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COURT OF APPEALS
STATE OF NEW YORK

FLORENCE NEMETH,

Appellant,

-against-

NO. 24

BRENNTAG NORTH AMERICA,

Respondent.

20 Eagle Street
Albany, NY
March 15, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Ellen S. Kolman
Official Court Transcriber



1 THE CLERK: All rise. Please stand for the
2 Court. All may be seated.

3 CHIEF JUDGE DIFIORE: Okay. Good afternoon,
4 everyone. The third appeal on this afternoon's calendar is
5 number 24, Nemeth v. Brenntag North America. Counsel?

6 MR. FRIEDMAN: Good afternoon, Your Honors.
7 Bryce Friedman, Simpson, Thacher, & Bartlett for Whittaker,
8 Clark & Daniels. I'd like to reserve two minutes for
9 rebuttal if I may?

10 CHIEF JUDGE DIFIORE: You may, sir.

11 MR. FRIEDMAN: The primary basis for setting
12 aside the verdict is that plaintiff failed to show as a
13 matter of law that Mrs. Nemeth was exposed to a sufficient
14 amount of asbestos in Desert Flower dusting powder to have
15 caused her peritoneal mesothelioma.

16 At trial, plaintiff did not present expert
17 evidence specifying the level of exposure to respirable
18 asbestos that would have been sufficient to cause her
19 peritoneal mesothelioma, the specific cancer with which she
20 was afflicted.

21 Plaintiff failed to provide the fact-finder with
22 a scientific expression of the exposure level known to
23 cause peritoneal mesothelioma and that Mrs. Nemeth exceeded
24 that level.

25 And I want to make another point which is very



1 relevant to all of us as we sit here in masks for the last
2 two years, that there was no evidence of the amount of
3 asbestos plaintiff actually inhaled or breathed in a space
4 with the dimensions and air conditions of her bathroom.
5 Given the specific record of her use - - -

6 JUDGE RIVERA: Counsel is I can interrupt? I'm
7 on the screen. Hello. Good afternoon.

8 MR. FRIEDMAN: Good afternoon.

9 JUDGE RIVERA: On this last point, is that
10 required? Is it required to show what the person actually
11 inhaled?

12 MR. FRIEDMAN: Well, exposure is required, but
13 there's a lot of shorthand in these cases that leads to
14 unfortunate results. Because exposure in this case means
15 inhaled, and that's why we have the second issue with
16 respect to the problems at summation.

17 Just because somebody was exposed to something,
18 doesn't mean it had a potential to cause disease. And
19 there's no dispute in this case that the only exposure is
20 the potential to cause disease is if the toxin got in her
21 lungs.

22 So yes, she had to be in a condition in which the
23 toxin got in her lungs. It's sort of trite by now, but we
24 all know - - -

25 JUDGE RIVERA: Okay. But wasn't the - - - wasn't



1 there an expert who did, of course, the glove box test, but
2 who also did measure sort of some of the inhalation rate?
3 It is a releasability, right, that's sort of the asbestos
4 releasability is the main part of that test, but there's
5 more to that test; is there not?

6 MR. FRIEDMAN: There is not. There is no expert
7 who testified anything, not a single word in the entire
8 case about inhalation.

9 What the expert did, it took a box about this
10 big, put the product in the box, shook it up, and measured
11 whether any asbestos was released from the product, and
12 said what was released was orders of magnitude more than is
13 in the ambient air. That is it. There is no discussion of
14 what she may have been inhaling or otherwise. And in fact,
15 most of the cases that have come before the Court - - -

16 JUDGE RIVERA: Well, if you're in a bathroom, and
17 you're using this powder all over your body and then you're
18 cleaning it up which is, I recall, you're not disputing
19 that part of the evidence, some of it is going to be
20 inhaled. I'm not saying you're not correct, that the law
21 requires that we don't go around saying well, just because
22 it's in the air we assume you breathed it. I'm not saying
23 otherwise. But it's not true that there's no evidence,
24 right. It's just you're saying, look, it just doesn't
25 reach enough of a threshold for the jury to have come to a



1 conclusion in favor of the plaintiff on that issue.

