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COURT OF APPEALS

STATE OF NEW YORK

SADEK,

Appellant,

-against-

No. 30

WESLEY,

Respondent.

20 Eagle Street
Albany, New York 12207
March 23, 2016

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: This is number 30 on
2 this afternoon's calendar, Sadek v. Wesley.

3 Counsel.

4 MR. FORD: Good afternoon, Your Honors, may
5 it please the court. My name is Gerald Ford, I
6 represent Mr. Jenkins and his employer, Greyhound
7 Lines, and I would like to reserve three minutes for
8 rebuttal.

9 CHIEF JUDGE DIFIORE: You have your three
10 minutes, sir.

11 MR. FORD: Thank you.

12 I would like to start with the issue that
13 bothered the First Department the most, which is namely
14 that the stroke occurred five minutes after the accident,
15 and the First Department says, well, plaintiff's theory
16 that the accident caused the stroke is really an
17 unremarkable premise.

18 And I think it's clear from this record that
19 it's actually a fairly sophisticated medical issue. And
20 the court properly decided to hold a Frye hearing on that
21 issue, and she heard the testimony of our expert, Dr.
22 Segal, one of the leading stroke experts in the greater
23 New York City metropolitan area. And by the way, the
24 First Department actually made a mistake in its opinion.
25 It said that Dr. Yazgi was the director of the stroke

1 center at New York Presbyterian hospital; actually it's
2 our doctor, Dr. Segal, who is the director.

3 She heard a Dr. Segal's testimony, and Dr. Segal
4 said, in essence, that the plaintiff's causation theory is
5 junk science.

6 JUDGE PIGOTT: One of the most troubling
7 things to me was how late all of this happened, you
8 know. I've tried enough cases to know that when
9 you're ready for trial, you're ready for trial, and
10 you've probably spent a lot of money on, among other
11 things, experts, and you filed seven, if I remember
12 right, motions in limine challenging every single one
13 of their experts.

14 MR. FORD: Right.

15 JUDGE PIGOTT: Was there a reason why they
16 were on the eve of trial as opposed to being almost
17 any other time?

18 MR. FORD: Well, first of all, there was no
19 liability expert reports on this causation until two
20 years after the note of issue expired. With respect
21 to the other experts - - -

22 JUDGE PIGOTT: But when you say two years
23 after, how long before trial was that?

24 MR. FORD: The - - - it was - - - well,
25 there's - - - Dr. Yazgi's second report was - - -

1 JUDGE PIGOTT: No, how long was it - - - I
2 mean, when you got the first report - - - what I'm
3 trying to pick on you about is that I don't think you
4 were particularly expeditious in challenging the
5 expert disclosures that the plaintiff had. If I'm
6 incorrect on that, I would like to - - -

7 MR. FORD: Well, the Dr. Yazgi disclosure,
8 the second disclosure was in July of 2011. That was
9 a few months before the scheduled trial date in
10 September. Now, the - - -

11 JUDGE FAHEY: Yeah, but you had the initial
12 report almost a year before, right?

13 MR. FORD: We did, Your Honor.

14 JUDGE FAHEY: Right, and then - - - so
15 normally what you do is, just like Judge Pigott said,
16 put had a fair amount of negligence and if he had a
17 problem with it, you would make a motion to expand it
18 or - - - you didn't do any of that.

19 MR. FORD: Your Honor, I don't think there
20 is an obligation on the defendant to file this motion
21 to amplify that the First Department talked about.

22 JUDGE PIGOTT: I don't know if it is or
23 not, but I'm just thinking, professionally, when you
24 read this, it leaves you cold. I mean, you got
25 somebody who is injured, they have a cause of action,

1 they have a doctor that says the competent producing
2 cause of this is this, and everybody is fine. And
3 then we're going to pick a jury, we've picked the
4 jury, and now somebody says, wait a minute, you know,
5 every single one of your experts has to be precluded.

