

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

MATTER OF NEW YORK CITY ASBESTOS
LITIGATION - JUNI V. A.O. SMITH WATER
PRODUCTS

No. 123

20 Eagle Street
Albany, New York
October 16, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

ALANI GOLANSKI, ESQ.
WEITZ & LUXENBERG, P.C.
Attorney for Appellant
700 Broadway
New York, NY 10003

J. TRACY WALKER, IV, ESQ.
MCGUIREWOODS LLP
Attorney for Respondent
F800 East Canal Street
Richmond, VA 23219

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Okay. The next appeal on
2 this afternoon's calendar is appeal number 123, the Matter
3 of New York City Asbestos Litigation - Juni v. A.O. Smith
4 Water Products.

5 Good afternoon, counsel.

6 MR. GOLANSKI: Good afternoon. Thank you, Your
7 Honor. May I reserve two minutes, please?

8 CHIEF JUDGE DIFIORE: How many?

9 MR. GOLANSKI: Two minutes, please.

10 CHIEF JUDGE DIFIORE: Two, yes, you may.

11 MR. GOLANSKI: Thank you, Your Honor. Each - - -
12 each workday for twenty-five years Mr. Juni went to the
13 municipal garages - - -

14 JUDGE STEIN: Before you get into the whole
15 history, can - - - I just want to clarify something up
16 front, and I'll ask your adversary the same thing. Is
17 either party seriously arguing that we should apply a
18 different standard from the standard that we've set in
19 Parker and Cornell and Sean R. in asbestos cases? In other
20 words, either an easier standard or a more difficult
21 standard? Any change at all from our established standard,
22 or are we just really applying that established standard to
23 the proof in this case?

24 MR. GOLANSKI: We're totally applying the
25 established standard from Parker, Cornell, and Sean R. to



1 the proofs in this case. Parker was issued approximately
2 eight years prior to this case going to trial. The
3 plaintiffs had years and years to study the exact language
4 in Parker and to - - - and to understand whether their case
5 complied with and addressed the indicia of scientific
6 expression in Parker and then - - - and then later in
7 Cornell. Parker, 7 N.Y.3d, look at page 446. One of the
8 scientific indicia is whether other causes of the disease
9 have been eliminated. In this case, the trial court in its
10 own opinion said repeatedly that asbestos is the only known
11 cause, at least, you know, for litigation purposes but also
12 in the scientific community of Mr. Juni's disease,
13 mesothelioma.

14 JUDGE STEIN: Well, isn't one of the - - - isn't
15 one of the particular problems in this case is that there
16 were a number of defendants, there were a - - - well, and -
17 - - and Juni, as you started to say, did a number of
18 different things. And so what we're left with in this case
19 is what proof there is that Ford's products caused Mr.
20 Juni's illness?

21 MR. GOLANSKI: Each day for twenty-five years Mr.
22 Juni went to work and he worked on a fleet of 500 Ford
23 vehicles, all the products during that twenty-five-year
24 period with minimal exception were Ford products. The
25 products during that twenty-five-year period, the few that



1 were not - - -

2 JUDGE STEIN: But the vehicles were Ford
3 vehicles.

4 MR. GOLANSKI: Yes.

5 JUDGE STEIN: But the products, weren't there
6 replacement products and - - -

7 MR. GOLANSKI: On, no, Your Honor. The - - - the
8 trial judge eliminated those from the - - - from the
9 equation at the outset. This isn't that kind of a case.
10 All the - - - all the products sent to the jury were - - -
11 were products installed by Ford, Ford brakes, Ford
12 clutches, and non-Ford gaskets that were installed by Ford
13 and that Mr. Juni then removed. In the - - - you know,
14 creating tremendous dust clouds of asbestos.

