

THE NEXT CASE IS PHILIP MORRIS
VERSUS DOUGLAS.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

I REPRESENT THE DEFENDANT AND
WITH THE COURT'S PERMISSION I
WILL RESERVE MY TIME FOR
REBUTTAL.

THE PLAINTIFF IN THIS CASE ASKS
THIS COURT TO DO SOMETHING
EXTRAORDINARY AND UNPRECEDENTED.
I HAVE ASKED THIS COURT TO
IMPOSE STRICT LIABILITY ON THE
DEFENDANTS WITHOUT REQUIRING THE
PLAINTIFF TO ESTABLISH EVERY
ESSENTIAL ELEMENT OF THE
PLAINTIFFS CLAIM IN THIS CASE.
TO DEMONSTRATE THAT AN ESSENTIAL
ELEMENT THAT WAS NOT ESTABLISHED
IN THIS CASE WAS ACTUALLY
DECIDED IN A PRIOR CASE.

THERE IS NO DISPUTE THAT THE
JURY IN THIS CASE WAS NOT ASKED
AND DID NOT DECIDE WHETHER THE
PARTICULAR CIGARETTES SMOKED BY
MRS. DOUGLAS WERE OR WERE NOT
DEFECTIVE.

>> IN ENGLAND, IF THE CLASS-ACTION
WENT ON FOR... WHAT WAS IT?
A YEAR'S TRIAL?

IF THE WOULD HAVE ENDED WITH A
JUDGMENT IN FAVOR OF THE
DEFENDANT, WOULD YOU BE MAKING
THE ARGUMENT THAT THE PLAINTIFF
STILL WOULD HAVE, EVERY
PLAINTIFF THAT WAS PART OF THE
CLASS, COULD GO BACK AND TRY
TO --

>> IT WOULD DEPEND ON THE
FINDINGS BUT FOR EXAMPLE WITH
RESPECT TO FINDING NUMBER THREE
WHICH ASKED WHETHER THE
DEFENDANT PLACED ON THE MARKET
CIGARETTES THAT WERE DEFECTIVE
OR UNREASONABLY DANGEROUS, IF
THE ANSWER THAT QUESTION HAD
BEEN NO, THEN WITH RESPECT TO
THE STRICT LIABILITY, THAT WOULD
HAVE BEEN WOULD HAVE BEEN THE
END OF THE MATTER BECAUSE THERE
WOULD HAVE BEEN NO SITUATION
WHERE ANY CIGARETTES PLACED ON
THE MARKET WERE DEFECTIVE.
THE ISSUE HERE IS, BECAUSE OF
THE GENERALITY OF THE QUESTION
AND BECAUSE OF THE WAY THE
PLAINTIFFS TRIED THE CASE IN

ENGLE WHAT THEY DID WAS THEY
OFFERED MANY DIFFERENT
ALTERNATIVE REASONS, REASONS
THEY DESCRIBED TO THE JUDGE AS
ALTERNATIVE REASONS.
BECAUSE THE JURY IN ENGLE WAS
NEVER ASKED AND DID NOT DECIDE
THAT ALL CIGARETTES WERE
DEFECTIVE AT ALL TIMES OR IF SO,
WHETHER OR NOT THEY HAD A COMMON
DEFECT.
AND IF SO WHAT THAT COMMON
DEFECT WAS.
YOU DON'T HAVE THAT INFORMATION
BECAUSE THOSE DECISIONS WERE NOT
ACTUALLY DECIDED.
YOU CAN'T TAKE THAT FINDING AND
USE IT TO --
[INAUDIBLE]
>> WHAT THE THIS COURT MEAN IN
ENGLE WHEN THEY SAID THAT
FINDING, THAT THE DEFENDANTS
PLACED CIGARETTES ON THE MARKET
THAT WERE DEFECTIVE AND
UNREASONABLY DANGEROUS WOULD
HAVE --
>> IT SEEMS LIKE YOUR ARGUMENT
IS THAT DETERMINATION OF THIS
COURT ESSENTIALLY HAS NO EFFECT.
>> NO, YOUR HONOR.
I THINK WHAT THIS COURT DID IN
ENGLE WAS DECIDE WHICH FINDINGS
WOULD HAVE A PRECLUSIVE EFFECT,
NOT TO DECIDE WHAT THE PURPOSE
OF EFFECT WAS.
THAT FINDING HAS PRECLUSIVE
EFFECT.
IT IS NOT POSSIBLE FOR A
DEFENDANT TO COME IN AND COUNTER
THAT FINDING.
BUT THAT DOESN'T ANSWER THE
QUESTION AS TO WHAT THAT FINDING
MEANS.
FOR EXAMPLE, IF THAT FINDING --
>> BUT IT SEEMS TO ME YOU ARE
SAYING EFFECTIVELY MEANS NOTHING
IN ANY SUBSEQUENT CASE.
I'M TRYING TO UNDERSTAND HOW IN
ANY SUBSEQUENT CASE THAT FINDING
WOULD HAVE ANY SORT OF
PRECLUSIVE EFFECT THAT WOULD
MEAN ANYTHING.
>> I THINK YOUR HONOR IT MEANS
VERY LITTLE.
I THINK THAT --
>> AS LITTLE AS NOTHING?
>> NOT SO MUCH NOTHING YOUR

HONOR BECAUSE THE 11TH CIRCUIT
HOLDS BUT WHAT IT DOES IT
PRECLUDES THE DEFENDANTS FROM
SAYING IT NEVER MARKETED A
DEFECTIVE CIGARETTE BUT THE FACT
IS IT MAY HAVE LIMITED
RELEVANCE, THAT PARTICULAR
FINDING MAY HAVE LIMITED
RELEVANCE GOING FORWARD.
IT'S NOT A REASON TO GIVE THAT A
SUBSTANCE THAT WAS NEVER GIVEN
BY THE JURY.

THE JURY NEVER DECIDED THIS
QUESTION.

ASK YOURSELF, ASK YOURSELF, WHAT
WAS THE DEFECT AND MRS. DOUGLAS'
CIGARETTE?

WHY DO YOU NEED TO KNOW THAT?
YOU NEED TO KNOW THAT BECAUSE IF
YOU DON'T KNOW THAT THE JURY
CANNOT ANSWER A LEGAL CAUSE
QUESTION THAT THIS COURT SAID
HAD TO BE ANSWERED IN A
SUBSEQUENT TRIAL.

IF YOU HAVE A SINGLE JURY, ALL
YOU HAVE TO DO IS ASK A JURY,
WAS THE PRODUCT EFFECTIVE AND
THAN DID THE DEFECT CAUSED THE
INJURY?

BUT WHEN YOU ARE TRYING TO TAKE
ONE JURY'S FINDING AND TRY TO
TRANSPORT IT TO ANOTHER JURY'S
CASE, THE SECOND JURY HAS TO
KNOW WHAT THAT DEFECT FOUND WAS
BECAUSE IF THEY DON'T THEY
CANNOT DO THE LEGAL CAUSE
DECISION THAT HE SAID HAD TO BE
DONE.

