

To be argued by Mark R. Bower, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND DEPARTMENT

-----X

SELMA ROSEN and **MEYER ROSEN**,
Plaintiffs-Respondents,
- against -

BROWN & WILLIAMSON TOBACCO CORPORATION,

Defendant-Appellant.

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PLAINTIFF-RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

The defense's Brief distorts the facts of the case, and misstates Plaintiffs-Respondents' (hereafter simply "Plaintiffs") contentions and arguments, setting up a straw man for the sole purpose of knocking it down. This Preliminary Statement, and Plaintiffs Counter-Statement of Facts below, will set the record straight.

The defense errs by basically mis-stating both the plaintiffs' "theory of the case", and the injuries which the plaintiffs claim. The defense argues that injured plaintiff Selma Rosen was "born addicted" to tobacco. That is not, and never was, our legal contention. Rather, plaintiffs have consistently contended that Selma Rosen was born with a *predilection* to tobacco addiction, but not that she was *born* addicted. The difference is important. There is no evidence that baby Selma underwent "withdrawal" from tobacco as a newborn, as an addicted baby would. Rather, she was born with a craving for tobacco, but her *pre-disposition* towards tobacco addiction did not become complete (or "finalized," as our expert put it) until Selma Rosen began smoking the defendant's product at age eleven.¹ All of the

¹ Defendant-Appellant Brown & Williamson Tobacco Corporation (hereafter simply "defendant B&W") is the successor by acquisition to American Tobacco Co., the manufacturer of Lucky Strike cigarettes, which Mrs. Rosen began smoking circa 1955 at age 11.

defense's subsequent arguments fail, because the defense misunderstands and misconstrues plaintiffs' basic position.

Plaintiff's "theory of the case" was encapsulated in two succinct paragraphs that began our Affirmation in Opposition to the defendant's summary judgment motion in the court below:

Selma Rosen contends that by reason of her mother smoking while pregnant, Selma was exposed to the addictive components of tobacco smoke while still in the womb, resulting in her being born craving tobacco. This pre-disposition to addiction was exacerbated by her mother blowing smoke in baby Selma's face, and growing up continually exposed to second-hand smoke in her home. Her mother and considerably older siblings were all smokers, and her home was filled with smoke. Selma smoked her first cigarette at age 11, when one of her friends began buying Lucky Strike brand cigarettes for her. Those cigarettes were manufactured by American Tobacco Co., a predecessor of Brown & Williamson Tobacco Co. (When the American Tobacco Co. merged and was bought up by Brown & Williamson Tobacco Co., Brown & Williamson took on the liabilities of American Tobacco Co., including the liability for Selma Rosen's injuries that were induced by her use of American Tobacco's products.) Selma smoked these cigarettes consistently, for four years.

From age 15 years onward, Selma smoked various other brands of cigarettes; however, she became addicted as a result of her use of Lucky Strike cigarettes, and that addiction to tobacco caused her to keep smoking for the next 30 or so years. As a result of a lifetime of smoking tobacco products, Selma developed lung cancer, and lost [part of] a lung to that cancer five [actually, eight] years ago. (See

the annexed expert Medical Affirmation of Dr. Arnold Mandelstam.)
This lawsuit was started shortly thereafter.

The defense repeatedly mis-states this contention to say that Mrs. Rosen was *born addicted*. From that false premise, they reason that plaintiffs sued the wrong defendant (the correct one, according to them, being the manufacturer of Selma's *mother's* cigarettes - Chesterfields, manufactured by Liggett & Meyers Tobacco Co.). The defense fallacy depends on the misconception that Selma was *born addicted*, which is their misrepresentation, not our contention. Although we know that some components of smoke cross the placental barrier, there is no existing scientific evidence that a fetus can become addicted to tobacco *in utero* (yet). Plaintiff's expert plainly stated that Selma *became addicted* when she started smoking B&W's Lucky Strike brand at age eleven.

The defense goes on to argue that plaintiff's "injury" was her addiction. According to B&W, since the addiction began in the womb (the same mis-statement is repeated over and over throughout their Brief), the statute of limitations supposedly expired years ago. Again, the defense mis-states plaintiff's case, just so that they can attack it. It is not for the defense to decide what injuries the plaintiff is suing for; it is up to the plaintiffs. Plaintiffs never alleged "addiction" as an

“injury”, although it is a fact, or circumstance, that led to the injuries for which we are suing.

