>> ALL RISE.
HERE YE, HEAR YE, HEAR YE,
THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEAD,
DRAW NEAR, GIVE ATTENTION,
AND YOU SHALL BE HEARD.
>> GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA
AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN,
THE SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING, EVERYONE.
WELCOME TO THE FLORIDA SUPREME
COURT.
THE FIRST CASE ON YOUR DOCKET IS
SOFFER V. REYNOLDS TOBACCO
COMPANY.
>> GOOD MORNING, AND MAY IT
PLEASE THE COURT?
I'M JOHN MILLS ON BEHALF OF
LUCILLE SOFFER.
THE ISSUE-- AND I'D RESERVE
FIVE MINUTES FOR REBUTTAL.
THE ISSUE IN THIS CASE IS
WHETHER MEMBERS OF THE ENGEL
CLASS CAN SEEK PUNITIVE DAMAGES
ON THEIR CLAIMS FOR NEGLIGENCE
AND STRICT LIABILITY.
THE DISTRICT COURT IN THIS CASE
CORRECTLY HELD THAT CLASS
MEMBERS STAND IN THE SAME SHOES
AS IF THEY WERE THE NAMED
PLAINTIFFS WHO FILED THE ENGEL
CLASS ACTION.
IT ERRED, HOWEVER, BY HOLDING
THAT BECAUSE THE NAMED
PLAINTIFFS DID NOT TIMELY SEEK
LEAVE TO AMEND THEIR COMPLAINT
TO SEEK PUNITIVE DAMAGES ON
THESE CLAIMS, THAT CLASS MEMBERS
ARE FOREVER BARRED FROM DOING SO
IN THEIR FOLLOW-UP INDIVIDUAL
ACTIONS.
THIS WAS ERROR BECAUSE ALL
PARTIES IN FLORIDA HAVE THE
RIGHT THE RENEW A MOTION FOR
LEAVE TO AMEND A COMPLAINT WHEN
A NEW TRIAL IS ORDERED.

THERE IS NO REASON IN THIS COURT'S PRECLUSION DOCTRINES OR THE ENGEL DECISION TO TAKE THAT RIGHT AWAY FROM ENGEL CLASS MEMBERS AS OPPOSED TO EVERYBODY ELSE.
AND THE STATUTE OF LIMITATIONS AND EQUITABLE TOLLING CASE LAW ON WHICH THE DEFENDANTS RELY HAS NO APPLICATION.
>> LET ME ASK YOU, HOW DOES OUR DECISION IN AIR VAC ENTER INTO YOUR ANALYSIS OR NOT?
>> SURE.
WELL, IT ENTER INTO YOUR ANALYSIS BECAUSE IT HAD NEVER, EVER BEEN RAISED BEFORE.
THIS ARGUMENT WAS RAISED BELOW OR IN THE FIRST ARGUMENT BY THE DEFENDANTS, BUT IT HAS BEEN RAISED HERE.
SO WE TOOK A LOOK AT IT FOR THE FIRST TIME, AND IN OUR REPLY BRIEF, I THINK I SAID ONE THING ABOUT THAT CASE WHERE I HAD MISUNDERSTOOD THE PROCEDURAL HISTORY THINKING THAT THERE WAS AN ADVERSE JUDGMENT AGAINST THE DEFENDANT IN THAT CASE.
THERE'S TWO DEFENDANTS, AND THERE WAS AGAINST ONE AND NOT AGAINST THE OTHER.
AND THE PROCEDURAL POSTURE IS VERY IMPORTANT, SO LET ME JUST START FROM THE BEGINNING WITH AIR VAC, IF I MAY.
BECAUSE I DO THINK THAT'S OUR ONLY HURDLE TO CROSS HERE.
IN AIR VAC, THE PLAINTIFF HAD LENT MONEY AND SECURED THAT NOTE WITH A LIEN ON AN AIRPLANE OWNED BY AIR VAC.
THE AIRPLANE WAS INSURED BY THE INSURANCE COMPANY, RANGER INSURANCE COMPANY.
AND THE PLANE WAS LOST, AND SO THE PLAINTIFF FILED A LAWSUIT AGAINST BOTH AIR VAC AND RANGER TO COLLECT ON THE AIRPLANE AND THE INSURANCE POLICY FOR HER

LIEN.
AND AT-- SHORTLY BEFORE TRIAL,
FOUR DAYS BEFORE TRIAL THE
INSURANCE COMPANY FILED A MOTION
FOR LEAVE TO AMEND THE COMPLAINT
TO ADD AN ENTIRELY NEW
AFFIRMATIVE DEFENSE THAT THE
LIEN WAS THE RESULT OF A
FRAUDULENT TRANSFER, FRAUDULENT
CONVEYANCE.
THE TRIAL COURT DENIED THAT
MOTION.
WE DON'T KNOW WHY.
IT'S NOT IN ANY OF THE OPINIONS.
IT COULD BE BECAUSE UNTIL TOO
LATE, IT WAS-- BECAUSE IT WAS
TOO LATE.
IT WAS FOUR DAYS BEFORE THE
TRIAL.
BUT AT ANY RATE, IT WAS DENIED,
AND THAT CASE WENT TO TRIAL.
THAT TRIAL ENTERED A DIRECTED
VERDICT AGAINST AIR VAC FINDING
THEM LIABLE TO THE PLAINTIFF,
AND THE CASE-- THERE WAS A JURY
DETERMINATION AND A JURY VERDICT
IN FAVOR OF RANGER INSURANCE
COMPANY.
ON THE BREACH OF WARRANTY CLAIM
ON THE INSURANCE POLICY.
THE PLAINTIFF APPEALED TO THE
FOURTH DCA, AND IN THE APPEAL
SAID THAT IT WAS ERROR FOR THERE
TO BE A VERDICT FOR THE DEFENSE
COMPANY, FOR THE INSURANCE
COMPANY, BECAUSE THE EVIDENCE
SUPPORTED TWO FACTORS.
DOESN'T MATTER WHAT THE TWO
FACTORS ARE, BUT IT SAID IT
SUPPORTED THESE TWO FACTORS.
SO THAT WAS THE APPEAL, WE
APPROVED THAT, AND WE SHOULD
WIN.
THERE WAS NO CROSS-APPEAL.
THE INSURANCE COMPANY DID NOT
RAISE THE DENIAL 06 LEAVE TO AN
END, AND EVEN IF ALL THAT'S
TRUE, WE STILL WIN BECAUSE THERE
WAS A FRAUDULENT CONVEYANCE.
AND SO THE FOURTH DCA REVERSED,

HELD THAT THE PLAINTIFF WAS CORRECT, BUT THERE HAD ON THE A DETERMINATION, THERE HAD TO BE A SPECIFIC JURY DETERMINATION ON THOSE TWO FACTORS.
SET IT OUT AND SAID IF PLAINTIFF RECEIVES THESE TWO FACTORS, HE'S ENTITLED TO RECOVER ON THE INSURANCE POLICY.
SO THAT WAS THE HOLDING S. SO IT WENT BACK FOR A NEW TRIAL ON THOSE TWO ISSUES, AND BEFORE THAT TRIAL THE INSURANCE COMPANY SAID, WAIT, THERE SHOULD BE ANOTHER ISSUE, WE'RE RENEWING OUR MOTION TO ADD THE FRAUDULENT CONVEYANCE.
AND THAT MADE IT BACK UP TO THE SUPREME COURT TO THIS COURT, AND THIS COURT ULTIMATELY HELD THAT IT WAS TOO LATE.
IN THE AIR VAC DECISION IT CAST ITS OPINION IN TERMS OF LAW OF THE CASE, BUT SUBSEQUENTLY CITED IN OUR BRIEF IT CLARIFIED IT WAS NOT A LAW OF THE CASE DECISION.
AND THE REASON IT WAS A WAIVER THERE WAS BECAUSE THE WHOLE ISSUE ON THE APPEAL WAS WHAT DID YOU HAVE TO PROVE TO GET LIABILITY AGAINST THE INSURANCE COMPANY?
AND IF THE DEFENDANT INSURANCE COMPANY WANTED TO SAY ONE OF THE THINGS WE GET TO ESCAPE LIABILITY FOR IS IF WE PREVAIL ON THIS UNPLED THEORY THAT THE TRIAL COURT SHOULD HAVE ALLOWED US TO PLEAD, THAT WAS THE TIME THE RAISE IT.
THAT DOESN'T APPLY IN THIS CASE BECAUSE ENGEL APPEAL WAS NOTHING LIKE THAT AT ALL.
IN FACT, HERE THERE WAS NO REASON FOR A CROSS-APPEAL.
THE PLAINTIFFS WON EVERYTHING.
THEY HAD $150 BILLION PUNITIVE JUDGMENT, PUNITIVE DAMAGE JUDGMENT.

