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COURT OF APPEALS

STATE OF NEW YORK

MARCIA L. CARONIA, ET AL.,

Appellants,

-against-

No. 227

PHILIP MORRIS USA, INC.,

Respondent.

20 Eagle Street
Albany, New York 12207
November 13, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

VICTORIA E. PHILLIPS, ESQ.
PHILLIPS & PAOLICELLI LLP
Attorneys for Appellants
380 Madison Avenue
24th Floor
New York, NY 10017

KENNETH J. PARSIGIAN
LATHAM & WATKINS LLP
Attorneys for Respondent
John Hancock Tower
20th Floor
200 Clarendon Street
Boston, MA 02116

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Caronia v. Philip
2 Morris.

3 MS. PHILLIPS: May it please the court.
4 I'm Victoria Phillips for the plaintiffs in this
5 action. If I could reserve five minutes for
6 rebuttal?

7 CHIEF JUDGE LIPPMAN: Five minutes. Go
8 ahead, counselor.

9 MS. PHILLIPS: Your Honors, this action
10 seeks to provide a lifesaving form of technology,
11 low-dose computed tomography, to a class of
12 individuals at high risk for developing lung cancer,
13 which is the leading cause of cancer death in the
14 United States, currently responsible for
15 approximately 160,000 deaths each year.

16 CHIEF JUDGE LIPPMAN: Counsel, is this case
17 on all fours with Donovan, the Massachusetts case?

18 MS. PHILLIPS: When you mean it's on - - -
19 on all - - - they're sister companion cases, so - - -

20 CHIEF JUDGE LIPPMAN: Yes, is it - - - are
21 the same issues involved?

22 MS. PHILLIPS: Yes, it is.

23 CHIEF JUDGE LIPPMAN: Is Massachusetts the
24 only state that's recognized this kind of a equitable
25 cause of action in this - - -

1 MS. PHILLIPS: There - - -

2 CHIEF JUDGE LIPPMAN: - - - context?

3 MS. PHILLIPS: There are many states that
4 have recognized medical monitoring, and I'd be happy
5 to discuss it - - -

6 CHIEF JUDGE LIPPMAN: Right, but I mean, in
7 relation to tobacco and in this particular context.

8 MS. PHILLIPS: To my knowledge,
9 Massachusetts is the only one on these identical
10 records where the same plaintiffs' counsel and, in
11 this case, the same defense counsel have gone forward
12 on the same proofs and pleadings.

13 CHIEF JUDGE LIPPMAN: Okay. Tell us, in a
14 nutshell, why - - - from a policy perspective, why
15 should New York recognize an equitable cause of
16 action along these lines?

17 MS. PHILLIPS: Okay. There are a number of
18 reasons, and some of the - - -

19 CHIEF JUDGE LIPPMAN: And are there
20 practical - - - let me do it in two parts. What are
21 the policy reasons why we should recognize it, and
22 what are the practical difficulties in doing so?

23 MS. PHILLIPS: Thank you for the
24 opportunity. I - - -

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 MS. PHILLIPS: - - - would be pleased to
2 address it. The courts in Ayers, and also in the
3 Potter case in California - - - I think it's Potter
4 v. Firestone - - - have walked through multiple
5 policy considerations that support medical
6 monitoring. And indeed, New York's courts have been
7 cited by the Askey decision as recognizing some of
8 these goals as well.

9 CHIEF JUDGE LIPPMAN: So what are they?

10 MS. PHILLIPS: One - - -

11 CHIEF JUDGE LIPPMAN: What are the policy
12 considerations?

13 MS. PHILLIPS: Sure. One is deterrence,
14 that wrongdoers who cause people to sustain an
15 increased risk of developing cancer should be
16 responsible, ultimately; that equity demands that the
17 wrongdoer pay for the cost of it, rather than the
18 public at large or the party who's been harmed.

19 Another is, obviously, the interest in
20 saving lives and in reducing mortality. And here,
21 that's extraordinarily compelling. There are two New
22 England Journal of Medicine articles that have
23 concluded that this form of technology can save
24 lives. And if you look at the amicus submission of
25 the Lung Cancer Alliance and the Legacy Foundation,

1 they speak in extraordinary detail to the compelling
2 science here. This can save lives. It's been shown
3 to save as much as - - - some people think eighty or
4 ninety percent increased chance of life, and
5 certainly twenty percent for the - - -

6 JUDGE PIGOTT: Is this the only situation
7 where this type of monitoring would be called upon?

8 MS. PHILLIPS: You mean "this" being for
9 smoking or - - -

10 JUDGE PIGOTT: Right.

11 MS. PHILLIPS: The answer is overwhelmingly
12 lung cancer is caused by - - -

13 JUDGE PIGOTT: But I mean, would there be -
14 - - could you - - - could you conceive of monitoring
15 other defendants for other ailments that cause this
16 type of concern?

17 MS. PHILLIPS: Could - - - meaning, LDCT,
18 in particular, or could other monitoring actions - -
19 -

20 JUDGE RIVERA: I think the question is
21 where do you draw the line.

22 MS. PHILLIPS: Oh, where do you draw the
23 line? Well, I think the short answer is, is that on
24 the certified facts in the record here there's no
25 question that the equities call for it. Whether New

1 York should recognize it in other contexts, I would
2 submit that there are compelling cases, and we could
3 talk about some of them - - -

4 CHIEF JUDGE LIPPMAN: What are the
5 practical difficulties with doing it, if we - - - if
6 we buy your general argument that this is good, from
7 a policy perspective, what are the practical
8 difficulties of recognizing this kind of cause of
9 action?

