why -  
23 - - why, from a fairness perspective, shouldn't - - -  
24 shouldn't the jury be able to determine that, if you  
25 know there's some relationship? And I understand

1 what you're saying the difference between associated  
2 and causation, but why couldn't you leave that, you  
3 know, to be to the fact finder?

4 MS. JAYNE: Because association isn't  
5 causation, and the two experts in this case - - -

6 CHIEF JUDGE LIPPMAN: What is it, if not a  
7 causation?

8 MS. JAYNE: It's - - - it's evidence that  
9 you have two events that are happening together. You  
10 have someone that is in the same location as mold who  
11 is claiming that my having been in that same location  
12 as mold is the cause for all of my health effects  
13 whatever they be.

14 JUDGE SMITH: There are certainly - - -  
15 there are - - - yeah, like the classic examples like  
16 gray hair doesn't - - - gray hair and death are  
17 associated, but gray hair doesn't kill you. But how  
18 would that - - - how - - - how would that apply? I  
19 mean, is it really plausible that there's an  
20 association between asthma and mold but that one  
21 isn't causing the other? I mean, to a layman, that  
22 sounds surprising.

23 MS. JAYNE: That is the - - - that is the  
24 state of the evidence of this record, Your Honors,  
25 that there is - - - that there is evidence of an

1 association but not causation. And both Dr. Phillips

2 - - -

3 CHIEF JUDGE LIPPMAN: It's generally  
4 accepted that there's association.

5 MS. JAYNE: Correct.

6 CHIEF JUDGE LIPPMAN: In the scientific  
7 community - - -

8 MS. JAYNE: Right.

9 CHIEF JUDGE LIPPMAN: - - - it's generally  
10 accepted that it's associated.

11 MS. JAYNE: Correct, and both experts  
12 testified - - -

13 CHIEF JUDGE LIPPMAN: But that's not enough  
14 to get to the fact finder?

15 MS. JAYNE: - - - that that's not  
16 causation, and I think - - -

17 JUDGE PIGOTT: All right. So get me there,  
18 then. All right. So you've got an association;  
19 you've got a doctor who says I've examined this  
20 patient, I've done a differential diagnosis, I think  
21 the competent producing cause of her illnesses is the  
22 mold that is in her apartment. Now, you want to say,  
23 as a matter of law, that can't be true?

24 MS. JAYNE: Not based on the evidence of  
25 the record, Your Honor, because causation - - - an

1 association is not causation.

2 JUDGE PIGOTT: But he is evidence; he is  
3 the evidence. He is the doctor who's saying I saw  
4 her, I saw her medical condition, I know that - - - I  
5 know that there is mold in the - - - in the  
6 apartment, and I have made this determination based  
7 upon the evidence in front of me. You're saying,  
8 fine, but that - - - that is not what - - - that we  
9 can confidently say this case ought to be thrown out  
10 of court, you should not be able to darken the door  
11 of the courtroom to establish this. I don't - - - I  
12 don't disagree with you, by the way, that this could  
13 be a very weak case. But I just don't know where we  
14 get - - - we get to the situation where we say, as a  
15 matter of law, you cannot bring this case.

16 MS. JAYNE: Well, that's the purpose of the  
17 Frye standard. That's the whole reason we have the  
18 Frye standard.

19 CHIEF JUDGE LIPPMAN: Are you saying we'd  
20 have to change the Frye standard to go - - - to go  
21 with your adversary?

22 MS. JAYNE: I'm saying that's what the  
23 Appellate Division did, in an effort to - - -

24 CHIEF JUDGE LIPPMAN: It changed the Frye  
25 standard?

1 MS. JAYNE: Yes.

2 CHIEF JUDGE LIPPMAN: Well, how exactly did  
3 it change the Frye standard?

4 MS. JAYNE: They modified it, they lowered  
5 it, they took it from general acceptance - - -

6 CHIEF JUDGE LIPPMAN: They lowered the bar?

7 MS. JAYNE: Lowered the bar to some  
8 support, and then they took some support and said we  
9 have one study - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but what about  
11 - - - what about this idea that there is agreement in  
12 the scientific community that it's associated - - -  
13 that it's associated. That's more than saying just  
14 some support; it's saying it's associated. And I  
15 understand the distinction you're making.

16 MS. JAYNE: Right.

17 CHIEF JUDGE LIPPMAN: Why can't we say  
18 that's the - - - the Frye standard, if we know that  
19 it's - - - it's associated; that the scientific  
20 community agrees that these symptoms are associated  
21 with mold?

22 MS. JAYNE: Because then you're making the  
23 determination that that is enough for causation.

24 JUDGE PIGOTT: Did your expert examine the  
25 plaintiff?

1 MS. JAYNE: No, he did not.

2 JUDGE PIGOTT: And as I - - - as I remember  
3 the motion papers, I mean, there's a stack of  
4 studies, but they're studies. I mean, I'm wondering,  
5 you know, if your expert went and examined her and  
6 said, oh, my God, I now realize that these studies  
7 that I've gotten from all over the country are wrong  
8 and what this doctor says is right. And why should  
9 we make that decision?