>> MAYBE, AND I WOULD HAVE TO GO
BACK AND LOOK AT EVERYTHING IN
ENGLAND FROM SEVERAL YEARS AGO,
BUT I THOUGHT IT HAD SOMETHING
TO DO WITH PUTTING UNREASONABLY
HIGH LEVELS OF NICOTINE IN THE
CIGARETTE THAT THEN CREATED
ANOTHER ADDITIVE THAT CREATES
PLEASURE AND BECAME ADDICTIVE.
A BIG ISSUE THOUGH THAT WE SAID
THAT WATER PLAINTIFF WOULD HAVE
TO DO AGAINST DAMAGES IS SO THAT
AS A RESULT OF THE CIGARETTE
SMOKING, THAT THEY HAVE
DEVELOPED LUNG CANCER AS OPPOSED
TO --

AS A RESULT OF EXPOSURE TO
ASBESTOS OR SOMETHING ELSE SO
THAT LEGAL CAUSATION WAS

REQUIRED AND WE WERE VERY CLEAR ABOUT SOME OF THE OTHER FINDINGS THAT WE SAID WOULD NOT HAVE ANY EFFECT.

BUT ARE THERE OTHER DEFECTS THAT I AM MISSING ABOUT CIGARETTES AND WHAT THE ENGLE CASE ON BEHALF OF A CLASSWIDE GROUP OF SMOKERS WHAT OTHER DEFECTS WE WERE TALKING ABOUT WAS CIGARETTES?

>> THERE WERE A NUMBER OF DEFECTS.

>> THAT WARNINGS WERE FOUND AND FRAUDULENT FOR YEARS AND YEARS, THOSE WERE ALL FOUND?

>> I'M NOT TALKING ABOUT THAT. THE COURT IS EXACTLY RIGHT. ONE OF THE DEFECTS THAT WAS ALLEGED WAS FOR SOME BRANDS FOR SOME PERIOD OF TIME THEY USED MEDICALLY MODIFIED TOBACCO TO INCREASE THE NICOTINE LEVELS. ANOTHER DEFECT THAT WAS ALLEGED WAS THAT CERTAIN BRANDS AT CERTAIN POINTS OF TIME HAD AMMONIA THAT MADE THE PRODUCT EFFECTIVE.

ANOTHER THEORY, BECAUSE FILTERS COULD FILTER OUT HARMFUL BYPRODUCTS OF SMOKING THAT IT WAS A DEFECT OF HIGH NICOTINE AND TAR LEVELS AND NOT HAVING FILTERS WAS THE DEFECT.

ANOTHER DEFECT THAT WAS ALLEGED WAS THE FILTERS WHEN THEY WERE PUT ON HEAD DEFECTS.

>> YOU ARE SAYING THERE WERE DIFFERENT PERIODS OF TIME THAT THE CIGARETTES WERE DIFFERENT THINGS BUT WASN'T THAT BEEN A FAILING OF THE ENGLE DEFENDANT WHO HAD HOW MANY PAGES OF INTERROGATORIES DOES THE JURY HAVE IN ENGLE?

IT SOUNDS LIKE THIS WOULD HAVE BEEN A VERY GOOD ARGUMENT MADE AT THE TIME OF THE ENGLE TRIAL THAT WE ARE ONLY GOING TO AGREE THAT THIS DEFECT IS GOOD FOR THESE FIVE YEARS FOR THE CIGARETTES.

WE ARE NOT GOING TO BAND OURSELVES TOGETHER AND SAY THAT CIGARETTES ARE PERFECTLY FINE.

>> ONE OF THE THINGS WE DID DO WAS WE ASKED THE COURT TO POSE A

DETAILED QUESTIONNAIRE OF WHAT WAS THE DEFECT AND WHEN DID IT APPLY, EXACTLY WHAT THE COURT IS SUGGESTING.

REMEMBER THE PLAINTIFFS WEREN'T LOOKING FOR A PROGENY CASE. THESE PROGENY CASES CAME OUT AND WHAT HAPPENED THERE WAS AN ISSUES CLASS. THEY WERE TAKING ABOUT HOW THIS WAS GOING TO BE.

[INAUDIBLE]

AND THEY ASKED THE COURT TO GIVE A GENERAL AND IN FACT THE ARGUED AGAINST AND THE REASON THEY SAID IS WE HAVE MANY ALTERNATIVE THEORIES, SEVERAL ALTERNATIVE THEORIES.

THOSE WERE THE PLAINTIFFS IN THE ENGLE AND NOT MIND THEM MINE AND BECAUSE THERE ARE ALTERNATIVES, THIS COURT CAN'T KNOW, AND NO COURT COULD KNOW, WHICH THEORY WAS ADOPTED AND WHICH WASN'T. WHAT YOU DO KNOW IS THAT THOSE THEORIES DID NOT APPLY, ALL CIGARETTES DID NOT APPLY AT ALL PERIODS OF TIME.

>> THEY DID APPLY TO THE CIGARETTES MANUFACTURED BY THESE.

THESE DEFENDANTS AS OPPOSED TO OTHER MANUFACTURES.

>> EXACTLY.

THEY APPLY TO SOME CIGARETTES. IN OTHER WORDS EACH THESE DEFENDANTS WAS FOUND TO HAVE PLACED ON THE MARKET SOME CIGARETTE.

>> YOUR THEORY THEN JUST GOING BACK IS THAT SOMEONE MUST GO BACK AND FIND ASHES OF THE BURNED CIGARETTES TO PROVE THAT THE BURNED CIGARETTES CONTAINS A DEFECT AS A CONDITION PRECEDENT TO RECOVERY IN THIS CASE.

YOU HAVE TO MOVE THE PARTICULAR CIGARETTE CONTAINING ASHES AND X WAS THE CAUSE OF DEATH FOR MS. DOUGLAS.

>> YOU WOULD HAVE TO PROVE THAT PARTICULAR BRAND OF CIGARETTES

--

>> THEY DID DO THE BRANDS. THAT WAS THE WHOLE POINT IN ENGLE.

YOU ARE SAYING THEY HAVE TO GO

BACK TO THE PARTICULAR
CIGARETTE.

>> NO YOUR HONOR, WE ARE NOT
SAYING WE HAVE TO GO BACK AND
FIND ASHES.

>> IT HAS TO BE THE PARTICULAR
DEFECT IN THAT PARTICULAR
CIGARETTE.

>> WHAT I'M SAYING YOUR HONOR IS
THE DEFECTS THAT WERE ALLEGED
WORD EFFECTS AND THE CASE OF THE
BRAND OF CIGARETTE.

FOR EXAMPLE CERTAIN CIGARETTES
HAD AMMONIA ADDED TO THEM IN
CERTAIN CIGARETTES HAVE NEVER
HAD AMMONIA ADDED TO THEM.
CERTAIN CIGARETTES HAD AMMONIA
ADDED FOR SOME PERIODS OF TIME
AND NOT FOR OTHERS.

THE SAME WAY WITH THE
GENETICALLY-MODIFIED TOBACCO
THAT WAS MENTIONED EARLIER.
THERE WERE OBVIOUSLY TIMES WHEN
FILTERS WERE AVAILABLE AND TIMES
WHEN FILTERS WERE NOT AVAILABLE.
SOME CIGARETTES HAD THE FILTERS
WITH CHARCOAL AND SOME HAD
ANOTHER KIND OF FIBER.

DIFFERENT ARGUMENTS WERE MADE TO
THE ENGLE JURY ABOUT WHY EACH OF
THESE THINGS WERE DEFECTIVE.

>> I GUESS WHAT WE ARE STILL
LOOKING AT AND MAYBE THE FACT
THAT WHAT WE THOUGHT WE WERE
DOING IN ENGLE WHAT WAS BEING
ARGUED IS THAT THIS SHOULD NOT
HAVE BEEN A CLASS.