10 MS. PHILLIPS: Okay. Well, I would say for
11 starters, the court wants to deal with the - - - and
12 should deal with the accrual question. And there the
13 Donovan court provides helpful guidance. Because the
14 court's got to decide, a medical monitoring action,
15 the reason why we're talking about an equitable cause
16 of action and the reason why we're talking about the
17 elements is that we need to know when such a claim is
18 timely and how it can be brought. And there, Donovan
19 provides very useful guidance from a court that
20 rendered a thoughtful decision and recognized that in
21 a situation such as here, where there was no form of
22 relief available until the action was brought in New
23 York and Massachusetts in 2006, and where the
24 defendant continued to misbehave and the plaintiff
25 continued to sustain harm and an increased risk of

1 cancer, that it's appropriate to deem the plaintiffs'
2 claims timely. But certainly you have to grapple
3 with the question of when a medical monitoring claim
4 accrues, because it's not like your conventional,
5 typical personal injury suit - - -

6 CHIEF JUDGE LIPPMAN: Do you need - - -

7 MS. PHILLIPS: - - - like a car accident.

8 CHIEF JUDGE LIPPMAN: Do you need a lot of
9 experts to come in, in this kind of a - - - a - - -

10 MS. PHILLIPS: I'm sorry - - -

11 CHIEF JUDGE LIPPMAN: - - - cause of - - -
12 would you need experts? What would experts tell you
13 and - - -

14 MS. PHILLIPS: Most courts have found that
15 medical monitoring claims should be supported by
16 competent expert proofs. And certainly here you can
17 look at the proofs from Albert Miller, a prominent
18 physician and pulmonologist, or from Dr. Markowitz,
19 who has experience organizing monitoring programs for
20 Department of Energy workers. But certainly you'd
21 need somebody to come in and testify to the fact that
22 the plaintiffs are at increased risk. In this case
23 you'd want some testimony about the defendant's
24 misconduct. And Dr. Farone, who's been cited very
25 positively by Judge Kessler in United States v.

1 Philip Morris, is an expert who talks about the
2 misconduct and how cigarettes could have been
3 designed in a safer way, the steps that could have
4 been taken. He can address what he'll - - -

5 JUDGE GRAFFEO: Let me ask you something
6 more basic - - -

7 MS. PHILLIPS: Sure.

8 JUDGE GRAFFEO: - - - because this is a
9 consumer product, unlike the Department of Energy's
10 situation. I could see where someone's working
11 somewhere and exposed to a toxic hazard, there's a
12 higher degree of susceptibility. How do you know
13 with a consumer product that these individuals have
14 only used this particular product, that they didn't,
15 for fifteen or twenty years, smoke some other type of
16 other manufacturer's cigarette but they've now
17 decided to say I only smoked Marlboros?

18 MS. PHILLIPS: That's actually an argument
19 that Philip Morris raised, without success, in
20 Massachusetts. So I'd - - - my short answer, rather
21 than taking up the fifteen minutes would be to - - -

22 JUDGE GRAFFEO: Well, we're - - -

23 MS. PHILLIPS: - - - to point you to - - -

24 JUDGE GRAFFEO: You know, this is a
25 different state, and we've got our concerns, too. So

1 I'm asking, for consumer products, because once you
2 do it here - - -

3 MS. PHILLIPS: Uh-huh.

4 JUDGE GRAFFEO: - - - we're going to be
5 faced with other consumer product - - - claims
6 against other consumer products.

7 MS. PHILLIPS: In - - -

8 JUDGE GRAFFEO: How do you determine that
9 issue?

10 MS. PHILLIPS: In the case of an individual
11 plaintiff going forward, there can be testimony and
12 there was testimony from Ms. Caronia, Ms. Feldman,
13 Ms. McAuley, who came forward and said I smoked
14 Marlboro cigarettes and - - -

15 JUDGE GRAFFEO: So as long as they say it,
16 that's it?

17 MS. PHILLIPS: Well, certainly in personal
18 injury cases, theoretically, the defendants could
19 challenge it. In fact the reality is, is that
20 doesn't tend to be the issue in the litigation.

21 JUDGE RIVERA: You're saying you handle it
22 like you handle - - -

23 MS. PHILLIPS: Let me - - -

24 JUDGE RIVERA: - - - other evidentiary
25 questions?

1 MS. PHILLIPS: Yes, I'm being pointed to
2 something very - - - very helpful which is that we
3 know and we learned in Massachusetts, and it's
4 subject to a protective order so I can't get into the
5 details of it, but it was before the court in
6 Massachusetts that Philip Morris maintains extensive
7 consumer lists in a database documenting its
8 customers. And the details of that are confidential.

9 JUDGE RIVERA: What - - -

10 MS. PHILLIPS: But it was - - - the court
11 reached a ruling on ascertainability, which is
12 essentially the question you're asking.

13 JUDGE RIVERA: What happens when - - - and
14 let's say we'll hope - - - when there's an even
15 better technology that comes around the corner.

16 MS. PHILLIPS: That's another - - -

17 JUDGE RIVERA: What do we do - - - if we
18 recognize this particular cause of action, what do we
19 do? Then this is no longer a fund that Philip Morris
20 has to put money into, rather, we set up a different
21 fund? What happens? What if the technology changes?

22 MS. PHILLIPS: Theoretically, for
23 plaintiffs who are not yet proper candidates at the
24 time of this suit, they might be able to go ahead and
25 pursue a different form of technology. So if there's

1 someone who's a - - - you know, today is not a proper
2 candidate but fifty years from now, conceivably, they
3 might be able to seek something even better in the
4 future. For the class that exists today, there was
5 nothing until LDCT, and this is disputed - - -
6 undisputed by the parties.

7 JUDGE RIVERA: No, no, no, but that's not
8 my question.

9 MS. PHILLIPS: Oh.

10 JUDGE RIVERA: Let's say in a year - - -
11 let's say we recognize it, you set up the fund, they
12 start the testing, and in a year there's a new
13 technology that's even better so that this one that
14 you're seeking for the clients - - - for the
15 prospective class is now outdated and not the state
16 of the art and it's not supported by the medical
17 community, it's not the standard.

18 MS. PHILLIPS: I think the virtue of equity
19 is that the remedy is specific to the particular
20 circumstances. And so to the extent that it's a
21 minor tweak of the technology, you know, you need a
22 slightly bigger CAT scan or a slightly - - - you
23 know, the standard of care changes such that people
24 should now receive it every one year versus every two
25 year, conceivably a funded mechanism could address

1 the - - - a minor tweak in the technology.