10 MS. JAYNE: No, I don't believe he would  
11 say that.

12 JUDGE SMITH: Well, is an expert allowed to  
13 do that, I mean, to examine a patient and say I've  
14 decided that this - - - this person's illness is  
15 caused by the tide, and I don't care of all the  
16 scientific studies in the world show that the tide  
17 can't cause - - - show no association between tide  
18 and this ailment. Can an expert do that?

19 MS. JAYNE: Of course the expert can say  
20 that, but that's why we have the Frye standard, so  
21 that that doesn't get to the jury, so that a jury is  
22 not making a determination that would differ from  
23 what has been shown to be - - -

24 JUDGE RIVERA: But isn't what it's trying  
25 to avoid - - -

1 MS. JAYNE: - - - generally accepted by the  
2 scientific community.

3 JUDGE RIVERA: Isn't what it's trying to  
4 avoid is junk science? And can you really say it's  
5 junk science when you do have some scientific studies  
6 that indicate that there is a true connection between  
7 the kinds of ailments she had and mold?

8 MS. JAYNE: I don't refer to it as junk  
9 scien - - - giant (sic) - - - junk science  
10 personally; I refer to it as a novel theory - - -

11 JUDGE SMITH: Well, but do you - - -

12 MS. JAYNE: - - - of causation that hasn't  
13 been established - - -

14 JUDGE RIVERA: But - - -

15 MS. JAYNE: - - - to be generally accepted  
16 as proven.

17 JUDGE RIVERA: But it doesn't mean that  
18 everyone has to agree with it. When you say general  
19 - - -

20 MS. JAYNE: Absolutely not.

21 JUDGE RIVERA: - - - acceptance, it means  
22 you can't have outliers that disagree.

23 MS. JAYNE: Absolutely not. We don't think  
24 - - -

25 CHIEF JUDGE LIPPMAN: And this is changing

1 all of the - - -

2 MS. JAYNE: - - - one study - - - I don't  
3 think one study establishes - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but - - -

5 MS. JAYNE: - - - general acceptance.

6 CHIEF JUDGE LIPPMAN: - - - the studies are  
7 - - - are continually evolving, wouldn't you say?  
8 That - - - on this issue and so many others, that - -  
9 -

10 MS. JAYNE: I don't disagree.

11 CHIEF JUDGE LIPPMAN: But you don't think  
12 they're evolved to the point where your adversary - -  
13 -

14 MS. JAYNE: Has established with the  
15 evidence of the record? No, it has not.

16 JUDGE SMITH: Well, let me - - -

17 JUDGE PIGOTT: Does - - - I'm sorry, Judge.

18 MS. JAYNE: Sorry.

19 JUDGE PIGOTT: He makes the point that  
20 apparently there are some allegations that the  
21 experts that are writing these - - - these articles  
22 are the experts that are testifying for the defense,  
23 and that there's this - - - this vortex of I'll write  
24 an article and then I'll go testify saying there's  
25 published articles that say I'm right.

1 MS. JAYNE: Well, that's where you have to  
2 look to Fraser, which was the extensive ten-day  
3 hearing where she took testimony from the experts.  
4 She asked them about the studies that were before  
5 her. Those criticisms were raised. She found Dr.  
6 Phillips to be more credible than Dr. Johanning, and  
7 she determined, based on all that testimony, all  
8 those scientific articles, that that really didn't  
9 play a part - - -

10 JUDGE SMITH: Let me ask you - - -

11 MS. JAYNE: - - - the general acceptance -  
12 - -

13 JUDGE SMITH: - - - a more specific  
14 question, if I could.

15 MS. JAYNE: Okay.

16 JUDGE SMITH: Is there even an association  
17 between mold and the particular ail - - - now, this -  
18 - - this plaintiff is not allergic, as I understand  
19 it.

20 MS. JAYNE: Correct, Your Honor.

21 JUDGE SMITH: She's not found to be  
22 allergic to mold.

23 MS. JAYNE: Correct.

24 JUDGE SMITH: Is there any scientific - - -  
25 I mean, is there any scientific study anywhere that

1 shows even an association between mold and asthma  
2 where the - - - where the person exposed is not  
3 allergic?

4 MS. JAYNE: That is the one study that the  
5 Appellate Division was pointing to, Your Honor, that  
6 was not submitted to the Fraser court.

7 JUDGE SMITH: And which is that? The  
8 health assignment (ph.) study?

9 MS. JAYNE: The - - - that particular study  
10 was the Hydrophilic Fungi and Ergosterol - - - the  
11 findings of fungi in the dust samples, that  
12 particular article, Your Honor.

