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COURT OF APPEALS

STATE OF NEW YORK

SEAN R. ,

Appellant ,

-against-

No. 3

BMW OF NORTH AMERICA, LLC ,

Respondent .

20 Eagle Street
Albany, New York 12207
January 04, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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Sara Winkeljohn
Official Court Transcriber

1 JUDGE PIGOTT: Case number 3, Shawn R.
2 versus BMW of North America.

3 MR. PHILLIPS: And, Your Honors, with your
4 permission I'd like to reserve six minutes and use
5 nine minutes for my initial comments.

6 JUDGE PIGOTT: Six minutes, yes, sir.

7 MR. PHILLIPS: May it please the court, I'm
8 here on behalf of the Reeps family. This case has
9 been extensively briefed and there are many reasons
10 why we believe reversal is called for. But given the
11 limited time for oral arguments, I'd like to focus on
12 two issues, if I might. Of course, if Your Honors
13 have questions on other issues, I know you won't be
14 shy or hesitate to let me know about it. But - - -

15 JUDGE RIVERA: Fewer, but no slower - - -

16 MR. PHILLIPS: Fair.

17 JUDGE RIVERA: - - - in questions.

18 MR. PHILLIPS: Fair enough. Thank you,
19 Judge Rivera.

20 Your Honors, the first question, which I
21 think is the central one, relates to the question of
22 exposure and whether or not there is in the record a
23 sufficient basis to conclude, under the Frye
24 standard, that both as a methodological and as a
25 factual matter, there was a showing of sufficient

1 exposure to comport with this court's ruling in the
2 Parker case. And I'd like to share with Your Honors,
3 when we filed this case, I was keenly aware,
4 practicing in this area, of the Parker holding; and
5 took pains, we thought, to comport with what Parker
6 required.

7 JUDGE STEIN: Can we talk about that for a
8 minute, because it seems to me that there is a - - -
9 that there's some melding of the issues of foundation
10 and methodology. In other words, Frye - - - I don't
11 know if you'd say Frye versus Parker, but do you
12 agree with me that those are two completely separate
13 inquiries?

14 MR. PHILLIPS: Your - - - Your Honor, the
15 case law generally says that they are separate
16 inquiry, and I can certainly cite to you New York
17 cases that say very directly that a Frye inquiry goes
18 to methodology and that the conclusion of the expert
19 is really a matter Constitutionally protected and
20 subject to cross-examination and jury determination,
21 because we understand that experts disagree.

22 JUDGE STEIN: So what - - - so what
23 happened here? There was a - - - there was a summary
24 judgment motion based on Parker, which was denied,
25 right, and then there was the Frye motion. Did - - -

1 was the foundational question revisited on the Frye
2 motion?

3 MR. PHILLIPS: Well, Your Honor, one of the
4 ways in which we felt that the trial court - - - that
5 the IAS court sort of went off the rails is that he
6 revisited an issue that had not only been resolved at
7 the trial level, but was also resolved at the
8 Appellate Division level. I don't - - -

9 JUDGE PIGOTT: I thought the - - - I
10 thought the defendants went out of their way to say
11 this is not a Frye issue when they were bringing
12 their summary judgment motion; said we're not
13 addressing that, we're addressing simply the - - -

14 MR. PHILLIPS: Well, Your Honor, saying it
15 and it being true are two different things. Because
16 if you look at the IAS record from the first round of
17 appeals, there are two things that are clear. The
18 first is that the trial court wisely - - - and I
19 think this was a good proceeding - - - on the
20 defendant's request, deferred the summary judgment
21 motion until after the 3101 disclosure. And when
22 they made the motion, it may not have been as
23 artfully made as all of that, but you will find that
24 there was a specific attack or challenge - - - and if
25 you look at the first round of - - - of appeal and -

1 - - and motion practice, Parker figured in that. The
2 Parker issue was raised, it was addressed, and it was
3 rejected, and correctly so.

4 JUDGE FAHEY: You know what I'm wondering,
5 though, is I - - - I don't say this casually, but in
6 this circumstance, what difference does it make? In
7 Parker, general causation, I think, was conceded,
8 specific causation wasn't; that's the way I read
9 that. In this case, general causation would be that
10 - - - would - - - would be that gasoline vapors can
11 cause the damages claimed here, general causation,
12 and that there's proof for that and that it's
13 generally accepted in the scientific community. And
14 general acceptance in the scientific community would
15 be the same as general causation.

16 So then the next step is reached no matter
17 what is, even if you haven't shown that, we'll give
18 you the benefit of the doubt on that, we still got to
19 go to the next level, assuming that it's generally
20 accepted - - - which I don't know if we can do that
21 here - - - we got to go to the level of specific
22 causation. And so the question becomes, at what
23 threshold levels does - - - do gasoline vapors cause
24 the damages alleged and has that been shown by
25 anybody.

1 MR. PHILLIPS: Your - - -

2 JUDGE FAHEY: So what I'm saying to you is,
3 does it matter if it's Frye or if it's Parker here in
4 this circumstance, and don't we still end up with the
5 question of specific causation no matter what?