6 MR. FORD: All right, well, if - - - I
7 mean, with respect to the damage experts, which
8 really aren't at issue here, you have to remember
9 that nine days before the trial, he served
10 supplemental disclosures for the damages experts,
11 which added about 3.2 million dollars in damages. If
12 I - - -

13 JUDGE PIGOTT: So did you ask - - - did you
14 ask for an adjournment at that point?

15 MR. FORD: No, Your Honor, we did not. We
16 asked - - - we filed a motion in limine. Look, the
17 motion in limine - - - there is no rules - - - maybe
18 there should be rules on motions in limine - - -

19 JUDGE PIGOTT: Maybe there will be one.

20 MR. FORD: Maybe there should be, but there
21 are no rules on the time limit and - - -

22 JUDGE STEIN: There is a rule, on the other
23 hand, that would require you to wait to make these
24 motions until you got before the trial judge, right -
25 - - correct?

1 MR. FORD: I beg your pardon, Your Honor.

2 JUDGE STEIN: There is no rule conversely
3 that would require you to wait to make these motions
4 until you get to the trial judge.

5 MR. FORD: You are correct, Your Honor.

6 JUDGE STEIN: Okay.

7 MR. FORD: Yes, yes.

8 But when we filed the motions in limine, the
9 trial judge has the responsibility of making sure that
10 everyone has a fair opportunity to be heard on that.

11 JUDGE PIGOTT: Your doctor said that what
12 their doctor said is not true.

13 MR. FORD: Correct.

14 JUDGE PIGOTT: Isn't that what juries do?
15 In other words, it seemed to me that what you did is
16 - - - you didn't object to this doctor saying that
17 you - - - than an embolism can travel based upon a
18 traumatic event. Until - - - then you say, my doctor
19 says that's not true, so let's preclude that one.
20 Well, why don't we just let the jury decide which one
21 they are going to - - - because this isn't - - - this
22 is not a moonshot. I mean, this isn't new, you know,
23 that somebody suffers a traumatic brain injury, or
24 that, in this particular case, an embolism. And I
25 understand your point with respect to whether there

1 was one or not, but it just seems to me, you got to
2 move. I mean, you've tied up a judge, you've tied up
3 a jury, you've tied up all of these experts, and then
4 you come into court and say, oh, by the way, we are
5 challenging every single thing that's going on in
6 this case and we want - - - we want a Frye hearing.
7 And why are we doing it now? Because we want to.

8 MR. FORD: But no, Your Honor - - - well,
9 first of all, the damage issues really aren't - - -
10 experts aren't at issue on the case. But with
11 respect to Dr. Yazgi, in July of 2011, he submits
12 this - - - according to Justice Tom, his words - - -
13 incomprehensible second report. That was the
14 cornerstone of our motion in limine.

15 JUDGE PIGOTT: So in July of 2011, you
16 moved to - - - for a better report, right?

17 MR. FORD: No, Your Honor, not in July,
18 later.

19 JUDGE PIGOTT: I know, well, I think I made
20 my point.

21 MR. FORD: Sure.

22 JUDGE PIGOTT: I'll leave you alone.

23 MR. FORD: Yeah. But I - - - but I also
24 want to address Your Honor's point that isn't this
25 for the jury. Before the jury is allowed to hear

1 this expert testimony, there has to be a
2 determination whether the plaintiff's theory is
3 generally accepted.

4 JUDGE PIGOTT: Let's assume this. Why
5 don't they move to preclude your guy because your guy
6 says that what his guy says is untrue, and he can
7 say, I want to preclude the defense expert because
8 they are saying that what I'm saying is untrue, and
9 that's nonsense.

10 MR. FORD: Well, I mean, I suppose he could
11 have done that if he wanted to, but he - - - he did
12 not. What we - - - the generally accepted principle
13 of Frye I think is fully appropriate here when the
14 leading stroke doctor of New York City says, I've
15 never heard of this stuff, it's imaginary, it's made
16 up, no one in my community would believe this. That,
17 to me, calls for a Frye hearing.

18 And she heard - - - the trial judge heard
19 the testimony of Dr. Segal, he says it's junk
20 science, she chose to credit him over Dr. Oh and his
21 two expert - - -

22 JUDGE STEIN: Is your argument that there
23 has to be studies based on motor vehicle accidents
24 and strokes in order to allow Dr. Oh's opinion to be
25 presented?