15 JUDGE STEIN: So we're limiting - - - the proof
16 here is limited to the original parts in those vehicles?

17 MR. GOLANSKI: No, the - - - all the - - - the
18 new brakes and the used brakes were Ford - - - Ford
19 equipment in this - - - in this case. The new and used
20 clutches testified to were Ford - - - Ford products. There
21 was no decision in this case either at the trial court in
22 the Appellate Division that what we're dealing with here
23 are non-Ford products. The trial court's decision was
24 that, yes, you had all of this dust generated - - -

25 JUDGE STEIN: Yeah, I'm sorry.



1 MR. GOLANSKI: Yes.

2 JUDGE STEIN: I just - - - I just need to clarify
3 this. You're agreeing then that that has to be established
4 that it was Ford products that caused - - -

5 MR. GOLANSKI: There was no dispute that what we
6 were talking about during the case was products for which
7 Ford was responsible.

8 JUDGE STEIN: Okay. But that - - - but you're
9 not saying that that's all that Mr. Juni worked with in the
10 course of his employment, are you?

11 MR. GOLANSKI: No, I wouldn't say that. He
12 worked with some other products but - - -

13 JUDGE STEIN: Okay. That's - - - that's my point
14 is don't we have to ascertain in all the years that he
15 worked and in all the capacities that he worked and in all
16 the different facilities in - - - that he worked in, how
17 much of his total exposure to asbestos came from those Ford
18 parts? Isn't that one of the questions that we - - - that
19 we have to answer?

20 MR. GOLANSKI: No, Your Honor, because if you
21 have some idea of a total exposure to asbestos what you
22 have is a concurrent causation case, and - - - and you can
23 have - - - you know, this is actually one of the easiest
24 cases possible in the asbestos litigation in terms of
25 assigning responsibility for different manufacturers of



1 asbestos because usually you have - - - let's say an
2 individual who's been exposed to twenty different asbestos-
3 containing manufactured products. And here, all the
4 clutches that were used, all the brakes that were used, and
5 all the gaskets that were used were installed by Ford.
6 That's undisputed in the record.

7 JUDGE FAHEY: Well, at the core, though, isn't -
8 - - isn't the question for us is - - - is quantifiability?
9 How quantifiable does the specific causation have to be in
10 this case for us to say that Ford - - - of all these other
11 users that - - - or all these other possible exposures that
12 the plaintiff could have had, there's specific causation as
13 to Ford. And so if that's the case, if - - - if you can't
14 give a percentage - - - which you could never give in any
15 asbestos case ever for exposure, that would be impossible
16 for any party to be able to do that - - - then you really -
17 - - then you're really looking at the science as to how the
18 disease is generated, how much exposure causes disease.
19 Let me ask this, is there any quantifiable safe level of
20 exposure to asbestos in the proof that you offered in this
21 case by either side? In other words, someone said this
22 much exposure to asbestos is safe and anything below this
23 isn't safe?

24 MR. GOLANSKI: No, Your Honor. However, there's
25 a regulatory standard issued by OSHA which is a 0.1



1 standard. So if the exposure in this case were shown by
2 industrial hygiene studies, for instance, in - - - in this
3 sort of work to be below 0.1 then that would be an issue,
4 and we'd have to say, well, you know, there's no safe
5 exposure. But here we're talking about - - - the Mount
6 Sinai's study's compressed air blowout generated asbestos
7 concentrations of 300 times the OSHA level. The NIOSH
8 studies generated - - -

9 JUDGE FAHEY: Right. Let's not - - - let's not
10 go into the - - - into the twenty-two different
11 epidemiological studies right now. I just want to - - -

12 MR. GOLANSKI: I wasn't. That's a different
13 issue.

14 JUDGE FAHEY: I want to stay focused on - - - on
15 this issue, though.

16 MR. GOLANSKI: Yes.

17 JUDGE FAHEY: So in my review of the record there
18 was one expert for the - - - for the defendant that
19 referred to a quantifiable level I believe, but it was
20 mentioned in Judge Feinman's dissent. That was the only
21 reference I saw in the record to it outside of the
22 testimony itself. So assuming there's no quantifiable
23 level of a safe exposure to asbestos then - - - and we
24 can't identify what it is then we're left with purely
25 anecdotal evidence. The anecdotal evidence was the time he



1 spent working on it. And - - - and are we left then with
2 the theory that visible dust constitutes significant - - -
3 direct proof of causation by exposure?