6 MR. PHILLIPS: Your Honor has asked several
7 questions and - - -

8 JUDGE FAHEY: I understand. I understand,
9 and they're not simple questions.

10 MR. PHILLIPS: And - - - but - - - but I -
11 - - I welcome the opportunity to address them and it
12 may take me a minute or two to do so.

13 JUDGE FAHEY: That's up to Judge Pigott,
14 not to me.

15 JUDGE PIGOTT: Sally forth.

16 MR. PHILLIPS: Let me do my best. Your - -
17 - Your Honor, let me start by saying that in order
18 for us to prevail ultimately, of course we have to
19 establish exposure at a level sufficient to cause
20 this injury, and we have to do a bunch of other
21 specific causation things; all of which we've done, I
22 would suggest. And we're appealing here the
23 exclusion of experts in a setting, Your Honor, where
24 other experts were permitted to testify on specific
25 causation. So to put the - - - you know, we - - - we

1 need to have the whole picture here.

2 I - - - I would - - - and I want to state
3 this carefully; I would agree with Your Honor that
4 all of those things need to be addressed. Whether
5 they're before you on this appeal or not is a
6 different question. What's before you on this
7 appeal, I would suggest, is the exposure question,
8 strictly speaking, although I expect to address the
9 caus - - - the specific and general causation
10 question as well, or at least I hope to if time - - -
11 time permits. But the Appellate Division decision
12 departed from the IAS decision because it
13 acknowledged that general causation had been
14 addressed. It's not a very lengthy or illuminating
15 decision, but they - - - they do - - - they - - -
16 they do depart and they depart quite directly from
17 the IAS decision which challenges causation.

18 With respect to the exposure piece of this,
19 let me say this to Your Honor; the methodology of
20 symptom - - - because it's not just odor threshold,
21 it's symptom threshold, and Dr. Frazier is - - - is
22 extraordinarily qualified to address that.

23 JUDGE RIVERA: Well, let's look back. Did
24 she do anything other than in figuring out that it's
25 1,000 ppms - - - or even one-third less than that, I

1 remember she said that in her affidavit. Did she do
2 anything other than look at what the symptoms, the
3 reactions were? Did she base it on anything other
4 than that, whether - - - not just related to Mrs.
5 Reeps but anyone else - - - is it only based on what
6 people said were their symptoms?

7 MR. PHILLIPS: Yeah. Well, first of - - -

8 JUDGE RIVERA: Inhaling the vapors.

9 MR. PHILLIPS: First of all, let's not
10 forget that there's the engineer - - -

11 JUDGE RIVERA: Well, I - - - that's what
12 I'm asking you.

13 MR. PHILLIPS: Yeah.

14 JUDGE RIVERA: What else did she do? I
15 understand you have your engineer, I want to hear
16 about that, but what else did she base this on?

17 MR. PHILLIPS: Well, what she's base - - -
18 what she's based it upon is - - - is a very elaborate
19 of work in the AICGH and elsewhere about what
20 occupational medicine does. We have data. The data
21 in this record is both specific to this case, but
22 then a general scientific record.

23 And, Judge Rivera, let me sort of try to
24 adumbrate that quickly. First of all, you have the
25 testimony of not only Mrs. Reeps but others that they

1 experienced these symptoms in this car. Secondly,
2 you have evidence from the BMW recall records that
3 others driving cars with the same defects experienced
4 these defects. So a jury or a fact finder or an
5 expert has an ample basis for concluding that the
6 exposures are not just Mrs. Reeps' pregnancy - - -

7 JUDGE RIVERA: Well, I understand that.
8 But then - - - but then they put forward their
9 expert's testimony that the - - - those symptoms that
10 are experienced, right, the nausea, the headaches - -
11 -

12 MR. PHILLIPS: Yeah.

13 JUDGE RIVERA: - - - might be experienced
14 at a much lower threshold, a nontoxic level.

15 MR. PHILLIPS: Yeah.

16 JUDGE RIVERA: And so the question is, how
17 does your expert get to the point that says, I come
18 to the conclusion that they experienced it at this
19 toxic level?

20 MR. PHILLIPS: Because, Your Honor, the
21 AICGH in 2004 conducted an elaborate study about
22 symptom thresholds, and symptom thresholds are data
23 derived from the study - - - from many studies and
24 much scientific work, and the fact that their
25 experts, whose qualifications are what they are, say

1 it, doesn't make it so. Dr. Frazier, who is an
2 occupational medicine specialist and the only
3 occupational medicine specialist in this case,
4 informs this court in - - - in the record that this
5 is a generally accepted method in occupational
6 medicine, and that we have - - - we, meaning the
7 scientific world and the government regulatory
8 agencies, have information about when the average
9 person or most persons or people in general - - -

10 JUDGE RIVERA: And does the science say you
11 can rely on that alone or is that in addition to data
12 about the actual exposure?