2 JUDGE RIVERA: Is it possible to discover
3 it's not the technology you think it is?

4 MS. PHILLIPS: I think that's
5 extraordinarily unlikely in this particular case.
6 There was a 53,000-person trial that the defendants
7 pointed to as the gold standard trial, conducted by
8 the National - - -

9 JUDGE RIVERA: All right.

10 MS. PHILLIPS: - - - Cancer Institute.

11 JUDGE RIVERA: Then one more question.
12 What do we do with a situation where you have members
13 of your class who continue to expose themselves to
14 this toxicity? Why shouldn't we treat them
15 differently from those who have stopped smoking?

16 MS. PHILLIPS: The answer to that is that -
17 - - and I - - - if I may turn the question slightly -
18 - -

19 JUDGE RIVERA: Yeah.

20 MS. PHILLIPS: - - - which is the
21 defendant, of course, is continuing to expose them by
22 itself not manufacturing a safer product. Philip
23 Morris has the capacity, has long had the capacity to
24 design a safer cigarette. The reason why class
25 members continue smoking is that they're addicted,

1 because they continue to sell the most lethal, most
2 addictive product known to mankind.

3 JUDGE RIVERA: Well, it's legal.

4 MS. PHILLIPS: It is legal.

5 JUDGE RIVERA: It's a completely legal
6 product.

7 MS. PHILLIPS: And no one's arguing - - -
8 no one's arguing otherwise, but there are many legal
9 products out there - - -

10 CHIEF JUDGE LIPPMAN: Counsel, one other
11 question. Your time is running out.

12 MS. PHILLIPS: Sure.

13 CHIEF JUDGE LIPPMAN: What about the new
14 health care - - - what does that - - - how does this
15 affect it? Does it make it redundant if this kind of
16 thing is covered? How does - - - what's the impact
17 of that?

18 MS. PHILLIPS: Not at all. I wish that
19 that - - -

20 CHIEF JUDGE LIPPMAN: Why? Tell us.

21 MS. PHILLIPS: - - - were so.

22 MS. PHILLIPS: The very, very short answer
23 is the brief of the American Legacy Foundation and
24 the Lung Cancer Alliance addresses it. But the
25 Affordable Care Act, it's - - - first of all, they're

1 tentative recommendations.

2 CHIEF JUDGE LIPPMAN: Right.

3 MS. PHILLIPS: But beyond that, they're not
4 going to cover the entire class. They're not going
5 to be implemented until, at a minimum, I believe,
6 2016. And beyond that, there's no reason why Philip
7 Morris should be absolved of liability simply because
8 there may be collateral sources in existence.

9 CHIEF JUDGE LIPPMAN: So your argument is
10 that there might be some coverage to offset some of
11 it, but that that's not the answer as to whether or
12 not Philip Morris is responsible, and that we don't
13 know the extent of the coverage. Is that - - -

14 MS. PHILLIPS: That's exactly right. There
15 certainly won't be any for many years, and we can
16 only hope that it covers some portion of the class.
17 But just like if I got drunk, went out, and hit a
18 pedestrian, if the person was sixty-seven years old,
19 they might be covered by Medicare. That doesn't mean
20 that I shouldn't be on the hook - - -

21 CHIEF JUDGE LIPPMAN: All right.

22 MS. PHILLIPS: - - - for my misconduct.

23 CHIEF JUDGE LIPPMAN: So your view is that
24 it doesn't obviate the need for this course of
25 action.

1 MS. PHILLIPS: Yes.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. PHILLIPS: That's correct.

4 CHIEF JUDGE LIPPMAN: Let's hear from your
5 adversary.

6 MR. PARSIGIAN: Good afternoon, Your
7 Honors. Ken Parsigian, representing Philip Morris
8 USA.

9 Let me start by addressing - - -

10 CHIEF JUDGE LIPPMAN: Let me ask you the
11 same question I asked your adversary. From a policy
12 perspective, why shouldn't we create this cause of
13 action? Your adversary basically says the wrongdoing
14 is clear, we can save money, we can help people. Why
15 is this not a good thing to do for New York?

16 MR. PARSIGIAN: As you might imagine,
17 there's a long list of reasons. Let me run them off
18 for you.

19 CHIEF JUDGE LIPPMAN: Well, give us a few.

20 MR. PARSIGIAN: I'm going to start them for
21 you. It starts with opening the floodgates to
22 litigation. Okay? If we look at the one state that
23 has actually had experience with medical monitoring
24 claims, where a case has already gone all the way to
25 trial, you've got West Virginia. We cited in our

1 case the Henry case from Michigan Supreme Court where
2 they detailed some of - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but we can do
4 it the way we do it in New York. I mean, it's not
5 necessarily going to be on all fours with any other
6 state.

7 MR. PARSIGIAN: Not necessarily going to be
8 on all fours, but as the court recognized, several
9 judges recognized, you're not making a decision here
10 that will apply only to this defendant or only to
11 this claim. If medical monitoring - - - this is a
12 claim - - - let's remember, what plaintiffs are
13 saying is no injury, no symptoms. Right? And the
14 vast majority of them will never get an injury.

15 JUDGE RIVERA: Well, they claim there's an
16 injury. They claim at the cellular level there's an
17 injury.

18 MR. PARSIGIAN: Actually, Your Honor, that
19 is a brand new claim in their brief here that was not
20 claimed below. And in fact, if you turn to page 62 -
21 - -

22 JUDGE RIVERA: But are you denying that
23 there's a cellular injury every time you smoke?

24 MR. PARSIGIAN: That's an interesting
25 question. There is - - - it's an interesting

1 question because there's a difference between
2 cellular change and cellular injury. There is
3 absolutely evidence that every time you smoke cells
4 change. It's also the case that every time you walk
5 down the street, that a car exhaust is there, cells
6 change. Whether it's injury, in a legal sense, it's
7 certainly not compensable injury. Plaintiffs
8 themselves concede it's not compensable injury.
9 Okay? So it depends on what we mean by injury.