4 MR. GOLANSKI: No, Your Honor. There's a - - -
5 there's a ton of quantitative evidence in the record. One
6 of the indicia of scientific expression in Parker, for
7 instance, is comparison to exposures in similar studies,
8 and the similar studies were - - - as I was saying, the
9 Mount Sinai studies showing that exactly what this
10 plaintiff did, compressed air blowout, generated as
11 stipulated levels in the air blowout generated as
12 stipulated levels in the air 300 times the OSHA level.
13 There were the city NIOSH studies without compressed air
14 showing that it was two to three times the regulatory
15 level. Ford's own documents were massive. They showed
16 that beveling linings, what this - - - which Mr. Juni did
17 on Ford linings from Ford vehicles generated exposure
18 levels of seventy-two fibers per cc which is 720 times
19 above OSHA, and that means that in - - - in Mr. Juni's
20 cubic centimeter - - - cubic meter of workspace, he was
21 exposed to seventy-million fibers per cubic meter. And
22 this is every day - - -

23 JUDGE WILSON: So I understood the - - -

24 MR. GOLANSKI: Yes.

25 JUDGE WILSON: I understood the defense here to



1 be a little bit different than it is in a standard asbestos
2 case, that the defense here really was through the experts
3 that the asbestos in the brake products have been
4 essentially encased in resin, subjected to very high
5 temperatures, and then high temperatures again not in the
6 manufacturing but in the use of the brakes that for
7 simplification purposes essentially rendered almost all of
8 it not the kind of asbestos that is reported in the other
9 studies that demonstrate a causal link between as asbestos
10 inhalation and mesothelioma and that - - - that you may
11 have needed one more expert, not an - - - not an MD but
12 some sort of a researcher to say - - - to rebut the
13 evidence that these fibers are now so small that they are
14 easily dissolved or they've been converted to the
15 forsterite - - -

16 MR. GOLANSKI: Forsterite.

17 JUDGE WILSON: Forsterite.

18 MR. GOLANSKI: Yes.

19 JUDGE WILSON: That is there a missing piece of
20 proof in this case regarding that defense?

21 MR. GOLANSKI: No, Your Honor. First of all,
22 this forsterite issue goes to the use under high heat of
23 brakes, used brakes. There were also new brakes, beveling
24 of new Ford brakes, beveling, sanding, grinding of new Ford
25 brakes which generated asbestos levels in the air hundreds



1 and hundreds of times above the OSHA level, so that has
2 nothing to do with the used brakes. There are clutches,
3 new clutches and used clutches which has nothing to do with
4 the forsterite issue, and then there are all the gaskets
5 coming out of Ford vehicles that Ford installed for which
6 Ford is responsible.

7 JUDGE FAHEY: I thought there was proof that - -
8 - that some asbestos didn't actually convert even - - -
9 even though it was part of the brakes?

10 MR. GOLANSKI: Yes, and then we go to the used
11 brakes itself - - -

12 JUDGE FAHEY: Yeah.

13 MR. GOLANSKI: - - - the level shown through
14 electron microscopy was thirty-five - - - thirty percent of
15 the asbestos still remained in the used - - - in the used
16 brakes. But even if it was one to three percent asbestos,
17 it's kind of a red herring of an issue because the
18 industrial hygiene study showed repeatedly that what the
19 brake worker is actually exposed to are levels of asbestos
20 fibers in the air hundreds of times above the regulatory
21 limit.

22 Now I understand that for instance in Parker you
23 say that the regulatory standards are not proof of
24 causation, and there's no dispute about that. However,
25 regulatory standards and violation of regulatory standards



1 several hundred times above the standard goes to the - - -
2 the viability of the foundation, the creation of the
3 foundation for the - - - for the opinion. Visible dust,
4 that issue is a separate issue that parallels what happened
5 in Sean R. where this court in Sean R. said that sensory
6 thresholds are a viable alternative. They're a proxy to
7 actual impossible-to-do precise measurements. And so if
8 you've shown through your expert testimony that exposure to
9 a sensory threshold puts you over the regulatory limit and
10 exposes you to a substantial risk of injury then you've
11 gone a long way toward establishing your foundation for the
12 causation.