2 MR. FRIEDMAN: I'm saying more than that.

3 JUDGE RIVERA: Okay.

4 MR. FRIEDMAN: Not only was there no evidence of
5 how much she inhaled, it is - - - I understand a jury could
6 have found that she inhaled some of the powder that was in
7 her bathroom. That is not an unreasonable inference. But
8 there is no evidence of how much she inhaled. And most
9 importantly, that even if you make wild assumptions that
10 are not in the record about how much she inhaled, how much
11 could have caused - - - and this is important - - - not
12 just mesothelioma, because when you read the record, all
13 the testimony is about mesothelioma - - - it is peritoneal
14 mesothelioma which is different than the pleural or - - -

15 JUDGE RIVERA: I'm sorry, Counsel. Is there
16 doubt in the evidence that asbestos causes the kind of
17 cancer that the decedent suffered?

18 MR. FRIEDMAN: There is doubt in the evidence
19 that the level of potential exposure she had does, but in
20 the abstract, it - - -

21 JUDGE RIVERA: Okay. So that's a little bit
22 different. That's your first point. I'm not challenging -
23 - - in terms of you making that point. But I just want to
24 be clear that you're not here today suggesting that
25 asbestos doesn't raise the risk of getting the cancer from



1 which she suffered.

2 MR. FRIEDMAN: It's - - -

3 JUDGE RIVERA: You're just saying it's not - - -
4 they didn't - - - they didn't connect the dots, that's your
5 point.

6 MR. FRIEDMAN: There is evidence in the record on
7 the point that Your Honor just asked about which is there
8 is a level of risk raised, but this is important. And if
9 you look at one thing in the record, look at the famous
10 Helsinki criteria, which is 897 in the record, which is the
11 report of a gathering of some scientists in Helsinki,
12 Finland at which they identified ways in which you could
13 attribute exposure to asbestos-related disease. And this
14 is the primary source of scientific evidence that's in the
15 case. And what it says is you can take exposure history to
16 attribute a disease to asbestos, specifically pleural
17 mesothelioma. But if you want to go to what we have here,
18 peritoneal mesothelioma, it has to be higher levels of
19 exposure. But nothing is defined.

20 So when this expert in this case just talks about
21 oh, there could be a relationship - - -

22 JUDGE RIVERA: So Counsel, why doesn't, if you
23 got one expert saying you go in the box, here's a certain
24 level of magnitude of the asbestos that's released that
25 might be breathed, and you got another expert that says



1 look all the data shows that there are these stands that
2 the federal government uses that's very high above those
3 standards, why isn't your argument an argument about the
4 weight of the evidence, that the jury can decide given what
5 we've heard on direct, given what we've heard on cross,
6 we're going to hold in favor of the plaintiff - - - or they
7 could have held in favor of the defendant, I assume is your
8 position - - - but why doesn't go to the weight as opposed
9 to whether or not that satisfies the minimum standard
10 necessary to get this to the jury?

11 MR. FRIEDMAN: Because the evidence you just
12 described is not, in fact, in the record. Because let me
13 give you one specific example of what you just said.

14 You said federal standards are exceeded. Well,
15 there are federal standards that says we can all work in
16 this courtroom based on a measurement of what's in the
17 ambient air, and if the level exceeds that, it's not safe
18 to work in the courtroom. Well, guess what? Those
19 measurements are not in the record at all with respect to
20 anything that happened in this case.

21 So the fact that there exists the standard, and
22 the fact that the plaintiff didn't put any evidence of the
23 standard, this forms the - - -

24 JUDGE RIVERA: Well, I thought that you said that
25 the expert who uses the box says it's the amount that's



1 higher than the ambient air, and that falls to Dr. Moline
2 as she relies on that and says the same. Again, you might
3 say it's just not good evidence, it's not strong enough,
4 but I'm not sure you're correct when you say there's no
5 evidence. It sounds to me like you're arguing, again, over
6 the quality of this evidence, which is to me different from
7 whether or not it meets the minimum threshold.

8 MR. FRIEDMAN: No. Respectfully, I think I'm not
9 arguing about quality at all. I think I'm saying there is
10 no evidence sufficient to bring this case to a jury. Just
11 the fact that there is more of X in the ambient air doesn't
12 tell us anything at all.

13 And I want to address something that I think is
14 behind some of the questions, and is an important point
15 that is raised in the dissent - - - excuse me - - - in the
16 majority opinion in the First Department, which is somehow
17 that us asking the Court to specifically apply the Parker
18 standard and saying that there is no exception for asbestos
19 cases somehow means the death knell of asbestos cases, and
20 that is absolutely one hundred percent not the case. And
21 the record here shows you that.