10 But if we look at what they say at page 62
11 of their brief, they say, "Here plaintiffs neither
12 asserted nor conceded that they suffered an injury at
13 all." That's plaintiffs' words. So the claim in a
14 footnote that there's subcell - - - if we need to
15 show injury, there's subcellular harm, this court is
16 hearing this case on certified questions of law.
17 They're not hearing their motion to amend their
18 complaint - - -

19 JUDGE RIVERA: If a - - -

20 MR. PARSIGIAN: - - - to assert new
21 allegations.

22 JUDGE RIVERA: If a member of the class
23 gets lung cancer, can they sue you?

24 MR. PARSIGIAN: Absolutely.

25 JUDGE RIVERA: If a member of this class

1 got lung cancer - - - now we've got the symptom and
2 the injury - - - can they sue you?

3 MR. PARSIGIAN: Absolutely. Many do.

4 JUDGE RIVERA: And can they sue you for all
5 of the medical bills that they incurred, testing
6 themselves up to the time - - -

7 MR. PARSIGIAN: The things that they - - -

8 JUDGE RIVERA: - - - that they were
9 identified to have lung cancer?

10 MR. PARSIGIAN: - - - incurred in the past?

11 JUDGE RIVERA: Correct.

12 MR. PARSIGIAN: Well - - -

13 JUDGE RIVERA: Until the time they
14 identified the lung cancer.

15 MR. PARSIGIAN: No. Of course, up till
16 now, it wouldn't have happened at all, because this
17 particular medical monitoring didn't exist. Now the
18 question has been asked about the Affordable Care
19 Act, and it's responsive to your question, Your
20 Honor. The Affordable Care Act, we've got the United
21 States Preventive Services Task Force, which has made
22 a temporary recommendation that the screening should
23 be done. They expect to be giving their final
24 recommendation for - - -

25 CHIEF JUDGE LIPPMAN: So does that let you

1 off the hook, or is that just an offset if - - -

2 MR. PARSIGIAN: I do believe it does let us
3 off - - -

4 CHIEF JUDGE LIPPMAN: - - - if it is
5 covered, some of that, it's an offset.

6 MR. PARSIGIAN: I believe, Your Honor - - -

7 CHIEF JUDGE LIPPMAN: But why isn't that
8 just the answer to that?

9 MR. PARSIGIAN: The reason it's not the
10 answer is you're being asked to create an entirely
11 new cause of action. And one of the things this
12 court has always considered in deciding whether to
13 create a new cause of action itself or to leave it to
14 the legislature, is to look at whether there's
15 already a way to get relief. And here there are two
16 ways to get relief.

17 First of all, let me just address the
18 Affordable Care Act. Here's what happened. If the
19 U.S. Protective (sic) Services Task Force
20 recommendation finally recommends a B level, as it
21 has suggested it will do early next year, all health
22 insurers, except for grandfathered plans, will be
23 required to provide it for free without copay. It
24 will also become the standard of care, in which case,
25 even the grandfathered plans are going to pay for it.

1 JUDGE PIGOTT: Well, in a present case of a
2 tort, when somebody sues and gets damages, they get
3 damages for their medical expenses, and then it's a
4 collateral source thing, and the one who paid it, the
5 innocent insurance company, gets reimbursed.

6 MR. PARSIGIAN: Correct.

7 JUDGE PIGOTT: So it's conceivable here
8 that while the ACA may cover it, if this were to go
9 into effect, you would be paying for it, and that
10 would save money on the ACA side, right?

11 MR. PARSIGIAN: If the collateral source
12 rule applies - - -

13 JUDGE PIGOTT: Right.

14 MR. PARSIGIAN: - - - and if you create the
15 cause of action. Both are relevant. First of all,
16 when you think about whether you should create a
17 cause of action, let's look at what the Supreme Court
18 said in Buckley. Let's look at what the cases they
19 rely on say - - -

20 JUDGE RIVERA: Well - - -

21 MR. PARSIGIAN: - - - like Ayers.

22 JUDGE RIVERA: Well, I thought they claim
23 - - -

24 MR. PARSIGIAN: They - - -

25 JUDGE RIVERA: I thought they claim that

1 New York has already recognized medical monitoring.
2 They just think it applies to you.

3 MR. PARSIGIAN: No, there's a big
4 difference, Your Honor. What New York has done
5 already, in the Askey case, among others, is
6 recognize that a plaintiff who proves an injury in a
7 normal cause of action, negligence, strict liability,
8 may recover medical monitoring as part of
9 consequential damages. That's what Askey found.
10 It's not the question before this court, not what
11 they're asking for.

12 JUDGE READ: Because you're saying there's
13 no - - -

14 MR. PARSIGIAN: They're asking for - - -

15 JUDGE READ: - - - there's no inj - - -

16 MR. PARSIGIAN: I'm sorry, Your Honor?

17 JUDGE READ: Because you're saying there's
18 no injury here?

19 MR. PARSIGIAN: Well, because what they're
20 asking for - - - let's look at the precise question:
21 Does New York recognize an independent equitable
22 cause of action for medical monitoring? Okay?
23 That's a whole different thing than what Askey said.
24 Askey said if you have an injury and you can prove a
25 negligence or a strict liability claim. Let's

1 remember they brought those claims here. They
2 brought them, and the district court assumed, under
3 Askey, that they could recover medical monitoring if
4 they had prevailed on those claims. The district
5 court found they couldn't prevail on their negligence
6 or strict liability claims because of the statute of
7 limitations. So what they're really trying to do is
8 create - - - get you to create a new claim that will
9 let them circumvent the statute of limitations. They
10 had a remedy for medical monitoring; they just
11 couldn't make out the claim. That's what happened
12 below. And that's not before you.