13 JUDGE SMITH: Okay.

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

16 MS. JAYNE: Thank you.

17 MR. BERKOWITZ: May it please the court. I  
18 am Morrell Berkowitz. I'm appearing for the  
19 plaintiff-respondent. Your Honor - - -

20 CHIEF JUDGE LIPPMAN: Let me ask you the  
21 first question - - -

22 MR. BERKOWITZ: Certainly.

23 CHIEF JUDGE LIPPMAN: - - - that I asked  
24 your adversary. So Fraser - - -

25 MR. BERKOWITZ: That was my first - - -

1 CHIEF JUDGE LIPPMAN: What's wrong with - -  
2 -

3 MR. BERKOWITZ: - - - point.

4 CHIEF JUDGE LIPPMAN: What's different  
5 about Fraser - - - about this case than Fraser, when  
6 it's exactly the same - - -

7 MR. BERKOWITZ: It's not exactly the - - -  
8 we have overwhelming evidence in this case - - -

9 CHIEF JUDGE LIPPMAN: As distinguished - -  
10 -

11 MR. BERKOWITZ: - - - that makes this - - -

12 CHIEF JUDGE LIPPMAN: - - - from Fraser?

13 MR. BERKOWITZ: Yes.

14 CHIEF JUDGE LIPPMAN: What - - -

15 MR. BERKOWITZ: And I was at the argument  
16 of - - -

17 CHIEF JUDGE LIPPMAN: What are the - - -

18 MR. BERKOWITZ: - - - Fraser as well, Your  
19 Honor.

20 CHIEF JUDGE LIPPMAN: What are the areas of  
21 difference from Fraser?

22 MR. BERKOWITZ: The areas of difference is,  
23 first of all - - - and I'm going to be referring to  
24 volumes V and VI of the - - -

25 CHIEF JUDGE LIPPMAN: Sure, go ahead,

1 counselor.

2 MR. BERKOWITZ: - - - those six volumes.

3 CHIEF JUDGE LIPPMAN: Yeah.

4 MR. BERKOWITZ: First of all, there was 100  
5 and - - - approximately 105 pages of medical and  
6 diagnostic tests of the plaintiff-respondent, 15  
7 different blood tests. That's on pages 2,499 to  
8 2,501 and 2,819 to 2,923.

9 JUDGE SMITH: But having a lot of pages of  
10 tests doesn't do it; the tests have to show  
11 something. They show - - - and obviously they show  
12 that she had - - - she had asthma or that she had a  
13 rash - - -

14 MR. BERKOWITZ: More than that; she had a  
15 panoply of illnesses - - -

16 JUDGE SMITH: Suppose she's got a panoply;  
17 she can have all the panoply - - -

18 MR. BERKOWITZ: She was very sick.

19 JUDGE SMITH: - - - she wants. You've got  
20 to - - - how do the tests show that they were caused  
21 by the mold?

22 MR. BERKOWITZ: Because we have - - - Dr.  
23 Johanning was her treating physician - - -

24 JUDGE SMITH: Yeah, okay, does that - - -

25 MR. BERKOWITZ: - - - from the very

1 beginning.

2 JUDGE SMITH: But does that do it? You've  
3 got a panoply of symptoms.

4 MR. BERKOWITZ: Yes.

5 JUDGE SMITH: And you've got a doctor who's  
6 prepared to say they're caused by the light in the  
7 ceiling; does that do it?

8 MR. BERKOWITZ: It does it, because it's  
9 more than just the light in the ceiling. In addition  
10 to that - - -

11 JUDGE SMITH: Well, don't you have to have  
12 a scientifically accepted cause that - - - for the  
13 expert to testify to?

14 MR. BERKOWITZ: Yes, Your Honor.  
15 Differential diagnosis is the main - - -

16 CHIEF JUDGE LIPPMAN: But you - - -

17 JUDGE SMITH: But wait a minute, wait a  
18 minute - - -

19 CHIEF JUDGE LIPPMAN: Go ahead, Judge  
20 Smith.

21 JUDGE SMITH: - - - you can't do  
22 differential diagnosis. I mean, if - - - if I - - -  
23 if I go to a doctor and I ask him why I'm losing my  
24 hair and he does a differential diagnosis and he  
25 eliminates all of the causes except moonlight; I say

1 I've been out in the moonlight. He can say the  
2 moonlight caused me to lose my hair?

3 MR. BERKOWITZ: Let me answer it a  
4 different way, Judge - - -

5 JUDGE SMITH: Can he get to a jury on that?

6 MR. BERKOWITZ: You can get to a jury - - -  
7 just let me list the toxic substances in this  
8 apartment that were found on pages 2925 - - -

9 JUDGE SMITH: No, I will not let you - - -  
10 let you list the toxic substances.

11 MR. BERKOWITZ: Okay. There was - - -

12 JUDGE SMITH: You've got to show me some  
13 scientific evidence that connects the toxic  
14 substances to the kind of - - - the kind of  
15 conditions that this woman had.

16 MR. BERKOWITZ: All of these toxic  
17 substances - - - and there were studies in the  
18 record; we submitted an appendix. If Your Honors - -  
19 - all you have to do is read the newspaper.

20 JUDGE SMITH: Okay. Okay.

21 MR. BERKOWITZ: There are - - -

22 JUDGE SMITH: Don't get mad.

23 MR. BERKOWITZ: I'm not getting mad, Judge.  
24 I'm just - - -

25 JUDGE SMITH: Once again, there are

1 studies. Give me - - - what's your best one? Which  
2 pages of the record?