1 MR. FORD: Well, it's a couple of things.
2 First of all, the articles that he relied on don't
3 show causation. They show an association, which
4 under Cornell - - -

5 JUDGE STEIN: Okay. That's not my
6 question.

7 MR. FORD: Okay.

8 JUDGE STEIN: My question - - - it seems to
9 me that the argument is being made, well, there's no
10 studies about the relationship of motor vehicle
11 accidents and strokes. And to me, there are a lot of
12 other things that could produce the same kind of
13 situation as a motor vehicle accident. So that's my
14 question; is it really - - - is the Frye inquiry that
15 narrow?

16 MR. FORD: Your Honor, I think it - - -
17 there has to be at least some discussion of trauma,
18 it has to be a showing that it's generally accepted,
19 that - - -

20 JUDGE FAHEY: Well, but that's - - - didn't
21 Judge - - - was a Judge Moskowitz who did a
22 concurrence?

23 MR. FORD: Yes, Your Honor.

24 JUDGE FAHEY: Yeah. I thought Judge
25 Moskowitz's concurrences picked up on Judge Stein's

1 point which is really, this would've been - - - it
2 shouldn't have been a Frye hearing. You are relying
3 on the Frye hearing standard. You may have an
4 argument on the Frye hearing standard, but if it's
5 not the Frye hearing that should've been applied - -
6 - like Judge Moskowitz said, it should have been
7 either a Parker or a simple evidentiary hearing to
8 see if there was sufficient foundation presented for
9 him to offer the opinion that he was offering, not
10 whether or not it was generally accepted in the
11 scientific community, but whether a foundation had
12 been laid for him to offer an opinion in and of
13 itself. Her argument seemed to me to be more on
14 point.

15 MR. FORD: Well, Your Honor, I think it's
16 definitely generally accepted, I think that's an
17 issue in the case, I think it's a big issue in the
18 case, given our experts' testimony. With respect to
19 Parker and specific causation, I think Justice Tom
20 got it right below in terms of the lack of proper
21 showing specific causation, specifically, the
22 differential diagnosis that Dr. Oh tried to do here.

23 Under Cornell, we know that if you're going
24 to do differential diagnosis, you can't just rule in
25 the cause that you like, you have to rule out the

1 other causes. The articles that Dr. Oh relies on
2 show that there is a two hour - - - purports to show
3 that there is a - - - there can be a two-hour onset
4 period. Dr. Oh made no attempt to rule out the
5 possibility that this stroke had nothing to do with
6 the accident, he made no attempt to rule out the
7 possibility of some other sudden body movement.

8 JUDGE FAHEY: Well, each point you're
9 making seems to go to weight, not to admissibility.

10 MR. FORD: Well, I think under - - - well,
11 first of all, generally accepted, that issue, I think
12 is - - - does not go to the weight, that is a
13 question for the court.

14 JUDGE FAHEY: That's why I asked you about
15 Judge Moskowitz's distinction.

16 MR. FORD: Right. Right.

17 JUDGE PIGOTT: Because if Frye doesn't
18 apply, but an evidentiary hearing was required, then
19 we're in a different posture.

20 MR. FORD: Right. But - - - but - - -

21 JUDGE ABDUS-SALAAM: Could I back up,
22 counsel, because I see your other - - - your white
23 light is on, do you consider Judge - - - I mean, Dr.
24 Oh's theories, were they new theories or were they
25 expansions of Dr. Yazgi's theories, what - - - what

1 do you consider them to be?

2 MR. FORD: We consider them new theories,
3 Your Honor, because they were not mentioned in either
4 of Dr. Yazgi's two reports. They weren't mentioned
5 in Dr. Oh's expert disclosure report either.

6 And if you look at the Israeli article - - - I
7 see my time is up, I'll just try to finish this. If you
8 look at the Israeli study that Dr. Oh relies on, when they
9 talk about sudden body movement, they're not talking - - -
10 first of all, they're not talking about motor vehicle
11 accidents, Dr. Oh admitted that, but they're also not even
12 talking about physical trauma. They're talking about, for
13 example, you're sitting at your chair and the doorbell
14 rings, and you stand up, that type of sudden body
15 movement.

