BAILIFF: PLEASE RISE. HEAR YE HEAR YE HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, 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 FLORIDA SUPREME COURT. PLEASE BE SEATED.

GOOD MORNING, LADIES AND GENTLEMEN. WELCOME TO THE FLORIDA SUPREME COURT. AS YOU CAN SEE, JUSTICE ANSTEAD AND JUSTICE PARIENTE ARE REACCUSED IN THIS CASE, AND WE HAVE A QUORUM, AND WE WILL HEAR THE CASE AS SCHEDULED. FIRST CASE ON THE COURT'S CALENDAR IS GRADY CARTER VERSUS BROWN & WILLIAMSON TOBACCO CORPORATION. MR. WILNER, ARE YOU READY TO PROCEED?

MAY IT PLEASE THE COURT. THANK YOU FOR PERMITTING ME TO BE HERE TO REPRESENT MR. CARTER. MR. CARTER'S CASE COMES UP FROM THE DISTRICT COURT ON DISCRETIONARY APPEAL, BEING REVERSED BY THE DISTRICT COURT AFTER A FAVORABLE JURY VERDICT AGAINST BROWN & WILLIAMSON TOBACCO COMPANY IN JACKSONVILLE, 1996. TWO PLEAS. THE FIRST AREA THAT THE COURT REVERSED ON WAS ON THE STATUTE OF LIMITATIONS. THE FOLLOWING CHRONOLOGY, I THINK, IS ALL WE NEED TO UNDERSTAND. IT IS REALLY A VERY SIMPLE, IN 12-91, MR. CARTER HAD SYMPTOMS. HE COUGHED UP BLOOD. ON 2-4-91, HE HAD A TIMELY VISIT WITH A DOCTOR NAMED DECKER. HE WAS REFERRED, IMMEDIATELY, TO A PULMONARY SPECIALIST. ON THAT SAME DAY HE HAD A CHEST X RAY REPORT BY A RADIOLOGIST. ON 2-5-91 THERE WAS A DISCUSSION WITH DR. YURGIN, A POSSIBLE TUBERCULOSIS, PNEUMONIA OR CANCER. THERE WAS ALSO A CHEST X RAY INTERPRETATION PIE DR. YURGIN, AND THERE WAS A SILENT REFERENCE IN THE FILED, AND A REFERENCE TO O.P.D., AND THE DOCTOR SAID WE DON'T KNOW WHAT IT IS. WE NEED TO DO FURTHER TESTING. ON 2-8-91, THAT IS THE OPERATIVE DATE FOR THE STATUTE, AND ON 2-12-1, THE BIOPSY OF REPORTED CANCER.

MR. WILNER, ARE YOU -- IS IT YOUR POSITION THAT THE TANNER VERSUS HARTZOG STANDARD IS WHAT APPLIES HERE?

YES. INNINGS. CERTAINLY WHAT THIS COURT TAUGHT, IN TANNER.

SO, WHAT WE ARE DEALING WITH, THEN, IS WHETHER THERE IS A POSSIBILITY, NOT A PROBABILITY. THAT IS WHAT TANNER TALKS.

TANNER TALKS ABOUT THE POSSIBILITY OF NEGLIGENCE, NOT THE POSSIBILITY OF INJURY.

RIGHT. WELL --

AND THERE IS A BIG DIFFERENCE.

HOWEVER, IN THIS INSTANCE, IF WE GO BACK TO NARDONE, THEN AND KIND OF TRACE WHERE WE HAVE BEEN IN THE STATUTE OF LIMITATIONS LAW, WHAT -- THE INJURY IS THE FACT THAT HE COUGHED UP BLOOD. I MEAN THAT WOULD BE THE INJURY, UNDER A NARDONE TEST, WOULD IT NOT?

THE NARDONE TEST, THE ANSWER IS NO. THE INJURY IS NOT A SYMPTOM. THE INJURY IS NOT GOING TO THE HOSPITAL. THIS COURT HAS NEVER SAID EXACTLY WHAT INJURY IS, BUT THERE IS NO PRODUCTS CASE WHICH SUGGESTS THAT INJURY IS JUST SOMETHING THAT IS UNRELATED TO ANYTHING ELSE. IT JUST YOU WAKE UP IN THE MORNING, AND ALL OF A SUDDEN YOU FEEL BAD. THIS COURT HAS, ALWAYS, SAID, ALTHOUGH IT HAS NEVER TAKEN APART INJURY FROM

RELATION TO THE PRODUCT, BUT THIS COURT HAS ALWAYS SAID THAT THE, FOR INSTANCE, IN THE COPY LAND CASES, THAT THERE HAS TO BE SOME CONNECTION TO THE PRODUCT, BEFORE WE COME TO THE REALIZATION THAT WE HAVE AN ACTIONABLE INJURY.

WELL, THAT IS WHAT MAKES THESE KINDS OF INJURES, THAT AN ASBESTOS AND SMOKING, KIND OF DIFFICULT TO FIT INTO A MEDICAL MALPRACTICE CONTEXT. ISN'T THAT CORRECT?

YES.

BUT THE -- WHAT SECTION OF THE STATUTE ARE WE DEALING WITH?

WELL, WE ARE DEALING WITH THE FLORIDA STATUTE 90.031, WHICH SAYS THAT ACTIONS FOR PRODUCT LIABILITY MUST BEGIN WITHIN THREE YEARS, AND IT IS A TIME REFERENCE ANOTHER, EARLIER IN THE STATUTE, WHICH IS FOUR YEARS, WITHIN A PERIOD OF TIME THE FACTS GIVING RISE TO THE ACTION WERE DISCOVERED OR SHOULD HAVE BEEN DISCOVERED, WITH THE EXERCISE OF DUE DILIGENCE. THAT IS ALL IT SAYS. SO THE MALPRACTICE STATUTE SAYS, WITHIN TWO YEARS FROM THE TIME THE INCIDENT IS DISCOVERED OR SHOULD HAVE BEEN DISCOVERED, WITH THE EXERCISE OF DUE DILIGENCE, ONE SAYS FACTS AND ONE SAYS INCIDENT. IT HASN'T EVER BEEN COMPLETELY CLEAR, BUT WHAT WE READ, FROM TANNER, IS NOT SO MUCH THAT, AS A MATTER OF LAW, THESE ARE THE SAME, BUT FOR PURPOSES OF EVALUATING THIS QUESTION OF DUE DILIGENCE, WHICH IS, REALLY, WHAT IS BEHIND THIS ENTIRE ANALYSIS, IN OTHER WORDS, IF WE RETURN TO THE STATUTE AND SAY FROM THE TIME THE FACTS GIVING RISE TO THE CAUSE OF ACTION WERE DISCOVERED OR SHOULD HAVE BEEN DISCOVERED, WHAT ARE THE FACTS GIVING RISE TO THE CAUSE OF ACTION? WELL, TANNER SAID IT IS NOT JUST INJURES STANDING ALONE. IT IS INJURY AND THE REASONABLE POSSIBILITY OF MEDICAL MALPRACTICE. THAT WAS THE -- THAT WAS WHERE TANNER DEPARTED FROM NARDONE AND DEPARTED FROM B OMENT LGORF -- FROM BOLGORF. TANNER SAID NOT ACTING ALONE BUT AS TO THE INJURY, AND WITH THE BABY, NOT JUST TO AS A MATTER OF LAW BUT BEGAN THE STATUTE TO RUN.

WHAT MOTIVE DID THE PLAINTIFF HAVE, AS OF 2-3 --

2-4?

YEAH. 2 -- WHEN HE WAS -- WHEN HE VISITED THE DOCTOR AND THE DOCTOR TOLD HIM THAT HE HAD, EITHER, TB, PNEUMONIA OR CANCER?

WHAT SYMPTOMS?

WHAT NOTICE, LEGALLY?

WELL, I THINK --

DID HE HAVE AT THAT POINT?