A CLASS, IF YOU ARE IN THE
CLASS, WHICH WE SAID WAS DEFINED
FOR A SPECIFIC PERIOD OF TIME,
AND SPECIFIC MANUFACTURES AND
YOU HAD THE BENEFIT OF THE
LIABILITY VERDICT.

YOU ARE SAYING NO, ALL YOU HAVE
THE BENEFIT OF WAS THAT YOU
COULD USE ANYTHING IN THAT
RECORD TO PULL IT OUT AND THEN
RETRY LIABILITY AGAIN.

IS THAT WHAT YOU ARE SAYING?
IT SOUNDS LIKE THAT IS WHAT
YOU'RE SAYING.

IN OTHER WORDS YOU WILL TAKE THE
EXPERTS WHO TESTIFIED AND YOU
CAN USE THAT, BUT YOU WOULD HAVE
TO REPROVE YOUR CASE.

NO, YOU ARE NOT SAYING THEY HAVE
TO REPROVE THEIR CASE?

>> IT DEPENDS ON HOW MUCH THEIR CASE HAS PROVEN.
LET ME GIVE YOU AN ILLUSTRATION.
WHICH OF THESE ARE CAUSED BY CIGARETTES AND THE JURY WENT THROUGH THE DISEASES THAT WERE CAUSED AND THE DISEASES THAT WERE NOT CAUSED.
THAT FINDING CAN BE EASILY -- FOR EXAMPLE IF THEY SAID 20 OF THESE DEFECTS ARE NOT SO WE WOULD KNOW.
>> NOW AGAIN WE ARE GOING BACK TO WHAT YOU WOULD SAY IS THAT WE NEED TO GO BACK AND SEE, WHO CAUSED THESE FINDINGS NOT TO BE AS DETAILED AND THEN ON APPEAL, WAS THAT RAISED BY THE DEFENDANT AS A GROUND FOR NOT GIVING THIS CLASS-ACTION PRECLUSIVE EFFECT BECAUSE I FEEL LIKE WE ARE HEARING AN ARGUMENT FROM THE ENGLE CASE IS WHAT I AM FEELING.
>> I THINK NOT YOUR HONOR BECAUSE I THINK THE ENGLE CASE DECIDED WHICH FINDINGS, AND THE COURT USED THE TERM ISSUED LAST, THAT IS WHICH OF THE ISSUES WERE DECIDED.
>> PUTTING ISSUE IN CLASS AND COLLATERAL ESTOPPEL HE WAS TALKING ABOUT IT IN TERMS OF LIABILITY ISSUES AND DAMAGE ISSUES, NOT SEGREGATING OUT THE DEFECT ISSUE.
YOU MUST AGREE WITH THAT.
>> YOUR HONOR.
>> YOU DON'T AGREE WITH THAT?
>> I DON'T COMPLETELY AGREE WITH THAT YOUR HONOR BECAUSE WHAT THE COURT DID WAS LEGAL CAUSATION, THEY ALL CAUSATION DECISION WOULD BE FOR A SECOND JURY.
YOU CANNOT HAVE LIABILITY WITHOUT LEGAL CAUSATION.
I DON'T THINK THAT LIABILITY CAUSE THE DAMAGE IS.
>> THE COURT DID NOT MEAN WHAT IT SAID WHAT IT SAID YOU WILL HAVE EFFECT ON THESE FINDINGS OF DEFECTS.
>> NO YOUR HONOR I THINK THE COURT DEFENSE OF THOSE FINDINGS WERE GOING TO BE CONCLUSIVE BUT THEY ARE ONLY PRECLUSIVE AS TO WHAT THEY ACTUALLY FIND.
>> YOU ARE JUST SAYING IT IN

DIFFERENT WORDS.

YOU ARE SAYING EXACTLY WHAT I SAID.

IT'S JUST THAT YOU ARE TRYING TO USE PRETTY WORDS TO AVOID CONFRONTING IT AND THAT IS THAT THERE IS A DIFFERENCE BETWEEN ISSUE PRECLUSION, COLLATERAL ESTOPPEL AND RACE JUDICATA.

THERE IS, IS THERE NOT?

>> FLORIDA LAW FOR EXAMPLE IN THE EXAMPLE FOOTNOTE 2 OF OUR REPLY BRIEF, THIS COURT'S DECISION IN 1981 AND THE FLORIDA DEPARTMENT OF TRANSPORTATION CASE, 801.101, THE JUDICATA IS CONTENT AND ISSUE PRECLUSION AND CLAIMED PRECLUSION.

THAT IS THE SAME POINT THAT WAS MADE.

>> I THINK YOU OUGHT TO LOOK AT OTHER CASES BECAUSE FLORIDA DOES -- LATERAL ESTOPPEL AND RACE JUDICATA.

THERE REALLY WOULD HELP IF YOU WOULD RESPOND TO THE QUESTION I ASK RATHER THAN TRYING TO GO AROUND IT.

YOU ARE VERY GOOD AT DOING THAT AND YOU ARE A GREAT LAWYER BUT I STILL GOT NO ANSWERS MY QUESTION.

>> LET ME TRY AGAIN YOUR HONOR. I APOLOGIZE.

YOUR PRECISE QUESTION.

LET ME TRY TO DEAL WITH PRECISELY.

I REALLY WANT TO RESPOND BECAUSE THIS IS SOMETHING WHICH I KNOW THE COURT, WITH THE COURT WOULD LIKE TO DO HERE AND I APPRECIATE THAT.

AND WHAT I'M SAYING IS THEY CAN ONLY HAVE THE EFFECT AS TO WHAT WAS DESIGNED.

THIS JURY WAS NEVER INSTRUCTED AS TO WHAT THE ELEMENTS OF THE STRICT LIABILITY CASE WHERE. ONE OF THE ELEMENTS OF LIABILITY IS THAT THE JURY HAS NOT DEFINED THAT THE DEFECT CAUSED THE INJURY.

NOW IF THE JURY HAS MADE THE DECISION THAT THE PRODUCT IS DEFECTIVE, IT KNOWS WHAT THE DEFECT IS AND IT CAN THEN APPLY IT.

IF IT IS TAKING SOMETHING FROM AN EARLIER DECISION, AND LESS THERE IS A PARTICULARITY AS THERE IS IN THE DISEASE FINDING, IT TELLS YOU WHAT DEFECTS WERE FOUND OR WHAT DISEASE WAS FOUND DEPENDING ON THE FINDINGS. THE JURY CAN'T KNOW THAT AND CAN'T APPLY THAT AND BECAUSE OF THAT YOU CANNOT DETERMINE WHETHER IT WAS ACTUALLY DECIDED. THE RULE HAS BEEN IN THIS STATE IN EVERY STATE THAT I KNOW OF, THAT WHERE PLAINTIFF WANTS TO RELY ON A FINDING IN A PRIOR CASE, THE PLAINTIFF MUST PROVE WITH REASONABLE CERTAINTY THAT THE LANGUAGE OF THESE COURTS, THE FLORIDA COURTS -- THAT ISSUE IS ACTUALLY DEFINED IN THE PRIOR CASE.

>> YOU ARE DOWN TO YOUR LAST FEW MINUTES.

>> THANK YOU YOUR HONOR. I WILL RESERVE THE REMAINDER OF MY TIME.

>> MAY IT PLEASE THE COURT. I AM STEVE BRANNOCK.

>> HAVE REACHED THIS SAME CONCLUSION THAT RES JUDICATA MEANS RES JUDICATA, THE MISCONDUCT FINDINGS ARE, IN FACT, SETTLED.