THEY WERE ALREADY FOUND TO BE
ENTITLED TO PUNITIVE DAMAGES.
THE FINDING FOR PUNITIVE DAMAGES
WAS NOT TIED TO ANY INDIVIDUAL
COUNT.
IF YOU LOOK BACK TO THE ENGEL
PHASE ONE VERDICT, IT WAS A
GENERAL VERDICT.
DIDN'T SAY YOU ONLY AWARD IT IF
YOU FIND IT ON THIS COUNT OR
THAT COUNT.
THEY FOUND ON ALL THE COUNTS,
AND THE QUESTION WAS, ARE
PUNITIVE DAMAGES WARRANTED?
THEY SAID, YES.
THERE WAS A PHASE 2B, AND THEY
DETERMINED THAT WAS THE AMOUNT,
AND THAT WENT UP.
THERE WOULD HAVE BEEN ABSOLUTELY
NO REASON AND, INDEED, IT
POTENTIALLY WOULD HAVE BEEN
FRIVOLOUS FOR THE CLASS TO SAY
WE SHOULD HAVE BEEN GRANTED
LEAVE TO AMEND OUR COMPLAINT TO
SEEK PUNITIVE DAMAGES IN THIS
CASE.
>> I THINK YOU WOULD HAVE HAD A
GOOD ARGUMENT, I MEAN THEY WOULD
HAVE, IF WE HAD INSTEAD OF JUST
VACATING THE WHOLE PUNITIVE
DAMAGES AWARD REMANDED FOR A NEW
TRIAL ON PUNITIVE DAMAGES.
I THINK I MAKE THAT POINT, BUT
THERE WOULD HAVE BEEN NO REASON
NOT TO HAVE CLOUDED ON
ALL FOUR COUNTS.
>> ABSOLUTELY.
>> I WANT TO ASK A SPECIFIC
QUESTION ON THE PROCEDURAL
POSTURE IN THIS CASE.
WE HAVE WITH PUNITIVE DAMAGES
THERE'S A STATUTE THAT ACTUALLY
DOES, YOU'RE FAMILIAR WITH IT.
IT DOESN'T ALLOW A PLAINTIFF TO
ACTUALLY INITIALLY PLEAD
PUNITIVE DAMAGES.
THEY HAVE THE SEEK LEAVE TO
AMEND--
>> RIGHT.
>>-- BECAUSE THERE HAS TO BE

MORE THAN JUST AN ALLEGATION.
NOW, IN THIS CASE THERE WAS A MOTION TO AMEND FOR PUNITIVE DAMAGES, AND THE OPPOSITION BY R.J. REYNOLDS WAS NOT BASED ON ENGEL, IT WAS BASED ON THAT YOU HAD NOT ESTABLISHED ENOUGH EVIDENCE IN THE MOTION FOR PUNITIVE DAMAGES.
SO I DON'T UNDERSTAND, I GUESS, WHY-- AND THIS IS THE PROCEDURAL POSTURE, IF WE'RE TALKING ABOUT PROCEDURAL POSTURE, SHOULDN'T THAT ISSUE HAVE BEEN RAISED PRETRIAL AS TO RESTRICTING WHAT CLAIMS COULD BE--
>> ABSOLUTELY.
>> BUT I DON'T, THERE'S NO-- YOU'VE NOT ASSERTED AN ISSUE OF WAIVER BY R.J. REYNOLDS OR PREJUDICE IN HOW THE CLAIM WAS PRESENTED TO THE JURY SINCE THIS WASN'T BROUGHT UP UNTIL JURY INSTRUCTIONS, RIGHT?
>> I THINK WE HAVE RAISED IT AS ANISH SHY.
I DON'T KNOW THAT IT'S AN INDEPENDENT LEGAL BASIS, BUT AS THE PROCEDURAL POSTURE HERE, I THINK IT DOES MAKE A DIFFERENCE.
I DON'T THINK YOU NEED TO MAKE A CASE-SPECIFIC DECISION HERE.
WE'RE HERE ON A CERTIFIED QUESTION, AND WE HAVE CONFLICT.
WE ALREADY HAVE THREE CONFLICTING CASES.
WE NEED A RESOLUTION BUT, YES, ON THE FACTS OF THIS CASE FOUR MONTHS BEFORE THE TRIAL WAS THE HEARING, THIS WASN'T RAISED AT ALL.
THE ONLY ISSUE WAS WHETHER WE PROFFERED SUFFICIENT EVIDENCE.
>> WELL, ISN'T THAT THOUGH, AGAIN, WE'RE TALKING ABOUT TWO CLAIMS THAT ARE INTENTIONAL TORTS.
SO IF YOU CAN ESTABLISH INTENTIONAL TORTS, PUNITIVE

DAMAGES SORT OF FLOW FROM THAT.
MUCH HARDER TO GET PUNITIVE
DAMAGES ON A NEGLIGENCE, YOU
HAVE TO ACTUALLY, OBVIOUSLY,
SHOW GROWTH--
>> RIGHT.
>> OR STRICT LIABILITY.
SO I'M TRYING TO UNDERSTAND IN
TERMS OF THE POSTURE OF THIS WHY
THE STRATEGIC, IF YOU CAN PLEAD
AND PROVE THE TWO INTENTIONAL
TORTS, WHAT IS THE IDEA THAT YOU
CAN ALSO TRY TO GET DAMAGES ON A
NEGLIGENCE OR STRICT LIABILITY?
WHAT'S BEHIND THIS IF YOU COULD
EXPLAIN IT?
IS THERE A DIFFERENCE IN WHAT
ELEMENTS HAVE TO BE ESTABLISHED
OR A PLAINTIFF LOSING THEIR
INTENTIONAL--
>> YES.
ARE YOU ASKING WHY IS IT
IMPORTANT TO THE PLAINTIFF'S--
SURE.
>> IT SEEMS TO ME IF I HAVE AN
INTENTIONAL TORT, I'M GOING TO
BE MORE LIKELY TO CONVINCE A
JURY THAT THERE SHOULD BE
PUNITIVE DAMAGES--
>> I UNDERSTAND.
IT'S HUGELY IMPORTANT FOR TWO
REASONS, ONE OF WHICH YOU HAVE
IN YOUR CONTROL RIGHT NOW.
AND THAT IS THESE INTENTIONAL
TORT CASES ARE HARD TO PROVE WAS
THE NEGLIGENCE AND STRICT
LIABILITY, ALL WE HAVE TO PROVE
IS CLASS MEMBERSHIP AT THIS
POINT.
IF YOU PROVE HE WAS A MEMBER OF
THE CLASS, HE WAS ADDICTED TO
SMOKING AND THAT CAUSE THE
DISEASE, YOU RECOVER.
BUT TO GET THE INTENTIONAL
TORTS, YOU HAVE TO GO ONE STEP
FURTHER, AND YOU HAVE TO SHOW
THAT THE FRAUD INJURED THE
PLAINTIFF, THAT THE PLAINTIFF--
WE USE THE TERM "RELIANCE."
WE ARGUED ABOUT THIS SIX MONTHS