I THINK THIS WOULD BE JUST LIKE IF YOU WENT INTO THE HOSPITAL AND YOU HAD SOMETHING WRONG WITH YOU, AND THE DRT SAID, WELL, I AM GOING TO GIVE YOU -- AND THE DOCTOR SAID, WELL, I AM GOING TO GIVE YOU A SERIES OF TESTS AND THE DOCTOR COMES BACK AND SAYS I DON'T LIKE WHAT I SEE ON THIS X RAY. AND ANOTHER TEST COMES BACK AND SAYS, WELL, THAT IS NOT CONCLUSIVE. WHAT ABOUT A BLOOD TEST? AND THE THIRD TEST SAYS WE HAVE DONE A BIOPSY AND THIS IS WHAT IT IS.

IS ANYTHING TRIGGERED BY THAT? IS THAT A TRIGGERING MECHANISM FOR ANYTHING? ONCE HE IS TOLD THAT?

I THINK IT IS UP TO THE JURY TO ANALYZE WHETHER THAT IS WHAT THEY WERE PROPERLY

CHARGED, WHICH IS THE EXERCISE OF DUE DILIGENCE, DOES THAT GIVE DISCOVERY TO THE FACTS GIVING RISE TO THE CAUSE OF ACTION? THE ANSWER IS, ACCORDING TO WHAT COPELAND HAS BEEN DECIDED AND TRANER HAS BEEN DECIDED, IS THAT, WITHOUT -- AND TANNER HAS BEEN DECIDED, IS THAT, WITHOUT MORE, WHEN THE JURY LOOKS AT A DIAGNOSTIC PROCEDURE, WHEN YOU ARE DONE -- IN OTHER WORDS YOU ARE BEING DILL GENERALITY. MR. CARTER WAS DILL GENERALITY. HE CAME BACK, EVERY TIME, TO HIS APPOINTMENT, AS SCHEDULED. THIS WAS NOT A CASE, LIKE BORGDOFF, WHERE YOU HAD A 10- 10-YEAR HIATUS. WHERE ARGUABLY SOMETHING COULD HAVE BEEN DISCOVERED BUT IT COULDN'T. THIS WAS A TWO-WEEK PERIOD, WHERE HE WAS BEING SUBJECT TO THE MEDICAL PROCESS AND COMING BACK EXACTLY WHEN HE WAS TOLD.

WOULDN'T DUE DILIGENCE, AT THAT POINT, REQUIRE HIM TO DO SOMETHING, OTHER THAN SAY, WELL, WHATEVER THE DOCTOR TELLS ME TO DO. HERE IS A PERSON THAT HAS BEEN SMOKING A COUPLE OF PACKS OF CIGARETTES MOST OF HIS LIFE, ISN'T HE, AND HE GOES IN, AND HIS DOCTOR TELLS HIM THAT THERE IS A POSSIBILITY YOU HAVE CANCER. AND I GUESS MY QUESTION IS DUE DILIGENCE WOULD REQUIRE HIM TO DO WHAT AT THAT POINT?

TO DO EXACTLY WHAT HIS DOCTOR SAID, WHICH IS DO A BIOPSY AND COME RIGHT BACK FOR YOUR RESULTS, WHICH IS WHAT HE DID, AND I THINK THAT IS THE KEY TO THE CASE. IF HE HAD, AT THAT TIME, SAID, WELL, DOCTOR, I DON'T REALLY WANT TO KNOW. I WILL LEAVE. I THINK THE JURY COULD WELL FIND THAT THERE WAS A TIME WHEN HE SHOULD HAVE KNOWN, BUT HIS DOCTOR AND DOCTOR YERGIN SAID, AND IT IS FOR THE JURY TO DETERMINE EXACTLY THIS CONVERSATION, DR. YERGIN SAID, PUT UP NIGHT, PLEASE, "I DEFINITELY UNEQUIVOCALLY DID NOT TELL HIM IT WAS MOST LIKELY LUNG CANCER". I SAID YOU HAVE A PROBLEM AND THE PROBLEM COULD BE TB, AND I STATED AND CLINICALLY WILL STATE LUNG CANCER LAST. I SAID IT COULD BE TB, IT COULD BE A SLOW RESOLVING PNEUMONIA, AND IT COULD BE LUNG CANCER.

WHEN DOES THE QUESTION OF THE BEGINNING OF THE RUNNING OF THE STATUTE OF LIMITATIONS BECOME A JURY QUESTION? I KNOW, IN THIS CASE, THE JURY 1ED THE STATUTE OF -- THE JURY SAID THE STATUTE OF LIMITATIONS HAD NOT RUN, BUT WHETHER IS THE STATUTE OF LIMITATIONS?

I THINK PEOPLE COULDN'T AGREE. THIS THIS CASE, HAD THE BIOPSY COME BACK ON THE 14th, AS IT DID, AND THE JURY FOUND THAT THE STATUTE DID NOT START RUNNING FOR ANOTHER YEAR AND NOTHING HAD HAPPENED, I THINK, MAYBE, YOU COULD SAY, WELL, WHAT IS THIS? WHAT IS GOING ON? BUT FOR THE JURY TO SAY, WELL, IF YOU ARE IN THE MIDDLE OF A DIAGNOSTIC PROCEDURE AND YOU HAVE A SUGGESTION AND YOU FOLLOW-UP ON IT, AND IT IS A SERIES OF TESTS, AND THEN THE TEST COMES BACK, AND IT SAYS, YES, YOU HAVE GOT IT, THAT THAT IS A REASONABLE, THAT YOU HAVE BEEN REASONABLY DILIGENT.

SO IT BECOMES A JURY QUESTION, IF THERE IS SOME QUESTION ABOUT DUE DILIGENCE.

I THINK THAT IS ABSOLUTELY TRUE. AND SOME QUESTION ABOUT WHAT THE FACTS WERE, GIVING RISE TO THE CAUSE OF ACTION. SO IF WE TAKE WHAT DR. YERGIN SAID AT TRIAL, NOW, BROWN & WILLIAMSON SAYS THAT IS NOT ENOUGH. THAT, REALLY, IS -- DR. YERGIN, REALLY, SAID SOMETHING ELSE. DR. YERGIN REALLY TOLD HIM. WELL, THAT IS NOT WHAT DR. YERGIN SAID, AND THAT WAS FOR THE JURY TO RESOLVE ULTIMATELY, AND DR. YERGIN TESTIFIED AT LENGTH.

MY PROBLEM WITH THAT, AND WHAT I AM TRYING TO FIG OUT IS, ARE YOU SAYING THAT, IF -- TO FIGURE OUT IS, ARE YOU SAYING THAT, IF THE FACTS ARE UNDISPUTED, THAT, THEN, WE JUST LEAVE IT UP TO THE JURY TO DETERMINE WHETHER, UNDER THOSE FACTS, THERE WAS DUE DILIGENCE, OR WHAT I AM STRUGGLING WITH IS WHY ISN'T THAT A LEGAL QUESTION?

THE QUESTION OF DILIGENCE?

THE LEGAL QUESTION BEING SETTING A STANDARD FOR WHAT IS POSSIBLY RELATED TO THE PRODUCT AND WHAT GIVES RISE TO THE NOTICE OF THAT FACT? I MEAN, DON'T WE HAVE TO HAVE A LEGAL STANDARD THAT WE ARE DEALING WITH, AND THEN SEE IF THERE ARE ANY CONTESTED FACTS?

WELL, I THINK THE LEGAL STANDARD WAS CORRECTLY READ TO THE JURY. THE LEGAL STANDARD WAS EXACTLY -- THE JURY INSTRUCTION SAID EXACTLY THAT. IT STATED THE STATUTE AND THEN SAID WHETHER PLAINTIFF HAD KNOWLEDGE OF THE ACTUAL INJURY AND KNOWLEDGE THERE WAS A REASONABLE --

WHAT ARE THE DISPUTED ISSUES OF FACT THAT THE JURY WAS TO RESOLVE HERE?