22 There were nine other defendants in this case who
23 paid over a million-four to this defendant because the
24 proof against them, and they're actually asbestos-
25 containing products, met the Parker standard and that's why



1 they paid the money. But here, we're in a line drawing
2 exercise.

3 This is not a product that was designed to be
4 created with asbestos, and if there is no actual evidence
5 that this product's - - - exposure to this product causes
6 disease at a certain level of exposure, there has to be the
7 line that's drawn and that's the Parker line. And we're
8 just asking the Court to apply it to an asbestos case in
9 this case. And I see my time is up, so I'd like to just
10 reserve the two minutes, please.

11 CHIEF JUDGE DIFIORE: You have your two minutes,
12 sir.

13 Counsel?

14 MR. DYMOND: Thank you, Your Honor.

15 May it please the Court. Seth Dymond for the
16 plaintiff/respondent.

17 With all due respect, the arguments that were
18 just presented are either completely out of touch with
19 Parker or boil down to mere semantics. So take for
20 instance the assertion that we have to show the exact level
21 of which Mrs. Nemeth actually inhaled the asbestos fibers.

22 JUDGE TROUTMAN: So even if you are correct that
23 there's no exact level, what measurement, if any, was
24 shown?

25 MR. DYMOND: The measurement was quantified as 2-



1 point million - - - more than 2-point million asbestos
2 fibers, amphibole asbestos fibers, the more potent type.

3 JUDGE CANNATARO: Well, that number's the glove
4 test - - - the glove box test. The discussion we were
5 having was about inhaling it. Is there any number on
6 inhalation?

7 MR. DYMOND: Your Honor, that is the inhalation
8 number, and let me explain to you in the record why.

9 The discussion about releasability is not related
10 to this test on Desert Flower. It's related to a different
11 test discussed in the peer review literature. That is
12 borne out in the record on page 3177 through 3180. It's a
13 different test.

14 For this test, our testing experts said on page
15 3187 of the record, the purpose of this test is to target
16 the actual exposure, that's why we're putting filters in
17 the breathing zone, that's why we're using respiratory
18 rates with the pumps that we have in the glove box. And
19 then the mathematical modeling, one of the actual
20 methodologies identified by this Court and Parker was then
21 used to say here's what the actual exposure is.

22 And two other critical citations. 3219 where our
23 expert says yes, if it's getting in the breathing zone,
24 it's being inhaled, and 4818 where our medical expert says
25 the exact same thing.



1 And indeed, think about this, the idea of having
2 a breathing zone is because that's the zone of air you are
3 breathing in.

4 So the asbestos being released into that
5 breathing zone is being inhaled, which Ms. Nemeth did on a
6 daily basis in her cramped unventilated bathroom for a
7 eleven straight years. And - - -

8 JUDGE RIVERA: And Counsel, if I can interrupt
9 you? I'm on the screen.

10 With respect to what you're arguing now, I just
11 want to be clear, are you saying that the experts relied on
12 studies to that effect? That is to say that studies say if
13 it's in the "breathing zone" then obviously it's inhaled,
14 it's going into your lungs, or is that a conclusion they
15 drew from their experience or from something else? I just
16 want to be clear on what you say the record represents.

17 MR. DYMOND: The answer is both, Justice Rivera.
18 And let me give you a few other record citations on this.

19 On page 4108, Dr. Moline says, when you use a
20 cosmetic health product, and it's generating levels at
21 orders of magnitude above ambient background level,
22 multiple studies show that at that exposure level, you will
23 see elevated rates of mesothelioma. And keep in mind, that
24 this is a causation record - - -

25 JUDGE CANNATARO: So was the doctor's testimony



1 at that point tantamount to saying anything above the level
2 of asbestos in ambient air is going to be causative to
3 peritoneal mesothelioma? Was that what she was saying?

4 MR. DYMOND: No. She was - - - there's another
5 point where she is defining what it means to have a
6 nontrivial exposure, and that's an instance where she says
7 a nontrivial exposure that's going to contribute, not
8 that's going to be a substantial contributing factor, but
9 it's going to contribute is one that is double the
10 background rate in the ambient air.

11 So compare that two orders of magnitude higher;
12 2.7 million asbestos fibers, the more carcinogenic type of
13 asbestos, is two orders of magnitude greater than the
14 60,000 in the ambient air.