AGO IN THE HESS CASE, AND THERE I SAID IT'S NOT RELIANCE ON A STATEMENT, AND RELIANCE IS A BAD TERM, BUT IT'S THE NAME OF THE LEGAL ELEMENT.
YOU HAVE TO SHOW THAT THE PLAINTIFF ARE WAS MISLED, THAT THE PLAINTIFF RELIED ON THE CONCEALMENT THAT HAD THEY TOLD HIM WHAT THEY KNEW, THAT THEY WERE MANIPULATING THESE CIGARETTES TO MAKE THEM AS ADDICTIVE AND DANGEROUS AS POSSIBLE, THAT LIGHTS WERE A SHAM, FILTERS WERE A SHAM, ALL THOSE THINGS, HAD THEY SAID WHAT THEY KNEW, THAT WOULD HAVE MADE A DIFFERENCE TO THIS PLAINTIFF.
THAT'S DIFFICULT TO PROVE, AND WE FAIL TO PROVE THAT SOMETIMES.
ESPECIALLY THESE ARE WRONGFUL DEATH ACTIONS WHERE THE SMOKER HAS BEEN DEAD FOR A LONG TIME SO THE JURY CAN'T HEAR FROM THE SMOKER.
WE HAVE TO PUT ON CIRCUMSTANTIAL EVIDENCE ABOUT HIS OPINION ABOUT THE HEALTH EFFECTS OF CIGARETTES.
SO THAT'S VERY DIFFICULT.
AND WE ALSO HAVE IN SOME JURISDICTIONS AN ADDITIONAL HURDLE WHICH IS THE STATUTE OF REPOSE WHICH IS DIRECTLY AT ISSUE IN THE HESS CASE.
AND IN HESS THE FOURTH DCA HELD WE ALSO HAVE TO NOT JUST PROVE RELIANCE, BUT RELIANCE ON A STATEMENT AND THAT THE STATEMENT WAS MADE AFTER 1982.
THAT'S VERY DIFFICULT TO PROVE.
WE PROVED THAT SOMETIMES AND MOVED OUT THE ISSUE, BUT OFTEN TIMES WE FAILED.
AND UNDER SOFFER RULE, IF WE FAIL THERE, THE JURY NEVER GETS TO DECIDE PUNITIVE DAMAGES.
WE SHOULD BE ABLE TO ENTITLED TO GET TO THE JURY ON PUNITIVE DAMAGES ON ALL THESE COUNTS.

AND REALLY ALL THE INTENTIONAL
TORTS SHOULD MATTER FOR IS
IT APPLIES OR NOT.
YOU DON'T REDUCE THE DAMAGES FOR
COMPARATIVE FAULT.
PUNITIVE DAMAGES SHOULD BE IN
PLACE IN EVERY CASE.
UNLESS THE PLAINTIFF DOES WHAT
THE CLASS DID, AND THIS IS SUPER
IMPORTANT.
WE HAVE THE EXACT REVERSE
PROCEDURAL POSTURE FROM ENGEL.
IN ENGEL THE PLAINTIFF DIDN'T
MOVE TO AMEND BEFORE THE TRIAL.
IT DIDN'T MOVE TO AMEND DURING
THE TRIAL.
PHASE I TRIAL DURING DIRECTED
VERDICT ARGUMENTS IN THE SUMMER
OF 1999, IT CAME UP AND JUST IN
PASSING WHETHER THEY HAD PLED IT
OR NOT.
AND PLAINTIFF'S COUNSEL SAID,
WELL, I THOUGHT WE HAD PLED IT
FOR EVERYTHING, AND IF WE
HAVEN'T, THAT'S HOW WE'RE TRYING
THE CASE.
THERE WAS NO MORE DISCUSSION
ABOUT IT, AND THE VERDICT WAS
RETURNED.
THERE WERE NO INSTRUCTIONS
LIMITING IT.
THE JURY QUESTION ON ENTITLEMENT
TO PUNITIVE DAMAGES WAS NOT
LIMITED TO ANY COUNT.
WE LITIGATED THAT AND HAD THEM
ENTITLED TO PUNITIVE DAMAGES.
A YEAR LATER WE'RE IN PHASE 2B
GOING OVER THE AMOUNTS,
AND WE FINISHED
THAT TRIAL LARGELY.
IT'S AT THE CHARGE CONFERENCE
THAT WE ASK, WE ARGUE AGAINST AN
INSTRUCTION THAT WOULD LIMIT
THEM TO YOU CAN ONLY CONSIDER
THE AMOUNT AS TO THE INTENTIONAL
TORTS.
AND R.J. REYNOLDS SAY, NO, YOU
NEVER AMENDED YOUR COMPLAINT.
WE SAY, WELL, OKAY, WE NOW
HEREBY MOVE TO AMEND THE

COMPLAINT.
SO THE MOTION TO AMEND THE COMPLAINT WAS IN THE SECOND PHASE OF THE TRIAL AT THE END OF THE CASE.
OUR CASE IS EXACTLY THE OPPOSITE.
FOUR MONTHS BEFORE TRIAL WE MOVED TO AMEND.
THEY DON'T ARGUE ANY OF THIS STUFF.
WE DON'T HEAR ANY OF THE STUFF THAT WE'RE ARGUING ABOUT TODAY, AND THE TRIAL COURT HAS DISCRETION TO GRANT OR TO DENY A MOTION TO AMEND, AND THIS TRIAL COURT EXERCISED THAT DISCRETION IN FAVOR OF THE AMENDMENT, ALLOWED THE AMENDED COMPLAINT.
AND SO THE AMENDED COMPLAINT, THE OPERATIVE COMPLAINT IN THIS CASE DOES SEEK PUNITIVE DAMAGES ON THE NONINTENTIONAL TORTS, ALL FOUR COUNTS.
AND IT WAS HERE, IT WAS NOT UNTIL THE CHARGE CONFERENCE IN THIS CASE AFTER THIS CASE WAS ALMOST OVER THAT R.J. REYNOLDS RAISES THIS FOR THE FIRST TIME AND SAYS, NO, JUDGE, AS A MATTER OF LAW FORGET WHAT YOU ALLOWED THEM TO DO IN THE COMPLAINT.
AS A MATTER OF LAW HE SAID PRECLUSION PRINCIPLES--
>> AND THIS IS, BECAUSE YOU SAID WE SHOULD, THIS IS A CONFLICT CASE, AND WE'VE GOT THE CONFLICT FROM THE SECOND DISTRICT.
THE MAIN, IMPORTANTCY SHY IS WHETHER AS A MATTER OF LAW BASED ON ENGEL FINISH.
>> RIGHT.
>>-- THERE WAS JUDICATA EFFECT AS TO THE PROCEDURAL POSTURE OF THE ENGEL CASE.
>> THAT'S ABSOLUTELY CORRECT.
AND, OF COURSE, IN ENGEL, THE ONLY THING YOU SAID ABOUT PUNITIVE DAMAGES WAS YOU CAN'T HAVE A CLASS ACTION TRIAL ABOUT

PUNITIVE DAMAGES.
SO THAT ALL GOT THROWN OUT, AND THE COMPLAINT GOT THROWN OUT.
THESE INDIVIDUAL PLAINTIFFS, AS YOU CAN SEE FROM HERE, AS YOU CAN SEE FROM THE WILLIAMS CASE WHICH WAS SUPPLEMENTAL AUTHORITY, WE DON'T GET TO COME IN AND SAY, OKAY, WE'RE CLASS MEMBERS, WE'RE OPERATING UNDER THAT COMPLAINT, WE HAVE TO FILE A NEW COMPLAINT.
WE HAVE THE STATUTE THAT SAYS WE CAN'T IN THAT NEW COMPLAINT PLEAD DAMAGINGS.
SO EVEN THOUGH IN ENGEL THE CLASS WAS ALLOWED TO SEEK DAMAGES ON THE FRAUD CLAIMS, THESE PLAINTIFFS AREN'T UNLESS THEY GET LEAVE TO AMEND THEIR COMPLAINT.
>> THIS-- BECAUSE I KNOW YOU'LL BE IN YOUR REBUTTAL.
IF WE AGREE WITH YOU AND RELIVE THE SECOND DISTRICT AND JUDGE LEWIS'--
[INAUDIBLE]
THE REMEDY, IS IT, R.J. REYNOLDS ARGUES THAT THEY'VE GOT TO GO BACK AND TRY LIABILITY.
>> YOU DON'T.
IF YOU DECIDE THAT AGAINST US, WE LOSE.
WE DO NOT WANT THAT REMEDY.
THE ONLY REMEDY WE WANT IS A NEW TRIAL ON PUNITIVE DAMAGES ONLY.
AND IF FOR SOME REASON YOU SAY IT'S INTERTWINED, THEN I GUESS WE LOSE THIS CASE, BUT WE'VE ESTABLISHED THE LEGAL PRINCIPLE.
THERE'S NO REASON TO RETRY COMPENSATORY DAMAGE CANS OR LIABILITY ARE.
THOSE DON'T HAVE ANYTHING TO DO WITH THIS QUESTION.
THIS QUESTION WAS WHETHER THE CONDUCT HERE WARRANTED FRAUDULENT STANDARDS.
IT'S CLEAR AND CONVINCING ED, AND WE DO THIS ALL THE TIME.