Rather, the plaintiff is suing for Selma Rosen’s lung cancer, and other harms that flow from her cancer (loss of part of a lung, becoming a pulmonary cripple, fear of death, inability to return to her prior employment as a bank officer, and the like). Mrs. Rosen’s cancer was diagnosed in 1995. Her law suit was started in 1997, easily within the three-year statute of limitations from the time of discovery of the injury - cancer - on which the suit was based. Accordingly, the statute of limitations did not expire, and this case is timely.

Neither of these two main arguments - the “born addicted / wrong manufacturer defense”, and the statute of limitations defense mistakenly based on “addiction” as the plaintiff’s main injury - were argued in the Court below. The defense has radically changed its positions on appeal. Their present arguments were not preserved for appeal. Rather, these are new arguments that were recently created in an effort to circumvent the loss in the court below. These new arguments should not be heard on this appeal, as they are *dehors the record*.

The defense also argues that “everybody” knew that tobacco caused cancer, so that anyone who smokes assumes the risk of disease. However, the

extraordinarily extensive (and expensive) discovery that is unheard-of in any other kind of personal injury case but is *de rigueur* in tobacco litigation, the defense deposed not only the injured plaintiff and her husband, but also the *ex*-husband who she divorced decades earlier, both of her adult sons, her brother and her sister, failed to produce evidence that Mrs. Rosen had any significant awareness or understanding of the dangers of smoking until long after she was hopelessly addicted and powerless to quit. Every family member testified, without exception, that Mrs. Rosen was not a “reader” of newspapers or magazines, nor a radio-listener or television watcher, and was uninterested in current events (R. 364), so that the defense’s “everybody knew about it from the media” argument cannot be tied to Selma Rosen in particular, in any meaningful way. Indeed, after painstakingly fine-combing thousands and thousands of pages of deposition testimony from ten witnesses, at best they can come up with only a handful of casual, passing comments about the dangers of tobacco extracted from a span of over forty years of smoking. In light of plaintiff’s proof of addiction and lack of “freedom of choice”, the defense’s “freedom of choice” argument fails.

At the same time, the plaintiff proved in the court below that while the defense postured that “everybody” knew of the dangers of smoking, Brown &

Williamson sponsored advertising intended to cast doubt on the link between smoking and disease, and published instructions to its employees on how to deflect pointed questions about the risks of tobacco use and lull smokers into a false sense of complacency. The defendant did everything in its power to continue to sell its product, by convincing the public that smoking was not dangerous after all. That promotion was intended to keep the gullible smoking. Selma Rosen was susceptible to the defense's siren song. The defense is thus hoist by its own petard, having vociferously denied the very dangers that it now claims, in retrospect, were "common knowledge". Having affirmatively denied and disputed such dangers, the defense is estopped from contending that they were common knowledge, and that they cannot "blame the victim" when their own publications sought to mislead and delude the public into believing that smoking was safe (or, at least, that the evidence linking smoking to disease was unreliable and inconclusive).

The rest of the defense's arguments are "boilerplate" recycled from similar motions made in other tobacco cases, and which will be easily disposed of at the end of this Brief.

As such, the court below was correct in finding that there are numerous questions of fact that preclude summary judgment. The case requires a trial, so that

a jury can sort out those factual disputes. The Order Appealed From was correctly decided, and should be affirmed.