3 MR. BERKOWITZ: I - - - I'm sorry; I don't  
4 have the pages in the record, but I have - - - what I  
5 would like to read - - -

6 JUDGE SMITH: What's the name of it?

7 MR. BERKOWITZ: - - - is the - - - two  
8 affidavits, portions of two affidavits.

9 JUDGE PIGOTT: No, we've read those.

10 JUDGE SMITH: Yeah, but just - - -

11 MR. BERKOWITZ: I understand.

12 JUDGE SMITH: Just give me a study by name  
13 - - - if you don't have the pages, give me the name.  
14 Give me a study.

15 MR. BERKOWITZ: The studies are referred to  
16 by Dr. Johanning on page 2487 of the record. He says  
17 in his affidavit, on page 2486, "Indeed, Cornell  
18 suffered and continues to this day to suffer from her  
19 responsiveness to exposure to a biological agent or  
20 mixture of agents that included allergens and  
21 irritants that have been long and widely recognized  
22 as being triggers - - -

23 JUDGE SMITH: I'm open - - -

24 MR. BERKOWITZ: - - - that cause or  
25 aggravate asthma."

1                   JUDGE SMITH: Look, really, I'm not - - -  
2                   I'm actually not determined - - - I'm not trying to  
3                   defeat your case; I'm just trying to figure it out.  
4                   I'm trying to find a study that I can read that shows  
5                   that this sort of agent causes this sort of  
6                   condition. I'm open to 2486; I don't see anything  
7                   cited.

8                   MR. BERKOWITZ: He referred to Exhibit 18,  
9                   which is the number of environmental studies - - - I  
10                  don't have all the names at my fingertips, Judge.

11                  JUDGE SMITH: Okay.

12                  MR. BERKOWITZ: I apologize for that.

13                  JUDGE SMITH: But all I want is one, and I  
14                  mean, and maybe there is one, but I'm - - - I'm  
15                  having - - - partly because there's so much in this  
16                  case, I'm having trouble pinning it down. But - - -  
17                  but if you have - - - do you have somebody showing -  
18                  - - a study showing that mold is a known cause of  
19                  asthma in someone not known to be allergic to the  
20                  mold?

21                  MR. BERKOWITZ: Yes.

22                  JUDGE SMITH: And what study is that?

23                  MR. BERKOWITZ: There are recent studies by  
24                  OSHA, by the World Health Organization, by the  
25                  Centers for Disease Control that specifically say

1 mold causes asthma.

2 JUDGE SMITH: In nonallergenic - - -

3 MR. BERKOWITZ: Yes, in nonallergenic  
4 people.

5 JUDGE SMITH: Okay. And they're in - - -

6 MR. BERKOWITZ: There are a host of studies  
7 - - -

8 JUDGE SMITH: And they're in here  
9 somewhere?

10 MR. BERKOWITZ: They're in there somewhere.

11 JUDGE SMITH: Maybe - - - maybe if the - -  
12 - if the Chief doesn't object, you can just point out  
13 the pages where it says that, not now, but when you  
14 have a chance?

15 MR. BERKOWITZ: Yes.

16 CHIEF JUDGE LIPPMAN: Let me ask you a  
17 question. Do we have to dilute the Frye standard to  
18 find for you?

19 MR. BERKOWITZ: No, and that was the first  
20 point that I wanted to make.

21 CHIEF JUDGE LIPPMAN: Why - - - why not?  
22 Why - - -

23 MR. BERKOWITZ: Because all the Appellate  
24 Division did - - - first of all, this is not junk  
25 science, it's not a novel theory - - -

1 CHIEF JUDGE LIPPMAN: Say we disagree with  
2 the - - - with the view that some, you know, evidence  
3 of - - - that it's causally related is enough. Say  
4 it's got to be a general acceptance within the  
5 scientific - - -

6 MR. BERKOWITZ: Your Honor had made a very  
7 good - - -

8 CHIEF JUDGE LIPPMAN: - - - can you meet  
9 that? Can you meet that?

10 MR. BERKOWITZ: Yes. Your Honor made a  
11 very good point in questioning my adversary, and that  
12 is - - - and the other judges also made the point  
13 that an association - - - we did not pull this out of  
14 thin air.

15 CHIEF JUDGE LIPPMAN: What's the difference  
16 between association and causation? Is there a  
17 difference?

18 MR. BERKOWITZ: There is a difference, and  
19 I have a quote from Dr. Harriet Ammann, who for  
20 sixteen years was the chief toxicologist in the State  
21 of Washington, who explains that it's unethical to  
22 give someone different levels of Stachybotrys to see  
23 how much actually causes illness, but that the - - -

24 JUDGE SMITH: We probably could have - - -  
25 we actually don't need an expert; obviously it's

1 unethetical, but still people do do studies to  
2 associate cause - - -

3 MR. BERKOWITZ: Well, I wanted to, if I  
4 may, just read just the two sentences from her  
5 affidavit, which I think is instructive, and  
6 obviously she has - - -

7 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

8 MR. BERKOWITZ: - - - a lot more knowledge  
9 and is a lot more articulate than I am in discussing  
10 the science of it. And that's on page 2729 of the  
11 record in volume V. "This (proof to an absolute  
12 scientific certainty) is a much higher standard than  
13 that utilized by physicians and public health  
14 officials in making real-life decisions about causal  
15 relationships in any given case" - - -

16 JUDGE SMITH: Well, but the - - -

17 MR. BERKOWITZ: - - - "or regarding public  
18 health statistics."

19 JUDGE SMITH: - - - the real-life decision  
20 that she's talking about, though, are things like the  
21 standards that OSHA applies when it does an  
22 investigation - - -

23 MR. BERKOWITZ: No, she also - - - Your  
24 Honor, with all due respect, she's also discussing  
25 how treating physicians have used all of these

1 studies and showed - - - if I could just finish the  
2 next three sentences.