>> SO IT'S YOUR POSITION THAT THIS FINDING THREE REGARDING THE DEFECTIVE AND UNREASONABLY DANGEROUS CONDITION --

[INAUDIBLE]

PLACED ON THE MARKET WAS A FINDING THAT ALL THE CIGARETTES THE DEFENDANT PLACED ON THE MARKET WERE EFFECTIVE AND UNREASONABLY --

>> ALL OF THE CIGARETTES THAT WERE SOLD TO THESE CLASSROOM MEMBERS.

REMEMBER, THE CLASS MEMBERS ARE THOSE MEMBERS WHO ARE ADDICTED, AND THAT ADDICTION CAUSES AN INJURY.

WE'RE TALKING ABOUT THE CIGARETTES THAT WERE PUT ON THE MARKET BY THESE DEFENDANTS THAT CAUSED ADDICTION.

AND WHEN USED REPEATEDLY, RESULTS IN INJURY OR DEATH, YES. ALL OF THOSE CIGARETTES WERE

DEFECTIVE.

>> OKAY.

WELL, MY QUESTION IS, HOW DO WE KNOW WHAT CIGARETTES THOSE ARE? IF IT'S NOT ALL OF THE CIGARETTES SOLD BY THE DEFENDANT, HOW DO WE KNOW THAT THE CIGARETTES THAT WERE DEFECTIVE WERE CIGARETTES THAT WERE USED BY MRS. DOUGLAS? I'M -- BECAUSE OF THE WAY THIS IS WORDED, IT'S KIND OF A PUZZLING WAY TO WORD THIS FINDING, BECAUSE IT WOULD HAVE BEEN EASY TO WORD THE FINDING SO THAT IT WAS CLEAR THAT IT COVERED ALL OF THE CIGARETTES THAT THE DEFENDANTS PLACED ON THE MARKET, BUT IT DOESN'T REALLY SAY THAT.

IF IT IS SAID THAT THE CIGARETTES THE DEFENDANTS PLACED ON THE MARKET WERE DEFECTIVE AND ARE REASONABLY DANGEROUS, THAT'S ONE THING.

BUT THAT'S NOT WHAT IT SAYS. IT SAYS THEY PLACE CIGARETTES THAT ARE ON THE MARKET.

WELL, THAT SEEMS TO NOT BE AN EXPRESSION STATEMENT.

>> THE REASON WE KNOW THAT SHE WAS INJURED BY THESE CIGARETTES THAT WERE AT ISSUE WAS BECAUSE OF THE CLASS DEFINITION.

IN ORDER TO PARTAKE OF THOSE FINDINGS, SHE HAS TO PROVE SHE'S A MEMBER OF THE CLASS, AND TO PROVE A MEMBER OF THE CLASS, SHE HAS TO PROVE THAT SHE WAS ADDICTED TO THOSE CIGARETTES. THAT TIES DIRECTLY BACK INTO THE CLAIM THE PLAINTIFFS WERE MAKING THAT THE DEFECT HERE WAS THE SALE OF A HIGHLY-ADDICTIVE PRODUCT COUPLED WITH THE FACT THAT WHEN YOU USE IT REPEATEDLY, IT CAUSES INJURY.

WE'RE NOT TALKING ABOUT CIGARETTES THAT AREN'T ADDICTIVE.

THAT'S WHERE YOU GET THE CONNECT.

IT'S FINDING OF ADDICTION CONNECTS TO THESE PARTICULAR CIGARETTES.

WHAT I THINK IS IMPORTANT FOR THE COURT TO UNDERSTAND WAS THAT

THIS WAS A CLASS ACTION, AND IT WAS LITIGATED AS A CLASS, AND THE JURY WAS TOLD YOU ARE MAKING CLASS-WIDE FINDINGS THAT ARE GOING TO BE COMMON TO ALL OF THE PLAINTIFFS.

>> YEAH.

I THINK WHAT WE DID IN ENGEL WAS THE PLAINTIFFS WERE SAYING THAT THERE SHOULDN'T EVEN HAVE TO BE LEGAL CAUSATION, THAT THEY SHOULD JUST PROCEED TO DAMAGES. AND WE REJECTED THAT.

BECAUSE IT SEEMED THAT THAT LINK HAD TO BE MADE INDIVIDUALLY.

UM, I WANTED TO, THOUGH, ASK YOU ABOUT MR. BOYCE'S STATEMENT THAT DURING THE PERIOD OF TIME THAT'S COVERED BY THE CLASS, SOME CIGARETTES HAD GENETICALLY ENGINEERED -- WERE WORSE THAN OTHERS AND THAT THE FINDINGS OF THE ENGEL JURY AS TO THIS WERE NOT SPECIFIC ENOUGH TO ALLOW THOSE FINDINGS OF STRICT LIABILITY AND DEFECT TO BE USED IN A SUBSEQUENT CASE.

COULD YOU ADDRESS THAT?

IN OTHER WORDS, LIKE IF THE FINDING HAD BEEN ALL THESE CIGARETTES HAD THE GENETICALLY, YOU KNOW, FROM THE PERIOD OF TIME TO WHATEVER THE PERIOD OF TIME, AND BE VERY SPECIFIC ABOUT WHAT THE FACT WAS ABOUT WHAT'S BEING PUT IN AT A PARTICULAR POINT IN TIME.

>> I THINK THE BOTTOM LINE IS THAT THERE'S JUST A FUNDAMENTAL MISUNDERSTANDING OF HOW THIS CASE WAS TRIED.

THE JURY WAS NOT ASKED TO DECIDE BRAND PARTICULAR DEFECTS BECAUSE THIS WAS A CLASS ACTION.

ON THE PLAINTIFF SIDE --

>> WHAT I'M ASKING ON THE DEFENDANT SIDE -- BECAUSE I ALWAYS WONDERED ABOUT THAT, THIS ALL OCCURRED AFTER I BECAME A JUDGE AND HAD THIS ALL EVOLVED -- DID THEY WANT THERE TO BE DIFFERENTIATION BETWEEN THE DIFFERENT MANUFACTURERS? FOR EXAMPLE, PHILIP MORRIS IS HERE, THEY MARKETED THEIR CIGARETTES DIFFERENTLY. HOW DID THAT WORK IN ENGEL AND,

THEREFORE, FOR US UNDERSTANDING AS TO PHILIP MORRIS IN THE PERIOD OF TIME WE'RE TALKING ABOUT WHETHER IT'S UNFAIR TO FIND THEM TO THESE FINDINGS.

>> THE ANSWER IS THEY HAD ABSOLUTELY NO INTEREST IN DISTINGUISHING AMONG THEIR BRANDS.

THEY WERE ALL IN.

THIS WAS AN ALL-OR-NOTHING DEFENSE.

THEIR ARGUMENT WAS THAT NONE OF THESE CIGARETTES WERE DEFECTIVE FOR THE MANY REASONS THEY DISCUSSED.

THEY NEVER PRESENTED AN ARGUMENT TO THE JURY THAT SOME CIGARETTES WERE SAFER THAN OTHERS OR SOME CIGARETTES WERE MORE DEFECTIVE THAN OTHERS.

IT WAS AN ALL-OR-NOTHING APPROACH.

THEY THOUGHT THEY WERE GOING TO WIN.

THEY WERE CONVINCED THEY WERE GOING TO WIN IN FRONT OF THE JURY.