13 JUDGE FAHEY: Judge, could I - - - could I - - -

14 CHIEF JUDGE DIFIORE: Yes.

15 JUDGE FAHEY: - - - ask one question?

16 CHIEF JUDGE DIFIORE: Yes.

17 JUDGE FAHEY: I know - - - I know we're over.

18 MR. GOLANSKI: Yes, Your Honor.

19 JUDGE FAHEY: One of the issues that comes up is
20 the standard of review by which we're to look at the jury
21 verdict here. There's been some argument that the abuse of
22 discretion standard I believe the defendant has argued
23 should apply here. And the other side of the coin is that
24 the 4404 standard should apply. You want to address that?

25 MR. GOLANSKI: Well, this is a sufficiency case.



1 The question is, the - - - the standard is whether the
2 jury's verdict was utterly irrational. That's the standard
3 here. The Appellate Division looked at that standard,
4 accepted it, and did I think a de novo review. There was
5 not one word of either abuse or discretion in the Appellate
6 Division's decision. If you use an abuse of discretion
7 decision and go back to the trial court's issue, there's no
8 question that the trial court did abuse its discretion.
9 The - - - the crux of that trial court decision was that
10 there is no sufficient evidence of any exposure to asbestos
11 in - - - in any of the dust over that twenty-five-year
12 period.

13 Now therefore, the trial court's theory of the
14 case and Ford's theory of the case is that cumulative
15 exposures that Mr. Juni sustained during the few summers
16 prior to working on the Ford vehicles during those few
17 summers walking through the power plant, not even working
18 with products but walking through the power plant, those
19 cumulative exposures were the sole cause of his
20 mesothelioma. That is an incredible theory that no
21 mainstream scientist, no physician in the world would - - -
22 would ascribe to.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. GOLANSKI: Thank you, Your Honor.

25 CHIEF JUDGE DIFIORE: Counsel.



1 MR. WALKER: May it please the court, Tracy
2 Walker on behalf of Ford Motor Company. Going to Judge
3 Stein's question first, it is Ford's position absolutely
4 that the Parker causation standard for toxic tort cases, as
5 further articulated in Cornell, absolutely applies here.
6 And - - - and the Junis did not meet that standard as the
7 courts below held. You - - - you asked the question about
8 what his exposure was, and there - - - there are really two
9 separate times when he was exposed to products. While he
10 was working as a garage mechanic, the testimony from Mr.
11 Juni was that the replacement parts that were purchased
12 included Raybestos parts, Bendix parts, Kelsey-Hayes parts,
13 and other parts, and he could not recall when they were
14 using actual Ford original equipment parts. Now if a
15 vehicle is a Ford vehicle and it comes in for the first
16 time for servicing then the first time it will have Ford
17 parts, but then you put in a different brand parts, it's no
18 longer Ford. And he could not recall the Ford exposure.

19 JUDGE STEIN: So how - - - how would he prove
20 that? How would he - - - how would he or his expert or
21 somebody prove what the extent of his working with Ford
22 parts was this many years later?

23 MR. WALKER: He may or may not be able to prove
24 it. In some cases, a plaintiff will have very specific
25 recall of what he did or did not or she did or did not work



1 with. And - - -

2 JUDGE FAHEY: Well, but isn't that really a
3 question of the quality of proof? I mean he did testify
4 that he worked with Ford parts, and he described the
5 process and talked about scraping the gaskets out and doing
6 all those things. That's exposure. It's a question of
7 really the quality of proof which seems to be a jury
8 question.

9 MR. WALKER: It's a fundamental foundational
10 question for the experts to render a causation opinion
11 under - - -

12 JUDGE FAHEY: Right, and - - -

13 MR. WALKER: - - - Parker.

14 JUDGE FAHEY: - - - so unless - - - unless
15 there's a quantifiable level that's below which he would be
16 safe, then if you show a pattern of repeated exposure then
17 it really comes down to how good was this proof to show
18 that pattern of repeated exposure over a period of time?