13 JUDGE RIVERA: Because they - - -

14 MR. PARSIGIAN: The question before you is
15 independent - - -

16 JUDGE RIVERA: Because they should have
17 brought those claims when?

18 MR. PARSIGIAN: They should have brought
19 those claims - - - the trial court found - - - I
20 might argue something differently - - -

21 JUDGE RIVERA: I understand.

22 MR. PARSIGIAN: - - - but the trial court
23 found that - - - the federal district court, that
24 they should have brought them when they had a twenty-
25 year pack history of smoking, because that's when

1 they had increased risk of lung cancer.

2 JUDGE ABDUS-SALAAM: So then this - - -

3 JUDGE RIVERA: And then - - -

4 JUDGE ABDUS-SALAAM: - - - was back in the
5 '90s?

6 MR. PARSIGIAN: It was a few years before
7 they brought suit in the '90s, is correct, Your
8 Honor. What - - - if you look at - - -

9 JUDGE RIVERA: But I thought you said you
10 couldn't monitor at that point. It's only recently
11 that you can.

12 MR. PARSIGIAN: That's correct. That is
13 correct. Just like - - - just as is the case that
14 you can't have a car accident with someone who's
15 judgment-proof and wait twenty years until they win
16 the lottery to bring your claim. Or you can't suffer
17 an injury that has no treatment, and thirty years
18 later, when medicine discovers one, bring your claim.

19 JUDGE ABDUS-SALAAM: Is there a difference
20 here between the consumer product, sort of, analysis
21 that was alluded to earlier and some environmental
22 toxin that, you know, some people can't avoid? In
23 other words, these - - - these plaintiffs choose to
24 smoke, even though they may be addicted. There are
25 ways of, you know, dealing with addictions too, but

1 they're choosing, apparently, not to do that. So is
2 there a difference here?

3 MR. PARSIGIAN: There is a difference. If
4 I might just, before I answer it, very briefly say,
5 this is not an addiction case. They have not alleged
6 addiction as part of their claim. And of course
7 there are more people who have quit smoking than are
8 current smokers. And the evidence is that anybody
9 can quit. But your specific question, yes, there's a
10 difference between environmental exposure and this
11 exposure. And Your Honor identified it, which is,
12 whether it's voluntary or not. If you look at
13 somebody who lives in a neighborhood that has an
14 exposure, those people didn't have any choice, they
15 didn't know it was coming. These people smoked
16 cigarettes that have carried warnings on the packs,
17 about the very risk they're talking about, since
18 1966.

19 JUDGE PIGOTT: So if this was a lead paint
20 case, they would have a stronger argument, you'd
21 think?

22 MR. PARSIGIAN: I don't think they would
23 have a stronger argument, but in response to the
24 specific question of whether there's a difference
25 between the two, there is a difference between an

1 environmental exposure. I don't think this court
2 should recognize an independent equitable cause of
3 action for an environmental exposure - - -

4 JUDGE RIVERA: So if you're - - -

5 MR. PARSIGIAN: - - - either.

6 JUDGE RIVERA: - - - if you're exposed to
7 secondhand smoke, do you have a claim?

8 MR. PARSIGIAN: May - - -

9 JUDGE RIVERA: I don't want to be exposed
10 to secondhand smoke - - -

11 MR. PARSIGIAN: Yeah.

12 JUDGE RIVERA: - - - but I am.

13 MR. PARSIGIAN: Everyone is exposed to some
14 secondhand smoke in their life, and that's a pretty
15 good illustration of why this could be a problem.
16 When I talk about opening the floodgates and
17 potentially millions of suits, the U.S. Supreme Court
18 said there could be tens of millions of exposed
19 plaintiffs from people walking down the street and
20 having car fumes, from secondhand smoke - - -

21 CHIEF JUDGE LIPPMAN: If we - - - if we
22 recognize the cause of action, would this be a prod
23 to you to produce safer cigarettes?

24 MR. PARSIGIAN: Your Honor, Philip Morris
25 has had a range of cigarettes on the market for fifty

1 years.

2 CHIEF JUDGE LIPPMAN: No, but I'm asking
3 you a specific question. If we recognize this kind
4 of cause of action, couldn't that be viewed as
5 something that would promote better public health?

6 MR. PARSIGIAN: No, it couldn't, Your
7 Honor, and here's why.

8 CHIEF JUDGE LIPPMAN: Why not?

9 MR. PARSIGIAN: That's what I'm trying to
10 answer. We have made those products available for
11 fifty years, and people choose not to smoke them.
12 They're on the market now. You can go out right now
13 and buy products that have extraordinarily low levels
14 - - -

15 CHIEF JUDGE LIPPMAN: So you're saying - -
16 -

17 MR. PARSIGIAN: - - - of tar and nicotine.

18 CHIEF JUDGE LIPPMAN: - - - you make the
19 safest products possible, and this - - -

20 MR. PARSIGIAN: They're available.

21 CHIEF JUDGE LIPPMAN: This - - -

22 MR. PARSIGIAN: People don't choose them.

23 CHIEF JUDGE LIPPMAN: This would have no
24 effect on you, really?

25 MR. PARSIGIAN: It would not - - - it would

1 have no effect in that way. And let me say, this is
2 a significant piece - - -

3 CHIEF JUDGE LIPPMAN: You're a business,
4 aren't you? Wouldn't that have an effect if it - - -
5 if - - -

6 MR. PARSIGIAN: We're a business, but
7 people have to - - - if people don't want to buy it,
8 no business is going to sell any - - -

9 JUDGE RIVERA: But - - -

10 MR. PARSIGIAN: - - - we make it already.

11 JUDGE RIVERA: But aren't you really - - -

12 JUDGE PIGOTT: You mean if they took the
13 alcohol - - -

14 JUDGE RIVERA: But aren't you really - - -

15 JUDGE PIGOTT: - - - out of the beer they
16 wouldn't buy it?

17 MR. PARSIGIAN: Excuse me?

18 JUDGE PIGOTT: You mean if you took the
19 alcohol out of the beer they wouldn't buy it?

20 MR. PARSIGIAN: Well, people - - - there is
21 no-alcohol beer, and not very many people buy it.

22 JUDGE RIVERA: So but - - -

23 MR. PARSIGIAN: Right? It's there; it
24 wouldn't change what you do.

25 JUDGE RIVERA: Aren't you really arguing

1 whether - - - not whether or not we should recognize
2 medical monitoring, but whether or not they can
3 satisfy whatever might be the elements to medical
4 monitoring?