COUNTER-STATEMENT OF FACTS

Selma Rosen's mother smoked cigarettes while pregnant with Selma. (R. 208-209) As a fetus, Selma was exposed to the addictive components of tobacco smoke in the womb, resulting in her being born craving tobacco. (R. 1622) As a baby, her mother blew smoke in baby Selma's face. Her parents and considerably older siblings were all smokers, and her home was filled with smoke, continually exposing her to second-hand smoke, and the pervasive atmosphere that smoking was acceptable. (R. 293, 1622, 1640) It was natural for the child to want to emulate her parents and older brother and sisters. When she was eleven years old, the one of her friends began buying the defendant's Lucky Strike brand cigarettes for Selma. Selma smoked Lucky Strikes for four years, until she was fifteen years old, completing her life-long addiction to tobacco through her use of Brown & Williamson's (predecessor's) product. (R. 1622, 1641)

From age fifteen onward, Selma smoked various other brands of cigarettes; however, she became addicted as a result of four years of smoking Lucky Strike cigarettes, and that addiction to tobacco caused her to keep smoking for the next thirty or so years. (R. 1641) Selma developed lung cancer from her tobacco use. (R. 1641) The cancer was diagnosed in 1995. (R. 130) She suffered a lobectomy

(loss of part of the lung), and became a pulmonary cripple. Until then, she had been employed as an Assistant Vice President of the NatWest Bank in Melville, New York, earning approximately \$60,000 per year, plus fringe benefits. Since being diagnosed with lung cancer, she has been on disability. (R. 131) Her injuries and fear of death caused her serious depression, for which she has been under the care of psychiatrist Dr. Arnold Mandelstam. This lawsuit was started shortly after the cancer was diagnosed.

In opposition to the defendant's summary judgment motion, plaintiff submitted Dr. Mandelstam's Expert Affidavit. (R. 1638-1641) In addition to being a licensed medical doctor and Mrs. Rosen's treating psychiatrist, Dr. Mandelstam has impressive specialty credentials in addiction medicine. Dr. Mandelstam explained how Mrs. Rosen's use of Brown & Williamson's product resulted in her life-long addiction and caused the development of her lung cancer:

Ms. Rosen was exposed to the addictive substances in tobacco from conception to birth, even before she was born. Her mother smoked cigarettes throughout her pregnancy, while Ms. Rosen was a fetus in the womb. The addictive chemicals in the tobacco smoke inhaled by Ms. Rosen's mother crossed the placenta and more likely than not, affected Ms. Rosen's brain even before she was born, resulting in her being born with a *craving* for tobacco smoke, much as the baby born of a heroin or crack addict is born with his/her mother's drug addiction.

This craving for tobacco smoke was intensified by Selma's parents and three older siblings smoking while Selma was an infant, further exposing baby Selma to these addictive chemicals through constant exposure to second-hand smoke. Furthermore, Selma's mother would blow smoke into her baby's face from time to time, yet furthering baby Selma's *propensity towards addiction* to tobacco.

As a result, even as an infant, Selma Rosen was adversely affected by tobacco smoke. Throughout her childhood, Selma was continually exposed to smoke at home, promoting, reinforcing, and sustaining her born cravings, and at the same time, inculcating an attitude that smoking was an accepted way of life. Selma has an early memory, as an infant, of being on the beach and finding a butt and asking her family for a light.

This early addiction was manifested by her *taking up smoking habitually at the age of only eleven years*, and continuing to smoke more or less continuously for the rest of her adult life, until shortly before she lost a lung to the cancer that was induced by her life-long exposure to tobacco smoke. In fact, Ms. Rosen's addiction is amply demonstrated by her many unsuccessful attempts to quit smoking, including some in which she was actually institutionalized for days at a time for tobacco detoxification. Nonetheless, the addiction proved too strong, and she returned to smoking for the simple reason that she could not control her addiction.

The defense typically mis-characterizes a plaintiff's smoking as a "freedom of choice" issue. That philosophical argument is medically incorrect and misleading. People who are addicts, such as Selma Rosen, have no "freedom of choice". They are "hooked" on tobacco, just as a drug addict is "hooked" on narcotics, cocaine, or crack.

For the first four years of her smoking, Ms. Rosen smoked cigarettes manufactured by Brown & Williamson Tobacco Co.'s predecessor company, American Tobacco Co. It was *these cigarettes, for which Brown & Williamson Tobacco Co. is liable, that finalized the plaintiff's path to tobacco addiction.* Accordingly, Ms. Rosen's addiction to tobacco, and the catastrophic consequences that addiction caused to her health, can be laid squarely at the foot of Brown & Williamson Tobacco Co. That Ms. Rosen switched brands and used other manufacturer's products from time to time over the next thirty-two years is of no consequence, as *it was the defendant's (mis)conduct that substantially caused her addiction and led to her lung cancer.* (R. 1638-1641) [Underlining original; italics added].