15 Pages 3942 through 3945 make that out. And so -
16 - -

17 JUDGE SINGAS: Counsel, aren't those just
18 association studies, and association evidence versus cause
19 and effect?

20 MR. DYMOND: No. And what you're referring to
21 Justice Singas I believe is the Welch study. That's one
22 piece of the evidence. But the Welch study found a sixfold
23 increase for peritoneal mesothelioma including a
24 nonoccupational settings.

25 Sixfold increase is well above an association.



1 Twofold increase is causative. But there's other citations
2 in the record, including page 4400 through 4402 where Dr.
3 Moline specifically says here's an exposure level which we
4 know is thousands of times excess risk, and she's asked,
5 tell me the studies you're relying on that this level
6 causes peritoneal mesothelioma, and she says let me tell
7 you, there's five. Two from authors Lacourt, one from
8 Rothenberger, one from Iwatsubo and one from Agudo, and
9 there's zero cross-examination whatsoever on any of that
10 predicate.

11 So that goes to CPLR 4515 which says once we've
12 laid bare our scientific predicate, it's incumbent upon the
13 defendant on cross-examination to delve into that data and
14 try and knock down some of those articles. It wasn't done.
15 So that's more of a weight of the evidence challenge than
16 legal sufficiency. And consider that not a single case
17 with civic opinion was offered during this trial by any of
18 the defendants' experts.

19 So all of this scientific proof came in
20 completely un rebutted. And so I think when you really look
21 at this, and the idea that under the standard review, valid
22 lines of reasoning and permissible inferences, it simply
23 cannot be said that this is an instance that it was utterly
24 irrational for the jury to have reached the causation
25 finding that it did.



1 And I think it's somewhat fortuitous that this
2 Court recently decided the Juni case, because we can look
3 at those two records and we can see stark distinctions
4 across every element of causation. But the most critical
5 of which is the idea that in that case, the product was
6 radically altered such that the asbestos converted to a
7 nontoxic substance, and you can't apply the conventional
8 asbestos toxicology to that product because we don't even
9 know necessarily if it's an asbestos product at that point.

10 Compare that to here. There's not even an
11 allegation, let alone evidence, that the asbestos taken out
12 of the earth, put into this appellant's talc, changed form
13 and chemical composition in any way when Mrs. Nemeth
14 inhaled it.

15 And when we consider the idea that these are
16 completely different records, it makes sense why the
17 Appellate Division fell on the opposite side of the coin,
18 the legal sufficiency coin from the Juni case.

19 And there's an inherent contradiction in the
20 appellant's argument on this issue. You look at footnote 8
21 of their opening brief, they cite cases in which they say
22 oh, no, those cases causation was validly established. And
23 those were not cases where actual inhalation was
24 demonstrated, because a lot of times in the vast majority
25 of times, we don't have the ability to do quantification



1 evidence. We have the ability to test the product here.
2 We're not going to get that in the vast majority of
3 instances.

4 So when we go back to Parker, and we see that
5 look - - -

6 JUDGE TROUTMAN: So was her exposure quantified
7 in any way here?

8 MR. DYMOND: It was quantified by the glove box
9 test which then, via mathematical modeling, said the
10 exposure was 2.7 million fibers in the breathing zone. And
11 you link that up with the testimony that this is being
12 inhaled because it's in the breathing zone, and we have an
13 actual quantification of exposure.

14 And also keep in mind, there's no other evidence
15 on this record of asbestos exposure from any other product.
16 There's no other risk factor for peritoneal mesothelioma on
17 this record at all. All we have - - -

18 JUDGE RIVERA: Counsel can I ask - - - Counsel,
19 if I may ask you a question? I don't know that you'll be
20 able to answer it, and I would understand why.

21 There's an amicus from Colgate, I don't know if
22 you are familiar with what the amicus raises, but they have
23 an exhibit which references - - - in favor of Colgate - - -
24 and experts modeling, and I was wondering if you knew what
25 that modeling was, and if it was in any way similar to the



1 modeling used by the expert from your client?

2 MR. DYMOND: Yeah. Your Honor, I think that was
3 an attempt at precise dose quantification in there. And
4 that was something defendant attempted here. It was
5 precluded as junk science, and there's no challenge at this
6 point in the appeal as to the preclusion of that junk
7 science which simply says it's not something we in science
8 are really capable of demonstrating.

9 And go back to Parker for a moment. The legal
10 framework in Parker is tied to the science, because Parker
11 was trying to strike this balance. We don't want highly
12 credentialed experts coming in and saying here's a
13 conclusory opinion, but we also don't want to generate an
14 insurmountable burden for a plaintiff.