5 MR. PARSIGIAN: I'm arguing that - - -

6 JUDGE RIVERA: It strikes me as a whole
7 different question.

8 MR. PARSIGIAN: Of course it - - - that's
9 the second question, right? And in fact, really the
10 second question isn't whether they can satisfy the
11 elements.

12 JUDGE RIVERA: Right.

13 MR. PARSIGIAN: It's just for this court to
14 identify the elements if it creates the claim. But
15 the point is, there is no reason to create this
16 claim.

17 I only got through the first one of my
18 answers to Your Honor, but if I might go through the
19 list very quickly - - -

20 CHIEF JUDGE LIPPMAN: Sure, go ahead.

21 MR. PARSIGIAN: - - - the concern about
22 overwhelming the courts is a great one, but there's
23 also the harm to potential plaintiffs. What the
24 Supreme Court recognized in the Buckley case, and
25 many other courts have recognized, is that if we

1 allow independent claims for medical monitoring like
2 this, there's no limit. Right? Askey creates a
3 limit; you have to actually be able to prove a
4 negligence claim or a strict liability - - -

5 CHIEF JUDGE LIPPMAN: What about the
6 benefits to potential claimants?

7 MR. PARSIGIAN: Well, here that's where you
8 get into the Affordable Care Act. Lives are not at
9 stake.

10 CHIEF JUDGE LIPPMAN: Wouldn't it be a lot
11 - - -

12 MR. PARSIGIAN: This is a question - - -

13 CHIEF JUDGE LIPPMAN: Wouldn't it be a lot
14 cheaper if people were able to be cured, if this new
15 technology allows people to be cured earlier, or
16 before they even really get any kind of significant
17 damage? Wouldn't that be a tremendous benefit to
18 claimants?

19 MR. PARSIGIAN: Your Honor, the answer is
20 no, for a number of reasons.

21 CHIEF JUDGE LIPPMAN: It might be at your
22 expense, but it might be tremendous benefit to
23 claimants.

24 MR. PARSIGIAN: It would not be.

25 CHIEF JUDGE LIPPMAN: Why not?

1 MR. PARSIGIAN: Okay. First of all, the
2 ones who want the monitoring are going to get it
3 anyway. If this becomes the standard of care, if it
4 is authorized by the federal government - - -

5 CHIEF JUDGE LIPPMAN: Maybe they'll get it
6 in part, and maybe they won't get it in part.

7 MR. PARSIGIAN: Well - - -

8 CHIEF JUDGE LIPPMAN: Maybe it's not the
9 same as you could provide.

10 MR. PARSIGIAN: Actually, it likely will be
11 better than we could provide - - -

12 JUDGE RIVERA: Yeah, but - - -

13 MR. PARSIGIAN: - - - because instead of -
14 - - if I might, Your Honor - - -

15 CHIEF JUDGE LIPPMAN: There's a lot of
16 commentaries that the - - - the new health care bill
17 maybe, you know, won't provide such good care. I
18 mean, I think it's - - - that's a very subjective
19 viewpoint that they could do it a lot better than
20 you. There's a lot of people arguing today that
21 that's not the case.

22 MR. PARSIGIAN: There are; that's why I
23 only said maybe to agree with you. But this is
24 exactly the kind of - - -

25 JUDGE RIVERA: But counsel - - -

1 MR. PARSIGIAN: - - - policy calculus that
2 the legislature is better suited to address, Your
3 Honor.

4 JUDGE RIVERA: Counsel, I've never heard -
5 - - well, okay. So I'm struck by the fact that an
6 alleged tortfeasor is arguing that there's no claim
7 because the public should pay for the injury that
8 they caused. So I don't see - - -

9 MR. PARSIGIAN: No, that's not what I'm
10 arguing, Your Honor. But let me make a quick - - -

11 JUDGE RIVERA: It sure sounds like it.

12 MR. PARSIGIAN: Okay. Well, then let me -
13 - - I apologize for the lack of clarity. When this
14 court is considering whether to create a new cause of
15 action - - - see, this would be diff - - - let's say
16 they could make out the Askey claim. They had a
17 negligence claim, they sued, and they wanted to
18 collect their expense, then that's a normal case,
19 right? The collateral source rule applies, we have
20 to pay for it; nobody cares whether they get
21 insurance to pay for it.

22 This is a different question. The question
23 here is, as the U.S. Supreme Court said, if we open
24 the door to independent claims for medical
25 monitoring, we run the risk of using precious

1 resources, both of courts and of defendants, on
2 claims that aren't as valuable, as they put it, that
3 aren't as strong, that aren't as serious, and running
4 out of money before you get to the people or running
5 out of resources before you get to the people who
6 have real injury claims.

7 CHIEF JUDGE LIPPMAN: So we wait - - -

8 MR. PARSIGIAN: So - - -

9 CHIEF JUDGE LIPPMAN: But I think that the
10 whole question is what comes first, you know, the
11 cart or the horse. Do you wait until people are
12 seriously ill and then say, okay, now we understand,
13 and then you get a cause of action, and then, you
14 know, you have to pay for it, or whatever happens
15 after that. Or this is - - - this is a novel
16 approach that says, hey, let's not wait for that.
17 Let's use modern technology for the benefit of
18 everybody in order to - - - and maybe even including
19 Philip Morris - - - for the benefit - - - let's get
20 it at an early point before people are really sick.
21 Let's do this monitoring because the new science
22 tells us that people can be cured or never really
23 impacted. Why isn't that more a logical way to do
24 business, or is it just that, in your view, it
25 violates the way we normally do litigation? Is it

1 the novelness of it that bothers you? That's what
2 I'm - - -

3 MR. PARSIGIAN: Well, certainly the no - -
4 -

5 CHIEF JUDGE LIPPMAN: - - - trying to get
6 at.

7 MR. PARSIGIAN: Certainly the novelty is an
8 issue, right? This court is capable and has before
9 created novel causes of action.