THE JURY WAS TO HAVE RESOLVED, IN THIS PARTICULAR CASE, WAS WHEN MR. CARTER HAD REASONABLE KNOWLEDGE OF INJURY, NOT A POSSIBILITY OF INJURY, BUT IF HE HAD, AT ONE POINT IN TIME, ONLY THE KNOWLEDGE THAT HE COULD BE INJURED BY CIGARETTES, THAT IT COULD BE TUBERCULOSIS AND IT COULD BE SOMETHING ELSE, EVERYBODY HAS THAT. I MEAN, IF YOU WAKE UP ONE MORNING, AND YOU HAVE -- AND LET'S SAY YOU HAVE SMOKED OR YOU HAVE BEEN AROUND ASBESTOS, WHEN YOU WAKE UP ONE MORNING WITH A BAD DAY, YOU MIGHT SAY, WELL, I MIGHT BE INJURED. THAT IS NOT ENOUGH. NOW, I AM NOT SAYING THE JURY COULDN'T, IN ANY CIRCUMSTANCES, FIND THAT TO BE ENOUGH, BUT IT IS NOT ENOUGH, WHEN YOU PROMPTLY AND DILIGENTLY GO TO THE PHYSICIAN AND SAY CHECK ME OUT, AND HE SAYS I WILL CHECK YOU OUT. HERE IS WHAT WE WILL DO. AND WE GO THROUGH A SERIES OF TESTS. NOW, WHAT THEY -- WHAT I THINK THE -- WHAT BROWN & WILLIAMSON --

EXCUSE ME. I WANT TO STOP YOU BEFORE YOU GET TOO FAR. SO IF THIS PLAINTIFF HAD NOT BEEN EXPOSED TO BOTH ASBESTOS AND TOBACCO AND, SAY, IT WAS JUST TOBACCO THAT HE HAD BEEN EXPOSED TO, THEN YOU WOULD HAVE A DIFFERENT QUESTION HERE?

I DON'T THINK -- I DON'T KNOW HOW THE PLAINTIFF IS SUPPOSED TO RELATE HIS EXPOSURE TO TOBACCO TO A PARTICULAR DISEASE, WITHOUT SOME WAY OF -- SOME IDEA FROM AN EXPERT OF WHAT IT IS. YOU CAN'T DIAGNOSE YOURSELF WITH CANCER. PEOPLE DON'T KNOW EXACTLY WHAT THE CONNECTION IS. WHAT IF HE WAS AROUND, YES, ASBESTOS IS ONE. HE WAS EXPOSED TO IT. B. WHAT IS TB? TO EXPECT, AND I -- HE WAS EXPOSED TO IT. B. TO EXPECT -- AND THAT WAS IN THE CASE OF TANNER, WHEN HE SAID, JUSTICE KOGAN, THAT WE HAVE TO LOOK AT IT FROM A PARTICULAR POINT OF VIEW.

LET ME ASK, IS THIS INJURY PLUS CAUSAL RELATIONSHIP, THE TWO FACTORS?

YES. I THINK THAT, AS NEAR AS WE CAN TELL, THE TRIGGERING RELATIONSHIP HAS TO BE INJURY WHICH INCLUDES CAUSAL RELATIONSHIP, ALTHOUGH NOT BEYOND DISPUTE. I THINK A REASONABLE BASIS FOR A CAUSAL RELATIONSHIP, IF YOU GET HIT BY A TRUCK, YOU HAVE THAT. IF YOU GET A CREEPING DISEASE, LIKE FROM ASBESTOS, LIKE IN COPELAND, YOU DON'T NECESSARILY HAVE THAT, THE MOMENT YOU HAVE A COUGH OR ANY KIND OF SYMPTOM, BECAUSE YOU DON'T KNOW WHAT IT IS FROM. YOU MAY HAVE SUSPICIONS, BUT THERE IS NO WAY YOU COULD BLAME THAT ON THE PLAINTIFF FOR HAVING SUSPICIONS OR FEARS. SO THE NEXT -- SO THEN YOU HAVE TO HAVE A REASONABLE BOLT OF -- THAT NEGLIGENCE WAS INVOLVED. AND WE HAVE NOT EVEN TALKED ABOUT THAT, BECAUSE THERE IS NOBODY ATTRIBUTED THIS DISEASE TO SMOKING. AT ALL. UNTIL MUCH LATER, AND THAT WASN'T EVEN DEVELOPED IN THE RECORD, BUT EVEN AS OF THE 14th, WHEN THE BIOPSY CAME BACK, NOBODY ATTRIBUTED IT TO SMOKING OR SO THE JURY COULD HAVE FOUND. NOW, THEY CROSS-EXAMINED GRADY CARTER, AND THEY SAID, WELL, WHEN YOU COUGHED UP BLOOD, DIDN'T YOU KNOW IT WAS FROM SMOKING, AND HE SAID NO. NOW, THEY SAY HE SAID YES, THAT IS A DISPUTED FACT FOR THE JURY, AND THEY DISAGREED.

I ASKED MY QUESTION AS SOON AS YOU WERE GOING INTO YOUR REBUTTAL.

YES. IF YOU WANT TO SAVE SOME REBUTTAL, YOU MAY.

THANK YOU. I WOULD ONLY POINT OUT, JUST IN CASE I GET STOPPED ON REBUTTAL, THERE ARE TWO OTHER ISSUES, INCLUDING THE PREEMPTION AND AN ISSUE OF UNPLEADED CLAIM, WHICH WE CALL A MYSTERY CLAIM, WHICH WAS NEITHER PLED NOR ARGUED NOR WAS IT INSTRUCTED. THE INSTRUCTIONS WERE CORRECT ON BOTH OF THOSE. BOTH OF THOSE WERE CORRECT, AS A MATTER OF LAW, AND ON REBUTTAL, I WILL TRY TO ANSWER ANY FURTHER QUESTIONS.

THANK YOU. COUNSEL.

MAY IT PLEASE THE COURT. MY NAME IS TOM BEZANSON. I AM FROM CHAD BOURN AND PARK IN NEW YORK CITY. I AM HERE REPRESENTING BROWN & WILLIAMSON, SUCCESSIVE BY MERGER TO THE TOBACCO COMPANY. THANK YOU FOR GIVING ME THE PRIVILEGE OF APPEARING BEFORE YOU TODAY AND WITH ME ARE THE TWO TRIAL COUNSEL ON THE CASE, BOB PARISH, AND, ALSO, MY PARTNER, TOM REILLY, ALSO FROM CHAD BOURN AND -- CHADBOURNE AND PARKE IN NEW YORK. I WOULD LIKE TO ADDRESS THE UNPLEADED CLAIM ISSUES.

WOULD YOU CONSIDER THE STATUTE, UNDER FLORIDA LAW, TO HAVE COMMENCED, UNDER CIRCUMSTANCES, WHERE YOU HAVE A SMOKER, A HEAVY SMOKER, WHO AWAKENS ONE MORNING AND HAS COUGHING SPELL, THAT IS MORE THAN JUST A SIMPLE COUGH, WOULD THAT ESTABLISH THE STATUTE OF LIMITATIONS, THE A CRUEL OF THE CAUSE OF ACTION, UNDER -- THE ACRUAL OF THE CAUSE OF ACTION UNDER FLORIDA LAW AS YOU READ IT?

NO, JUSTICE, I DON'T THINK THAT WOULD. I THINK THAT DEFINITION OF INJURY IS LAID OUT VERY NICELY IN BOGARF AND INCORPORATED IN TANNER. THE TEST IS A DRAMATIC CHANGE IN CONDITION. I DON'T THINK THAT MIRACOF -- I DON'T THINK THAT A MERE COUGH IS A CHANGE OF CONDITION.

HOW DRAMATIC DOES THAT COUGH HAVE TO BE TO BE DESCRIBED AS A CHANGE IN CONDITION? I AM DESCRIBING IT SAS AN UNUSUAL COUGHING, MORE THAN YOU HAVE EVER HAD BEFORE. IS THAT SUFFICIENT?