15 And so what we did here by actually testing the
16 product at issue, was provide more evidence than what has
17 already been deemed to satisfy the Parker standard, and for
18 those reasons, this is an order that should be affirmed.
19 Thank you.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 Counsel, your rebuttal?

22 JUDGE GARCIA: Counsel, before you start, could
23 you address - - - what you want to address - - - but could
24 you address the releasability versus breathability of the
25 glove box test?



1 MR. FRIEDMAN: Sure. I think - - - what I was
2 going to begin by referring the panel to the record,
3 because my colleague made a lot of references to the
4 record, but I may not necessarily agree with, but I don't
5 think going through that in my two minutes is a useful part
6 of the time. But I will refer the panel to 2019 where Mr.
7 Fitzgerald offers his releasability opinion, and 3180 which
8 he's asked why he did a releasability study, 3199 where he
9 says what he found, and 3200 where he gives this 2.7
10 million number which sounds very impressive, but so what.
11 I mean, it could have been 5 million or 25,000 or 86
12 million; it doesn't really tell us anything. It tells us
13 nothing about whether that's good, bad, otherwise, or
14 relates to peritoneal mesothelioma.

15 JUDGE CANNATARO: But Counsel, the argument is
16 that the glovebox test has a breathing component to it as
17 well.

18 JUDGE GARCIA: Right. So could you address that?

19 MR. FRIEDMAN: There is no breathing component to
20 it. I read the - - - I read Mr. Fitzgerald's testimony
21 again yesterday. There is no breathing component to the
22 test.

23 The closest thing to a breathing component is the
24 sensors were put in a bunch of different places in the box,
25 and that's it.



1 There's no - - - there's no in - - - there's
2 nobody breathing in. There's no statement that this is the
3 amount of asbestos.

4 JUDGE RIVERA: But again, Counsel, isn't that
5 what you - - - you disagree with whether or not it's
6 persuasive. It's not that there's nothing there, right.
7 You just said that there - - - it's some machinery there,
8 but you're disagreeing as to whether or not that should be
9 persuasive. And given the standard on our view of - - -
10 the fact that there was a jury verdict for the plaintiff,
11 again, isn't the opponent correct, your opposing counsel,
12 that that's to the weight.

13 MR. FRIEDMAN: Not even - - - I disagree. Not
14 even the experts in the case said she breathed in 2.7
15 million asbestos fibers. That was just a statement of what
16 was in the file.

17 JUDGE RIVERA: Yes, but I asked you at the
18 beginning, is that what you need? Do you need someone to
19 say look, this is exactly what she breathed in, and you
20 yourself - - - and you can correct me if I'm wrong - - -
21 conceded that's not necessarily what you need, and I agree
22 with you: you need something, and no one's saying you don't
23 need anything. Our case law is very clear you got to have
24 something.

25 MR. FRIEDMAN: We're in agreement you have to



1 have something, but more than a measurement of asbestos
2 released into the air, that's - - -

3 JUDGE RIVERA: So let me ask you this.

4 MR. FRIEDMAN: Yes.

5 JUDGE RIVERA: If we disagree with you, and
6 decide that the record does indeed present evidence on
7 breathability, do you lose?

8 MR. FRIEDMAN: No.

9 JUDGE RIVERA: Why not?

10 MR. FRIEDMAN: No, because - - - because in this
11 - - - what this Court said in Parker is that plaintiff had,
12 "far more exposure to benzene than did the refinery workers
13 in the epidemiological studies". The Court found that
14 plainly and sufficient to establish causation. It neither
15 states the level of the refinery worker's exposure, nor it
16 specifies how Parker's exposures exceeded it. There's
17 lacking in evidence to support the claim.

18 Even with - - - even if I assume you're correct,
19 Judge Rivera, and that's in the record, you still fail that
20 test under Parker. There is no question about it. My
21 colleagues on the other side haven't even argued otherwise.
22 Thank you, Your Honors.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 THE CLERK: All rise. Hear ye, hear ye, hear ye,
25 all persons having anything further matters before this



1 Court of Appeals or before the State of New York may
2 (indiscernible) Wednesday afternoon at 2 o'clock, at which
3 time, court now stands adjourned.

4 (Court is adjourned)

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

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Florence Nemeth v. Brenntag North America, No. 24 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Ellen S. Kolman

Signature: _____

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