13 MR. PHILLIPS: The answer to that is that
14 that is coupled with data about actual exposure. The
15 AICGH (sic) does not simply collect complaints about
16 gasoline. They have numbers and they give - - - in
17 fact, someone from this court asked us to send that
18 document along, and I would commend it to your
19 attention.

20 JUDGE FAHEY: I - - - I read it. I read
21 it. And one of the things that strikes me is the
22 title of it is "Confirmed Animal Carcinogen with
23 Unknown Relevance to Humans". It does say, as your
24 expert did and I think you're correct about that,
25 that 1,000 ppms show - - - show a mild toxic effect

1 in humans. It doesn't make the leap that you're
2 asking it to make - - - let me just finish - - - but
3 it does say that there's a mild toxic effect. Then
4 it talks about threshold levels and long-term effect,
5 about 300 parts per million.

6 MR. PHILLIPS: Yeah.

7 JUDGE FAHEY: So its - - - its relevance to
8 humans isn't established, I don't think, the way your
9 expert argued it is, but I think it's a point in her
10 favor, I guess.

11 MR. PHILLIPS: Yeah. Judge Fahey, let me
12 respond to you by saying - - -

13 JUDGE PIGOTT: Be - - - before you do that,
14 I'm going to have to intrude on your time for a
15 little bit so that we can hear from your opponents.
16 But you still - - -

17 MR. PHILLIPS: May I just answer his
18 question while - - -

19 JUDGE PIGOTT: Certainly.

20 MR. PHILLIPS: - - - it's fresh in our
21 mind? This needn't be established off that document,
22 because what - - - you know, an expert doesn't have
23 to rely on one document for each point.

24 JUDGE FAHEY: I don't want to take up your
25 time because this is a complicated issue, but the

1 problem was, I found that to be the strongest
2 document in your favor. That's why I bring it up.

3 MR. PHILLIPS: Yeah, the point that I'm - -
4 - that I wish to make, if I might, is that that
5 document is then coupled with a score of documents
6 that show that at 100 parts per million, there's
7 damage to a brain; that adults suffer brain damage at
8 50 parts per million of benzene. And so what I would
9 urge Your Honor to do is to take that document and
10 then read it, as you must, in conjunction with the
11 other documents that document the level of birth
12 defects - - - look at California's documents and so
13 on - - - and I will get up again to - - - to address
14 that if I may. But I think that it's critical, and I
15 would urge Your Honor to take a look at this document
16 in conjunction with the others because it's there.

17 JUDGE PIGOTT: Thank you, Mr. Phillips.

18 Mr. Semprevivo - - - am I pronouncing your
19 name correctly?

20 MR. SEMPREVIVO: [Sem-pre-vee'-voh], Your
21 Honor, correct.

22 JUDGE PIGOTT: Welcome.

23 MR. SEMPREVIVO: Thank you. And - - -

24 JUDGE PIGOTT: You're conceding about three
25 of your minutes to your compadres.

1 MR. SEMPREVIVO: Yes. Yes. Yes, Your
2 Honors. Good afternoon. As indicated, my name is
3 Phil Semprevivo. I'm here on behalf of the
4 defendants-respondents BMW. And I simply - - - I
5 want - - - I want to begin with what I - - - I
6 believe the Appellate Division highlighted, as well
7 as Judge York below, that the - - - the - - - almost
8 the elephant in the room is there has been no
9 scientific study linking a causal relationship
10 between gasoline and developmental defects.

11 JUDGE STEIN: Are you saying that you have
12 to administer gasoline vapors to pregnant women and
13 see what the result is?

14 MR. SEMPREVIVO: No, Your Honor. We're not
15 saying that you have to go through that.

16 JUDGE STEIN: So what are you saying - - -

17 MR. SEMPREVIVO: Okay.

18 JUDGE STEIN: What - - - what are you
19 saying? I mean, what - - - and what are your experts
20 actually saying? I mean, it seems to me that it's -
21 - - at its basest level, that's what they're saying.
22 Oh, there's no - - - you know, there's no - - -
23 there's no controlled studies of this and how it
24 affects - - - how else would - - - how would you do
25 that?

1 MR. SEMPREVIVO: Okay. I - - - I think I
2 would - - - I'm sorry to interrupt.

3 JUDGE STEIN: Go ahead.

4 MR. SEMPREVIVO: But I think I would answer
5 that best is listen, gasoline is a very common
6 substance. It's been around for quite a while. We
7 have federal and state regulatory agencies that are
8 out there examining it for everything, and there has
9 never been any causal finding, let alone an
10 association, with any sort of developmental defects.
11 And I'm not saying you have to go out and test, but
12 you would expect that through all the testing over
13 all the decades, that you would have something - - -

14 JUDGE RIVERA: Well, they said that about
15 cigarettes, too, and that took several decades, too.
16 I don't - - - I don't know that that might be your
17 strongest point there.

