

[Products Liability Law Daily Wrap Up, EVIDENTIARY ISSUES—TOBACCO PRODUCTS—Fla. Dist. App.: New trial in \\$2M Florida *Engle* case affirmed based on improper argument by counsel, \(Sept. 8, 2016\)](#)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

In an *Engle*-progeny action resulting in a \$2 million verdict, improper arguments made by counsel for the husband of a deceased smoker justified a new trial, a Florida appellate court held in affirming the trial court's ruling. However, a directed verdict in favor of one of the tobacco company defendants on the ground that the husband lacked evidence of causation was reversed and the case was remanded for further proceedings (*Cohen v. Philip Morris USA, Inc.*, September 7, 2016, Ciklin, C.).

Lawsuit and proceedings. The husband brought an *Engle* progeny action against a number of tobacco companies—Philip Morris, R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Liggett Group, LLC, and Vector Group, Ltd., Inc. (defendants or tobacco companies) on behalf of the estate of his wife, asserting claims for negligence, strict liability, fraud by concealment, and conspiracy to commit fraud by concealment, among others. Prior to trial, the defendants (with the exception of Liggett Group) moved "to preclude argument or comment disparaging them for defending themselves in litigation, or referring to defendants' supposed failure to 'take responsibility' or 'apologize' to plaintiff." The trial court denied the motion without prejudice, but granted the defendants' motion *in limine* to prohibit arguments that the jury could disregard any references to the statute of limitations. At the close of the husband's case at trial, Philip Morris moved for a directed verdict, arguing that the husband failed to provide evidence establishing that the decedent's use of its cigarettes was a legal cause of her chronic obstructive pulmonary disease (COPD) and lung cancer. The cigarette maker argued that the evidence that she smoked its cigarettes at certain times was insufficient evidence of the actual amount of time she smoked its cigarettes. It also argued that expert testimony did not establish that its cigarettes were a "but for" or "substantial" cause of disease and death. The trial court granted the motion.

One of the verdict form interrogatories referred to the decedent's injury/illness as "COPD/emphysema." The plaintiff's counsel did not object to the description. In addition, during closing argument, the plaintiff's counsel made a number of statements regarding the defendants' failure to take responsibility, and also informed the jury that COPD was "not the same kind of thing as emphysema."

Verdict. The jury found in favor of the defendants on the fraud and conspiracy counts, but otherwise in favor of the husband in the amount of \$2,055,050.26. The remaining defendants moved for new trial based on, among other grounds, comments made by the plaintiff's counsel during closing argument. The trial court granted the motion, finding that counsel's statements regarding COPD and emphysema misled the jury to believe there was "some difference between COPD and emphysema for purposes of the statute of limitations" in spite of counsel's agreement and the court's instruction that there was no difference between the two. Moreover, counsel's "take responsibility" and "apologize" arguments were improper and warranted a new trial.

Improper closing argument. The trial court did not err in granting a new trial based on the closing argument of the plaintiff's counsel that the court of appeals found "crossed the line into 'take responsibility' and 'apologize' territory." The husband's argument that his attorney's statements were permissible because he was seeking punitive damages was rejected. To obtain punitive damages, a plaintiff must establish "by clear and convincing evidence the defendant is guilty of intentional misconduct or gross negligence," and an *Engle* plaintiff can do this by showing, as an example, that a cigarette manufacturer was aware of but publicly denied the addictive and harmful nature of cigarettes. The arguments in the case were not clearly linked to proving intentional misconduct or gross negligence; instead of focusing on the timing of the manufacturers' denials and what the evidence

reflected they knew when they made the denials, the plaintiff's counsel made broader accusations, including that the tobacco companies never admitted guilt and never apologized. The appellate court found these arguments improper and unacceptable.

In addition, the trial court did not abuse its discretion in granting a new trial based in part on the plaintiff's counsel's comments related to the statute of limitations defense. Arguments that are not confined to the facts and evidence presented to the jury and misstate the evidence in an attempt to mislead the jury are improper, the district court of appeal said in finding the plaintiff's counsel's argument concerning COPD and emphysema to be misleading. To prevail on a statute of limitations defense, the tobacco companies had to prove that the deceased smoker was aware, prior to May 5, 1990, that she had "COPD/emphysema" and that it was related to smoking. Counsel's claim in closing argument that COPD was distinct from emphysema was an attempt to raise the defendant tobacco companies' burden so that they would have to prove the decedent's knowledge as to COPD *and* emphysema, rather than "COPD/emphysema" as it was phrased on the verdict form. A question by the jury about distinguishing the two diseases in their findings indicated to the appellate court that counsel's closing argument contributed to the jury's confusion. Even if the jury's confusion stemmed in part from the use of both terms throughout trial, this did not "undo the fact that plaintiff's counsel impermissibly exploited any existing confusion." Thus, the two grounds relating to the closing argument provided a sufficient basis for a new trial.

Directed verdict on issue of causation. The husband was successful in his challenge to the directed verdict for Philip Morris on the element of causation. In negligence actions, Florida courts follow "the more likely than not standard of causation." Proof that the negligence probably caused the plaintiff's injury is required. The tobacco companies argued that a directed verdict was proper because no expert testified that if the decedent had not smoked Philip Morris cigarettes, her injuries would not have occurred; nor did any expert testify that smoking Philip Morris cigarettes alone would have been sufficient to cause her injuries. The District Court of Appeal for the Fourth District, however, in agreement with a decision by the First District (*Whitney v. R.J. Reynolds Tobacco Co.*, 157 So. 3d 309 (Fla. 1st DCA 2014) [see *Products Liability Law Daily's* December 8, 2014 [analysis](#)]), rejected this reasoning. That case noted that the "more likely than not" or "but for" standard of causation did not require that a plaintiff prove a defendant's negligence or defective product "was more than fifty percent of the cause of [the plaintiff's] injury, or that it was the only cause" of the injury. Further, one of the Florida standard jury instructions provided that to be a legal cause of an injury, negligence need not be the only cause. Negligence can be a legal cause of that injury even if it "operates in combination with" another cause if that negligence "contributes substantially to producing" the injury at issue.

Therefore, the court of appeal determined that Philip Morris was not entitled to a directed verdict on the element of causation merely because the husband's experts were unable to say that the decedent smoker would not have developed her fatal diseases if she had not smoked the manufacturer's cigarettes or that she would have developed her fatal diseases if she had smoked only Philip Morris cigarettes.

The case is No. [4D13-2681](#).

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Companies: Philip Morris USA, Inc.; R.J. Reynolds Tobacco Co.; Vector Group, Ltd., Inc. f/k/a Brooke Group, Ltd.; Lorillard Tobacco Co.

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