WE'VE CITED SEVERAL EXAMPLES.
AND I'D JUST LIKE TO END-- AND
I DO WANT TO SAVE SOME TIME FOR
REBUTTAL--
>> LET ME JUST ASK YOU THIS
THOUGH, IS THE EVIDENCE YOU
WOULD HAVE TO PUT ON DEMONSTRATE
PUNITIVE DAMAGES THE SAME KIND
OF EVIDENCE THAT YOU WOULD PUT
ON FOR THE INTENTIONAL TORTS?
>> WELL, NO.
NO, BECAUSE WE DIDN'T, WE WON'T
BE DOING THAT BECAUSE WE LOST ON
THAT.
WE'RE NOT ARGUING THAT WE GET
ANOTHER BITE AT THAT.
>> NO, I KNOW YOU DON'T GET
ANOTHER BITE AT THAT, BUT IT
SEEMS TO ME THAT IT'S THE SAME
KIND OF EVIDENCE THAT YOU WOULD
NEED TO PUT ON--
[INAUDIBLE]
>> WELL, WE HAVE TO, SO IN ENGEL
PHASE I WE PROVED THE NEGLIGENCE
AND STRICT LIABILITY CONDUCT BY
MORE LIKELY THAN NOT STANDARD.
NOW WE HAVE TO PROVE THAT SAME
CONDUCT WAS GROSSLY NEGLIGENT BY
CLEAR AND CONVINCING EVIDENCE.
THAT'S WHAT WE HAVE TO DO, WE
HAVE TO GO OVER THE NEGLIGENCE
AND CLEAR LIABILITY STUFF.
THAT OVERLAPS WITH THE FRAUD AND
OVERLAPS WITH SOME OF THE
EVIDENCE THAT THIS JURY HEARD.
IT'S NOT NECESSARILY, YOU KNOW,
THERE'S NO REASON TO REDO THAT.
IF WE WERE GOING TO REDO IT, I
GUESS WE'D GET TO REDO THE
FRAUD.
IF IT'S SO INTERTWINED ERIK I
DON'T KNOW WHY IT WOULD APPLY TO
ONE AND NOT THE OTHER.
AND JUST IF I COULD CLOSE WHILE
STILL SAVING SOME TIME, Y'ALL
HAVE GOT LOTS OF IMPORTANT
CASES, AND I'M NOT HERE TO TELL
YOU THIS IS MORE IMPORTANT THAN
ANY OTHER CASE.
BUT JUST SO YOU KNOW THE IMPACT.

WE HAVE A NUMBER OF THESE
TRIALS.
IN THE 25 MONTHS SINCE THIS
DECISION WAS DECIDED, THERE HAVE
BEEN 84 OF THESE CASES THAT HAVE
GONE TO TRIAL.
>> HOW MANY?
>> 84 IN 25 MONTHS.
IN JUST THE SIX MONTHS SINCE I
WAS HEAR ARGUING HESS, WE'VE HAD
29 CASES THAT HAVE GONE TO
TRIAL.
AND SO WE EXPECT TO HAVE 50 IN
THE NEXT YEAR.
AND SO IN BOTH OF THESE CASES
YOUR DECISION IS PROBABLY GOING
TO REQUIRE SOME NEW TRIALS.
WE CAN'T WAIT.
WE HAVE-- THESE ARE PEOPLE WHO
WERE BORN IN THE 1930s AND
'40s WHO HAVE BEEN SMOKING
ALMOST THEIR ENTIRE LIVES.
THEIR SURVIVORS ARE TYPICALLY
THEIR SPOUSES WHO ARE IN THE
SAME BOAT.
THEY'RE DYING.
THEY'RE DYING ON THE SAME VINE.
AND WE HAVE TO PUSH THIS
THROUGH.
YOUR RULING IN EITHER WAY,
THERE'S A LOT OF TAG CASES, IT'S
PROBABLY GOING TO REQUIRE SOME
NEW TRIALS, AND THAT TAG IS
GOING TO BUILD.
SO I JUST THROW THAT OUT THERE
JUST SO YOU'RE AWARE.
I KNOW YOU'VE GOT A--
>> DID YOU FILE A MOTION TO EXWE
DIED?
>>-- EXPEDITE?
>> WE HAVE NOT.
I DO DEATH PENALTY CASES, ALL
KINDS OF THINGS THAT REQUIRE
IMMEDIATE RELIEF, SO I DON'T
WANT TO BE PRESUMPTUOUS TO TELL
YOU YOU NEED TO EXPEDITE THIS
OVER YOUR CASES.
I JUST WANT YOU TO BE AWARE SO
WHEN YOU'RE EXERCISING YOUR OWN
DISCRETION IN PRIORITIES, YOU

CAN DO THAT AND BE FULLY
INFORMED.
THANK YOU VERY MUCH.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, GREGORY
CATS FOR R.J. REYNOLDS.
NEITHER THE CLASS IN ENGEL
ITSELF, NOR THE NAMED PLAINTIFFS
IN ENGEL PURSUED PUNITIVE DAMAGE
CANS ON THE CLAIMS FOR STRICT
LIABILITY AND NEGLIGENCE.
>> BUT DO YOU AGREE WITH THIS,
WITH SORT OF-- THERE WAS A LOT
OF THINGS ABOUT ENGEL THAT WERE
USUAL, AND ONE OF THE THINGS IS
WHAT MR. MILLS IS MENTIONING, IS
THAT REALLY THE PHASE I OR II,
IT WAS SORT OF A FINDING OF
PUNITIVE DAMAGES WITHOUT
RESTRICTING IT TO ANY ONE COUNT,
AND THERE WAS AN ASSUMPTION THAT
IT WAS ALL FOUR COUNTS.
AND SO WAS IT, DO YOU AGREE THAT
WHEN THEY SOUGHT LEAVE TO AMEND
TO SAY, OH, WE MEANT TO PLEAD IT
FOR ALL COUNTS, IT WAS DENIED
NOT BASED ON A SUBSTANTIVE
MANNER, BUT BASED ON THE
PROCEDURAL POSTURE OF THE CASE
AT THE TIME?
>> IT WAS DENIED ON PROCEDURAL
GROUNDS.
WE DISAGREE ON WHAT THOSE
GROUNDS ARE.
MR. MILLS TAKES THE POSITION
THAT IT WAS DENIED ONLY BECAUSE
IT WAS FILED ON THE EVE OF THE
2B TRIAL, THE PUNITIVE AMOUNT
TRIAL.
WE THINK IT WAS DENIED FOR ONE,
IF NOT TWO OTHER REASONS.
NUMBER ONE, THE MOST CRITICAL
FACT IS THAT WHEN THEY, WHEN
THEY SOUGHT TO EXPAND THE STRICT
LIABILITY AND NEGLIGENCE CLAIMS
TO INCLUDE PUNITIVE DAMAGES, IT
WAS AFTER THE CONDUCT ELEMENTS
OF THOSE CLAIMS HAD BEEN
ESTABLISHED IN PHASE I.
IT WASN'T SIMPLY ON THE EVE OF