YOUR HONOR, IS RAISING THE VERY GOOD POINT, THAT, EVEN WITH A BRIGHT LINE RULE, WHICH I BELIEVE THE BOGARF DEFINITION IS, A CHANGE IN CONDITION, THERE WILL ALWAYS BE THE ISSUE OF DEGREE. I THINK THE CHANGE, IN ONE OF THESE CASES, IS MR. CARTER COUGHED UP BLOOD, WAS SHOCKED, CONSULTED A MEDICAL TEXAS THAT TOLD HIM COUGHING UP BLOOD, PARTICULARLY IN MALES 45 YEARS OLD WHO HAVE BEEN SMOKING, IS A SIGN OF CANCER. THE TEXTBOOK, ALSO, TOLD HIM THAT THIS IS A POSSIBILITY OF TUBERCULOSIS. HOWEVER, AT THAT PARTICULAR TIME, ADDRESSING THE INJURY POINT, MR. CARTER'S OWN TESTIMONY IS THAT HE KNEW HE HAD SOMETHING BAD WRONG WITH HIM RIGHT THEN. HE QUIT SMOKING. HE INSTANTLY MADE AN APPOINTMENT TO SEE A DOCTOR, WHICH HE DID, ON THE 4th OF FEBRUARY, AND ON THE 4th OF FEBRUARY, AN X RAY DISCLOSED A MASS ON THE LUNG, AND DR. DECKER TOLD HIM THAT HE HAD A SPOT ON THE LUNG, SO THERE IS NO DOUBT THAT THIS IS NO MERE COUGH, NOR IS IT EVEN AN AGGRAVATED COUGH. THIS IS A SERIOUS SITUATION. THE INJURY IS THERE. UNDER THE BOBOGARF TEST, WHICH HAS TWO PRONGS, KNOWLEDGE OF INJURY AND KNOWLEDGE OF POSSIBILITY OF CLAIM, THE INJURY PART IS CLEARLY MET. IN FACT, EVEN ON FEBRUARY 4, NOT ONLY WAS THERE THE SPOT ON THE LUNG. THERE WAS, MR. CARTER STATED, FEAR THAT HE HAD LUNG CANCER AT THAT POINT. AT NO TIME DID THE POSSIBILITY OF TUBERCULOSIS OR PNEUMONIA OVERTAKE THE CONCERN FOR LUNG CANCER, TO THE POINT THAT HE WAS PUT OFF NOTICE. IT WASN'T LIKE THEY MISS DIAGNOSED THESE CASES, WHERE SOMEONE IS TOLD, IN EFFECT, DON'T WORRY ABOUT DISEASE CONDITION "X", YOU REALLY HAVE "Y".

BUT NOBODY HAD TOLD HIM AT THIS POINT, SPECIFICALLY NO MEDICAL EXPERT HAS TOLD HIM

THAT YOU HAVE CANCER, SO WHY ISN'T THIS A JURY QUESTION OF WHETHER OR NOT.

YOUR HONOR, I BELIEVE THIS IS NOT A JURY QUESTION, BECAUSE THE TEST TO COMMENCE THE RUNNING OF THE STATUTE OF LIMITATIONS DOES NOT REQUIRE SPECIFIC PROOF OF WHAT THE INJURY IS. IF THAT WERE THE TEST, AND I SUBMIT THE PLAINTIFFS ARE CONTENDING THAT THEY CAN ONLY SUCCEED IN REVERSING THE FIRST DCA'S WELL-REASONING OPINION, IF THE BOGARF-TANNER TEST IS CHANGE TO THAT. NOW, WHAT WOULD BE WRONG WITH A TEST THAT SAYS THE SPECIFIC INJURY HAS TO BE KNOWN TO TRIGGER THE STATUTE, RULING OUT, PRESUMABLY, ALL OTHER POSSIBLE INJURES. IF THAT WERE THE TEST, YOU HAVE NO LONGER ANYTHING APPROACHING A BRIGHT LINE TEST.

BUT IF IT IS A MATTER OF DEGREE, IT SEEMS TO ME THAT LENDS ITSELF TO BEING A FACTUAL DETERMINATION, UNDER THE CIRCUMSTANCES OF THE PARTICULAR CASE, BECAUSE IF IT IS A MATTER OF DEGREE, THEN WHY ISN'T IT A DIFFERENT SITUATION, IF THE PARTICULAR PERSON IS -- HAS SOME DEGREE OF KNOWLEDGE ABOUT THE EFFECTS OF SMOKING THAT THE ORDINARY PERSON DOESN'T.

YOUR HONOR, EVERY STANDARD IS GOING TO HAVE SOME FACTUAL DETERMINATION THAT NEEDS TO BE MADE. HERE, THE FACTUAL DETERMINATION SHOULD NEVER HAVE GONE TO THE INJURY, BECAUSE THE BOGARF-TANNER TEST OF NOTICE OF INJURY, WHICH I HAVE DISCUSSED, WAS ALREADY MET, AND NOTICE OF A POSSIBLE CLAIM WAS ALREADY MET. FOR EXAMPLE AS IN BOGARF. YOU HAVE THE INJURY OF THE BRAIN DAMAGE, DRAMATIC CHANGE, AND NUMBER TWO, YOU HAD, ON THE PRODUCT LIABILITY SECTION OF THAT OPINION I DON'T KNOW, YOU HAD THE POSSIBLE INVOLVEMENT OF METHOTRAXATE. YOU DON'T HAVE TO GO FURTHER TO KNOW THE SPECIFICS --

BUT THE DRUG CASES ARE ALSO SPECIFIC, ARE THEY NOT, IN THAT THAT IS NOT THE SAME TYPE OF CREEPING DISEASE THAT WE ARE TALKING ABOUT IN THESE ASBESTOSES AND SMOKING-RELATED CASES.

I DON'T BELIEVE, YOUR HONOR, THAT THE CREEPING DISEASE LINE OF CASES APPLIES HERE, BECAUSE WE ARE NOT CONTENDING THAT THE INJURY SHOULD HAVE BEAN KNOWN BEFORE THE DRAMATIC CHANGE IN CONDITION. WE ARE NOT CLAIMING THAT, YOU KNOW, ANY SILENT ASPECT OF THAT DISEASE SHOULD HAVE BEEN KNOWN BEFORE THE DRAMATIC MANIFESTATION TO THE PLAINTIFF. ALSO, THE RECORD ESTABLISHED VERY CLEARLY --

JUSTICE QUINCE HAD A QUESTION.

I AM SORRY.

WHAT WOULD BE WRONG WITH A RULE WHICH INDICATES THAT, IN CIRCUMSTANCES WHERE YOUR MEDICAL DOCTORS TOLD YOU THAT THERE IS A POSSIBILITY OF TWO OR THREE REASONS WHY U6 THIS ILLNESS. -- WHY YOU HAVE THIS ILLNESS. WHY WOULDN'T THE BETTER RULE BE THAT YOU PROCEED WITH DUE DILL JERNKS TO MAKE A DETERMINATION OF WHICH OF THOSE POSSIBILITIES IS THE CASE?

BECAUSE I THINK, BY THE TIME A PATIENT HAS LEARNED THAT HE HAS CONDITIONS ONE, TWO OR THREE, DUE DILIGENCE, IS AT THAT MOMENT, COMPLETE. HE HAS ENOUGH INFORMATION AT THAT POINT TO KNOW HE HAS A POSSIBLE CLAIM. WHAT REMAINS IS FOUR YEARS TO RULE OUT THE OTHER POSSIBLE CLAIMS. THE LEGISLATURE GAVE A VERY GENEROUS AMOUNT OF TIME. FOUR YEARS FOR PRODUCT LIABILITY, AS COMPARED TO TWO YEARS FOR MEDICAL MALPRACTICE. AND THAT FOUR-YEAR PERIOD IS SUPPOSED TO BE USED FOR INVESTIGATION. EVEN AFTER THE FOUR-YEAR PERIOD, AFTER THE COMPLAINT IS FILED, YOU STILL HAVE THE DISCOVERY PERIOD, IN WHICH FURTHER AVENUES CAN BE PURSUED, AND OFTEN IT IS AN ISSUE AT TRIAL, WHETHER THERE IS, REALLY, AN ALTERNATIVE DIAGNOSIS TO THE ONE BEING

CLAIMED, SO IF THE RULE WERE TO BE NOT NOTICE OF A POSSIBLE CLAIM BUT NOTICE OF A CERTAIN CLAIM, THE STATUTE NO LONGER BECOMES GOVERNED BY ANNUITY RAL STANDARD BUT BECOMES GOVERNED BY A STANDARD THAT IS LARGELY IN -- NOT BY A NEUTRAL STANDARD BUT BECOMES GOVERNED, LARGELY, BY THE PLAINTIFF, SO LARGELY --

IN A CASE LIKE THIS, WHERE THE PLAINTIFF DID NOT SAY I WILL GO NEXT MONTH, NEXT YEAR, HE PROCEEDED, WITH, REALLY, DUE DILIGENCE, HERE, TO HAVE THE BIOPSY DONE AND MAKE THAT DETERMINATION.