18 MR. SEMPREVIVO: Well, I think - - -

19 JUDGE RIVERA: Well - - - well, we've never
20 said you absolutely must have these epidemiological
21 studies, correct? You - - - you - - -

22 MR. SEMPREVIVO: Well - - -

23 JUDGE RIVERA: It's not that a case falls
24 or rises based solely on those studies.

25 MR. SEMPREVIVO: But those are the studies

1 that will link to causal - - -

2 JUDGE RIVERA: I understand.

3 MR. SEMPREVIVO: Yeah.

4 JUDGE RIVERA: So - - - so their expert did
5 this weight of the evidence.

6 MR. SEMPREVIVO: Okay.

7 JUDGE RIVERA: And the question is, in
8 part, whether or not that's an appropriate scientific
9 methodology.

10 MR. SEMPREVIVO: Well - - -

11 JUDGE RIVERA: I don't think even your
12 experts deny that that's an appropriate scientific
13 methodology that could be followed.

14 MR. SEMPREVIVO: It - - - it's not, Your
15 Honor, and what we have there is everything that the
16 - - - the plaintiffs base it on is stud - - - and
17 they're not even studies - - - a case report
18 regarding toluene, which is a component of gasoline -
19 - -

20 JUDGE RIVERA: Um-hum.

21 MR. SEMPREVIVO: - - - which is one
22 percent, approximately, of gasoline. So even if we
23 were to look at the article Your Honor raised before
24 - - - which I would note, if you look at the
25 footnotes and you trace the footnotes back - - -

1 JUDGE RIVERA: But why doesn't that - - -

2 MR. SEMPREVIVO: - - - those studies go
3 back a hundred years and - - -

4 JUDGE RIVERA: Why doesn't that just end up
5 being the battle of the experts? She's - - - their
6 experts are using certain scientific methodological
7 studies and they come to particular conclusions that
8 your experts say you can't come to those conclusions,
9 these studies don't support those conclusions, and so
10 forth. But isn't the question whether or not they're
11 following appropriate scientific reviews and so forth
12 and using studies that have been peer-reviewed and
13 then it's a battle of the experts at - - - at the
14 trial - - -

15 MR. SEMPREVIVO: Well, I - - -

16 JUDGE RIVERA: - - - whether or not the
17 jury's persuaded by one or the other?

18 MR. SEMPREVIVO: I think you could almost
19 say that about anything if you were to take that
20 idea. But - - -

21 JUDGE RIVERA: Well, no. You said you
22 can't - - - you can't rely on junk science. Are you
23 arguing that - - - that their experts are relying on
24 junk science?

25 MR. SEMPREVIVO: I think what their experts

1 are relying upon - - - they've taken methodologies
2 that arguably those type of methodologies might work,
3 but they have taken leaps with those methodologies
4 and have not gone through them appropriately. For -
5 - -

6 JUDGE FAHEY: Well, what they're relying
7 on, though, is - - - is as the Judge has said,
8 they're relying on animal studies, occupational
9 studies, because that's really the only place, like
10 Judge Stein was saying - - -

11 MR. SEMPREVIVO: Right.

12 JUDGE FAHEY: - - - that's the only place
13 you're going to get this kind of information is
14 people work in the environment. And then so - - -
15 and then of course fetal glue sniffing studies that
16 have shown the effect of damages to fetuses who have
17 been exposed to toluene in that setting. So - - - so
18 it seems to me that what - - - what they're relying
19 on - - - I guess the question is is Frye requires a
20 scientific consensus to be generally accepted in the
21 scientific community to be admissible. Let's assume
22 the plaintiffs didn't make that scientific consensus.
23 That's a - - - that's I think a difficult standard
24 here. But what if it was Daubert and what if we were
25 applying Daubert? If we were applying Daubert - - -

1 in other words, not scientific consensus but
2 scientifically credible - - - what do you say then?

3 MR. SEMPREVIVO: I - - - I still say that
4 there is - - - there is nothing that has come forward
5 that is scientifically credible here because even if
6 we were to take the component of - - -

7 JUDGE FAHEY: So you're saying that studies
8 of mammals wouldn't be sufficient, you'd have to have
9 a study linking it up, specific causation between
10 humans and the inhalation of gasoline vapors?

11 MR. SEMPREVIVO: Well, we have - - - we
12 have studies of mammals here that don't support their
13 theory. The only ones out there, the mice - - - the
14 closest you come is if you soak - - - soak mice or
15 rats in - - - you know, in these chemicals or
16 gasoline over extended period of time, which we don't
17 have here. You might have - - -

18 JUDGE RIVERA: But - - -

19 MR. SEMPREVIVO: - - - a sudden abortion-
20 type scenario or the toluene - - - yes, Judge?

21 JUDGE RIVERA: But is the question really
22 consensus or whether or not they're using appropriate
23 science? They may come to a different conclusion
24 than your experts.