3 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

4 JUDGE SMITH: Three?

5 MR. BERKOWITZ: Maybe four; I'm always bad  
6 at estimating.

7 CHIEF JUDGE LIPPMAN: Go ahead. Go ahead.

8 MR. BERKOWITZ: "Were we to wait for such  
9 proof to an absolute certainty, for example, we would  
10 not give protective gear to the workers in New  
11 Orleans that are cleaning up after the flood, nor  
12 would the New York City Department of Health Mold  
13 Guidelines require extensive worker protection in  
14 contaminated environments. Why should we give them  
15 safety equipment if damp buildings do not 'cause'  
16 illness? The fact is that there comes a point where  
17 the body of medical and scientific literature,  
18 discussed below, shows a strong enough association,  
19 and is consistent with clinical experience, that  
20 physicians utilize that knowledge to do their causal  
21 assessments in individual cases, and public health  
22 officials utilize that knowledge to take appropriate  
23 measures for public safety. When the health of the  
24 public is in question, strong association is  
25 'sufficient' as stated in the IOM report" - - -

1 CHIEF JUDGE LIPPMAN: Counselor - - -

2 JUDGE SMITH: That's four sentences.

3 CHIEF JUDGE LIPPMAN: - - - no one's saying  
4 - - - it's much more than four sentences. No one is  
5 saying that - - - your adversary isn't saying  
6 absolute certainty.

7 MR. BERKOWITZ: I - - -

8 CHIEF JUDGE LIPPMAN: She's saying general  
9 acceptance - - -

10 MR. BERKOWITZ: And I'm going to get to  
11 that - - -

12 JUDGE SMITH: Well, can I - - -

13 MR. BERKOWITZ: - - - in the very next  
14 sentence - - -

15 JUDGE SMITH: Can I now ask - - -

16 MR. BERKOWITZ: - - - if you let me just -  
17 - -

18 JUDGE SMITH: Can I ask the question you  
19 wouldn't let me ask before?

20 MR. BERKOWITZ: Sure.

21 JUDGE SMITH: Isn't the standard for giving  
22 workers protective gear a more - - - a standard which  
23 you would expect the scientific people to be more  
24 cautious than in awarding millions of dollars to a  
25 plaintiff who's suing?

1 MR. BERKOWITZ: It's a result of people  
2 getting sick. This is like the tobacco industry - -  
3 -

4 JUDGE SMITH: Well - - -

5 MR. BERKOWITZ: - - - saying smoking - - -

6 JUDGE SMITH: Well, wait a minute.

7 MR. BERKOWITZ: - - - is good for me.

8 JUDGE SMITH: Wait a minute. Wouldn't you  
9 think that in giving protective gear to workers we  
10 ought to err on the side of caution?

11 MR. BERKOWITZ: It's because - - -

12 JUDGE SMITH: How about a yes or no to that  
13 one?

14 MR. BERKOWITZ: In part, Judge.

15 JUDGE SMITH: Okay. Do we err on the side  
16 of caution in awarding damages to a plaintiff in a  
17 tort suit?

18 MR. BERKOWITZ: All we're saying and all  
19 the Appellate Division said in this case is that - -  
20 - first of all, all they did is interpret their prior  
21 decision that we're not saying never, that you never  
22 could go to a jury. That was said in the Fraser  
23 decision, and the very first sentence in this case is  
24 the lower court - - -

25 JUDGE SMITH: But we're - - -

1 MR. BERKOWITZ: - - - misconstrued our - -  
2 -

3 JUDGE SMITH: - - - we're not - - -

4 MR. BERKOWITZ: - - - earlier decision - -  
5 -

6 JUDGE SMITH: We're not bound by the first  
7 Fraser decision anyway, so you don't need - - -

8 MR. BERKOWITZ: I unders - - - but all I'm  
9 - - - but we're here because they've tried to take -  
10 - - they're trying to - - - they're taking an appeal  
11 of the Appellate Division's decision - - -

12 JUDGE RIVERA: Right, but - - -

13 MR. BERKOWITZ: - - - they're claiming  
14 there's a new standard.

15 JUDGE RIVERA: - - - how - - -

16 MR. BERKOWITZ: There was no new standard.

17 JUDGE RIVERA: But counsel - - -

18 MR. BERKOWITZ: Yes.

19 JUDGE RIVERA: - - - if in the Appellate  
20 Division they say to the trial court, you've  
21 misunderstood, you misinterpreted our decision, but  
22 your opponent says, then what happened is they  
23 modified the standard that should have been applied -  
24 - -

25 MR. BERKOWITZ: My adversary - - -

1                   JUDGE RIVERA: - - - and that's where they  
2                   disagreed. So as I understand her point, and the  
3                   point of contention is, she's saying you've got to  
4                   have that general consensus, very clear in Frye, we  
5                   all understand the standard. And she argues that  
6                   you're saying you don't need general consensus; if  
7                   I've just got some - - - some scientists who agree  
8                   with my side, that's enough. And she's arguing, no,  
9                   some is not enough; you can have outliers, but they  
10                  haven't shifted the medical community or the  
11                  scientific - - - the scientific community to their  
12                  perspective yet. So what's wrong with her argument?