PHASE 2B.
IF YOU LOOK AT OUR APPENDIX AROUND PAGES 25-75, YOU'LL SEE THE COLLOQUY IN WHICH THE CLASS MOVES TO AMEND BEFORE PHASE 2. THIS IS ON THE OCCASION OF THE DEATH OF ONE OF THE PLAINTIFFS. THEY HAVE TO DO AN AMENDMENT A TO SUBSTITUTE IN THE WRONGFUL DEATH CLAIM, AND THEY TAKE THAT OCCASION TO TRY TO EXPAND THE STRICT LIABILITY AND NEGLIGENCE CLAIMS TO INCLUDE PUNITIVE DAMAGES.
AND THE ENGEL TRIAL COURT DEFERS RULING ON THAT ISSUE, AND IN PHASE 2B THE ISSUE COMES UP, AND HE DENIES IT.
IT WOULDN'T HAVE BEEN PROPER TO DENY JUST ON THE EVE OF PHASE 2B BECAUSE THEY HAD TRIED TO PUT THAT AT ISSUE MONTHS BEFORE THE PUNITIVE TRIAL.
WHY WAS IT PROPER TO DENY THE MOTION?
BECAUSE LIABILITY, THE CONDUCT ELEMENTS OF LIABILITY, HAVE ALREADY BEEN ESTABLISHED.
AND WHETHER YOU THINK OF THIS AS A TOLLING CASE AS WE DO OR AS AN AMENDMENT CASE AS MR. MILLS DOES, THE FACT OF THE MATTER IS HE CAN'T, HE HASN'T CITED A SINGLE CASE UNDER EITHER DOCTRINE WHERE A PLAINTIFF HAS BEEN ALLOWED TO EXPAND CLAIMS TO TOSS IN PUNITIVE DAMAGES WHICH, AS YOU SAID, ON STRICT LIABILITY AND NEGLIGENCE THAT CHANGES THE FOCUS OF THE CLAIM.
IT PUTS THE DEFENDANT'S STATE OF MIND AT ISSUE FOR THE FIRST TIME.
SO YOU'RE INJECTING NEW ELEMENTS, AND IT DECREASES THE DEFENDANT'S EXPOSURE BY AN ORDER OF MAGNITUDE.
HE DOESN'T HAVE A SINGLE CASE WHERE THAT'S BEEN ALLOWED AFTER

ELEMENTS OF LIABILITY HAVE
ALREADY BEEN ESTABLISHED.
AND THAT'S WHAT HAPPENED IN
ENGEL.
THAT IS THE FUNDAMENTAL
UNFAIRNESS OF FORCING US TO
DEFEND AGAINST EXPANDED CLAIMS
AFTER WE'VE ALREADY LOST.
YOU KNOW, WE'RE TRYING PHASE 1
IN ENGEL.
HOW IS THAT COMING UP?
WE HAVE STRICT LIABILITY AND
NEGLIGENCE CLAIMS WHICH ARE
LIMITED TO COMPENSATORY DAMAGES,
RIGHT?
THOSE ARE OBVIOUSLY SERIOUS
CLAIMS IN A CLASS CONTEXT.
BUT THE EXPOSURE ON THOSE CLAIMS
IS CASE BY CASE COMPENSATORY
AWARDS.
REALISTICALLY, YOU'RE TALKING
ABOUT SEVEN-FIGURE AWARDS.
PRODUCES IN PHASE 2A BALLPARK
$15 MILLION FOR THREE PLAINTIFFS
VERSUS THE CONCEALMENT AND
CONSPIRACY CLAIMS WHICH, IN THE
TRIAL PLAN OF ENGEL, NOT ONLY
WERE SUPPORTING PUNITIVE
DAMAGES, WERE SUPPORTING CLASS
WIDE PUNITIVE DAMAGES.
THAT TURNED INTO A BANKRUPTING
AWARD OF $145 BILLION.
SO WHEN WE'RE TRYING PHASE 1 OF
ENGEL, THE COMPENSATORY CLAIMS
ARE THREE ORDERS OF MAGNITUDE
LESS IMPORTANT THAN THE PUNITIVE
CLAIM IN THE CONTEXT OF PHASE 1.
SO AFTER THE FACT TO CHANGE THE
RULES AND SAY, OH, BY THE WAY,
NOW THE STRICT LIABILITY AND
NEGLIGENCE CLAIMS--
>> I GUESS I'M LISTENING, BUT
I'M HAVING TROUBLE UNDERSTANDING
WHEN YOU SAY THE CONDUCT.
WHEN YOU GO TO PUNITIVE DAMAGES,
THE CONDUCT, WHAT HAS TO BE
PROVED BECOMES DIFFERENT.
AND SO THAT PART OF THE TRIAL
AND THAT VERDICT, THAT HUGE
VERDICT OF $145 BILLION, WAS

COMPLETELY SET ASIDE BY THIS COURT, RIGHT?
WE COULD HAVE BEEN SITTING HERE WHERE EVERYBODY WAS LIABLE FOR $145 BILLION AND THEY WERE JUST FIGURING OUT HOW TO CROSS IT OUT.
WE SET THAT ENTIRE NOT ONLY THAT ASIDE, BUT ALL OF THE FINDINGS ON PUNITIVE DAMAGES.
SO I'M TRYING TO UNDERSTAND THEN IF WHEN YOU SAY THE CONDUCT HAD NOT BEEN, HAD BEEN ESTABLISHED, THE CONDUCT FOR PUNITIVE DAMAGES WERE STARTING ON-- WE'RE STARTING ON SQUARE ONE, AREN'T WE?
>> I'M SORRY, I WASN'T CLEAR ENOUGH.
I'M TALKING ABOUT THE CONDUCT ELEMENTS OF LIABILITY.
>> BUT THE LIABILITY FOR NEGLIGENCE AND STRICT LIABILITY--
>> RIGHT.
>> THOSE ARE TO GET THE COMPENSATORY DAMAGES, BUT YOU'RE NOW STARTING ON-- LET ME JUST--
>> I'M SORRY.
>> YOU'RE GOING NOW TO PUNITIVE, YOU'VE GOT TO REESTABLISH CONDUCT PLUS, RIGHT?
SO IT'S NOT JUST THAT THEY WERE NEGLIGENT, IT'S THAT THEY'VE GOT TO BE BEYOND THE PALE.
SO, AND I WOULD THINK A LOT OF THE EVIDENCE ABOUT HOW BAD THESE COMPANIES WERE WOULD BE THE SAME EVIDENCE FOR POTENTIAL TORT AS FOR GROSS NEGLIGENCE IS JUST AS MR. MILLS SAID THAT THE DIFFERENCE IS, ONE, YOU HAVE TO PROVE RELIANCE, AND THE OTHER YOU'VE GOT CAUSATION.
SO I'M STILL NOT-- AGAIN, I'M UNDERSTANDING, I'M TRYING TO UNDERSTAND, EXPLAIN AGAIN THE SIGNIFICANCE OF THAT NOT BEING AT ISSUE IN PHASE 1 WHERE THERE

WAS A BELIEF THAT THE PUNITIVE DAMAGES WOULD ONLY BE RESTRICTED TO TWO OF THE EIGHT COUNTS.
>> OKAY.
THERE'S A LOT IN THAT.
>> WELL--
>> LET ME TRY TO--
>> OKAY.
>>-- UNPACK IT PIECE BY PIECE AS BEST I CAN.
SO FIRST OF ALL, YOU'RE ABSOLUTELY RIGHT THAT LIABILITY, THE ELEMENTS OF LIABILITY AND THE ELEMENTS OF PUNITIVE DAMAGES ARE DIFFERENT.
IN ORDER TO GET PUNITIVE DAMAGES ON A CLAIM, OF COURSE, THE PLAINTIFF HAS TO PROVE BOTH, HAS TO PROVE THE STRICT LIABILITY AND NEGLIGENCE ELEMENTS OF THE CLAIM AND THEN HAS TO PROVE THE PLUS FACTORS, THE WILLFUL INDIFFERENCE TO PEOPLE'S RIGHTS.
SO LET'S TALK ABOUT EACH OF THOSE.
THE POINT I WAS TRYING TO MAKE ON THE LAST ROUND AS TO ELEMENTS OF LIABILITY IS THAT WHEN WE TRIED THE ELEMENTS OF LIABILITY ON THE STRICT LIABILITY AND NEGLIGENCE CLAIMS IN PHASE 1, THOSE WERE COMPENSATORY-ONLY CLAIMS.
AND THAT EFFECTS TRIAL STRATEGY, SORT OF HOW IMPORTANT THOSE CLAIMS ARE RELATIVE TO THE OVERALL CASE.
>> BUT YOU'RE NOT REALLY SAYING THAT THE TOBACCO COMPANIES AT THE, IN THIS CLASS ACTION THAT HAD THE POTENTIAL OF HAVING 700,000 PEOPLE WERE NOT RIGOROUSLY DEFENDING BECAUSE THEY SAID, OH, WE'RE ONLY GOING TO BE EXPOSED FOR COMPENSATORY DAMAGES FOR THE 700,000 PEOPLE, BUT ON PUNITIVE WHERE, GEE, WE'RE NOT GOING TO HAVE PUNITIVE DAMAGES ON THESE NEGLIGENCE CLAIM ONLY ON INTENTIONAL TORTS?