25 MR. SEMPREVIVO: But - - -

1 JUDGE RIVERA: I understand your point
2 about that.

3 MR. SEMPREVIVO: But they're not using the
4 appropriate - - -

5 JUDGE RIVERA: Well, what is - - - that's
6 what I'm asking you.

7 MR. SEMPREVIVO: Okay.

8 JUDGE RIVERA: What is - - - what is
9 inappropriate about the way they have approached this
10 question of the cause of this child's defects?

11 MR. SEMPREVIVO: Okay. Well, they've - - -
12 they've looked at the situation. There's no studies
13 at all that support their theory, we know that. Then
14 what they - - -

15 JUDGE RIVERA: Studies that you can't do.

16 MR. SEMPREVIVO: Okay.

17 JUDGE RIVERA: So let's move on.

18 MR. SEMPREVIVO: Whether they could or - -
19 - okay, there's - - - there's nothing out there that
20 they can rely upon, so what they've done is taken
21 let's look at the constituents. Now, Parker which
22 said you can't look at that and - - - and, you know,
23 the 150 constituents here. They have one study of
24 gasoline that talks about nausea or headaches. Those
25 aren't developmental defects. Then you have the

1 component toluene, which you have the - - - the
2 abusers at 4,000 ppm to 12,000 ppm. Now, in
3 gasoline, at one percent, you're talking about ten -
4 - -

5 JUDGE PIGOTT: Well, let - - - let me - - -
6 can I ask you about that a little bit because that -
7 - - that seemed to me to be relatively significant
8 because I think in one of your experts, Dr. Shalli
9 (ph.), if I'm pronouncing it right - - -

10 MR. SEMPREVIVO: Yeah.

11 JUDGE PIGOTT: - - - said "in order for the
12 plaintiff mother to receive a dose of a constituent
13 compound such as toluene comparable to the dose found
14 to produce any injury in animal study subjects, she
15 would have had to inhale gasoline in concentrations
16 well in excess of the human lethal limit." So that
17 argument to me seems to be that concede everything -
18 - -

19 MR. SEMPREVIVO: Right.

20 JUDGE PIGOTT: - - - concede that you have
21 an expert, that your expert says X, we're telling you
22 that even with that, there is no - - - there is no
23 causal relationship here.

24 MR. SEMPREVIVO: Absolutely. And in that
25 situation, you would also only have - - - if - - - if

1 you exceeded, you know, those limits and you're in
2 that situation, the best you have is a case report,
3 not even a study, of people that had deaths of the
4 fetuses, not developmental defects. So there's - - -
5 there's no comparison, no association, no studies,
6 nothing backing up linking it all together.

7 JUDGE STEIN: Doesn't that go to the
8 weight, not the methodology? I mean - - - and in
9 terms of the components, didn't plaintiff's experts
10 talk about the combination of the components of the
11 gasoline and how they would exacerbate effects and -
12 - - and so on and so forth? Didn't they do more than
13 what was done in - - - in Parker?

14 MR. SEMPREVIVO: There's - - - there is
15 nothing supporting the - - - the fact that if you
16 combine all of this, it exacerbates, but still,
17 they'd have to put some sort of analysis there and
18 again you have one percent, you know, of - - - of the
19 substance.

20 JUDGE RIVERA: I thought they relied on
21 actual studies related to mixtures?

22 MR. SEMPREVIVO: Not of - - - not of this
23 gas - - -

24 JUDGE RIVERA: The mixtures of these toxic
25 components - - -

1 MR. SEMPREVIVO: But not in - - -

2 JUDGE RIVERA: - - - would themselves be,
3 at a minimum, as toxic if not more so. I thought
4 they - - - they relied on those studies.

5 MR. SEMPREVIVO: But there's no study
6 linking the - - - the components of, you know, 150 or
7 so con - - - constituents of gasoline to get there.

8 JUDGE RIVERA: I understand, but the
9 general proposition of the mixtures, why can't they
10 rely on that? Why isn't that a way - - -

11 MR. SEMPREVIVO: That - - -

12 JUDGE RIVERA: - - - to rely on science
13 that's appropriate in this case?

14 MR. SEMPREVIVO: That's never been an
15 accepted scientific principle, Your Honor. I mean -
16 - -

17 JUDGE RIVERA: You have to rely on the
18 actual studies of the actual components of the
19 mixture you're talking about?

20 MR. SEMPREVIVO: Exact - - - exactly.

21 JUDGE STEIN: But, I mean, it seems to me
22 that what you're arguing is the - - - not what they
23 did to - - - to study this, not the methods that they
24 use, but the conclusions that they reached from these
25 methods. And I - - - and I can't - - - and I'm

1 having trouble understanding why that is part of the
2 Frye analysis, and why that is not something that
3 should be decided by a jury.