16 The other example is, if you read the article
17 that was actually published, is a grandparent is lying in
18 bed, they hear a grandchild cry or fall down, they get up
19 from that sitting - - - from that supine position. No
20 mention of physical trauma anywhere.

21 JUDGE PIGOTT: But that's how - - - I think
22 that shows how easy it is, you know, to have this
23 condition occur. I mean, compared to what happened
24 here, or what's alleged to have happened here, those
25 are, you know, you think, if that can do it, why

1 can't an auto accident do it?

2 MR. FORD: Well, Your Honor, because our
3 expert says it can't happen and - - - and the trial
4 judge chose to credit that testimony.

5 JUDGE PIGOTT: All right, okay.

6 CHIEF JUDGE DIFIORE: Thank you.

7 MR. FORD: Thank you.

8 CHIEF JUDGE DIFIORE: Counsel.

9 MR. SKOBLAR: Good afternoon. My name is
10 Robert Skoblar and I represent Kamal Sadek in this
11 case.

12 The dissent stated twice in the lower court that
13 this was merely fortuitous that this stroke had happened
14 to occur right after the accident, and that it was merely
15 coincidence. That's found at CA24-25 and CA34.

16 I did the math on that, that this happened a few
17 minutes after the accident, and the math comes out to
18 24,177,600 to 1.

19 JUDGE PIGOTT: The problem, didn't - - -
20 didn't one of the courts question you on the fact
21 that you had done the research that the doctor then
22 adopted?

23 MR. SKOBLAR: When I found out - - -

24 JUDGE PIGOTT: But should we pick on you
25 for now doing - - - now testifying with respect to

1 certain - - -

2 MR. SKOBLAR: Well, I'd ask the court to
3 take judicial notice that there are sixty minutes in
4 an hour - - -

5 JUDGE PIGOTT: We can do that.

6 MR. SKOBLAR: There are seven days - - -

7 JUDGE PIGOTT: I think you understand my
8 point, I'm just - - -

9 MR. SKOBLAR: All right.

10 JUDGE ABDUS-SALAAM: And counsel, to the
11 point I asked your adversary, do you - - - do you
12 agree that these are - - - your - - - I guess your
13 position is these are not new theories, that this is
14 some - - - that - - - but I don't recall in Dr.
15 Yazgi's - - - either of his reports that he mentioned
16 that a change of position or spiking blood pressure
17 would cause a stroke or an embolic stroke.

18 MR. SKOBLAR: It was not that specific.
19 And the thing that - - - Dr. Yazgi basically said it
20 was the trauma of the accident that led to the
21 stroke. And really what I think the proper practice
22 ought to be is that if you find that report deficient
23 in any way - - - whether you're a plaintiff or a
24 defendant, you serve a report, you identify a Frye
25 issue or you identify a Parker issue, speak up.

1 You know, I'm a Jersey guy and I've heard
2 it said many times on that side of the river that,
3 what's your problem? You got a problem, speak up,
4 tell me what it is.

5 JUDGE STEIN: Well, that - - - that seems
6 like it would be the civil thing to do. But is there
7 any rule that requires that it be done that way?

8 MR. SKOBLAR: Well, the way it should - - -
9 the way it happened - - - I mean, other than the
10 total chaos that it created, the way that it happened
11 was that it's a summary judgment motion, a
12 dispositive motion, made when I'm ready to open to
13 the jury, and I stick out my arms and I get seven
14 motions in limine, and twenty-four hours in which to
15 respond - - -

16 JUDGE PIGOTT: But as I just - - - as I
17 understand their position, they - - - they weren't
18 really that concerned about Dr. Yazgi until the
19 second report came out. And that was what, you know,
20 lead to everything else that happened. So while it
21 certainly wasn't expeditious, it wasn't, you know,
22 quite as lackadaisical as it might appear.

23 MR. SKOBLAR: Well, first of all, in the
24 bill of particulars that was served two years before
25 the note of issue, the first thing where it says

1 injuries, it says stroke. You can't pretend - - -
2 they cannot pretend the depositions, all the
3 discovery, the medical evidence that was exchanged,
4 the authorizations - - - I have a Redweld filled with
5 authorizations - - - they can't pretend that they
6 didn't know that this case was about a stroke.