YOUR HONOR, THERE IS NO DISPUTING THAT MR. CARTER PROCEEDED WITH DUE DILIGENCE. HE PROCEEDED WITH GREAT REPIDITY, GIVEN THE GRAVITY OF THE SITUATION THAT WAS KNOWN TO HIM. DUE DILIGENCE, HOWEVER, FOR STATUTE OF LIMITATIONS PURPOSE, WAS DONE BY FEBRUARY 5, BECAUSE BY FEBRUARY 5, HE KNEW OF THE INJURY, AND HE KNEW OF THE POSSIBILITY OF A CLAIM. A VERY GOOD TEST, UNDER BOGARF AND STANDARD UNDER THE FIFTH DCA. DUE DILIGENCE, I SUBMIT, YOUR HONOR, IS NOT REASON TO EXTEND THE RUNNING OF THE STATUTE. UNDER THE STATUTE, DUE DILIGENCE IS AN OBJECTIVE MAN'S STANDARD TO PIN -- TO LIMIT THE TIME THAT THE STATUTE CAN RUN.

COULD YOU HELP US UNDERSTAND, IN YOUR VIEW, HOW IT ADVANCES THE JURIST PRUDENCE OF THE STATE TO -- THE JURIS PRUDENCE OF THE STATE, HOW IT ADD Z ADVANCES THE LEGAL ASPECT OF THE COURTROOM, HOW TO FERRET OUT IF WE HAVE A CLAIM, AS OPPOSED TO LEGITIMATE CLAIMS, AS WE ALL SEE THE PROBLEMS WITH THE ABUNDANCE OF LAWSUITS AND THOSE TYPES OF THINGS? HOW WOULD THAT FIT INTO THIS POSTURE?

I THINK THAT THE BOGARF-TANNER RULE STRIKES A VERY EQUITABLE AND NEUTRAL BALANCE BETWEEN ALLOWING STALE CLAIMS, ON THE ONE HAND, AND LIMITING OVER ACCESS TO THE COURTS ON THE OTHER, AND THE REASON I SAY THAT IS THE PRECEDENCE THAT WE HAVE CITED THIS MORNING ARE A GOOD EXAMPLE. THEY GO ON BOTH SIDES OF ISSUE. THE BOGARF-TANNER TEST IS VERY DISTINGUISHABLE IS ALLOWED CLAIMS, WITHOUT STALE CLAIMS AND WITHOUT KEEPING THE STATUTE RUNNING FOREVER, WHICH IS WHAT TANNER GAVE IN A FOUR-YEAR PERIOD TO INVESTIGATE. ALSO THE RULE IS BASED ON NOTICE, AND NOTICE IS A CONCEPT THAT IS WELL UNDERSTOOD BY BENCH AND BAR ALIKE, INJURY PLUS POSSIBILITY OF CLAIM, SO THIS PARTICULAR CASE IS A GOOD EXAMPLE. MR. CARTER HAD MORE THAN FOUR YEARS TO CONSIDER BRINGING HIS CLAIM, WHICH I THINK THE LEGISLATURE ESTABLISHES AS A GENEROUS AMOUNT OF TIME.

AT SOME POINT, I WOULD LIKE FOR YOU TO ADDRESS THIS UNPLED CLAIM KIND OF THEORY. I GET A SENSE, FROM GOING THROUGH THE BRIEFS, THAT, REALLY, WE ARE LOOKING AT A SITUATION WHERE YOU BELIEVE THAT YOUR PARTY WAS SEVERELY PREJUDICED BECAUSE OF CERTAIN STUDIES AND REPORTS THAT WERE UNDERTAKEN AND THE RESULTS OF THOSE, AND THAT WAS USED AS A SWORD AGAINST YOU, BY NAME, AS OPPOSED TO HAVING ANY RELEVANCE IN THIS LITIGATION. COULD YOU ASSIST ME, SOMEWHAT, IN UNDERSTANDING THE DEPTH OF THAT AND THE NATURE OF THE UNPLED CLAIM THEORY, IF YOU WILL.

I WILL TURN TO THAT RIGHT NOW, YOUR HONOR, IF YOU WOULD LIKE. THE UNPLED CLAIM, BROWN & WILLIAMSON WAS A DEFENDANT IN THIS CASE ONLY AS SUCCESSIVE BY MERGER TO THE AMERICAN TOBACCO COMPANY. BROWN & WILLIAMSON PURCHASED THE AMERICAN TOBACCO COMPANY MORE THAN 20 YEARS AFTER THE PLAINTIFF HAD SMOKED AMERICAN CIGARETTES. IT WAS WELL OUT OF THE TIME FRAME. THERE WAS NEVER A COMPLAINT, NEVER AN ALLEGATION MADE AGAINST BROWN & WILLIAMSON, ITSELF. AND YET, ADDUCED AT TRIAL, OVER AND OVER AGAIN, AS THE FIRST DCA POINTED OUT PERVASIVELY AND EXTENSIVELY THROUGH THE TRIAL, WAS A CLAIM ABOUT THE CONDUCT OF BROWN & WILLIAMSON BACK IN THE '60s AND IN THE '70s, AND ABOUT BROWN & WILLIAMSON'S FAILURE TO TURN INFORMATION OVER TO THE SURGEON GENERAL AND TO THE CONGRESS. AND THE PLAINTIFF'S EXPERTS'

TESTIMONY ABOUT BROWN & WILLIAMSON'S ALLEGED ETHICAL FAILURE IN TURNING OVER THIS INFORMATION, AND THIS WAS A STEADY PATTER THROUGHOUT THE TRIAL, OVER AND OVER AGAIN, AND IT IS A FUNDAMENTAL TENET, NOT A MATTER OF DISCRETION BUT A FUNDAMENTAL TENET, THAT, AS EVERY OTHER JURISDICTION OF THE UNITED STATES, IS A CASE THAT IS TRIED IS A CASE THAT IS PLED, AND NOBODY HAS EVER CHANGED THAT IN HISTORY. THE PLAINTIFF TRIED TO DEFEND WHAT THEY HAVE DONE WITH THIS BY SAYING THAT EVIDENCE IS PROBATIVE OF OTHER MATTERS, SUCH AS STATE-OF-THE-ART AND WHAT ANY OTHER COMPANY MIGHT OR SHOULD HAVE KNOWN AT ANY GIVEN --

WAS IT AN ISSUE AS TO WHAT THE INDUSTRY KNEW AT THIS TIME? WAS THAT PLAYED OUT IN THAT TRIAL?

THERE IS AN ISSUE STATE-OF-THE-ART POINTED OUT IN THAT, AND IF THE EVIDENCE WERE SUBMITED FOR THAT PURPOSE, WE WOULD BE HAVING A VERY DIFFERENT ARGUMENT HERE TODAY. THE KEY POINT IS WHY WAS THE EVIDENCE ADDUCED? WHY WAS IT PROFFERED? AND IT WAS PROFFERED ON THE TACK OF THE CONDUCT OF B AND W AND NOT WHAT SOME OTHER INFERENCE OR OTHER TOBACCO COMPANY SHOULD HAVE KNOWN.

HOW WOULD YOU SUGGEST THAT WE DEAL WITH THAT? THE DISTRICT COURT, IN EFFECT, DID NOT RULE ON IT, DID IT?