4 MR. SEMPREVIVO: Well, I think - - - well,
5 there's two - - - there's two things here that are
6 going on. They've taken the leap with those methods,
7 okay, similar to where you have a situation where
8 they have - - -

9 JUDGE STEIN: Well, that's what your
10 experts are saying, yes.

11 MR. SEMPREVIVO: Yeah, but - - - but I'm
12 also saying that, Your Honor, here today, is you have
13 a situation where they have - - - they've come out
14 and said, well, toluene, it causes bad things and we
15 have a study about that. Well, since toluene's in
16 gasoline, we're going to take the leap and say
17 gasoline causes these bad things. So that - - -

18 JUDGE STEIN: But isn't it that leap, that
19 conclusion that - - -

20 MR. SEMPREVIVO: Well, since there's no
21 found - - -

22 JUDGE STEIN: - - - that you - - - that
23 you're questioning?

24 MR. SEMPREVIVO: I'm - - - I'm questioning
25 - - - here actually both. I'm questioning the way

1 that they perform their methodologies as well as the
2 leap that they took with their conclusions on those
3 methodologies. So you have somewhat of a foundation
4 and a - - - and - - - and a Parker - - - yeah, Parker
5 scenario as well as a Frye scenario where - - -

6 JUDGE STEIN: I guess that gets me back to
7 I thought - - - I thought foundation in Parker were
8 decided already in the summary judgment motion. Why
9 - - - why are we - - -

10 MR. SEMPREVIVO: Oh, and - - -

11 JUDGE STEIN: - - - even looking at that
12 again?

13 MR. SEMPREVIVO: - - - and that's - - -
14 actually, Your Honor, when you brought that up I want
15 - - - I had in my notes to go right back to that. In
16 our motion for summary judgment that was brought a
17 year or so before this motion, that - - - you know,
18 with the guidance of the court, we brought it at the
19 time; in fact, during oral argument or actually
20 before the Judge said we're going to deal with Frye
21 issues later.

22 So we dealt with - - - in our motion it was
23 - - - the car at that time had been lost, and we - -
24 - they - - - it'd been disposed of and we had a
25 spoliation aspect of our motion for summary judgment.

1 But the key was that there had been this recall, and
2 the recall itself doesn't - - - does not get you a
3 basis to go forward with the case. There was no - -
4 - not sufficient circumstantial evidence to move
5 forward and summary judgment is warranted. We did
6 not - - - we did not attack Dr. - - - Dr. Kramer, Dr.
7 Frazier in our motion whatsoever. Now, I believe my
8 co - - -

9 JUDGE STEIN: But you could - - - you could
10 have.

11 MR. SEMPREVIVO: Well, that - - - no, that
12 - - -

13 JUDGE STEIN: You had the expert disclosure
14 at that time.

15 MR. SEMPREVIVO: We had the expert
16 disclosure at about that same time, but the - - - it
17 was understood - - - and in fact, Judge York, in his
18 decision, he makes it very clear - - - and I believe
19 it was the second decision, he may have said it in
20 both - - - that this is an evidentiary issue that I'm
21 dealing with separate from the summary judgment. So
22 we followed the guidelines as laid out by the judge
23 and the judge even reiterated that in his decision,
24 so the - - - we did not address their experts in that
25 because we had a clear, specific issue on the car,

1 the mechanical aspects of the car, and that's - - -
2 and that was the issue of our summary judgment
3 motion.

4 JUDGE ABDUS-SALAAM: Counsel, I - - -

5 JUDGE RIVERA: Can we talk about the 1,000
6 ppm and - - - and the - - - based on the reactions
7 and whether or not that's an appropriate scientific
8 way to come to that conclusion that it was toxic
9 exposure?

10 MR. SEMPREVIVO: A couple things on it.
11 One, the - - - that article of the 1,000 ppms that
12 doesn't deal with development defects, by the way.

13 JUDGE RIVERA: Um-hum.

14 MR. SEMPREVIVO: It deals with, you know,
15 eye irritation, throat, headaches, nausea; those are
16 symptoms very clear, especially when you're dealing
17 with - - - with a - - - with a pregnant woman in this
18 situation, that there's so many factors in life. You
19 can't work in reverse here on a different - - - you
20 know, again, you're assuming you're at a differential
21 diagnosis on a specific causation, which we say you
22 never get to, but - - -

23 JUDGE ABDUS-SALAAM: Going back to the
24 experts, I was just curious, you challenged Dr.

25 Frazier and Dr. Kramer. What about the other experts

1 who now presumably, if this case goes to trial, will
2 be able to testify?

3 MR. SEMPREVIVO: The other experts on the
4 issue of general causation relied wholly upon Frazier
5 - - - Dr. Frazier and Dr. Kramer. They brought in
6 more information regarding specific causation, and
7 the judge looked at it that we knocked out the
8 general and we - - - we would have to attack at trial
9 if there's a subsequent motion - - - which we had
10 conversations in chambers and then filed, it was
11 actually put on hold regarding the - - - the issues
12 of the other experts. That's not before Your Honor
13 at the moment, though.

14 JUDGE ABDUS-SALAAM: I - - - I understand
15 that. I was just curious about - - - I - - - I'm
16 trying to figure out why, if they relied, as they
17 apparently did, on Kramer and Frazier, why didn't you
18 also attack them?

