

ENVIRONMENTAL TOBACCO SMOKE CASE IS BLOWN AWAY

Laurel, Mississippi, June 2, 1999

Jury Finds For the Tobacco Industry After Less Than Two Hours of Deliberations

A jury in Jones County, Mississippi, found Philip Morris, R.J. Reynolds and Brown and Williamson not liable for the death of Burl Butler, who died of lung cancer. Plaintiff had alleged that Mr. Butler contracted lung cancer from environmental tobacco smoke (ETS) he was exposed to during the 32 years he worked in the barber shop he owned in Laurel, Mississippi.

Although instruments to measure ETS were available at the time the lawsuit was filed, plaintiff chose not to take objective measures of exposure, instead relying on the subjective testimony of Mr. Butler's family and friends, who reported that "yellow stuff" dripped from the ceiling, mirrors were coated with nicotine and when you opened the door, the place "looked like it was on fire." The defense countered with ten local witnesses who frequented the barber shop, including one of the defense experts in the case. These witnesses, some of whom were sensitive to cigarette smoke, described a clean, well kept shop where smoking took place, but nevertheless "smelled like a barber shop." No one, not even the plaintiff's exposure witnesses, had ever complained about the amount of smoke in the shop. The local air conditioning maintenance man testified he found hair clippings, talc and hair spray that was almost adhesive in nature in the filter he cleaned, and that the barber shop was not any more or less smoky than other local businesses.

The exposure evidence essentially ended the case. The jury never got to the question of causation, although here too, the defense's evidence was very strong. Mr. Butler, a non-smoker, had four or five other primary cancers in addition to the tumor in his lung, and a family history of cancer. He had other risk factors for cancer as well, including exposure to methylene chloride, which the FDA banned from use in the hair spray Mr. Butler used for decades. He was also exposed to enough asbestos from the talcum powder used in the shop for it to be found in his lung tissue on autopsy.

Scraping together what little evidence he had, plaintiff attorney, T. Roe Frazier in closing, told the jury, "If you find for the defendants, it will be like calling Mr. Butler and his family liars."

The jury took just one hour and 58 minutes to find for the defendants.

While this case was interesting in and of itself, its historical significance for the tobacco industry is even more so. The case was started in 1992 by plaintiff attorney, Ron Motley, who, along with Mississippi Attorney General, Mike Moore was later to play a key role in the national settlement. Motley used the case as a discovery vehicle for his efforts to force a national settlement. The judge who was hearing the case at the time gave Mr. Motley anything he wanted, including many company documents that the defense tried to protect under the attorney/client privilege.

Had the case been tried when it was first ready for trial several years ago, it would have been a much more difficult case for the defense. There would have been a plaintiff oriented judge and allegations of fraud and conspiracy, which were dismissed by Judge Robert Evans, who was ultimately brought in to try the case. Before the trial could take place, however, defense counsel accused the original judge of having a sexual liaison with one of the plaintiff attorneys in the case. While a determination of fact was never made, the original judge recused himself while awaiting a decision by the Mississippi Supreme Court on whether or not to remove him. In the meantime, Motley was sued by Ava Butler, the widow of Burl Butler, claiming he had abandoned her husband's case in favor of the national settlement, a malpractice claim that Motley settled out of court. After that settlement, Roe Frazier became the lead plaintiff attorney, and Judge Evans was brought in from another county to try the case.

Thus ends a case that never had any merit, yet touched many lives, and forever changed the tobacco industry and the nature of the litigation against it.

Litigation Strategies, Ltd. provided jury selection assistance and closing statement consultation to the lead attorney for Philip Morris, Inc., William Ohlemeyer, of Kansas City's Shook, Hardy & Bacon.

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