THE DISTRICT COURT RULED AGAINST US ON MANY OBJECTIONS THROUGH THE SCOPE OF THE TRIAL, THROUGH THE COURSE OF THE TRIAL. TRIAL COUNSEL OBED, AGAIN AND AGAIN, TO THIS -- OBJECTIONED -- OBJECTED, AGAIN AND AGAIN, TO THIS USE OF THE EVIDENCE, AND WE WERE OVERRULED. THE PROBLEM WAS MADE WORSE, YOUR HONOR, BY THE FACT THAT THE COURT WOULD NOT EVEN ALLOW MR. REILLY TO ASK THE PLAINTIFF -- MR. RILEY WHETHER OR NOT HE HAD EVEN SMOKED A BROWN & WILLIAMSON CIGARETTE. THE COURT DIDN'T ALLOW THE JURY TO KNOW WHETHER HE HAD SMOKED A BROWN & WILLIAMSON CIGARETTE, SO THE CLAIMS WERE, AS THE FIRST DCA SAID, PERVASIVE AN EXTENSIVE AND THERE WERE CLAIMS THAT WERE NEVER PLED AND THERE WERE CLAIMS AGAINST BROWN & WILLIAMSON, AS SUCH, AND NOT AGAINST AMERICAN TOBACCO AND HENCE BROWN & WILLIAMSON AS ITS SUCCESSOR.

BUT WHAT DID THE DCA SAY?

THE DCA SAID THAT, UPON THEIR CAREFUL REVIEW OF THE RECORD, THAT THE EVIDENCE WAS NOT PUT IN SEOUL I FOR THE STATE-OF-THE-ART -- PUT IN SOLELY FOR THE STATE-OF-THE-ART PURPOSES BUT WAS PUT IN WITH TESTIMONY, OPENING STATEMENT AND CLOSING ARGUMENT, ALL THREE, TO THE JURY, TO PURSUE A CLAIM THAT BROWN & WILLIAMSON HAD ENGAGED IN AN ETHICAL FAILURE FOR NOT TURNING INFORMATION OVER TO THE SURGEON GENERAL. AND THAT THIS, IN TURN, LED CONGRESS TO ENACT WEAKER WARNING LABELS THAN THEY OTHERWISE WOULD HAVE DONE, AND THAT THIS, IN TURN, PRESENTED MR. CARTER WITH A WEAKER WARNING LABEL THAN HE OTHERWISE WOULD HAVE HAD. THIS PRESENTS ANOTHER PROBLEM WITH THE UNPLED CLAIM, IS THAT AS THE CLAIM WAS DEFINED, THROUGH TESTIMONY AND ARGUMENT, THERE IS A CLAIM THAT HAD WE BEEN GIVEN NOTICE OF IT, HAD IT APPEARED IN THE COMPLAINT, WE COULD HAVE MOVED AGAINST IT AS AN IMPROPER ATTACK OR SECOND GUESSING OF THE MOTIVES OF CONGRESS, WHICH THERE IS -- ONE IS SIMPLY NOT ALLOWED TO DO.

BUT THE -- BUT DIDN'T THE DISTRICT COURT SAID WE WOULD NOT REVERSE FOR A NEW TRIAL, BASED ON THIS ISSUE ALONE?

NO. THAT WAS ON THE -- THAT WAS ON THE --

PREEMPTION?

NO O THAT WAS ON THE -- NO, SIR. THAT WAS ON THE YEMIN ATTORNEY ATTORNEY-CLIENT PRIVILEGE ISSUE AND ON THE STRICKEN TESTIMONY ISSUE. ON THE PREEMPTION ISSUE AND THE CLAIM ISSUE, THEY WOULD HAVE REVERSED.

IS THERE ANYTHING WITHIN THE INDUSTRY OR EVER A NEXUS BETWEEN YOUR CLIENT, OTHER THAN THIS TAKE OVER 20 YEARS LATER, AND THE MANUFACTURER OF THE PRODUCT THAT WAS INVOLVED HERE?

ONLY THAT AMERICAN TOBACCO WAS LATER PURCHASED BY BROWN & WILLIAMSON. THEY WERE, BOTH, MEMBERS OF THE SAME -- THEY ARE BOTH TOBACCO COMPANIES IN THE U.S., BUT THERE IS NO SPECIAL RELATIONSHIP OR NEXUS ADDUCED AT TRIAL, SO AS TO DRAW THE CONDUCT OF ONE INTO THE CONDUCT OF THE OTHER. THE CONDUCT THAT -- THE CONDUCT THAT WAS ATTACKED AT TRIAL WAS THAT, ALLEGEDLY, OF BROWN & WILLIAMSON, NOT THE CONDUCT OF AMERICAN TOBACCO.

DO YOU SEE ASBESTOSES AS A CREEPING DISEASE?

YES, YOUR HONOR. ASBESTOSES, I THINK, CAN BE, CERTAINLY, CAN BE A CREEPING DISEASE, AND THE CASE'S ORIGIN IN DETAIL WAS EVEN SO MUCH SO THAT IT IS UNNOTICED OR MISS DIAGNOSED, AND THE LIKES OF THE PLAINTIFF IN AN ASBESTOSES CASE MAY WELL BE PUT OFF NOTICE THAT THEY HAVE A CLAIM UNLIKE THIS CASE.

WHY ISN'T THIS A CREEPING DISEASE? I THINK YOU SAW MY FOLLOW-UP QUESTION.

YES, SIR. IT IS A VERY GOOD QUESTION TO IT. THIS IS NOT A CREEPING DISEASE, BECAUSE WE ARE NOT SAYING THAT THE INJURY SHOULD HAVE BEEN KNOWN BEFORE JANUARY 29, 1991. WHETHER LUNG CANCER WAS PRESENT BEFORE THEN OR NOT, WE ARE NOT SAYING IT IS RELEVANT TO THE RUNNING OF THE STATUTE OF LIMITATIONS. WE ARE SAYING THAT, LIKE BOGARF AND LIKE TANNER, THERE WAS A DRAMATIC CHANGE OF CONDITION, AND AS OF JANUARY 29, 1991, THAT DRAMATIC CHANGE IN CONDITION WAS MANIFESTED IN MR. CARTER, AND LATER --

LET'S TALK ABOUT THAT DRAMATIC CHANGE IN CONDITION AGAIN. WHAT IS -- PUT YOUR FINGER ON THAT PART.

IN BOGARF IT WAS BRAIN DAMAGE, AND IN TANNER, ALAS, IT WAS THE STILLBIRTH OF A CHILD, AND I THINK AN INJURY THAT INVOLVES COUGHING UP BLOOD IS CERTAINLY A DRAMATIC CHANGE IN CONDITION. I THINK AN INJURY THAT PROPELS ONE TO SEEK THE MEDICAL ADVICE IS CERTAINLY A DRAMATIC CHANGE IN CONDITION.

THAT COULD, THEN, SATISFY THE HEAVY, HEAVY COUGHING, I MEAN, ONE THAT YOU HAVE NEVER EXPERIENCED BEFORE, IF YOU WANT TO SEEK MEDICAL ADVICE.

NOT IF, WHEN YOU SOUGHT THE MEDICAL ADVICE, THE DOCTOR, THEN, TOLD YOU GO GET AN X RAY IMMEDIATELY. THE X RAY COMES BACK THE SAME DAY AND THE DOCTOR TELLS YOU YOU HAVE GOT A SPOT ON YOUR LUNG, AND THE DOCTOR TELLS YOU THAT YOU HAVE EITHER PNEUMONIA, TB, OR LUNG CANCER. THIS, TO A PERSON WHO IS UNCONTESTBLY WELL AWARE OF THE LINK BETWEEN SMOKING AND LUNG CANCER AND HAD BEEN SINCE THE '60s.

BUT WHAT I UNDERSTAND YOUR ARGUMENT TO BE, AND CORRECT ME, PLEASE, WHERE I AM WRONG, IS THAT YOU ARE NOT SAYING THAT THE SMOKING DISEASE, THE DEVELOPMENT OF LUNG CANCER, IS NOT A CREEPING DISEASE. SIMILAR TO ASBESTOSES, WHAT YOU ARE TALKING ABOUT, AS I HEAR YOU, IS THAT THE MANIFESTATION OF THE DISEASE, UNDER THESE CIRCUMSTANCES, WAS DETECTABLE.

YES, SIR.

AND BECAUSE OF THE COUGHING UP OF BLOOD. BUT IF WE ARE LAYING DOWN A RULE FOR -- AS DISTINGUISHING BETWEEN A LEGAL ISSUE AND A FACTUAL ISSUE, WHY IS -- WHY DOESN'T IT MEAN WHETHER IT MAN TESTS ITSELF IN -- MANIFESTS IT SELF IN A PARTICULAR CIRCUMSTANCE, IS A QUESTION OF FACT FOR A JURY TO DETERMINE?