19 MR. SEMPREVIVO: Well, we - - - we make it
20 very clear in our papers that they are - - - they're
21 relying on them and they have nothing to go on as
22 long - - - you know, when Dr. Kramer and Dr. Frazier
23 are - - -

24 JUDGE ABDUS-SALAAM: Okay.

25 MR. SEMPREVIVO: - - - knocked out on - - -

1 on the challenge.

2 JUDGE PIGOTT: If you win this, you're - -
3 - you're done?

4 JUDGE ABDUS-SALAAM: You're done.

5 MR. SEMPREVIVO: Yes.

6 JUDGE PIGOTT: Okay.

7 MR. SEMPREVIVO: Ultimately - - - it's not
8 - - - it's an evidentiary, but the ultimate effect is
9 yes.

10 JUDGE PIGOTT: Okay. Thank you - - - thank
11 you, sir.

12 MR. SEMPREVIVO: Thank you, Your Honor.

13 JUDGE PIGOTT: Ms. McHugh?

14 MS. MCHUGH: I have nothing to add unless
15 you have questions for me, Your Honors.

16 JUDGE PIGOTT: Mr. Brill?

17 MR. BRILL: Same here, Judge.

18 JUDGE PIGOTT: You must have been
19 brilliant.

20 MR. SEMPREVIVO: I hope so.

21 MR. PHILLIPS: May I have, Judge, three
22 minutes?

23 JUDGE PIGOTT: You have your rebuttal, sir.
24 You want their minutes too?

25 MR. PHILLIPS: A couple of things. First

1 of all, my specific causation experts do - - - do not
2 rely exclusively, nor do their - - - are their
3 opinions founded upon Drs. Kramer and Frazier.
4 They're independent. They say so. They say that
5 they concur, and that's a different matter, but
6 they're free. And of course when we go back, however
7 this comes, they have to make a summary judgment
8 motion and the legislature has recently enacted a
9 statute that sort of opens - - -

10 JUDGE PIGOTT: In regards to 3101.

11 MR. PHILLIPS: - - - a number of - - - of
12 doors on 3101.

13 But I'd like to return, Judge Fahey, with,
14 I hope, an additional answer to the question that you
15 initially - - - you propounded to me. If you look at
16 page 1546 and all of - - - of the record and then
17 thereafter - - - and that's Dr. Frazier's affidavit,
18 and I think Mr. Semprevivo in effect concedes,
19 because he said several times to you well, they do
20 have a toluene case, a tol - - - they do have toluene
21 things. Well, toluene is a significant proportion of
22 what this exposure is. It's sort of like saying, as
23 we said in our brief, gin and tonic in an alco - - -
24 in an alcohol impairment case, you know, the fact
25 that there's tonic in there too is besides the point.

1 JUDGE PIGOTT: Well, that's why I asked
2 that question before, though, about they - - - they
3 said even conceding that.

4 MR. PHILLIPS: Yeah, and I wanted to get to
5 that. I've known Dr. Shalli for a long time and I
6 have a low opinion of him, but if you read our brief,
7 I think you'll perhaps - - - I'm - - - I'm sure you
8 have read our brief, forgive me, but the fact that
9 Dr. Shalli says something is, at best, a subject to
10 be addressed at a hearing, because he's, frankly,
11 kind of - - - well, less credible than he might be.

12 JUDGE PIGOTT: That's a point - - - I
13 didn't mean to interrupt you, but that's a point I
14 think you made that you didn't have a hearing on
15 Frye. These - - - these two were just knocked out on
16 papers, right?

17 MR. PHILLIPS: Yes, and - - - and that
18 raises - - - that raises an interesting point. As a
19 plaintiff's lawyer, I'm loath to tell you that you
20 should issue an opinion saying there should always be
21 Frye hearings in everything, because that would
22 impose a burden on the courts in all sorts of things.
23 But where you have a record such as this, and we
24 asked for the Frye hearing and ask for it repeatedly
25 - - -

1 strikes me as very bad policy for the IAS judge to
2 have said, I've got enough, I don't need to address
3 this. And again - - -

4 JUDGE STEIN: When - - - when did you make
5 your repeated requests for the hearing? At what
6 stage?

7 MR. PHILLIPS: It - - - Your Honor, it was
8 made in the second round of argument. Justice York -
9 - - who is a wonderful judge, whose passing I mourn
10 personally, I - - - I suppose we all do - - - there
11 was an oral argument and it was never transcribed,
12 but at that oral argument - - - and I respectfully
13 disagree with my colleague. The point was made, if
14 you have any questions bring Dr. Frazier in, bring
15 Dr. Shalli in. Boy, would I like to cross-examine
16 him.

17 In our motion for re-argument, which was
18 granted - - - and again, this had a funny history.
19 We argued this and then waited for more than a year
20 because the motion was held in abeyance pending the
21 Appellate Division review of - - - of the initial
22 motion. Then it came back and we just waited and
23 waited and then there was a decision, so the decision
24 was stale, if I can put it that way. It came long,
25 long after this thing had been briefed and - - - and

1 argued.