13                 MR. BERKOWITZ: What's wrong with her  
14                 argument is that there was no lessening of the Frye  
15                 standard or a different standard. In this - - -

16                 CHIEF JUDGE LIPPMAN: What would be so  
17                 terrible - - -

18                 MR. BERKOWITZ: In this court's - - -

19                 CHIEF JUDGE LIPPMAN: What would be so  
20                 terrible about lessening the Frye standard? If  
21                 that's what you're trying to do - - -

22                 MR. BERKOWITZ: Well - - -

23                 CHIEF JUDGE LIPPMAN: - - - maybe you  
24                 should argue for that?

25                 MR. BERKOWITZ: Maybe, but - - -

1 CHIEF JUDGE LIPPMAN: Why isn't - - -

2 MR. BERKOWITZ: - - - but I'm - - - I'm

3 dealing with - - -

4 CHIEF JUDGE LIPPMAN: - - - Frye - - -

5 MR. BERKOWITZ: - - - what is, Judge.

6 There was no different standard. This court said in

7 the Parker v. Mobil Corp. case - - -

8 CHIEF JUDGE LIPPMAN: So - - -

9 MR. BERKOWITZ: - - - that you don't have

10 to prove a specific amount - - -

11 CHIEF JUDGE LIPPMAN: Your view is that

12 there is, in the words of the Frye standard, general

13 acceptance in the scientific community of causation

14 between mold and the kinds of symptoms we're talking

15 about.

16 MR. BERKOWITZ: Correct, that in fact for

17 these of things - - - and again, it was Stachybotrys

18 and Aspergillus and four different metals.

19 CHIEF JUDGE LIPPMAN: General acceptance or  
20 some evidence?

21 MR. BERKOWITZ: I don't know that there's  
22 much of a difference. In other words, if there's one  
23 person in the world that says I think - - -

24 CHIEF JUDGE LIPPMAN: No, no, forget - - -

25 MR. BERKOWITZ: - - - this cause - - - I

1 think gray hair is - - -

2 CHIEF JUDGE LIPPMAN: No, no - - -

3 MR. BERKOWITZ: - - - is the - - -

4 CHIEF JUDGE LIPPMAN: Forget - - -

5 MR. BERKOWITZ: - - - maybe that's totally  
6 whacko.

7 CHIEF JUDGE LIPPMAN: Forget - - - forget  
8 outliers.

9 MR. BERKOWITZ: Okay.

10 CHIEF JUDGE LIPPMAN: But you're saying  
11 that - - - that it's the same thing between general  
12 acceptance and - - - and a large number of opinions  
13 or some opinions that say it's - - -

14 MR. BERKOWITZ: Yes, I don't think it's a  
15 precise number, and I think when you have a dozen  
16 agencies all over the world - - -

17 CHIEF JUDGE LIPPMAN: Fifty - - -

18 MR. BERKOWITZ: - - - respected - - -

19 CHIEF JUDGE LIPPMAN: Fifty/fifty is good  
20 enough in terms of scientists?

21 MR. BERKOWITZ: I don't know that it's a  
22 percentage, Judge, because then - - -

23 CHIEF JUDGE LIPPMAN: Or I think - - -

24 MR. BERKOWITZ: - - - what's similar - - -

25 CHIEF JUDGE LIPPMAN: I think what you're

1           saying is if you have enough opinions, and entities,  
2           organizations that deal with this are accepting those  
3           opinions, that's good enough.

4           MR. BERKOWITZ:   Yes.

5           CHIEF JUDGE LIPPMAN:  Is that - - -

6           MR. BERKOWITZ:  In addition - - -

7           CHIEF JUDGE LIPPMAN:  - - - fair?

8           MR. BERKOWITZ:  - - - if this court is  
9           looking for a standard, I think it's really very  
10          simple, that if there's - - - and in some of the  
11          cases, even from the Appellate Division First  
12          Department - - - first of all, they're saying we  
13          never said never, and they're not saying you have an  
14          absolute right to a trial.  And there was one recent  
15          decision posted here where the person didn't even  
16          prove there was mold there, didn't even prove that  
17          the person was ill.  And it seems very simple, if  
18          there's mold or toxic substances in an apartment and  
19          there is exposure and there's illness, you're  
20          entitled to go - - -

21          JUDGE SMITH:  In any - - -

22          MR. BERKOWITZ:  - - - to a jury to prove  
23          that that's why I have - - -

24          JUDGE SMITH:  Any illness?

25          MR. BERKOWITZ:  - - - that illness.

1 JUDGE SMITH: Any illness?

2 MR. BERKOWITZ: Yes.

3 JUDGE SMITH: So for example,  
4 disorientation is known to be caused by mold?

5 MR. BERKOWITZ: Yeah, well - - -

6 JUDGE SMITH: I mean, has any - - -

7 MR. BERKOWITZ: - - - it could be.

8 JUDGE SMITH: Is there a study that shows  
9 that?

10 MR. BERKOWITZ: All the studies show the  
11 various - - - all of them, Judge, show the various  
12 symptoms that people have. People have headaches.  
13 They have rashes. They don't know why they feel  
14 sick.