IN SOME CASES IT WOULD BE A QUESTION OF FACT FOR THE JURY TO DETERMINE. HERE IT WAS UNDISPUTED THAT THE GENERAL INJURY, INJURY TO THE LUNG, WAS MANIFESTED. PLAINTIFFS ARE MAKING A RATHER DIFFERENT ARGUMENT. THEY ARE SAYING THAT, KNOWING THE GENERAL INJURY AND THAT IT MIGHT BE TB OR LUNG CANCER, IS INSUFFICIENT, BECAUSE YOU HAVE ANOTHER POSSIBLE CAUSE TO RULE OUT, AND MY POSITION IS THAT REWRITING THE RULE TO NOW HAVE THREE PARTS RATHER THAN TWO, INSTEAD OF BEING NOTICE OF INJURY AND NOTICE OF POSSIBLE CLAIM, NOW YOU HAVE NOTICE OF INJURY, RESOLUTION OF SPECIFIC INJURY, AND NOTICE OF POSSIBLE CLAIM, AND I WOULD SUBMIT THAT THAT WOULD ALLOW THE PLAINTIFF TO HAVE FOUR YEARS OF INVESTIGATION, TO TRY AND RULE OUT EVERY OTHER POSSIBILITY, AND THEN HAVE FOUR YEARS FOR THE STATUTE OF LIMITATIONS, AND I THINK THAT THE LEGISLATURE, IN GIVING FOUR YEARS AFTER NOTICE, HAS, ALREADY, PROVIDED AMPLE TIME FOR THIS PERIOD OF INVESTIGATION. MAY I SAY JUST A WORD ABOUT THE PREEMPTION ISSUE, BECAUSE I SEE THAT I AM OUT OF TIME.

YOU ARE, IF YOU WILL BRING YOUR REMARKS TO A CONCLUSION WITH THAT.

THANK YOU. WITH REGARD TO THE PREEMPTION ISSUE, THE TRIAL COURT OPENED THE DOOR TO ERROR, AND THEN THE PLAINTIFFS WALKED THROUGH IT. IN THEIR SUMMARY JUDGMENT ARGUMENT, PRIOR TO TRIAL, THE PLAINTIFFS CONTENDED THAT THE DEFENDANT HAD A DUTY TO GIVE SMOKING AND HEALTH INFORMATION THROUGH SOME MEANS OF COMMUNICATION, TO CONSUMERS, OTHER THAN ADVERTISING AND PROMOTION. THEY SAID THEY WERE GOING TO DO THAT AT TRIAL AND THEY DID IT AT TRIAL. NOW, I NOTE WITH INTEREST IN THEIR REPLY BRIEF NOW, THEY BACK AWAY FROM THIS AND SAY THEY NEVER REALLY MADE THE ARGUMENT THAT THERE WAS SOME UNPREEMPTED MEANS OF COMMUNICATION FROM A TOBACCO COMPANY TO THEIR CONSUMERS. HOWEVER, PRECEDENT IN THIS AREA IS UNIFORM THAT THE EXPRESS PREEMPTION OF THE FEDERAL LABELING STATUTE IS THAT THERE MAY BE NO CLAIM THAT PRESSES FOR VIOLATION OF A DUTY TO WARN, THROUGH ANY MEANS OF COMMUNICATION FROM THE TOBACCO COMPANIES TO THEIR CUSTOMERS. NOW, HAVING MADE THAT ERROR OF LAW, THE PLAINTIFFS, THEN, MARCHED RIGHT THROUGH IT, AND, AGAIN, WITH WHAT THE FIRST DCA DCA'S FIRST CAREFUL ANALYSIS CHARACTERIZED AS AN EXTENSIVE AND PERVASIVE USE OF A PACKAGE IN CERTAIN SOME OTHER MATERIALS REPEATEDLY TESTIFIED THAT WARNINGS, AFTER 1969, WERE A FAILURE, BECAUSE THEY DIDN'T SPECIFY PARTICULAR CONSTITUENTS IN THE CIGARETTE SMOKE. THAT THEY WERE A FAILURE IN THIS ADEQUATE WARNING, BECAUSE THEY DIDN'T MENTION SPECIFICALLY CANCER, UNTIL 1985, AND I WON'T, BEING OUT OF TIME, I WON'T BE LABOR THE POINT FURTHER, BUT THE RECORD, AS NOTED BY THE FIRST DCA IS REPLETE WITH USE OF AN ATTACK ON THE WARNINGS OF '69. THANK YOU.

THANK YOU. MR. WILNER.

THANK YOU, YOUR HONOR. IF I MIGHT, FIRST, ON THIS -- THE UNPLEADED CLAIM, WHICH I CALL A MYSTERY CLAIM, THEY SAID THEY ASKED FOR AN INSTRUCTION, BUT THEY DIDN'T TELL YOU WHAT INSTRUCTION THEY ACTUALLY GOT. WHICH SAID THAT THE CLAIMS ARE BASED, AND THIS IS THE JURY INSTRUCTION, SOLELY ON THE CONDUCT OF THE AMERICAN TOBACCO COMPANY AFTER IT MERGED WITH BROWN & WILLIAMSON. THE JURY WAS TOLD THAT. THAT WAS ALWAYS THE FOCUS. THIS IS SOMETHING INVENTED FOR THIS APPEAL, TO DREAM UP THIS IDEA OF AN UNPLED CLAIM THAT WAS NOT IN OUR PLEADING AND WASN'T INSTRUCTED TO THE JURY, EITHER. NOW, WHAT BROWN & WILLIAMSON HAS DONE IS TRY AND CREATE AN ISSUE OUT OF LANGUAGE, BECAUSE AT TRIAL, THEY WERE BROWN & WILLIAMSON. THE AMERICAN TOBACCO COMPANY IS GONE. IT COULD NOT APPEAR ON THE VERDICT, BECAUSE IT COULDN'T BE ASKED -- WE COULDN'T

GET ANY MONEY FROM THEM, SO NOW, AFTER MERGER, IT IS BROWN & WILLIAMSON, AND WHAT BROWN & WILLIAMSON STOOD UP AND TOOK POSITIONS AT TRIAL, AND BROWN -- WHEN WE REFER TO THE DEFENDANT, WE REFER TO THEM AS BROWN & WILLIAMSON, AND WE DO IN THIS COURTROOM.

I THINK HIS COMPLAINT, AS I UNDERSTAND IT, IS THAT YOU WERE USING OR THAT YOUR CLIENT WAS USING EVIDENCE OF BEHAVIOR ONE CON CONDUCT -- AND CONDUCT ON THE PART OF THAT PARTY IN SOME FASHION AS WAS OCCURRING AT THAT TIME WHEN THERE WAS NO BROWN & WILLIAMSON AND AMERICAN TOBACCO COMPANY, TOGETHER, IS WHAT I UNDERSTAND YOU ARE SAYING, SO WHAT IS WRONG WITH HIS ARGUMENT?