19 MR. WALKER: Well, it - - - it's not so much how
20 good his proof was. It's whether he supplied enough
21 information that his expert witnesses then could rely on to
22 come up with a reliable opinion - - -

23 JUDGE STEIN: Well, could they have gone to
24 Orange & Rockland, for example, and said do you - - - we
25 want discovery and we'd like your records on what - - - how



1 - - - what percentage of the parts that you ordered were
2 Ford parts and what percentage were from other
3 manufacturers? Is that something that would satisfy
4 Parker's foundational requirements?

5 MR. WALKER: That - - - that very well could.
6 This case is dependent on the facts. I mean there's - - -

7 JUDGE STEIN: No, I understand. I - - -

8 MR. WALKER: You know, there's the suggestion
9 that Ford and the courts below would put a lock on the
10 courthouse doors for mesothelioma plaintiffs, but you have
11 to take each case on the record that's available. And yes,
12 in some cases people do go and - - -

13 JUDGE STEIN: Well, would - - - but we have to be
14 sure that there - - - that there is a way - - - there is a
15 theoretical way - - -

16 MR. WALKER: And - - - yes.

17 JUDGE STEIN: - - - that we're not putting that
18 lock on the courthouse door.

19 MR. WALKER: And people do go gather those sorts
20 of records, and they get much more detailed testimony so
21 that they can do estimates of exposure. For example, I
22 read a case that wasn't from this jurisdiction cited by the
23 plaintiffs, the Rost case, and I was just struck again,
24 very detailed testimony about how often the plaintiff and
25 how much he swept each day, how many scoopfuls of this,



1 that, and the other. And here - - -

2 JUDGE RIVERA: Are you saying that's the minimum
3 threshold of evidence?

4 MR. WALKER: The minimum threshold is some - - -
5 from Parker is some scientific expression, and there is no
6 science behind the notion that exposure to visible dust,
7 which Dr. Markowitz said was a shortcut - - - a shortcut is
8 not science. That is - - - there's no scientific study out
9 there that says that all you need to do to show causation
10 is to show exposure to visible dust or any product.

11 JUDGE RIVERA: Has that methodology been rejected
12 by the scientific community?

13 MR. WALKER: Yes, the scientific community
14 through the great - - - they - - - they keep doing more and
15 more refined epidemiological studies. If - - - if this was
16 just an open and shut case that you just have to be exposed
17 to dust then the scientific community wouldn't be out there
18 studying the heck out of it to try to truly understand.
19 And to answer your question, Judge, there is - - -

20 JUDGE FAHEY: Well, it - - -

21 MR. WALKER: - - - a safe level.

22 JUDGE FAHEY: That's - - - it's not exposure to
23 dust. It's visible dust that's generated in the course of
24 working with asbestos products. I thought that was the
25 proof.



1 MR. WALKER: There - - - there was no description
2 from Mr. Juni, if you read his testimony in its entirety,
3 describing any amount of dust other than I saw dust. In
4 many of these other cases you see descriptions of clouds,
5 of visible - - -

6 JUDGE STEIN: Well, he described it when he used
7 to walk through the garage and - - -

8 MR. GOLANSKI: That - - - no, that was in the
9 power plant.

10 JUDGE STEIN: In the power plant.

11 MR. WALKER: When he was exposed to the amosite
12 asbestos from the insulation in the power plant.

13 JUDGE STEIN: If he had just made - - - used that
14 same description for working in the garage on Ford products
15 would that have been enough?

16 MR. WALKER: I don't know that that would have
17 been enough, but it would have advanced the ball in the
18 direction of having some qualification.