IF YOU'RE SAYING STRATEGY WAS DIFFERENT, WHERE IS THAT COMING FROM?
>> OF COURSE WE'RE RIGOROUSLY DEFENDING ALL THE CLAIMS, AND OF COURSE THEY'RE SERIOUS.
BUT WE'RE MAKING JUDGE-- WE'RE MAKING TACTICAL JUDGMENTS IN A CONTEXT OF LIMITED TIME FOR CLOSING ARGUMENTS, JURIES WITH LIMITED ATTENTION SPANS.
SO WE HAVE TO MAKE JUDGMENTS ABOUT WHICH CLAIMS ARE THE MOST THREATENING.
>> WHEN YOU WENT, WHEN PHASE 2 WENT TO TRIAL WHERE THIS WAS THIS GENERAL VERDICT FOR $145 BILLION--
>> RIGHT.
>>-- AND PUNITIVE DAMAGES, WAS MR. MILLS CORRECT WHEN HE SAID YOU'LL FIND PUNITIVE DAMAGES BASED ON WHICH COUNTS?
WAS IT A GENERAL PUNITIVE DAMAGES VERDICT?
>> NO, NO.
THE TRIAL, THE PHASE 2B JURY WAS SPECIFICALLY INSTRUCTED NOT TO AWARD PUNITIVE DAMAGES ON THE CLAIMS FOR STRICT LIABILITY AND NEGLIGENCE.
AND THAT'S PART OF THE BASIS FOR OUR ARGUMENT HERE.
>> OKAY.
AND THEN BUT THAT WAS SAID, AGAIN, NOW I'M JUST-- SO THAT WAS, THE WHOLE THING WAS SET ASIDE.
EVERYTHING ABOUT--
>> THE PUNITIVE AWARD WAS SET ASIDE IN ENGEL, BUT THINK OF WHAT CAME UP TO THIS COURT AND WHAT DIDN'T, JUST AS IMPORTANTLY, WHAT DIDN'T COME UP TO THE COURT IN ENGEL.
WHAT CAME UP TO THE COURT, WHAT YOU DECIDED IN ENGEL WAS WHETHER THAT PUNITIVE AWARD ON THE CONCEALMENT AND CONSPIRACY CLAIMS WAS PREMATURE AND

EXCESSIVE.
YOU SAID PREMATURE AND EXCESSIVE ON BOTH, SO YOU THREW OUT A PUNITIVE AWARD ON CONCEALMENT AND CONSPIRACY.
WHAT YOU DID NOT HAVE BEFORE YOU WAS THE QUESTION WHETHER THE CLASS COULD GET PUNITIVE DAMAGES ON STRICT LIABILITY AND NEGLIGENCE.
AND WHY DIDN'T YOU HAVE THAT BEFORE YOU?
THIS COMES BACK TO JUSTICE CANADY'S QUESTION ABOUT AIR VAC.
YOU DIDN'T HAVE THAT BEFORE YOU BECAUSE THE ENGEL CLASS AND THE NAMED PLAINTIFFS LOST ON THAT ISSUE.
THEY TRIED TO PUT PUNITIVE DAMAGES INTO THE STRICT LIABILITY AND NEGLIGENCE CLAIMS.
THEY LOST AT TRIAL, AND THEY DID NOT BE CROSS-APPEAL ON THAT ISSUE.
NOW, AIR VAC IS ONE OF MANY REASONS, MANY SUFFICIENT, INDEPENDENT REASONS WHY WE SHOULD WIN THAT APPEAL.
SO LET ME SPEND A FEW MOMENTS ON AIR VAC.
AIR VAC HOLDS THAT WHEN A PARTY MOVES TO AMEND UNSUCCESSFULLY AND THEN PREVAILS AT TRIAL, THAT PARTY MUST TAKE A CROSS-APPEAL ON THE DENIAL OF LEAVE TO AMEND OR ELSE IT WAIVES THE ABILITY TO RENEW THE MOTION ON REMAND.
THAT'S THE SQUARE HOLDING OF THE CASE.
NOW, MRS. SOFFER TRIES TO DISTINGUISH IT ON SEVERAL GROUNDS.
SHE SAYS, WELL, PLEASE RECEDE FROM AIR VAC TO THE EXTENT IT'S A CASE ABOUT WAIVER.
WELL, ORIGINALLY THERE WAS AMBIGUITY ABOUT WHETHER AIR VAC WAS ABOUT LAW OF THE CASE OR WAIVER.
YOU SAID IN GULIANO IT'S A CASE

ABOUT WAIVER.
IF YOU RECEDE ABOUT WAIVER,
THAT'S ASKING YOU TO OVERRULE.
THEY SAID IN THEIR BRIEF, I
THINK MR. MILLS BACKED OFF OF
THIS A LITTLE BIT, BUT JUST TO
BE CLEAR, THE QUESTION WHETHER
THE PARTY MOVING TO AMEND IS A
PREVAILING PARTY OR NOT IN AIR
VAC RANGER, THE DEFENDANT WHOSE
MOTION TO AMEND WAS AT ISSUE WAS
THE PREVAILING PARTY AND DIDN'T
TAKE THE CROSS-APPEAL ON THE
FAILURE TO TAKE THE CROSS-APPEAL
AFFECTED THE WAIVER.
AND THEN THE FINAL THING HE SAYS
IN HIS BRIEF IS, WELL, THIS
DOESN'T-- AIR VAC DOESN'T MAKE
ANY SENSE.
IT MAKES PERFECT SENSE.
THE POINT OF THE, THE POINT OF
THAT DOCTRINE IS TO TEE UP ON
APPEAL IN THE FIRST APPEAL
EVERYTHING THAT COULD
CONCEIVABLY GO UP AND BE
DECIDED.
AND IT WOULDN'T HAVE BEEN A
FRIVOLOUS APPEAL IN ENGEL ITSELF
HAD THEY FILED THE CROSS-APPEAL.
THEY COULD HAVE SAID THE DENIAL
OF OUR RIGHT TO SEEK PUNITIVE
DAMAGES ON THE STRICT LIABILITY
AND NEGLIGENCE CLAIMS WAS
IMPROPER.
AND IF YOU REMAND, YOU SHOULD
ALLOW US TO DO IT, AND THERE
WOULDN'T BE ANY PREJUDICE
ANYMORE.
IT'S ON THE EVE OF PHASE 2B.
ALL OF THE ARGUMENTS HE'S
MAKING.
WE COULD HAVE COUNTERED AND
SAID, NO, THAT SHOULD STAY OUT
OF THE CASE BECAUSE IT'S
IMPROPER TO EXPAND THE CLAIMS
AFTER LIABILITY'S BEEN
ESTABLISHED, TOO MUCH TIME HAS
PASSED, IT'S PRIVILEGE
ADDITIONAL BECAUSE IT'S
INTRODUCING NEW ELEMENTS.