7 JUDGE PIGOTT: Yeah, but did the doctor - -
8 - I know he went to the hospital, he wasn't - - - was
9 he - - - how long was he in the hospital?

10 MR. SKOBLAR: I want to say ten days,
11 perhaps.

12 JUDGE PIGOTT: Was there a discharge
13 diagnosis?

14 MR. SKOBLAR: Yes, it was stroke.

15 JUDGE PIGOTT: Did they tie it to the
16 accident?

17 MR. SKOBLAR: Yeah - - - well, I don't know
18 that it - - - it said motor vehicle accident and CVA,
19 so does that mean that the doctor at the hospital was
20 associating the two? It was just - - - at the scene
21 of the accident - - - Kamal suffered the stroke a few
22 minutes after the accident. EMT was called, they
23 took his blood pressure - - - and that's what I find
24 really interesting about this. He had no history of
25 hypertension; they took his blood pressure at the

1 accident scene, it was 198 over 120. The doctors at
2 the Frye hearing, both sides said, that's well within
3 the stroke danger zone.

4 JUDGE PIGOTT: Right. But that - - - that
5 followed the argument too, right?

6 MR. SKOBLAR: I'm sorry?

7 JUDGE PIGOTT: That followed the exchange
8 of words between the bus driver and he?

9 MR. SKOBLAR: Yes, that too, yes. There
10 was, you know - - - well, both doctors also testified
11 that they would expect that in the trauma of the
12 accident and the resultant argument, that they would
13 expect a person's blood pressure to rise.

14 JUDGE PIGOTT: Did that treating - - - did
15 you - - - were you going to call the treating
16 physician?

17 MR. SKOBLAR: Yes.

18 JUDGE PIGOTT: And what was his - - - what
19 was his - - -

20 MR. SKOBLAR: Dr. Yazgi.

21 JUDGE PIGOTT: Okay. he treated - - - he
22 was the treater at the - - - at the - - -

23 MR. SKOBLAR: Every month he saw Kamal.

24 JUDGE FAHEY: Can I ask a question? Going
25 to Frye for a second.

1 MR. SKOBLAR: Yes.

2 JUDGE FAHEY: So the Appellate Division
3 seemed to say that Frye was met. At least two of the
4 three in the majority said that Frye was met and that
5 - - -

6 MR. SKOBLAR: Yes.

7 JUDGE FAHEY: - - - as I asked your
8 opponent in the other side, I thought Judge Moskowitz
9 was saying something else, that general liability may
10 have been met and that Frye shouldn't have been - - -
11 shouldn't have even been an issue. What's your
12 position on that?

13 MR. SKOBLAR: I think what Judge Moskowitz
14 said is that perhaps a Parker hearing would have been
15 more appropriate.

16 JUDGE FAHEY: Well, I was thinking even
17 more fundamentally, like Richardson's rules on
18 general reliability, but go ahead anyway.

19 MR. SKOBLAR: I'm sorry, sir, the question
20 being - - -

21 JUDGE FAHEY: So the question being, where
22 are you - - - do you think that the Appellate
23 Division's determination on Frye is correct or Judge
24 Moskowitz is correct? Which would you say would
25 apply here? You see what I'm saying?

1 MR. SKOBLAR: Yeah.

2 JUDGE FAHEY: Okay. The reason I ask is
3 because - - - let me tell you what I'm thinking, it
4 might help you a~~r~~ little bit. The reason I ask is
5 because I am having a difficulty seeing general
6 acceptance in the scientific community when you get
7 to the counting scientific votes questions on whether
8 the Israeli study applies and the Finnish study,
9 okay. That isn't the same as general reliability.
10 And that's a separate question.

11 And it seems that there is a stronger
12 argument to be made there than the Appellate
13 Division's analysis of the application of Frye
14 because it seems like they really didn't apply Frye,
15 it seems like they more applied Daubert, and using
16 the Zito case, the Second Department case, and the
17 principles that were enunciated there. And in other
18 words, a confidence in the scientific confusion - - -
19 conclusion, rather than a general acceptance in the
20 scientific community. That's why I asked the
21 question.