10 CHIEF JUDGE LIPPMAN: That's what I'm
11 asking.

12 MR. PARSIGIAN: It has the power to do it.
13 I'm telling you why - - -

14 CHIEF JUDGE LIPPMAN: That's not inherently
15 bad, to do a novel cause of action.

16 MR. PARSIGIAN: Is it inherently bad? No.
17 Is it bad here? Yes. It's bad here because one of
18 the reasons is they will get the relief, both because
19 claimants in their position, an individual claimant
20 who actually demonstrates an injury, can prove a
21 negligence claim or a strict liability claim, can get
22 monitoring under New York law. So we've got that.

23 Second, if it becomes the standard of care
24 - - - this court doesn't want to go there to start
25 suggesting monitoring if it's not the standard of

1 care. In fact, if you go to the hospital today and
2 get a CT scan, they're going to give you a warning
3 that you shouldn't get too many of them, because they
4 have risks. Those kinds of policy evaluations are
5 done by the medical community, which the U.S.
6 Preventive Services Task Force is doing right now.
7 And if they decide, early next year, that it's
8 available, it will be avail - - - so you're not
9 making a decision that we need to create a new cause
10 of action because there are a whole bunch of people
11 who can't get this care. They will be able to get
12 the care. So then the question is - - -

13 CHIEF JUDGE LIPPMAN: If the government - -
14 - because the government will pay for it.

15 MR. PARSIGIAN: Because the gov - - -
16 because health insurance will pay for it. And the
17 question is, in a circumstance like that, not if they
18 could prove a claim, should we get out from under,
19 but that's a reason not to - - -

20 CHIEF JUDGE LIPPMAN: I understand, but - -
21 -

22 MR. PARSIGIAN: - - - act here, not to act
23 precipitously.

24 CHIEF JUDGE LIPPMAN: But you agree there
25 is an argument that maybe Philip Morris, if - - - if

1 there's wrongdoing here, should pay for it, rather
2 than the taxpayer.

3 MR. PARSIGIAN: If there's wrong - - -

4 CHIEF JUDGE LIPPMAN: That could be an
5 argument that one could make, right?

6 MR. PARSIGIAN: There's a - - - of course
7 that's an argument one could make. And the general
8 rule is that if you have an injury, then that would
9 apply. But what you're being asked to do is, is this
10 a circumstance, is this one of those rare
11 circumstances where this court should throw out the
12 injury requirement, which limits the claims to a
13 manageable number of people, and throw out hundreds
14 of years of tort law principles to create a new cause
15 of action.

16 If I might just say one thing - - -

17 CHIEF JUDGE LIPPMAN: One thought; go
18 ahead.

19 MR. PARSIGIAN: Okay. The one thing is if
20 you create a new cause of action, the critical
21 component we didn't get to discuss is the elements.
22 And I want to say one thing about one element.

23 CHIEF JUDGE LIPPMAN: One thing; go ahead.

24 MR. PARSIGIAN: That is the trial court
25 here found that even if we had made the alleged safer

1 cigarette and all of the class members, the purported
2 class members - - - because it hasn't been certified
3 - - - had smoked it, that they still would have
4 needed exactly the same medical monitoring. And we
5 submit that that is one of the critical elements that
6 this court should make clear is that for someone - -
7 - if there is an independent cause of action for
8 medical monitoring, claimants should have to prove,
9 as all the cases they cite say, if you read the
10 elements, that you wouldn't have gotten - - -
11 wouldn't have needed exactly the same medical
12 monitoring absent the misconduct.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 Thank you.

15 Okay, counsel, you're up; rebuttal.

16 MS. PHILLIPS: Okay. What - - -

17 CHIEF JUDGE LIPPMAN: What are the
18 elements, if there's a cause of action created?

19 MS. PHILLIPS: Okay. The elements, if I
20 can, to save time, are at the back page of our brief.

21 CHIEF JUDGE LIPPMAN: Okay. But tell us in
22 a nutshell; what are the elements?

23 MS. PHILLIPS: I can turn to the page. The
24 defendant's misconduct was a substantial factor in
25 causing the plaintiff to become exposed to a

1 hazardous substance.

2 JUDGE PIGOTT: Can I get medical monitoring
3 because I've been subjected to the secondhand smoke?

4 MS. PHILLIPS: The answer is you - - - you
5 would have to make - - - I think you'd have to come
6 in with expert proofs to show that you'd been exposed
7 to sufficiently large quantities of it, which in the
8 case of a secondhand smoke case may well be a more
9 difficult hurdle to jump over. But I don't see a
10 categorical reason why that would be an
11 impossibility.

12 JUDGE RIVERA: He says you've not got an
13 injury.

14 JUDGE ABDUS-SALAAM: Why can't we let the
15 legislature decide this?

16 MS. PHILLIPS: Oh, I got two questions.

17 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam
18 first.

19 JUDGE ABDUS-SALAAM: Why shouldn't we let
20 the legislature consider these policy concerns and
21 other things where they're more - - - I think where
22 they're more appropriately considered in hearings and
23 other things, rather than two lawyers arguing them
24 here?

25 MS. PHILLIPS: In answer to that question,

1 I would say that Askey has been on the books, and has
2 been cited, I think, over 200 times by New York's
3 courts, federal courts. And this is a situation
4 where the legislature has really had an opportunity,
5 if it wanted to, and it has passed tort reform
6 packages in the past; it hasn't done a think to alter
7 Askey. So the concept of medical monitoring has been
8 part of New York jurisprudence.