BROWN & WILLIAMSON DID DO THINGS, THAT ARE A PART OF THE PUBLIC HEALTH RECORD. THEY CAN'T SHRINK FROM THAT, THAN IS RELEVANT IN THIS CASE, RELEVANT EVIDENCE ON SEVERAL GROUNDS. FIRST, IT WAS EVIDENCE THAT THERE WAS SECRET RESEARCH DONE ON NICK CONTINUE, WHICH PROVED THAT NICOTINE WAS DETECTIVE, WAS RELEVANT, BECAUSE THE DEFENDANT HERE, CALL THEM WHOEVER YOU WANT, USED THIS 1964 SURGEON GENERAL REPORT, WHICH SAID THAT IT WASN'T ADDICTIVE, AND THEY SAID, WELL, THIS GIVES US, AND WE ARE GOING TO STAND UP, TODAY, AND SAY THAT THIS IS CORRECT, WHEN, IN FACT, UNKNOWN TO THEM, SECRET RESEARCH WAS NOT TURNED OVER, WHICH DISCREDITED THE 1964 SURGEON GENERAL REPORT, BECAUSE THEY HAD ASKED FOR IT AND HADN'T GOT IT. AND THEY PUT ON THEIR EVIDENCE ABOUT NICOTINE ADDICTION IN THE PRESENT SENSE, AND, JENNY, IF YOU WOULD PUT ON THE CHART, NUMBER 26, I THINK IT IS, THIS IS WHY, I THINK, ALL THIS BECAME A CONFUSION, AND I WANT -- IT IS AFTER MERGER. THIS IS JUST ONE REASON. NOW, FIRST, NOBODY MENTIONED THAT, BEFORE THAT, AS FAR AS THIS AMERICAN TOBACCO COMPANY, WE HAD TONS OF EVIDENCE AGAINST THEM. WHICH THEY DON'T EVEN MENTION. I MEAN, WE HAD TONS OF EVIDENCE THAT -- WE HAD VIDEOTAPE OF THEIR PRESIDENT. WE HAD AN ARTICLE FROM "THE NEW YORK TIMES", WHERE THEY HAD SAID IT IS NOT TRUE, THAT CIGARETTES CAUSE SMOKING. TONS OF EVIDENCE FROM AMERICAN TOBACCO. THERE IS NO CHAL EC -- CHALLENGE THAT THE CASE COULD STAND ON THAT ALONE. WHAT THEY ARE SAYING IS THAT EVIDENCE CAME IN THAT SOMEHOW SHOULDN'T HAVE COME IN AGAINST BROWN & WILLIAMSON. HERE IS AT LEAST ONE THEORY, AND THERE ARE SEVERAL THAT THAT EVIDENCE WAS ADMISSIBLE: AFTER THE MERGER IN 1964, THEN THE PEOPLE WHO WOULD CALL THEMSELVES AMERICAN CAN NO LONGER HIDE THEMSELVES TO THE DOCUMENTS THAT BROWN & WILLIAMSON HAD, BECAUSE THEY ARE, THEN, SHARED AT THE TIME OF THIS MERGER. SO OBVIOUSLY YOU CAN'T STAND UP IN A COURTROOM, IN 1996, AS BROWN & WILLIAMSON, EVEN IF YOU WANT TO SAY BROWN & WILLIAMSON AS SUCCESSOR IN INTEREST, AND SAY NICOTINE IS NOT ADDICTIVE, AND THE SURGEON GENERAL '64 REPORT WAS CORRECT AS OF THE DAY, BECAUSE YOU KNOW OTHERWISE. YOU KNOW OTHERWISE, BECAUSE YOU HAVE SEEN THE DOCUMENTS AS OF THE DATE THE MERGER, AT LEAST, IF NOTHING ELSE, SO I MEAN, THAT IS JUST ONE THEORY, AND IN THE REST OF IT, IT DEPENDS ON THE ADMISSION OF EVIDENCE. NOW, THERE HAS BEEN NO CLAIM, HERE, THAT THE ADMISSION OF EVIDENCE WAS -- THAT THE LEGAL STANDARD FOR ADMISSION OF EVIDENCE WAS VIOLATED IN THAT THERE WAS AN ABUSE OF DISCRETION. I DIDN'T HEAR A WORD ABOUT WHAT EVIDENCE HE WAS TALKING ABOUT. IT WAS VERY VAGUE ABOUT WE MADE A CLAIM OR WHAT WE INTENDED TO DO. THE CLAIM WAS DEFINED BY THE JURY INSTRUCTION, WHICH SAID YOU ARE TO CONSIDER AMERICAN TOBACCO'S CONDUCT. THE EVIDENCE WAS IN ABOUT AMERICAN TOBACCO. THERE WAS, ALSO, EVIDENCE ABOUT BROWN & WILLIAMSON'S SECRET RESEARCH, WHICH WENT TO THE VIABILITY OF THE SURGEON GENERAL'S REPORT, WHICH WAS IN ISSUE. WENT TO THE CONTROL OF INFORMATION AT THE TIME, AND, ALSO, WENT TO IMPEACHING BROWN & WILLIAMSON'S PRESENTLY-HELD TRIAL POSITION. BECAUSE THEY ARE NO LONGER AMERICAN TOBACCO. AFTER A MERGER, THEY COULD -- THEY COULD HAVE PICKED ANY NAME IN THE WORLD. THE CONFUSION THAT THEY WANT TO GENERATE HERE IS BECAUSE, WHEN, IN THE RECORD WE CALL THEM BROWN AND WILL I DON'T MEAN SON, JUST LIKE -- BROWN & WILLIAMSON, JUST LIKE TODAY THEY ARE BROWN & WILLIAMSON, SO WE SAY, YES, BROWN & WILLIAMSON WAS NEGATIVE AND THEIR FORMER SUBSIDIARY WAS NEGATIVE AND WE, ALSO,

MEAN THAT WHEN THEY STAND UP, TODAY, AND SAY BROWN & WILLIAMSON SAID THIS AND BROWN & WILLIAMSON SAID THAT, THEY MIGHT HAVE REASON TO KNOW OTHERWISE. AND IF I MIGHT RESPOND FOR 30 SECONDS, YOUR HONOR, MAY IT PLEASE THE COURT, WE DO NOT SEEK A CHANGE IN ANY RULE. WE ARE NOT HERE TELLING THE COURT THAT THE BARGORF BUT THE TANNER RULE, WE BELIEVE, AT LEAST AS NEAR AS WE CAN TELL INTO PRODUCTS LIABILITY, AND IT REQUIRES INJURY, NOT THE POSSIBILITY OF INJURY, BUT INJURY AND THE POSSIBILITY THAT THE INJURY IS CONNECTION. WE THINK THAT THERE IS NO WAY TO ANALYZE WHEN AN INJURY BEGINS, UNLESS IT A FACTUAL DETERMINATION THAT THE JURY HAS TO SEE. THERE IS NO WAY TO ANALYZE WHETHER THERE IS A CONNECTION TO THE PRODUCT IN THIS CASE, OTHER THAN WHAT THE JURY WAS EXPOSEED TO, IN TERMS OF MR. CARTER'S KNOWLEDGE. AND IT IS EASY FOR US TO SECOND GUESS IT IN HINDSIGHT AND SAY, WELL, HE KNEW HE SMOKED, BUT AT THE TIME THE KNOWLEDGE AVAILABLE TO HIM HAS TO BE LOOKED AT, AT THE TIME IT WAS AVAILABLE, AND AS TO HIS LIMITATIONS, AND MAYBE THEY COULD HAVE PERSUADED THE JURY THAT HE KNEW ENOUGH TO MAKE THAT CONNECTION. I THINK THEY TRIED TO PERSUADE THE JURY OF THAT, BUT THEY FAILED, AND ULTIMATELY IT ISN'T AN ISSUE OF LAW WHAT SOMEBODY'S PERCEPTION WAS ON THAT DATE, UNLESS IT IS SO OVERWHELMING THAT THERE IS NO POSSIBLE MEANS OF DISAGREEMENT, AND HERE THE JURY DISAGREED, AND ON THE LAST TOPIC ON THE PREEMPTION, WE WOULD ONLY SUGGEST THE -- AGAIN THE JURY WAS PROPERLY INSTRUCTED ON PREEMPTION. THE ONLY EVIDENCE THEY COULD POINT OUT WAS THIS PACKAGE INSERT. THE PACKAGE INSERT IS AVAILABLE IN THE APPENDIX, AT APPENDIX NUMBER 15. THE WHOLE PACKAGE INSERT IS IN THERE. IT DOESN'T SAY ANYTHING ABOUT A POST-1970 CLAIM. IT IS A GOOD PACKAGE. IT IS AN EXAMPLE OF A PRE-1966 WARNING THAT SHOULD HAVE BEEN ATTACHED. IF IT IS TRUE, THAT IT IS SUCH A GOOD EXAMPLE, THAT IT MAKES THE 1970 WARNING LOOK PALE BY COMPARISON, WE AGREE, BUT THAT HAS NOTHING TO DO WITH A MAKING A POST -- 70 CLAIM, AS THE TRIAL JUDGE CORRECTLY INSTRUCTED THE JURY ON THAT CLAIM. THANK YOU.

THANK YOU AND THANKS TO ALL OF YOU FOR ASSISTING US. WE WILL TAKE A FIVE-MINUTE BREAK. BAILIFF: PLEASE RISE.