22 MR. SKOBLAR: Well, the Finnish - - -

23 JUDGE FAHEY: Because what I am worried
24 about is, not just your case, but if somehow we make
25 a decision here that upholds this decis - - - the

1 Appellate Division, it would seem that we may be in
2 danger of undermining our own standard because it
3 seems to be imposing new rules, and maybe the wrong
4 standard was applied to begin with. That's why I'm
5 asking.

6 MR. SKOBLAR: Well, if a Parker hearing was
7 necessary, that's really what should have happened
8 here. The Finnish study, at least for our case, I
9 think was exactly on point and had a lot of
10 reliability to it. And that is, in the Finnish
11 study, from 1990 to 2001, 2,303 Finnish men were
12 followed. And the conclusion of that study was that
13 they tested the people originally, and some people
14 had their systolic blood pressure rise really
15 quickly, and other people in the stress test, their
16 systolic did not move much.

17 JUDGE STEIN: Did that study establish
18 causation or just a correlation?

19 MR. SKOBLAR: I think it was more of a
20 correlation, but - - -

21 JUDGE STEIN: Is that enough?

22 MR. SKOBLAR: I think it's enough. And the
23 reason being is that Kamal's - - - who had no history
24 of hypertension, and seventy-two percent of those
25 whose systolic blood pressure rose - - -

1 JUDGE STEIN: Over a long period - - - it
2 was over a long period of time.

3 MR. SKOBLAR: Well, the study was conducted
4 over eleven years. And during that time, 130 people
5 had strokes. But in this situation, where there is
6 such a rise in his systolic blood pressure, and at
7 the scene, within minutes after the accident, he
8 suffers a stroke.

9 JUDGE ABDUS-SALAAM: So where - - - where
10 is the study - - - I mean, maybe it's too basic
11 because it's a car accident, but where is the study
12 that says a car accident causes a spike in blood
13 pressure immediately, such as what happened here, and
14 that leads to a stroke?

15 MR. SKOBLAR: Well, you know, I mean, if we
16 were going to have absolute certainty, Kamal would
17 have been connected to TEE machine as he was driving
18 the fare back to New Jersey. But in the real world,
19 that is not going to happen. We know that there is
20 no history of any hypertension, we know that within
21 minutes after the accident, EMT comes and they read
22 his blood pressure at 198 over 120.

23 We know that the Finnish study, which Dr.
24 Segal, the defense expert, described, is an excellent
25 study. We showed that people that had a rise in

1 their systolic blood pressure, they were seventy-two
2 percent more likely to suffer a stroke. I do believe
3 that it was reliable, perhaps it was a Parker hearing
4 that could have been held, but I think that all four
5 - - - I mean, four of the five judges in the First
6 Department thought that the issue should have gone to
7 the jury even after the Frye hearing.

8 Thank you.

9 CHIEF JUDGE DIFIORE: Thank you.

10 Mr. Ford.

11 MR. FORD: A couple of things, Your Honor.

12 First of all, the record shows that the
13 plaintiff did have hypertension and other risk factors.
14 At page 224 of the record, it's indicated that he has a
15 smoking history of one pack per day. Dr. Oh said, at page
16 478 of the record, that he had hypertension. At page 510
17 of the record - - -

18 JUDGE STEIN: But going back to Judge
19 Pigott's earlier comment or question; isn't that a
20 causation question that's for the jury?

21 MR. FORD: No, Your Honor, I don't. I do
22 think that the whole point of Parker is if there is
23 an issue as to specific causation, then it shouldn't
24 go to the jur - - - it should not go to the jury if
25 the plaintiff hasn't laid a proper factual

1 foundation. And I don't think that there was a
2 proper factual foundation in this case because of the
3 way Dr. Oh rules in the - - - he says, the stress
4 from the accident, five minutes before the stroke,
5 caused the stroke. He doesn't address the
6 possibility of, what about the stress from the fight
7 with the bus driver three minutes before the
8 accident?