19 JUDGE RIVERA: I guess I'm not understanding this
20 argument. He's saying I - - - I worked on these products.
21 These products have asbestos, and when I worked on them it
22 created dust. Some of it fell on the floor. Some of it I
23 swept up. So it's all around me - - -

24 MR. WALKER: He - - - he didn't say it was all
25 around him, Your Honor.



1 JUDGE RIVERA: But the - - - it's dust. I mean
2 there are certain things you - - - you take from that
3 testimony, no?

4 MR. WALKER: Well, I - - - I guess from my
5 position, yeah, you have to take inferences that aren't
6 available in science to just say there's dust because dust
7 can mean a different thing to - - - if you ask a hundred
8 scientists what is dust you'd probably get a hundred
9 different answers. It - - - it does not meet the Parker
10 standard of a scientific expression.

11 JUDGE RIVERA: You mean - - - you mean there's
12 dust and then there's asbestos dust?

13 MR. WALKER: No, I - - -

14 JUDGE RIVERA: Is that what you're trying to say?

15 MR. WALKER: Putting - - - putting aside asbestos
16 just - - -

17 JUDGE RIVERA: Well, no, that's what we're
18 talking about here, right?

19 MR. WALKER: Well, I - - - the example I was
20 saying is there is - - - okay. There - - - the dust in
21 question the plaintiff's expert said the - - - the
22 overwhelming number of studies said was ninety-nine percent
23 not asbestos dust. It was dust and road grime and all
24 sorts of other things but asbestos, but there was no
25 quantification of how much dust. In other cases there are



1 descriptions of billowing dust, of dust on clothing, of
2 breathing it in - - -

3 JUDGE FAHEY: So here's the problem. Your
4 argument seems to say to me that quantification down to
5 some form of a number is necessary because - - -

6 MR. WALKER: Absolutely.

7 JUDGE FAHEY: Let me finish.

8 MR. WALKER: Okay. Yeah.

9 JUDGE FAHEY: And you - - - you can respond to
10 it.

11 MR. WALKER: Yes, sir.

12 JUDGE FAHEY: Just the reason is is because the
13 way I understand the argument - - - you can correct me if
14 I'm wrong - - - is that visible dust is - - - is seen.
15 He's - - - the guy is working on brakes. He's working on
16 all these other products that do have some asbestos in it.
17 There's visible dust. He's - - - he's - - - and he says he
18 walks through it and he's walking through it or that when
19 he's working in the garage it was generated in the course
20 of his work. You're saying that that has to be
21 quantifiable ninety-nine percent isn't true.

22 Of course, asbestos can be - - - can - - -
23 exposure to one percent can - - - can result in that. And
24 since the only known source of mesothelioma is asbestos, he
25 - - - clearly, it's a question of where the exposure took



1 place. That's the core of your argument. Does that
2 exposure to visible dust that must have contained asbestos
3 in it in some form, is that required to be quantified?
4 Must we know to establish specific causation a number to be
5 able to quantify what percentage of that dust or what
6 percentage of that dust he was exposed to to establish
7 specific causation?

8 MR. WALKER: Your Honor, I apologize for
9 interrupting. I didn't mean - - -

10 JUDGE FAHEY: No, don't - - - don't worry about
11 that.

12 MR. WALKER: Let me - - - let me answer - - -

13 JUDGE FAHEY: It's much worse many other - - -
14 it's much worse many other times.

15 MR. WALKER: Let me answer directly - - -

16 JUDGE FAHEY: Yeah.

17 MR. WALKER: - - - but then there's a very
18 specific explanation I want to give. There does not need
19 to be a numerical quantification. You can compare it to
20 some other things where there is an amount known to cause a
21 disease, in this case mesothelioma. There - - - there are
22 two particular subtexts to your question, though, that
23 really bear explanation.

24 The first is this gentleman did have other
25 exposures in a power plant prior to coming here. We don't



1 know what the effect of that was. There was testimony from
2 some that they thought that caused it, but Dr. Moline,
3 their expert witness, describing the very dust that we are
4 now talking about said she did not know whether the
5 asbestos debris that might have remained in that dust was
6 still biologically active, i.e., whether it had the
7 capability to cause mesothelioma.