WELL, THE JURY DISAGREED WITH THEM, BUT THEY ARGUED IT ALL OR NOTHING JUST AS THE PLAINTIFFS ARGUED IT ALL OR NOTHING.

THESE VARIOUS MICRODEFECTS AS WE CALL THEM ARE ALL VARIATIONS ON THE SAME THEME WHICH IS THIS WAS ALL EVIDENCE OF HOW TOBACCO MANIPULATED THE NICOTINE AND THE ADDICTIVE LEVEL OF THE CIGARETTES.

BUT IT'S ALL THE SAME DEFECT.

IT'S THE ADDICTION COUPLED WITH THE DISEASE CAUSATION.

>> WHAT WAS THE STIPULATION IN THIS CASE?

DID THEY STIPULATE ON ADDICTION, OR DID THAT HAVE TO BE PROVED?

>> THAT HAD TO BE PROVEN, AND THEY STIPULATED THAT HER COPD AND LUNG CANCER WERE CAUSED, IN FACT, BY SMOKING THE CIGARETTES --

>> AND THE JURY HAD ALSO FOUND SHE WAS A MEMBER OF THE CLASS?

>> ABSOLUTELY.

>> AND THE CLASS MEANT THAT SHE SMOKED CIGARETTES FOR WHAT PERIOD -- WHAT WAS THE PERIOD OF

THE CLASS?
IN OTHER WORDS, DID SHE HAVE TO
SHOW THEY WERE TALKING ABOUT
THINGS THAT HAPPENED MAYBE
PRIOR?
>> RIGHT.
THERE WASN'T ANY ISSUE IN THE
CASE OF WHETHER TIME WISE SHE
WAS A MEMBER OF THE CLASS.
SO WHAT SHE HAD TO PROVE WAS SHE
WAS ADDICTED, AND IT WAS A
POWERFUL CASE IN THIS --
>> IF WE HADN'T DECERTIFIED THE
CLASS, SHE WOULD HAVE BEEN ABLE
TO CONTINUE IN THE CASE IN
MIAMI.
>> ABSOLUTELY.
>> AND THEN GO TO PHASE TWO JUST
LIKE THE PLAINTIFF THAT DID --
>> RIGHT.
>> -- AND IT WOULD SORT OF BE,
THAT'S WHY I'M THINKING AT THAT
POINT IF SOMEONE HAD SAID, WELL,
YOU NOW HAVE TO REPROVE YOUR
CASE, AND I THINK THAT'S WHAT
I'M TRYING TO LOOK AT IT.
THIS IS REALLY A CONTINUATION OF
ENGEL WITH THE IDEA THAT YOU
HAVE TO, YOU KNOW, NOT
EVERYONE'S GOING TO GET TO
RECOVER.
THEY'RE GOING TO HAVE TO GO
THROUGH A LOT MORE HURDLES TO
GET THERE.
>> A LOT OF WORK.
I MEAN, THESE ARE LONG TRIALS.
THIS WAS A TWO WEEK TRIAL, IT
WAS ONE OF THE SHORTER TRIALS --
>> BUT, AGAIN, THE LENGTH OF THE
TRIAL CAN'T BE THE DECIDING
FACTOR ON THE LEGAL ISSUE.
>> OF COURSE NOT.
>> AND WHY IS THE DEFENDANT
SAYING YOU CANNOT HAVE FINDINGS
WITHOUT SOME NEXUS TO DAMAGE?
AND THAT'S WHY THE DEFENDANT'S
ARGUMENT IS, OKAY, YOU HAVE
FOUND THIS COFFEE CUP MAY HAVE
SOME DEFECTS, BUT THAT, THE
PRECLUSION OF THE FACT OF
FINDING THAT DEFECT DOESN'T
NECESSARILY TRANSLATE INTO IF
JUSTICE CANADY PICKS IT UP AND
HAPPENS TO BE INJURED BY IT, YOU
STILL NEED THE NEXUS, AS I
UNDERSTAND THE ARGUMENT.
>> AND THE CRITICAL NEXUS IS

WHETHER THE DEFECT WAS APPLICABLE TO ALL OF THE MEMBERS OF THE CLASS, AND THE DEFECT THAT WE'RE TALKING ABOUT HERE, THE ADDICTION COUPLED WITH THE DISEASE CAUSATION IS, IN FACT, A DEFECT THAT APPLIES TO ALL OF THE CLASS MEMBERS.

SO EVERY CLASS MEMBER, INCLUDING MRS. DOUGLAS, HAD TO PROVE THAT THEY WERE, IN FACT, ADDICTED -- >> BUT SHE COULD, BUT SHE COULD -- WHAT I DON'T UNDERSTAND YOUR POINT ABOUT THAT BECAUSE SHE COULD BE ADDICTED THEORETICALLY BECAUSE SHE USED ONE PARTICULAR TYPE OF CIGARETTE THAT WAS MADE BY ONE MANUFACTURER THAT HAD NOTHING TO DO WITH THE OTHER CIGARETTES THAT SHE USED, OR SHE COULD -- THEORETICALLY, SHE COULD BE ADDICTED FOR SOME OTHER REASON. I DON'T UNDERSTAND HOW THE FACT THAT SHE'S ADDICTED TO CIGARETTES NECESSARILY SHOWS THAT THE CIGARETTES, THAT THE CIGARETTES THAT SHE CONSUMED FROM ALL OF THOSE OF THE DEFENDANTS ARE DEFECTIVE AND UNREASONABLY DANGEROUS.

I DON'T UNDERSTAND HOW THAT LOGICALLY FOLLOWS.

>> BECAUSE ALL OF THE CIGARETTES CONTAIN THAT SAME DEFECT.

THERE WASN'T ANY ARGUMENT --

>> BUT HAS THE JURY, DOES THE JURY FIND THAT?

I UNDERSTAND THAT'S YOUR POSITION, BUT WHAT I'M STRUGGLING TO FIND IS A FINDING BY THE JURY TO THAT EFFECT.

>> RIGHT.

TWO POINTS.

FIRST, WE KNOW THAT'S WHAT THE JURY DECIDED BECAUSE THAT'S HOW THE CLASS WAS DEFINED.

THE CLASS WAS DEFINED IT WAS A FOCUS ON ADDICTION.

SECONDLY, WE KNOW HOW THIS CASE WAS ARGUED.

IT WAS ARGUED BY THE PLAINTIFF'S ADDICTION AND DANGEROUSNESS, AND THE DEFENDANTS DEFENDED EXACTLY THE SAME WAY SAYING IT'S NOT ADDICTIVE, AND THEY'RE NOT DANGEROUS, OR AT LEAST SCIENCE