THAT WOULD HAVE BEEN TEED UP.
YOU COULD HAVE DECIDED THAT.
WE WOULDN'T BE HAVING THIS ARGUMENT TODAY BECAUSE WE COULD HAVE HAD IT IN ENGEL, IT COULD HAVE BEEN DECIDED 20 YEARS AGO.
THAT'S THE POINT OF AIR VAC.
AND THEN THE FINAL AIR VAC POINT THEY MAKE WAS THAT AIR VAC WAS SOMEHOW IMPLICITLY OVERRULED BY THE ED RICKY LINE OF CASES, ED RICKY IS A CASE IN WHICH A RIGHT TO AMEND WAS GRANTED ON REMAND, BUT IN ED RICKY I THE PARTY THAT WAS NOT ALLOWED LEAVE TO THE AMEND THE FIRST TIME AROUND TOOK THE APPEAL.
SO THERE'S NO QUESTION OF WAIVER.
PERFECT CONSISTENCY BETWEEN THOSE CASES.
SO OUR VAC, AIR VAC IS DISPOSITIVE.
I DON'T THINK YOU NEED TO GO BEYOND IT.
BUT TO BE CLEAR, WE DON'T THINK YOU EVEN NEED TO REACH THE AIR VAC ISSUE.
AIR VAC PRESUPPOSES THIS IS A QUESTION OF AMENDMENTS, PERMISSIBLE AMENDMENTS.
WE THINK THE CASE IS MOST EASILY DECIDED AS A THRESHOLD MATTER ON TOLLING GROUNDS BECAUSE THE AMENDED-- THE PROGENY COMPLAINT IN THIS CASE WOULD BE UP TIMELY BY MORE THAN A DECADE BUT FOR THE ENGEL TOLLING RULE FILED IN 2007 ARISING OUT OF A 1992 DEATH.
SO THEN THE QUESTION IS WHAT'S THE SCOPE OF THE EQUITABLE TOLLING THAT THIS COURT GRANTED IN ENGEL AND THE GENERAL FLORIDA RULE ON EQUITABLE TOLLING IS THAT CLAIMS HAVE TO-- IT EXTENDS ONLY TO IDENTICAL CLAIMS.
WHEN YOU ADD A DEMAND FOR PUNITIVE DAMAGES WHETHER YOU

CALL IT A CLAIM OR A REMEDY, THE
POINT IS YOU'RE FUNDAMENTALLY
CHANGING THE NATURE OF THE
CLAIM.
PARTICULARLY ON STRICT LIABILITY
AND NEGLIGENCE WHERE THE CLAIM
ITSELF IS PURELY OBJECTIVE.
WERE THE CIGARETTES DEFECTIVELY
DESIGNED--
>> I'M HAVING A LITTLE BIT OF
DIFFICULTY WITH YOUR
CHARACTERIZATION UNDER OUR RULES
OF PROCEDURE WITH THE WORD
"CLAIM."
WE RECOGNIZE CAUSES OF ACTION--
>> UH-HUH.
>>-- AND A PUNITIVE DAMAGE
ASSERTION IS NOT A DIFFERENT
CAUSE OF ACTION, IS IT?
>> IT'S NOT A CAUSE OF ACTION.
IT IS DESCRIBED REPEATEDLY AS A
CLAIM FOR PUNITIVE DAMAGES.
>> WELL, IT MAY BE DESCRIBED
THAT WAY, BUT MY POINT BEING
THAT WHEN YOU START GETTING INTO
TOLLING AND WHAT IS OR IS NOT
TOLLED, AREN'T WE REALLY
CONCERNED ABOUT CAUSES OF ACTION
AS OPPOSED TO THIS CONCEPT THAT
IS REALLY FOREIGN TO OUR RULES
OF PROCEDURE OF A CLAIM?
>> YOU'RE CONCERNED ABOUT
FAIRNESS TO DEFENDANTS TO THE
EXTENT THE CLASS CLAIMS ARE
EXPANDED.
>> NO, I'M CONCERNED ABOUT WHAT
THE LAW IS WITH REGARD TO CAUSES
OF ACTION--
>> RIGHT.
>>-- THAT ARE TOLD OR NOT TOLD.
SO I'M NOT CONCERNED
OR-- THAT'S NOT THE ISSUE.
THE ISSUE IS A LEGAL DECISION AS
TO WHAT SEEMS TO ME UNDER OUR
RULES WOULD BE A CAUSE OF ACTION
THAT'S TOLD AND WHETHER IT
JUSTIFIES CERTAIN DAMAGES IS A
DIFFERENT QUESTION.
THAN WHETHER A CAUSE OF ACTION.
I MEAN, YOU CAN GO THROUGH OUR

RULES OF PROCEDURE, AND YOU CAN
SHOW ME, IF YOU WOULD, WHERE WE
CALL IT CLAIMS.
I JUST DON'T THINK IT'S THERE.
>> A LEGAL QUESTION ABOUT THE OF
EQUITABLE TOLLING--
>> WILL RIGHT.
WHICH RELATES TO WHAT?
>> THE FLORIDA-- WHICH RELATES
TO THE CLAIMS RAISED BY THE
PLAINTIFF.
>> WELL, AGAIN, YOU WANT TO GO
BACK TO THE WORD "CLAIMS" AS I
UNDERSTAND ALL OF FLORIDA LAW,
IT RELATES TO CAUSE OF ACTION,
AND THAT'S HOW YOU MEASURE AND
HOW YOU EVALUATE IT.
>> I DON'T WANT TO GET TOO HUNG
UP OVER LABELS.
I THINK THE--
>> WELL, I'M SURE YOU DON'T
BECAUSE THIS IS THE ESSENCE OF
THE DISCUSSION, IS THAT WHAT IS
ACTUALLY STILL AVAILABLE.
AND THAT'S, THAT'S--
>> AND THERE'S--
>> THE POINT BEING IS THAT YOU
CAN HAVE ASPECTS OF A, QUOTE,
CLAIM IF THAT'S WHAT YOU WANT TO
CALL IT, ELEMENTS OF DAMAGES
THAT COULD CHANGE AND COULD
DISAPPEAR OR COULD CHANGE IN
CONNECTION WITH AN UNDERLYING
CAUSE OF ACTION.
AND I ALWAYS UNDERSTOOD THAT IN
THIS AREA IN FLORIDA LAW IS THAT
WE'RE SPEAKING OF A CAUSE OF
ACTION, NOT THE CLAIMS.
>> RIGHT.
>> BECAUSE THE AMOUNT OF CLAIMS,
IT MAY VARY.
THAT'S JUST-- WHATEVER'S
AVAILABLE TO YOU, YOU KNOW, PAIN
OR SUFFERING OR WHAT'S HAND.
IT CHANGES OVER TIME-- WHAT'S
HAPPENED.
SO THIS INTERMINGLING, TO ME, IS
NOT SELLING IT.
I'M TRYING TO UNDERSTAND TO
PLACE YOUR ARGUMENT IN THE CAUSE

OF ACTION CONTEXT.
>> THE FLORIDA CASES AS WE READ THEM, RAY AND CROMIAK SPEAK OF THE CLAIM OR CAUSE OF ACTION HAVING TO BE IDENTICAL.
>> I AGREE WITH CAUSE OF ACTION.
>> THERE'S A COMPETING LINE OF CASES THAT SAYS THE CLAIMS HAVE TO INVOLVE THE SAME AT EVIDENCE WITNESS' MEMORIES.
REGARDLESS WHICH OF THOSE STANDARDS YOU ADOPT, OUR SUBMISSION IS THAT WHEN YOU ADD THE PUNITIVE DAMAGES-- THIS IS A LITTLE BIT DIFFERENT FROM WHAT YOU HAVE IN THE CASES WHERE SOMEONE IS TRYING TO TACK ONE CLAIM ONTO ANOTHER.
HERE WE ARE TALKING ABOUT A REMEDY.
IT'S A LITTLE BIT DIFFERENT.
BUT THE SOURCE OF UNFAIRNESS IS THE SAME.
IT'S ACTUALLY WORSE HERE BECAUSE WHEN YOU TACK ON THE DEMAND FOR PUNITIVE DAMAGES TO A STRICT LIABILITY OR NEGLIGENCE CLAIM, YOU'RE CHANGING THE FOCUS OF THE CLAIM INSTEAD OF JUST BEING AN ISSUE OF OBJECTIVE QUESTIONS ABOUT CIGARETTE DESIGN, IT NOW BECOMES A QUESTION OF WHAT'S IN THE MINDS OF THE DESIGNERS.
AND IT INCREASES THE DEFENDANT'S EXPOSURE WHICH IS WORSE THAN THE CASE WHERE YOU HAVE A STRICT--
A NEGLIGENCE CLAIM ENDING AND YOU TACK ON A STRICT LIABILITY CLAIM.
AND IT DOESN'T CHANGE THE EXPOSURE AND THE COURTS SAY, WELL, THAT'S FINE.
JUDGE LEWIS, IF I'M WRONG ABOUT TOLLING, WHAT FOLLOWS FROM THAT IS YOU JUST THINK OF A CASE ABOUT AMENDMENT.
INSTEAD OF TOLLING.
WHETHER IT'S THE IDENTICAL CLAIM STANDARD UNDER TOLLING, THE SAME EVIDENCE STANDARD UNDER TOLLING