8 Your question in a - - - in a sense assumes that
9 the dust must have been able to cause the disease, but the
10 - - - the very expert that they called said I can't say
11 whether it was still biologically active. How can they
12 have an expert witness to prove causation say I don't know?
13 It's like in the Parker case if the expert, Dr. Landrigan
14 in the Parker cases said I don't know if this particular
15 gasoline that Mr. Parker was exposed to still had benzene
16 in it because that was what caused the leukemia. And if -
17 - - if the expert there didn't even know if the benzene was
18 still present, that's what we get in this case on these
19 facts from their expert. The second point, Judge, is you
20 asked whether there is a known safe level. Parker and
21 Cornell do say - - -

22 JUDGE FAHEY: Well, I actually asked was there a
23 safe level.

24 MR. WALKER: Right.

25 JUDGE FAHEY: You know, how much exposure to



1 asbestos can you have and still not get mesothelioma?

2 MR. WALKER: There is an answer to that, but the
3 law first. Parker and Cornell both say that it is
4 incumbent on the plaintiff to - - - to show what is the
5 level and to show that your - - - your exposure is above
6 that level. The experts, all four of the experts I
7 believe, testified that there is a safe level, and that is
8 the background level. We all - - - they testified in - - -
9 to numbers of fibers. You've heard billions and millions.
10 There was testimony that we all have billions over our
11 lifetime fibers of asbestos in our lungs in our lifetime
12 that at any given time if you were to do a lung examination
13 of a person off the street they would have millions of
14 fibers. And the testimony was that at those levels it is
15 not known to cause mesothelioma.

16 So it's at some level above that, and they have
17 to then say, okay, well, what does the science show? If he
18 was in this garage working and he had an exposure that you
19 would get in a garage, are there studies that show people
20 working in garages are getting mesothelioma from those
21 types of exposures? And they didn't bring forth any such
22 study. I'm not going to go to the - - - to the
23 epidemiology that pointed the other way which came out - -
24 -

25 JUDGE STEIN: What about Roloff's study, though?



1 MR. WALKER: The Roloff study had a specific
2 disclaimer at pages 5 and 6 - - - it did find an increased
3 risk for brake workers, but then the authors of that study
4 put a big disclaimer and said we don't know if this
5 resulted from their exposure from that occupation or from
6 some prior occupation.

7 JUDGE STEIN: Doesn't that go to the weight then
8 of their - - - of their study rather than whether it's
9 sufficient to - - - to show a foundation? In other words,
10 isn't that a - - - isn't that a - - -

11 MR. WALKER: Well - - -

12 JUDGE STEIN: - - - jury question?

13 MR. WALKER: I don't think it could be when the -
14 - - when the very - - - the authors of the study say it
15 doesn't stand for this proposition. But interestingly, Dr.
16 Markowitz didn't rely on the Roloff study for his
17 foundation. He said that we know that chrysotile asbestos
18 at some level can cause mesothelioma, and then he inferred
19 down and said, well, then the one percent debris that may
20 be in brake and clutch dust can cause it. He didn't - - -
21 he talked - - - I'll finish up. I see the red light is on.
22 We talked about the OSHA standards. There was no study
23 that showed that exposure to asbestos at the OSHA
24 standards, which were prophylactic meant to prevent a lot
25 of diseases - - -



1 JUDGE RIVERA: What about your internal memos?

2 MR. WALKER: The internal memos never talked
3 about causation of mesothelioma. They simply took the
4 workplace safety rules and advocated them out to the Ford
5 internal community and said we should abide by these safety
6 rules. There is a discussion about whether it's dangerous.
7 But the internal memos were not a statement by Ford around
8 - - - around causation. And - - - and there simply - - -

9 JUDGE FAHEY: I had thought those documents said
10 that Ford was aware of air samples that show that workers
11 who did brake and clutch repairs in particular were exposed
12 to a much greater risk of developing mesothelioma or
13 cancer?

14 MR. WALKER: I - - - I think if you read them
15 exactly, they do say that from the - - - the Mount Sinai
16 study that he referred to that the exposure levels were
17 higher than Ford initially thought, just counting the
18 fibers. But there was no connection then that that level
19 of exposure is known to cause mesothelioma. There is a
20 complete absence in the record of any scientific study that
21 shows that.