HASN'T YET PROVEN IT WAS DANGEROUS WHICH IS INCREDIBLE THEY WERE STILL DOING THAT IN THE YEAR 2000, BUT THEY WERE. THEN WE HAVE A JURY THAT WAS INSTRUCTED THAT THEY WERE DECIDING COMMON ISSUES THAT WERE APPLICABLE TO ALL OF THE CLASS. NOW, WE HAVE TO PRESUME THAT THE JURY, IN FACT, FOLLOWED THOSE INSTRUCTIONS. AND THEN IF YOU LOOK AT THE CLOSING ARGUMENTS IN THE CASE ON BOTH SIDES, YOU WILL SEE, AGAIN, THESE ARE ALL-OR-NOTHING ARGUMENTS. NOBODY WAS FOCUSING ON THE MICRODEFECTS, NOBODY WAS FOCUSING ON DISTINCTIONS BETWEEN THE BRANDS. TOBACCO WAS SAYING NONE OF THESE CIGARETTES ARE DEFECTIVE, AND THE MANUFACTURERS WERE SAYING ALL OF THEM WERE. AND IN ENGEL THIS COURT HAD THE ENTIRE RECORD IN FRONT OF IT, AND ONE OF ITS TASKS WAS TO DETERMINE SHOULD THIS CLASS BE CERTIFIED. AND THE ONLY -- AND YOU ANSWERED, YES. AND THE ONLY WAY YOU CAN ANSWER YES TO THAT QUESTION IS TO REACH A SATISFACTION IN YOUR OWN MIND BASED ON A REVIEW OF THAT RECORD THAT THE FINDINGS WERE SUFFICIENTLY APPLICABLE IN THE ENTIRE CLASS THAT IT WAS NOT FAIR TO GIVE THEM A RACE JUDICATA GOING FORWARD. THE SECOND PART OF THE RESPONSE IS IF THEY DIDN'T THINK THAT THE JURY VERDICT FORM WAS GOING TO ADEQUATELY PROTECT THEM, THEN THEY SHOULD HAVE OFFERED A DIFFERENT ONE. THEY OFFERED THAT INITIAL JURY VERDICT FORM THAT ASKED NARRATIVE QUESTIONS, HAD FILL IN THE BLANKS, AND THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION AND SAID THAT WASN'T RIGHT AND PROPER. THEY COULD HAVE APPEALED THAT, THEY DIDN'T. SO THEN THE TRIAL JUDGE ASKED THEM ON SEVERAL OCCASIONS IF YOU

DON'T LIKE THIS JURY VERDICT
FORM, GIVE US SOMETHING YOU CAN
LIVE WITH.

THEY NEVER PRESENTED SOMETHING,
AND THE LAW'S VERY CLEAR IN
FLORIDA.

IF YOU'RE GOING TO COMPLAIN THAT
THE JURY WAS IMPROPERLY
INSTRUCTED, YOU'VE GOT TO --

>> I DON'T THINK THEY'RE
CLAIMING THAT THE JURY AT THAT
POINT WAS IMPROPERLY INSTRUCTED,
THEY'RE JUST SAYING WHAT DID THE
JURY, WHAT THE JURY FOUND DOES
NOT SUPPORT YOUR POSITION.

>> BUT THEY --

>> AND IT STILL IS A MYSTERY TO
ME WHY THAT FINDING IS WORDED
THE WAY IT IS WORDED, BECAUSE IT
WOULD HAVE BEEN SO EASY TO HAVE
A FINDING THAT ALL OF THE
CIGARETTES THAT WERE SOLD BY THE
DEFENDANTS WERE UNREASONABLY
DANGEROUS.

BUT THAT'S NOT WHAT IT SAID.

>> THAT'S CORRECT.

BUT REMEMBER, THEY KNEW THAT
THIS WAS JUST PHASE ONE OF
MULTIPLE PHASE TRIALS.

SO WHEN MR. BOYCE SAYS WE DIDN'T
HAVE ANY IDEA THESE PROGENY
BOOKS WERE COMING ALONG, THAT'S
COMPLETELY NOT TRUE.

EVERYBODY KNEW THIS WAS STEP ONE
OF A PROCESS AND ALL OF THESE
PLAINTIFFS WERE GOING TO HAVE
THEIR INDIVIDUAL DAY IN COURT.
THEY KNEW THERE WAS GOING TO BE
A PRECLUSIVE EFFECT GIVEN TO
THOSE FINDINGS.

AND IF THEY THOUGHT IT WAS GOING
TO BE UNFAIR FOR THOSE FINDINGS
TO BE GIVEN PRECLUSIVE EFFECT
BECAUSE THEY WEREN'T SPECIFIC
ENOUGH, THEN IT WAS INCUMBENT
UPON THEM TO PROVIDE A MORE
SPECIFIC FINDING.

THEY COULD HAVE APPEALED THAT IN
THE ENGEL I CASE, THEY RAISED
THE DUE PROCESS --

>> I THOUGHT THEY DID.

I DON'T HAVE THE BRIEFS IN FRONT
OF ME, BUT WE AGREED UNANIMOUSLY
THAT THE NONSPECIFIC FINDINGS IN
FAVOR OF THE PLAINTIFFS ON
QUESTION 4 -- 9, INTENTIONAL
AFFLICTION ARE INADEQUATE TO

ALLOW A SUBSEQUENT JURY TO
CONSIDER INDIVIDUAL QUESTIONS OF
RELIANCE AND LEGAL CAUSE.

THEREFORE, THESE FINDINGS CANNOT
STAND.

SO IF I LOOK AT WHAT WE SAY
ABOUT PHASE ONE, AND THIS GOES
BACK TO -- IT WOULD BE SORT OF A
NOVEL THOUGHT THAT WHAT WE WERE
SAYING AS TO THE PHASE ONE
ADDICTION AND STRICT LIABILITY
WHICH IS ONE, TWO AND THREE WERE
NOT TO BE GIVEN PRECLUSIVE
EFFECT.

AND, OBVIOUSLY, WE'VE GOT TO
FIRST LOOK AT WHAT WE SAID IN
ENGEL.

IF WE WERE WRONG IN ENGEL, THEN
THAT'S WHAT WE -- MAYBE WE'RE
BEING URGED TO RECEDE FROM
ENGEL, AND THAT'S, I DON'T KNOW
IF THAT'S SOMETHING THAT HAS
BEEN EXPRESSLY ASKED TO DO.
DID YOU GET THAT AS BEING ONE OF
THE THINGS, THAT WE SHOULD
RECEDE FROM ENGEL?

>> I THINK, IN EFFECT, WHAT THEY
ARE DOING IS APPEALING ENGEL I
ALL OVER AGAIN.

WHEN THEY HAD THEIR OPPORTUNITY
TO RAISE --

>> WELL, WAS THEIR AN ISSUE IN
ENGEL ABOUT THE JURY FINDINGS ON
LIABILITY NOT BEING SPECIFIC
ENOUGH?

>> THEY, IN FACT, RAISED THAT
ARGUMENT IN THEIR REHEARING
MOTION TO THIS COURT, AND IT WAS
REJECTED.

AND THEN THEY WENT TO THE
SUPREME COURT, AND THEY
PRESENTED PRECISELY THE DUE
PROCESS ISSUE THAT'S IN -- THEY
PRESENTED TO THE U.S. SUPREME
COURT, AND THE U.S. SUPREME
COURT DENIED CERT.

THEY PRESENTED IT AGAIN TO THE
U.S. SUPREME COURT THIS YEAR IN
THE FOUR CASES THAT HAVE FINALLY
AFTER 18 YEARS WOUND THEIR WAY
ALL THE WAY THROUGH TO THE END
OF THE COURT SYSTEM, AND, AGAIN,
THE U.S. SUPREME COURT DENIED --

>> HOW MANY, HOW MANY CLASS
ACTION PLAINTIFFS HAVE BEEN OR
SUBSEQUENT -- HOW MANY TRIALS
HAVE THERE BEEN IN THE STATE OF

FLORIDA?

>> AS OF THE FILING OF THE
AMICUS BRIEF HAS A NICE LITTLE
CHART ON THAT.

I THINK IT WAS 79.

THERE HAVE BEEN A FEW MORE SINCE
THEN.

>> AND ARE THEY -- THERE WERE
ABOUT A THIRD THAT WERE FOUND
FOR THE DEFENDANT?