9 JUDGE GRAFFEO: There's a big difference
10 between having monitoring as part of consequential
11 damages and establishing a separate tort, because
12 that has economic/fiscal impact - - -

13 MS. PHILLIPS: I think there - - -

14 JUDGE GRAFFEO: - - - on the state. I
15 mean, maybe not in Philip Morris' case because it's
16 such a large corporation, but you could have another
17 product involved where the monitoring ends up
18 bankrupting the company, so that those individuals
19 that actually have injuries and could have brought
20 negligence cases are now not going to have - - -

21 MS. PHILLIPS: That - - -

22 JUDGE GRAFFEO: - - - are now not going to
23 have a pot for recovery.

24 MS. PHILLIPS: Effectively, that's the
25 argument Philip makes, but the cases it points to as

1 an example of that is the asbestos context, which is
2 wildly inapposite. It's a situation where you have,
3 you know, I think, tens, if not hundreds of
4 bankrupted defendants. And the notion that Philip
5 Morris would ever be in those circumstances is really
6 implausible. And the certified question, of course,
7 is concerned with cigarettes and the cigarette - - -

8 JUDGE PIGOTT: Well, the other part of - -
9 -

10 JUDGE RIVERA: What's your - - -

11 JUDGE PIGOTT: - - - asbestos, too, is that
12 it was an enormous, and I guess remains an enormous
13 burden on the court system. I mean, there's a limit
14 to how much, you know, judges and courts can do.
15 What does this - - - what impact would this have if
16 you were to prevail here?

17 MS. PHILLIPS: I think the realistic impact
18 it would have is that this one case would go forward
19 and that the plaintiffs might be able to seek some
20 lifesaving - - -

21 JUDGE PIGOTT: What happens when I want to
22 bring my monitoring case, and because I had
23 secondhand smoke I've got to get an expert, and I'm
24 going to lose, and then I want to appeal, and I'm - -
25 - you know, and then my - - - my brother and my

1 don't think that under choice of law principles or
2 forum non conveniens principles - - -

3 JUDGE PIGOTT: But he's going to have to
4 make that argument and we're going to have to make
5 that decision.

6 MS. PHILLIPS: I think once that decision
7 gets made once or twice people are capable of reading
8 forum non conveniens jurisprudence, choice of law
9 jurisprudence, and they're only going to craft a
10 class that they think has a realistic chance of
11 getting through.

12 JUDGE RIVERA: What - - - sorry.

13 MS. PHILLIPS: Go ahead.

14 JUDGE RIVERA: What's - - - I know that
15 you've debated this in the briefs. He takes the
16 position you have no harm - - - injury.

17 MS. PHILLIPS: Yes, that - - -

18 JUDGE RIVERA: Let's hear your argument on
19 the injury. I believe it's the twenty-pack injury.

20 MS. PHILLIPS: That's exactly right, and if
21 you look at Dr. Miller's report - - - I think it's
22 also in Dr. Morabia's report - - - there is no
23 question that a person who has smoked twenty
24 pack-years and is fifty years of age, which is a
25 critical factor I'd like to return to in a second,

1 has not just cellular changes but cellular injuries.
2 And the reports make that absolutely plain.

3 JUDGE ABDUS-SALAAM: They have no lung
4 cancer yet, and there are people who never smoked a
5 day in their lives who are suffering with lung cancer
6 and dying.

7 MS. PHILLIPS: It's actually a very small
8 fraction. Overwhelmingly, people who do - - - it's
9 about ninety percent or eighty percent of smokers,
10 depending on the gender, are people who develop it
11 because of smoking. But the fact of the matter is,
12 is that cigarette smoking is the primary and almost
13 the exclusive risk factor for developing lung cancer.

14 If I may return to the question of age,
15 because I think that's a critical fact misapprehended
16 by the federal judiciary that should bear on your
17 timeliness analysis. Importantly, Ms. Caronia - - -
18 Marcia Caronia didn't even turn fifty until the year
19 before this action was filed in 2006. So for persons
20 like her, I think it's critical for the court to
21 recognize and to stress that she wasn't even a proper
22 candidate for medical monitoring until the action was
23 brought. And to say that she should have brought the
24 action back in 1996 would be forcing her to bring
25 suit at a time when she could - - - not only was

1 there no relief available, but she wasn't even
2 sufficiently at risk, under either side's experts, to
3 be able to - - -

4 JUDGE RIVERA: Because that's how you
5 define the class, based on what medical science tells
6 us is the point in time when there is this injury
7 you're talking about.

8 MS. PHILLIPS: That's exactly right. That
9 should be in the reports of Drs. Miller, Dr. Morabia
10 - - - I think also Dr. Markowitz addresses that.

11 If I could turn to the question of - - -

12 CHIEF JUDGE LIPPMAN: No, no, you can have
13 one thought. Go ahead.

14 MS. PHILLIPS: Okay. One thought is going
15 to be consumer products, because I think there was a
16 division that was being drawn by defense counsel that
17 maybe environmental torts are okay but not consumer
18 products. And I just have to respond. First of all,
19 there are people who are utterly blameless using
20 products such as a heart valve that malfunctions, who
21 may need medical monitoring, and the notion that
22 because it's not an environmental tort they should be
23 barred, seems to me unjust.

24 Beyond that, if we're going to talk about
25 blaming the plaintiff, which is effectively what

1 Philip Morris is doing, it's important to take into
2 account - - - and statistics and the Surgeon
3 General's reports will bear me out on this - - -
4 overwhelmingly, not just the class representatives
5 but the class as a whole, are targeted as children by
6 this industry, become addicted as children - - -
7 become addicted as children, and are incapable of
8 stopping smoking. And to say that these people are
9 not entitled to monitoring, particularly when Philip
10 Morris, which designs e-cigarettes with no tars, and
11 has many - - - if you look at Dr. Farone's report,
12 has many, many ways in which it could have made its
13 cigarettes - - - cigarettes more - - - safer. To say
14 that these people aren't entitled to or deserving of
15 relief that can save their lives - - -

16 CHIEF JUDGE LIPPMAN: Okay, coun - - -

17 MS. PHILLIPS: - - - constitutes an
18 injustice - - -

19 CHIEF JUDGE LIPPMAN: Thanks, counselor.
20 Thank you both. Appreciate it.

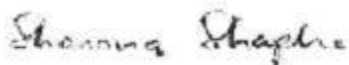
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Marcia L. Caronia, et al. v. Philip Morris USA, Inc., No. 227 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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