15 JUDGE SMITH: I see - - - I understand  
16 about headaches and rashes, although I'm not so sure  
17 that they show that in - - - in nonallergic people.  
18 And they also show transient irritation. But I'm - -  
19 - I'm looking, and I really am not averse to finding,  
20 if you've got 'em, evidence that the things she's  
21 complaining about: disorientation, dizziness,  
22 enduring symptoms that don't go away when you leave,  
23 that those have been known to even be in association  
24 - - -

25 MR. BERKOWITZ: This is a unique case - - -

1 JUDGE SMITH: - - - even to be in  
2 association with mold.

3 MR. BERKOWITZ: Judge, this is a unique  
4 case, because a lot of cases, if you move out of the  
5 apartment, you get better.

6 JUDGE SMITH: If this is a - - -

7 MR. BERKOWITZ: And the reason why I wanted  
8 to list - - -

9 JUDGE SMITH: If this is a unique case,  
10 then maybe it suggests that this is not a  
11 scientifically valid causation. If she's the only  
12 person who ever got better - - - didn't get better by  
13 moving out, then maybe it ain't the mold.

14 MR. BERKOWITZ: I don't - - - well, it's  
15 more than just mold. That's like saying she was hit  
16 with a barrage of a dozen different bad things that  
17 no one ever said that lead or arsenic or - - -

18 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -

19 JUDGE RIVERA: But doesn't that - - -

20 MR. BERKOWITZ: - - - Stachybotrys is good  
21 for you.

22 JUDGE RIVERA: Doesn't that create the  
23 causation problem for you, or one of them?

24 MR. BERKOWITZ: She was fine before that.  
25 She used to ride a bicycle 100 miles a week.

1                   JUDGE RIVERA: So it could be one of the  
2 other toxic substances, no?

3                   MR. BERKOWITZ: Well, you know what, Judge,  
4 I have no problem with them saying, oh, she was  
5 predisposed or she - - - it wasn't because of that,  
6 it was because she had pneumonia. That's a fair  
7 argument to make before a jury. But their argument  
8 is, is that somehow this is novel since she's  
9 agreeing it's not junk science - - -

10                  JUDGE GRAFFEO: I just have a question - -  
11 -

12                  MR. BERKOWITZ: - - - and I shouldn't even  
13 have a shot - - -

14                  JUDGE GRAFFEO: Can I - - -

15                  MR. BERKOWITZ: - - - at proving my case.

16                  JUDGE GRAFFEO: Can I - - - I just want to  
17 take you back a couple of steps here. I have a  
18 question on timing.

19                  MR. BERKOWITZ: Yes.

20                  JUDGE GRAFFEO: If after the proof that was  
21 presented at Supreme Court, down the road, there's  
22 different studies that come out, are we - - - is it  
23 appropriate for us to consider the more recent  
24 studies, or are we limited by what was presented on  
25 the record here?

1 MR. BERKOWITZ: Your Honor, they're asking  
2 this court to say - - -

3 JUDGE GRAFFEO: Well, can you answer my  
4 question?

5 MR. BERKOWITZ: Yes, you should - - -

6 JUDGE GRAFFEO: Are we - - -

7 MR. BERKOWITZ: - - - apply - - - if  
8 something came out yesterday, I think you should  
9 consider that, because they're trying to claim that  
10 this is - - - these studies do not happen easily.

11 JUDGE SMITH: We can - - - you're saying we  
12 can reverse the Appellate Division or we - - - or we  
13 could - - - or the Appellate Division can properly  
14 reverse Supreme Court on the basis of a study that  
15 Supreme Court didn't have in front of it?

16 MR. BERKOWITZ: First of all, the record  
17 before the - - - in the - - - before the Appellate  
18 Division - - -

19 JUDGE SMITH: Well, can you try - - -

20 MR. BERKOWITZ: - - - had studies which - -  
21 -

22 JUDGE SMITH: - - - answering that one?

23 MR. BERKOWITZ: The answer is it's an  
24 evolving study.

25 JUDGE SMITH: Are you saying - - -

1 MR. BERKOWITZ: And - - -

2 JUDGE SMITH: Are you saying yes or no to  
3 my question?

4 MR. BERKOWITZ: Yes.

5 JUDGE SMITH: Okay.

6 MR. BERKOWITZ: That if the issue is  
7 whether this is novel or junk science, well,  
8 scientists are working all over the world to show the  
9 connection. They can't - - -

10 JUDGE SMITH: I mean, I - - -

11 MR. BERKOWITZ: - - - administer the bad  
12 stuff to the - - -

13 JUDGE SMITH: You're making a legitimate  
14 point, obviously, that if - - - if it's discovered  
15 yesterday, and scientists generally recognize that, I  
16 don't know, lead in pencils causes cancer, then it  
17 seems ridiculous for a court to hold that it doesn't.  
18 On the other hand, is it really fair to decide a case  
19 based on something that wasn't before the court  
20 before and your adversary had no chance to make - - -

21 MR. BERKOWITZ: Yes, it's fair, because all  
22 we're asking and all the Appellate Division said is  
23 I'm entitled to a trial. I didn't move for summary  
24 judgment - - -

25 JUDGE SMITH: That - - - in every summary

1 judgment case we get, denial of summary judgment  
2 means you get to go to trial. Sometimes summary  
3 judgment does get granted, you know?