>> THAT'S RIGHT.

ABOUT A THIRD, AND IF YOU
INCLUDE THE MISTRIALS IN THAT,
THEN IT'S CLOSER TO 45%.
SO THESE ARE HARD-FOUGHT CASES.
THERE IS A FULL VETTING OF THE
CAUSATION ISSUE.

IT'S USUALLY VETTED IN
CONNECTION WITH THE CLASS
DEFINITION WHICH IS THE PROOF OF
ADDICTION.

GENERALLY SPEAKING, THE DEFENSE
TRIES TO ARGUE TO THE JURY THAT
THEY -- A MEMBER OF THE CLASS
BECAUSE IT WAS THEIR OWN
PERSONAL CHOICE --

>> WELL, ON THE CLASS
DEFINITION, ARE BRANDS OF
CIGARETTES IDENTIFIED IN THAT,
OR IS IT ALL CIGARETTES THAT
HAVE NICOTINE?

HOW IS THE CLASS DEFINITION?

>> THE CLASS IS DEFINED AS ALL
FLORIDA CITIZENS WHO ARE
SUFFERING FROM DISEASES AND
MEDICAL CONDITIONS CAUSED BY
THEIR ADDICTION TO CIGARETTES
THAT CONTAIN NICOTINE, SO IT'S
VERY BROADLY -- IT'S NOT BRAND
SPECIFIC.

>> THE DEFENDANTS WERE
PRESUMABLY -- HOW MANY
DEFENDANTS WERE THERE?

I THOUGHT THERE WAS ONE
DEFENDANT THAT WAS FOUND NOT
LIABLE.

>> THERE WERE --

>> OR TWO?

>> ON SOME OF THE, ON SOME OF
THE ISSUES BECAUSE THEY HAD NOT
PARTICIPATED FULLY IN THE
FRAUDULENT CONCEALMENT.

I DON'T REMEMBER EXACTLY --

>> SO THEY MADE THE STATEMENT, I
MEAN, THE POINT IS THEY MADE
DISTINCTIONS, BUT WHAT YOU'RE
SAYING IS WHEN IT CAME TO THE

ACTUAL LIABILITY FINDINGS, THEY DIDN'T ASK TO BE SEPARATED TO SAY MY CIGARETTE WAS BETTER -- >> ABSOLUTELY. BECAUSE THEY HAD NO INTEREST IN THAT. THEY WERE ALL IN. THEY WANTED THE JURY TO FIND THAT NONE OF THEIR CIGARETTES WERE DEFECTIVE. THEY HAD NO INTEREST IN ARGUING THAT ONE PARTICULAR CIGARETTE -- >> AND THEY CONCEDED. IF THEY FOUND NO, THAT WOULD HAVE BEEN THE END FOR MRS. DOUGLAS AND ALL THE MEMBERS OF -- >> SO IT'S HEADS, I WIN; TAILS, I WIN. THAT'S BASICALLY THE ARGUMENT THAT'S BEEN MADE HERE TODAY. THE FUNDAMENTAL BOTTOM LINE IS THEY HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE QUESTION OF DEFECTS INCLUDING A FULL AND FAIR OPPORTUNITY TO DEVELOP THE JURY VERDICT FORM THAT THEY KNEW WAS THEN GOING TO BE USED IN SUBSEQUENT CASES WHETHER IT WAS AS A CONTINUATION OF THE CLASS ACTION OR IN THE SEPARATE PROGENY LITIGATION. THEY HAD THAT FULL AND FAIR OPPORTUNITY. THEY LOST. THEY HAD THE FULL RIGHT OF APPEAL TO THE THIRD DCA AND TO THIS COURT WHERE THEY RAISED SOME OF THESE EXACT SAME ISSUES, AND THIS COURT REJECTED THOSE ISSUES. AND THEN THEY HAD THEIR OPPORTUNITY TO GO TO THE U.S. SUPREME COURT. NOW, FOR THE LIFE OF ME HAVING GONE THROUGH THAT PROCESS IS TO SUGGEST THAT THEY CAN THEN GO BACK TO THE TRIAL COURTS, SAME PARTIES, SAME CLAIMS AND LITIGATE THOSE THINGS OVER AND OVER AGAIN THOUSANDS OF TIMES. THAT IS JUST, THAT WOULD BE A FUNDAMENTAL VIOLATION OF THE PLAINTIFF'S RIGHT OF DUE PROCESS. I THINK THIS COURT CAME TO A VERY SENSIBLE MIDDLE GROUND IN

THE ENGEL DECISION IN GIVING
THOSE FINDINGS RES JUDICATA
EFFECT.

THIS COURT KNEW THEY WERE TRIED
AS A CLASS ACTION, HAD THE
ENTIRE RECORD BEFORE IT, SAW HOW
THE CASES WERE ARGUED, SAW HOW
THE DEFENSE HANDLED IT, SAW ALL
OF THAT AND DECIDED THESE
PARTICULAR FINDINGS HAD A
CLASS-WIDE EFFECT, AND,
THEREFORE, IT WAS QUITE FAIR TO
GRANT THEM A RES JUDICATA
IMPACT.

I WANT TO JUST SPEND A MINUTE
MORE SPECIFICALLY TALKING ABOUT
DUE PROCESS BECAUSE THAT'S, OF
COURSE, THE CERTIFIED QUESTION
THAT WAS HERE BEFORE THE COURT,
AND REALLY IT'S AMAZING HOW
SMALL A FEATURE IT IS IN THE
BRIEF.

AND I THINK IT'S A SMALL FEATURE
BECAUSE IT'S BEEN REJECTED SO
MANY TIMES.

BUT I'D LIKE TO GO BACK TO THAT
FAIRWEATHER CASE, THEIR
CENTERPIECE CASE WHICH THEY SAY
SUPPORTS THEIR DUE PROCESS
CLAIM.

THE CASE IS AN AWFUL LOT LIKE
THIS CASE.

THERE WAS A GENERAL VERDICT IN A
WILL-CHALLENGE CASE, AND IT WAS
TRIED ONCE AND LOST IN THE STATE
COURT.

THEN THEY TRIED EXACTLY THE SAME
CASE IN FEDERAL COURT, AND THEY
SAID, WAIT A SECOND, WE, UM,
THERE WAS A RELEASE ISSUE, AND
THE TRIAL JUDGE NEVER REACHED
THIS RELEASE ISSUE.

SO WE SHOULD GET THE RIGHT TO
TRY THIS CASE AGAIN.

AND EVEN BETTER FOR THE DEFENSE
THAN IN THIS CASE, THEY HAD AN
AFFIDAVIT FROM THE TRIAL JUDGE
THAT SAID I NEVER LOOKED AT THE
RELEASE CASE.

I NEVER LOOKED AT THE RELEASE
ISSUE.

AND THE U.S. SUPREME COURT SAID
THAT DOESN'T MATTER.

THESE PARTIES HAVE FULLY AND
FAIRLY LITIGATED THIS CLAIM, AND
LITIGATED TO A GENERAL VERDICT,
AND WE DON'T LOOK BEHIND THAT

GENERAL VERDICT.

ALL OF THE DEFENSES THAT WERE RAISED OR COULD HAVE BEEN RAISED ARE NOW CONSIDERED TO HAVE BEEN FULLY DISPOSED OF, AND THE COURT, UM, AFFIRMED THE APPLICATION OF PRECLUSION IN THAT CASE.