OR SIMPLY THE RULES FOR
AMENDMENT, AGAIN, THE FACT IS
MR. MILLS HASN'T BEEN ABLE TO
CITE A SINGLE CASE IN WHICH A
PARTY HAS BEEN ALLOWED TO EXPAND
STRICT LIABILITY AND NEGLIGENCE
CLAIMS TO ADD ON PUNITIVE
DAMAGES AFTER ELEMENTS OF THE
CLAIM HAVE BEEN ESTABLISHED AND
20 YEARS AFTER THE ORIGINAL
COMPLAINT HAS BEEN FILED.
>> YOUR TIME IS UP, SIR.
>> THANK YOU.
>> AND THERE CAT YOUS HAS
PRESENTED NO CASE THAT SAID YOU
CAN'T DO THAT.
ON A RELATED NOTE, I'VE BEGIN
YOU THE SECOND DCA DECISION AND
ADD A WHOLE NEW CLAIM FOR--
>> SO HOW DO YOU, HOW DO WE
SQUARE ED RICKY WITH AIR VAC?
AND I HAD NOT ACTUALLY-- I MUST
SAY I DIDN'T REALLY FOCUS ON AIR
VAC BECAUSE, AGAIN, TO ME I
THOUGHT THE SLATE HAD BEEN WIPED
PRETTY CLEAN.
>> RIGHT.
>> WHETHER BUT COULD YOU ADDRESS
WHAT HAS BEEN RAISED AS A TRUE
PREJUDICED ARGUMENT?
SO LET'S FORGET WHETHER THERE'S
WAIVER EITHER SIDE.
IT IS THAT THEY WERE DEFENDING,
WHEN THEY DEFENDED PHASE I IN
CONDUCT, THAT THEY WERE ASSUMING
THAT PUNITIVE DAMAGES WERE ONLY
GOING TO BE RESTRICTED TO TWO OF
THE FOUR CLAIMS.
>> SURE.
>> TRY TO DO IT IN A WAY THAT IS
NOT, THAT TAKES THEIR ARGUMENT
AND GIVE ME THEIR BEST ARGUMENT
AND THEN--
>> SURE.
THEY SUFFERED TWO POTENTIAL
KINDS OF PREJUDICE IN PHASE 1
WHEN THEY GOT THROUGH AND IT
WASN'T RAISED UNTIL DIRECTED
VERDICT, THIS ISSUE OF WHETHER
IT WAS PLEADED OR NOT.

ONE POSSIBLE THING IS WHAT HE
JUST SUGGESTED TO YOU WHICH IS
ABSOLUTELY ABSURD, THAT THEY
WOULD HAVE TRIED HARDER, THEY
WOULD HAVE TAKEN THIS CASE MORE
SERIOUSLY IF THEY KNEW PUNITIVE
DAMAGES WERE AT ISSUE IN ALL
COUNTS.
THAT'S RIDICULOUS.
THEY THOUGHT THERE WERE 800,000
CLASS MEMBERS.
TURNS OUT THERE WERE LESS THAN
10,000 WHO FILED CLAIMS.
SO THE EXPECTATION'S THEY'D
GOTTEN PRETTY LUCKY.
SO THAT BUDGET THE PREJUDICE
THAT LED THE JUDGE TO DENY ANY
LEAVE TO AMEND.
IT WAS THAT THE CASE-- WE'D
ALREADY HAD OPENING STATEMENTS,
WE'D ALREADY TRIED THE CASE FOR
MANY, MANY MONTHS.
PEOPLE WERE TRYING THEIR LONG
CLOSING ARGUMENTS--
>> THE CASE ON PUNITIVE DAMAGES.
>> THE CASE ON EVERYTHING.
THE CASE ON ENTITLEMENT TO
PUNITIVE DAMAGES WAS PHASE 1.
AND HE'S JUST WRONG.
IT'S PAGE 126 OF OUR -- IS
THE VERDICT FORM, AND IT DOESN'T
SAY BOO ABOUT WHICH PAGE THEY'RE
ON.
>> HE DID NOT SAY VERDICT FORM.
HE SAID THE JURY WAS
INSTRUCTED--
>> THEY WERE NOT INSTRUCTED IN
PHASE 1, THEY WERE INSTRUCTED IN
2B WHEN IT CAME UP.
BECAUSE IT WAS ADDRESSED DURING
THE CHAMPING CONFERENCE IN 2B.
THE PREJUDICE IS WHEN YOU GO MID
TRIAL--
>> PHASE 2B IS WHAT WE SET
ASIDE.
>> RIGHT.
RIGHT.
AND YOU SET ASIDE THE
ENTITLEMENT FINDING IN PHASE 1
TOO.

YOU SAID YOU CAN'T DETERMINE
ENTITLEMENT.
YOU CAN'T DETERMINE ANYTHING ON
PUNITIVE DAMAGES ON A CLASS
BASIS.
>> TAKE ABOUT 30 SECONDS TO WRAP
IT UP.
>> SURE.
SO THE ONLY PREJUDICE THEY COULD
HAVE HAD WAS THEIR TRIAL
STRATEGY.
YOU THREW ALL THAT OUT.
NOW THEY HAVE NEW TRIAL
STRATEGY, AND WE MOVED FOUR
MONTHS AHEAD OF TIME AND WERE
GRANTED LEAVE.
SO THAT DOESN'T APPLY.
THERE WAS NO ARGUMENT HERE.
WHAT WOULD OUR--
>> LET ME JUST ASK YOU THIS REAL
QUICKLY.
I BELIEVE HE SAYS THAT THEY WERE
INSTRUCTED, THE JURY WAS
INSTRUCTED AND PUNITIVE DAMAGES
WERE ONLY APPLICABLE TO THE
INTENTIONAL TORT AND NOT STRICT
LIABILITY AND DIMENSION.
IS THAT THE CASE?
THERE WAS NO CROSS-APPEAL OF
THAT.
>> THAT WAS THE CASE IN PHASE
2B.
THERE WAS NO CROSS-APPEAL
BECAUSE IT WOULD HAVE BEEN
FRIVOLOUS TO SAY WE SHOULD HAVE
BEEN ALLOWED TO RAISE IT MID
TRIAL.
WHEN IT SHOULD HAVE BEEN RAISED
WAS IN MOTION FOR REHEARING.
IF THIS COURT SAID WE'RE GOING
TO HAVE PUNITIVE DAMAGES ONLY IF
YOU FIND INTENTIONAL TORTS IN
THESE FINDINGS.
AND AT THAT POINT WE WOULD HAVE
HAD TO MOVE FOR REHEARING AND
SAY, WAIT, WE HAVE THIS, WE CAN
RENEW IT.
THAT'S WHAT HAPPENED IN AIR VAC.
ONCE THEY SAID THE REMEDY IS
PROVE THESE TWO THINGS AND YOU

GET LIABILITY, THAT'S THE POINT
THAT IT SHOULD HAVE BEEN NOT
CROSS-APPEALED, BUT IT SHOULD
HAVE BEEN A MOTION FOR REHEARING
THAT SAYS, YOUR HONOR, THAT'S
THE IMPROPER REMEDY.
THAT IS EXACTLY WHAT HAPPENED IN
THE TOWNSEND CASE WHICH IS A
TOBACCO CASE, AND I'LL DO A
NOTICE OF SUPPLEMENTAL AUTHORITY
TO SHOW YOU THAT CASE.
THANK YOU SO MUCH.
>> 60 SECONDS.
30 SECONDS.
THANK YOU.
>> SORRY.