2 But in the re-argument papers, and you'll
3 see this in the record, we - - - we urged the court
4 to have a hearing, and the court declined. The
5 Appellate Division found that - - - that he had
6 granted re-argument so it's certainly preserved and
7 there's no question that we had asked for that. Now
8 - - -

9 JUDGE RIVERA: What - - - what did - - -
10 can you talk about Edwin Zucker (ph.), the engineer?

11 MR. PHILLIPS: Sure.

12 JUDGE RIVERA: He's the engineer, correct?

13 MR. PHILLIPS: Yes.

14 JUDGE RIVERA: Yes, and he - - - he
15 addressed the symptom threshold, correct? Not
16 relying on merely the actual symptoms that anyone had
17 experienced.

18 MR. PHILLIPS: Well, what - - -

19 JUDGE RIVERA: Right? The - - - the
20 toxicity threshold, excuse me, not the symptom
21 threshold.

22 MR. PHILLIPS: Yeah, what - - - what - - -

23 JUDGE RIVERA: He came to a different
24 conclusion.

25 MR. PHILLIPS: Than Leeds and not - - -

1 JUDGE RIVERA: Yes.

2 MR. PHILLIPS: He - - - he corroborated - -
3 - there was an issue, Your Honor, about whether or
4 not the levels of exposure within that vehicle could
5 have reached 1,000 ppm. Leeds said no way no how,
6 and Zucker disagreed with him and presented the
7 formulaic basis for saying that indeed, the exposures
8 would - - - would have been at that level or - - - or
9 - - - or higher. Engineers are not by their nature
10 qualified to talk about medical causation, so he
11 didn't do that. I don't want to give you a false
12 impression on - - - on - - - on that.

13 JUDGE RIVERA: He was just talking about
14 what would have been in the car cabin, correct?

15 MR. PHILLIPS: Correct. What - - -

16 JUDGE RIVERA: The exposure level in the
17 car cabin?

18 MR. PHILLIPS: He was independently
19 confirming what Dr. - - - Dr. Frazier and Engineer
20 Zucker got to the same place using separate
21 methodologies.

22 JUDGE PIGOTT: I have to ask you to sum up,
23 sir, because your time has expired.

24 MR. PHILLIPS: Yeah, the - - - the point
25 that I would like to sum up, Your - - - Your Honor

1 and to - - - well, to all of you, of course, but to
2 Judge Fahey particularly, is that if you look at page
3 27 of our brief and then look at the authorities, you
4 - - - you will see that - - - and also at Dr.
5 Frazier's affidavit, you will see a - - - a well-
6 reasoned and careful analysis of why levels of ten
7 parts per million of benzene cause genotoxic injury,
8 and why genotoxic injuries are associated with - - -
9 with adverse - - - with birth defects.

10 And what I would lastly do is - - - is
11 point you all respectfully to some case law, because
12 if you look at the Zito case and the Marsh case in
13 the Appellate Divisions First and Second Department,
14 and above all the Milward case which is a - - - a
15 very well-crafted decision by the Chief Judge of the
16 First Circuit talking in Daubert but making the
17 point, you will see that in putting together a
18 causation case, it's not a matter of a reductionistic
19 atomistic thing. You look at - - - at all of those
20 cases and - - -

21 JUDGE ABDUS-SALAAM: Could I - - - counsel,
22 could I just interrupt slightly? You - - - you
23 mentioned Marsh. Is that Marsh v. Smyth in the First
24 Department? Judge Saxe's concurring opinion?

25 MR. PHILLIPS: Yes.

1 JUDGE ABDUS-SALAAM: Yeah, I'm very
2 familiar with it. And didn't Judge Saxe say that if
3 there - - - you have to have at least some study that
4 would support the position that the opponent of this
5 theory is - - -

6 MR. PHILLIPS: Yeah.

7 JUDGE ABDUS-SALAAM: - - - is proffering,
8 right? And - - - and don't we go back to what
9 counsel said for BMW, where is that study? Where is
10 that one study?

11 MR. PHILLIPS: Yeah, Your Honor, there are
12 actually not one but scores of studies that Drs.
13 Kramer and Frazier spell out at great length about
14 the capacity at eighty-eight parts per million of
15 toluene to create spontaneous abortion, and then
16 explaining that an abortion - - - a spon - - - a
17 miscarriage is a bigger injury than a birth defect,
18 and this is well established, so that there's a body
19 - - - there's a body of learning and this is a jury
20 question. It is one that really needs to be
21 presented to a jury, or at a minimum, for a hearing.
22 Your Honors, thank you so much for your indulgence.

23 JUDGE PIGOTT: Thank you, Mr. Phillips.

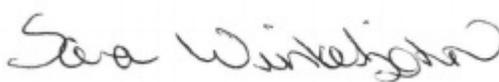
24 Thank you all.

25 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Sean R. v. BMW of North America, LLC, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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