SO I THINK IT IS ABSOLUTELY VERY POOR SUPPORT FOR THEIR ARGUMENT. FOR ALL THOSE REASONS, WE THINK THAT THE JUDGMENT OF THE JURY VERDICT BELOW SHOULD BE AFFIRMED, AND FOR THE REASONS THAT WE DISCUSSED IN OUR BRIEF, WE THINK THAT THE WAY THE JURY HAD BEEN INSTRUCTED IN THIS CASE WAS APPROPRIATE, AND THAT SHOULD BE AFFIRMED AS WELL.

THANK YOU.

>> THANK YOU.

>> LET ME TRY TO BE VERY CLEAR ABOUT A COUPLE OF THINGS.

FIRST, WE'RE NOT ASKING THE COURT TO DEPART FROM ENGEL. SECOND, WE'RE NOT SAYING THAT ANY OF THE FINDINGS THAT THE COURT HELD WERE APPROPRIATE FOR CLASS DETERMINATION, SHOULD NOT BE GIVEN PRECLUSIVE EFFECT.

ALL WE ARE DOING IS WE ARE SAYING WHAT FLORIDA LAW HAS ALWAYS SAID, WHAT FEDERAL DUE PROCESS HAS ALWAYS REQUIRED IS THAT BEFORE YOU TAKE A FINDING AND APPLY IT IN A SUBSEQUENT PROCEEDING, YOU MUST BE ABLE TO DETERMINE WHAT THE JURY ACTUALLY DECIDED, AND YOU MUST BE ABLE TO DETERMINE THAT WITH REASONABLE CERTAINTY.

>> CAN THAT BE -- IF THE TOBACCO INDUSTRY FULLY PARTICIPATED, I MEAN, NOT THAT THE DEFENDANT THAT INCLUDED YOUR DEFENDANT FULLY PARTICIPATED IN THE YEAR OR TWO-YEAR-LONG PROCEEDING AND GOT TO RAISE EVERY DEFENSE THAT THEY POSSIBLY COULD RAISE AS TO WHY THEIR CIGARETTES WERE NOT DEFECTIVE, THERE WAS NO BASIS FOR STRICT LIABILITY, I AM -- AS FAR AS THE DUE PROCESS ISSUE -- I'M HAVING -- WE MAY DIFFER AS TO WHETHER ENGEL FINDING SHOULD HAVE BEEN A LITTLE DIFFERENT, BUT AS FAR AS THE DUE PROCESS

ISSUE WHERE IS THERE A
CONSTITUTIONAL VIOLATION WHICH
IS THE CERTIFIED QUESTION?
>> BECAUSE, YOUR HONOR, UM, THE
CONSTITUTIONAL REQUIREMENT IS
THAT THE PLAINTIFF BE ABLE TO
ESTABLISH EACH ESSENTIAL ELEMENT
OF ITS CLAIM.
THAT'S DUE PROCESS UNDER
FAIRWEATHER AND A VARIETY OF
OTHER CASES.
AND THEY HAVE GOT TO BE ABLE TO
ESTABLISH IF THEY'RE GOING TO
USE A PRIOR CASE THAT THE ISSUE
WAS ACTUALLY DECIDED --
>> YOU SEE HERE IS, I THINK,
WHERE WE MAY BE DEPARTING
BECAUSE WASN'T -- THIS PLAINTIFF
WAS PART OF THE CLASS.
WE COULD HAVE SAID THE CASE
CONTINUES IN MIAMI, FLORIDA,
WITH INDIVIDUAL TRIALS FOR
EVERYBODY WHO'S PART OF THE
CLASS.
AND ISN'T THAT REALLY -- THIS
ISN'T LIKE SHE'S A DIFFERENT
PLAINTIFF.
SHE WAS PART OF A CLASS THAT'S
NOW CONTINUING PROBABLY FROM AN
ADMINISTRATION OF JUSTICE, THANK
GOODNESS FOR DADE COUNTY, RIGHT,
THAT IT'S BEING TRIED IN
DIFFERENT PLACES.
>> AND BECAUSE SHE'S A MEMBER OF
THE CLASS, SHE GETS THE BENEFIT
OF THOSE FINDINGS, BUT SHE ONLY
GETS THE BENEFIT TO WHAT THE
FINDINGS ACTUALLY SAY.
IT WOULD HAVE BEEN VERY EASY FOR
THEM TO SAY ALL CIGARETTES ARE
DEFECTIVE.
THEY DIDN'T WANT TO DO IT.
IT IS NOT TRUE THAT THIS WAS ALL
OR NOTHING.
WE ASKED TO HAVE THEM
SPECIFICALLY IDENTIFY, FILL IN
THE BLANKS WHICH BRANDS WERE
DEFECTIVE.
>> BUT WHY DOESN'T THE CLASS
DEFINITION AS ARGUED INCLUDE
THAT?
ALL CIGARETTES THAT HAVE
NICOTINE?
VERY BROAD.
>> THE JURY WASN'T ASKED,
THOUGH, WHETHER HAVING NICOTINE
AND CAUSING DISEASE MADE IT

DEFECTIVE.
AND, REMEMBER, UNDER FLORIDA LAW
YOU'VE GOT TO PROVE IT'S
UNREASONABLY DANGEROUS.
IT'S NOT ENOUGH THAT IT SIMPLY
CAUSES HARM AND IS ADDICTIVE.
AND EVEN A FLORIDA LAW -- EVEN
IF FLORIDA LAW WERE DIFFERENT,
FEDERAL PREEMPTION LAW WOULD
HAVE PREVENTED THAT RULING.
SO THEY DIDN'T ASK, THEY
COULDN'T ASK WHETHER ADDICTION
PLUS DISEASE EQUAL DEFECT.
IT WOULD HAVE BEEN VERY EASY FOR
THEM TO DO THAT IF THEY DIDN'T
WANT TO.
THEY WANTED TO GET A YES ANSWER.
THIS WAS A CASE THAT WAS TRIED
TO GET A LARGE PUNITIVE DAMAGES
AWARD, AND WHAT THEY WERE TRYING
TO DO WAS GET AS MANY YES
ANSWERS AS THEY COULD.
THAT WAS THEIR TRIAL THEORY.
THEY ARE -- NO ONE IS SAYING
THAT THEY CANNOT USE THE
FINDINGS FOR WHAT THEY SAY.
WHAT WE'RE SAYING IS THEY CAN'T
MAKE THE FINDINGS SOMETHING THAT
THEY'RE NOT, AND YOU'VE GOT TO
LOOK AT THE FINDINGS, AND THAT'S
WHAT THE COURT DID IN
FAIRWEATHER.
FAIRWEATHER, THE COURT WENT
BEHIND THE GENERAL VERDICT AND
LOOKED AT WHAT WAS ALLEGED.
WHAT THEY FOUND WAS THERE WAS
ONLY ONE THEORY.
HERE THERE ARE MULTIPLE
THEORIES, AND BECAUSE THERE ARE
ALTERNATIVE THEORIES, YOU CANNOT
FIND WHAT THE JURY ACTUALLY
DECIDED, AND WITHOUT KNOWING
THAT, YOU CAN'T DO THE LEGAL
CAUSATION ISSUE THAT THIS COURT
SPECIFICALLY IN ENGEL SAID HAD
TO BE DONE BY THE SECOND JURY.
>> YOU'RE OUT OF TIME.
THANK YOU FOR YOUR ARGUMENTS.
COURT WILL TAKE ITS TEN MINUTE
RECESS AT THIS TIME.
THANK YOU.
>> ALL RISE.