4 MR. BERKOWITZ: I understand that. But  
5 they're trying to say we're not saying it's junk  
6 science, but it's really - - -

7 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

8 MR. BERKOWITZ: - - - flaky - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. BERKOWITZ: - - - or novel - - -

11 CHIEF JUDGE LIPPMAN: Thank you, counsel.

12 MR. BERKOWITZ: - - - which we're saying it  
13 isn't.

14 CHIEF JUDGE LIPPMAN: Appreciate it.

15 MR. BERKOWITZ: Thank you very much.

16 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

17 What about the last question that Judge Smith has  
18 been asking? Tomorrow, today, yesterday, we find  
19 out, even in your mind, conclusively, one hundred  
20 percent, a mold causes whatever; can we address that  
21 here?

22 MS. JAYNE: I don't think this is the  
23 proper forum, Your Honor. When you're dealing with  
24 the concept of general acceptance and you're going to  
25 hang your hat on one study - - -

1 CHIEF JUDGE LIPPMAN: No, no, let's say  
2 it's a study that everyone in the world recognizes is  
3 the right - - - is the right conclusion; can - - -  
4 then what do we do? What do we do?

5 MS. JAYNE: I hesitate to say; I would  
6 almost suggest that it has to be remanded for - - -  
7 for the actual Frye hearing down the road.

8 JUDGE PIGOTT: Well, I would assume one of  
9 you two, whoever prevailed in this new study, would  
10 be bringing a motion somewhere very quickly saying  
11 that's - - - that's what happened.

12 MS. JAYNE: Right, but I still think you  
13 need the opportunity to present the expert evidence  
14 to - - - because then it's the court taking these  
15 studies at face value - - -

16 CHIEF JUDGE LIPPMAN: You would hold - - -

17 MS. JAYNE: - - - without any explanation.

18 CHIEF JUDGE LIPPMAN: - - - a new Frye hear  
19 - - - you would hold a new Frye hearing if that was  
20 the - - - if - - - if - - - underlined if.

21 MS. JAYNE: If you're saying that there is  
22 evidence of general acceptance, I would say - - -

23 JUDGE SMITH: If the - - -

24 MS. JAYNE: - - - this is not the forum; I  
25 can't present my expert.

1                   JUDGE SMITH:  If the science has  
2 significantly changed since the Frye hearing, the  
3 remedy is a new Frye hearing; it's not for us to try  
4 to improve on the one that we had?

5                   MS. JAYNE:  No, not on this particular  
6 issue, because it's so heavily based on science,  
7 which requires, almost, the experts to be able to  
8 testify and discuss whether these studies are  
9 relevant, whether they apply.

10                  JUDGE PIGOTT:  Doesn't that get you back to  
11 the fact question?  Let me give you an example of  
12 thalidomide, all right?  Thalidomide was a morning -  
13 - - you know, a morning sickness thing that was  
14 great.  Europe loved it.  You know, it's all over the  
15 place.  And one scientist in our FDA said I'm not  
16 sure this is true.  Now, if there had been a lawsuit  
17 at that point, they'd say, look, she's a low-level  
18 scientist in the FDA; we've got experts all over  
19 Europe that say this is helping young mothers to a  
20 great degree.  Now, obviously, the science changed.  
21 But the fact that the scientist reached her  
22 conclusion on one way, and the European scientists  
23 reach theirs in another way, does not mean that under  
24 a Frye hearing one of them has to fall.  It - - - it  
25 comes down to a question of your - - of your analysis

1 and the facts you reach from them, which is what  
2 you're saying. You're just saying everything this  
3 doctor says is fine but it doesn't get to the  
4 conclusion you want.

5 MS. JAYNE: Not if he doesn't have the  
6 support in the record to establish general acceptance  
7 of what he's saying, no.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MS. JAYNE: Okay.

10 CHIEF JUDGE LIPPMAN: Thank you both.

11 MS. JAYNE: Thank you, Your Honors.

12 CHIEF JUDGE LIPPMAN: Appreciate it.

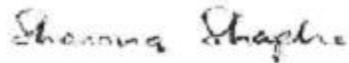
13 (Court is adjourned)

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 Brenda Cornell v. 360 West 51st Street Realty, LLC, et al., No. 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

AAERT Certified Electronic Transcriber (CET\*\*D-492)

Agency Name: eScribers

Address of Agency: 700 West 192nd Street

Suite # 607

New York, NY 10040

Date: January 23, 2014