9 JUDGE PIGOTT: Isn't that - - - isn't that
10 cross-examination?

11 MR. FORD: No, Your Honor, I think it's - -
12 - I think it's proper factual foundation for an
13 expert to even go to the jury on.

14 JUDGE PIGOTT: Well, because if you're - -
15 -

16 MR. FORD: That's what - - - that's what
17 Cornell says.

18 JUDGE PIGOTT: If you're going to say that,
19 I mean, he's forty-six years old; he says, well, he's
20 forty-six, you know, you don't have strokes when
21 you're forty-six unless there is something, then you
22 point out that he weighed - - - whatever he weighed,
23 I don't remember, and he says, well, there is no
24 possibility, you know, that that's the possibility
25 why he had a stroke - - - that's why you have trials.

1 It seems to me, you got a doctor, a very
2 competent doctor who says this accident did not cause
3 or this - - - cause this injury. They got a doctor
4 who says this accident caused this injury.

5 MR. FORD: Right.

6 JUDGE PIGOTT: What's the basis of your
7 findings? And the jury has to decide.

8 MR. FORD: But how can they get around
9 "generally accepted", though, Your Honor. If there
10 isn't proof in the record that the theory is
11 generally accepted - - -

12 JUDGE PIGOTT: I don't understand generally
13 accepted. I mean, you got an accident and you got an
14 injury. You got a doctor who says the injury was
15 caused by the accident. Well, that's not generally
16 accepted. Well, maybe it is.

17 I picture this happening every single
18 accident. Because he broke his - - - he broke his
19 arm when he was in an automobile accident. Well, how
20 do we know that he didn't break his arm before the
21 accident, how do we know that it's because he left a
22 bottle in the middle of his - - - and that's what
23 caused the accident. I mean, it just can go on and
24 on.

25 MR. FORD: Your Honor, it's not going to be

1 every accident. It's not going to happen - - - if
2 the plaintiff had a broken wrist, we wouldn't be
3 here.

4 JUDGE PIGOTT: Oh, I'm not so sure. How
5 can you say that colliding with the bus in the way
6 this happened would cause a broken wrist?

7 MR. FORD: Well, but it's - - - I think
8 it's generally accepted that trauma can cause a
9 broken bone. We're talking here about a very unusual
10 - - -

11 JUDGE PIGOTT: How's this; there is a - - -
12 a guy goes in for a back operation and comes out
13 blind. Can that happen? That's ridiculous, you're
14 working on - - - you're working on the back. It
15 actually happens.

16 MR. FORD: Right.

17 JUDGE PIGOTT: I mean, so you bring a
18 motion in limine and say, well, that's - - - that's
19 absolutely impossible, and I'm the judge and I say,
20 well, I've got to have a hearing on it; no, I'm going
21 to let the jury hear that this doctor says that
22 there's five major nerves in the back and one of them
23 leads to the - - - leads to the eyes - - -

24 MR. FORD: Right.

25 JUDGE PIGOTT: - - - and that's what could

1 be - - - I just don't know where it ends.

2 MR. FORD: Your Honor, my time is just
3 about up.

4 JUDGE PIGOTT: Right.

5 MR. FORD: I just want to make one - - -
6 one last - - - well, actually two final points.

7 One, I'm just concerned that what's lost
8 here is a little bit of the - - - of the trial
9 judge's discretion. Does the trial judge have any
10 discretion? This was an awfully hard-working trial
11 judge, she heard four days of hearings, she heard the
12 experts, she read the articles; I don't think he can
13 say on this record she abused her discretion.

14 The last point is, the - - - in Cornell,
15 this court talked about - - - look, our tort system
16 calls for the transfer of money from one person to
17 another because of an injury. But the message, I
18 think, from Parker, from Cornell, from Sean R., is
19 that before that transfer can occur, a party cannot
20 take any shortcuts when it comes to proving expert
21 causation.

22 And I would submit on this record, with
23 these articles that the plaintiff relied on, that
24 this is not the case to retreat from that position.

25 JUDGE PIGOTT: Yeah.

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CHIEF JUDGE DIFIORE: Thank you, sir.

MR. FORD: Thank you.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Sadek v. Wesley, No. 30 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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