22 JUDGE FAHEY: I - - - I could be wrong because
23 you - - - God knows you know the record better than I do,
24 but I thought that the - - - the Ford documents actually
25 say that they recommended to their employees that they



1 stopped using compressed air and - - -

2 MR. WALKER: Oh, they did. Absolutely.

3 JUDGE FAHEY: Of course, and this is in the '70s.

4 MR. WALKER: Yes, sir.

5 JUDGE FAHEY: And this plaintiff was doing the
6 exact same thing 10, 15 years later.

7 MR. WALKER: Ford took the recommendations from
8 OSHA to stop using compressed air, to wear a mask, at some
9 point to use vacuums. Ford took the cautious approach, and
10 Ford did not put those warnings on its products. And
11 that's the crux of their case, but that is not an admission
12 by Ford that the product was causing the disease. Ford was
13 being prudent. Their position is Ford wasn't prudent
14 enough in extending that warning out to others.

15 JUDGE RIVERA: Did the jury draw some inference
16 from these internal memos?

17 MR. WALKER: Well, they were argued as - - -

18 JUDGE RIVERA: Not - - - not favorable to your
19 client obviously.

20 MR. WALKER: Yeah. Yeah, I believe they - - - it
21 was argued as though Ford had admitted that it knew that
22 its products cause mesothelioma, but again, that doesn't go
23 to the foundational element. Obviously, the jury returned
24 a verdict against Ford Motor Company and that's why we're
25 here with it - - - with it being taken away. If the court



1 has no further questions, thank you, Your Honor.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 Counsel

4 MR. GOLANSKI: Thank you, Your Honor. Mr. Juni
5 testified at appendix page 501 the asbestos dust was all
6 over the place. Dr. Markowitz relied on the Roloff study
7 contrary to what counsel said at appendix page 175 as part
8 of a scientific foundation. Dr. Selikoff in consultation
9 with Ford addressed their concerns to a number of asbestos-
10 related diseases, including mesothelioma. Politoff, Ford's
11 IH supervisor, went back to Ford and reported this. Ford
12 issued warnings to its own employees, but not to people
13 like Mr. Juni out in the field, well before - - - years and
14 decades before Mr. Juni ceased his exposures to Ford
15 products.

16 JUDGE RIVERA: Could you address his
17 representation that Dr. - - - I think he said Dr. Moline
18 didn't know if the dust was biologically active?

19 MR. GOLANSKI: Dr. Moline had - - - didn't have
20 personal knowledge. She wasn't in the - - - she wasn't in
21 the - - - in the municipal garages. She did not know what
22 the state of the asbestos materials was, and for that,
23 instead of having personal knowledge she testified that she
24 relied on studies of comparable work showing 160 times over
25 the regulatory limit, precisely the kind of work that Mr.



1 Juni was doing. So she had professional expertise
2 knowledge but not personal knowledge.

3 JUDGE RIVERA: And is - - - is that methodology
4 accepted in the scientific community?

5 MR. GOLANSKI: Yes, there is a scientist brief
6 that was submitted as an amici brief that fully shows that
7 - - - the bottom line is that there is no mainstream
8 scientist in the United States of anywhere in the world who
9 would look at Mr. Juni's occupational record and not
10 attribute his exposures to Ford-related materials as a
11 causal - - - as a cause of his mesothelioma. It just would
12 not happen in mainstream science. And the counter theory
13 that only his exposures occurring a few summers as he
14 walked through power plants is the only cause of his
15 mesothelioma would be abhorrent and have absolutely no
16 support in the scientific community.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MR. GOLANSKI: Thank you, Your Honor.

19 (Court is adjourned)

20

21

22

23

24

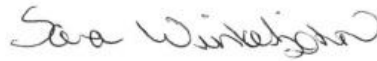
25



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, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York City Asbestos Litigation - Juni v. A.O. Smith Water Products, No. 123 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: October 22, 2018