Mrs. Rosen had several documented "quit attempts", which resulted in the temporary cessation of her smoking, but eventually she relapsed and took up the habit again. Mrs. Rosen's history of failed "quit attempts" is important, because they belie the defense's argument that smoking is a matter of choice. These are described in paragraph 28 of her Answers to Interrogatories (R. 132-133):

28. Selma Rosen's first made a formal attempt to quit smoking in approximately 1968 and went to Smoke Watchers (no longer in existence), in Manhattan, New York. This attempt was unsuccessful. Selma Rosen's next formal effort to quit smoking was in 1973, at which time she went to Smoke Enders, Ramada Inn, Mahwah, New Jersey. That effort was unsuccessful.

Selma Rosen's next formal effort to quit smoking was in 1983, at which time she attended "Stop for Life," Westchester, New York, wherein she was successful in quitting smoking for approximately six

years. Her next formal attempt to quit smoking was through a hypnotist in N.Y.C. (name and address not currently available). She then attempted acupuncture to help quit smoking, through Shiovahn Delaney, Greenlawn, N.Y., exact dates not known, but in approximately 1993. Her next formal attempt was through the Green Seminars, L.I.J.H., New Hyde Park, NY in 1994.

She resumed smoking in approximately 1989 and continued until two months before being diagnosed with lung cancer in 1995. On August 6, 1995, she went to Caron Family Services, Warnersville, Pennsylvania, an in-patient facility for six days admission, which resulted in her quitting smoking. In addition, she went to Nicotine Anonymous meetings from approximately May 1995 up to the present time and continuing, and an addiction counselor (Patricia Colorossi of Huntington, NY, from mid-August 1995 until approximately December 1995). In addition to these formal efforts, there were innumerable informal efforts where she would attempt to quit smoking on her own, for short periods of time, without success.

Thus, the facts in the Record on Appeal establish that Selma Rosen had a powerful predilection to tobacco use, but not that she was “born addicted” as the defense wrongly contends. That pre-disposition, her family continually exposing her to second-hand smoke and inculcating the attitude that smoking was acceptable, together with the unfortunate circumstance of a friend buying a first pack of the defendant’s cigarettes for her at age eleven years and her smoking Lucky Strikes for the next four years, combined with the addictive chemicals in tobacco smoke, according to the uncontradicted Affidavit of what Dr. Mandelstam, “finalized the plaintiff’s path to tobacco addiction.”

Mrs. Rosen is *still* addicted to tobacco, even though she no longer smokes. (R. 377, 715) She *still* goes to twelve-step meetings, and recognizes that she will always be “in recovery” from her tobacco addiction, (R. 379-381), much as “once an alcoholic - always an alcoholic,” even if they have stopped drinking for years. She testified that she *still* wants to smoke to this very day, but the loss of a lung has stopped her. Nonetheless, she will be a life-long risk of another relapse.

Brown & Williamson now concedes, on its website, that smoking causes cancer. (R. 1642-1643) In their summary judgment papers, the defense did not challenge that Selma Rosen’s cancer was caused by tobacco. This is a startling reversal of its historical position, which was to deny and contest the link between smoking and disease.

In 1954 (one year before eleven-year-old Selma Rosen began smoking Lucky Strikes), Brown & Williamson joined with the other major cigarette makers in publishing the notorious “Frank Statement to Cigarette Smokers” (reprinted in its entirety at R. 1646).² The signature of Brown & Williamson Tobacco Co. on this

² The copy of the “Frank Statement” that defense counsel put into the Record on Appeal is of such poor quality as to be almost illegible, and the bottom of the page is cut off. With the permission of this Court, we will bring a quality copy with us to the oral argument of this appeal, so that the Court can see this notorious document for themselves. It is a concise example of the tobacco industry’s campaign of lies.

outrageous document, is proudly affixed. This open letter to the American public explained that “eminent doctors and research scientists” had critiqued the “theory” that cigarette smoking is in some way [linked] with lung cancer in human beings,” and directly denied that smoking causes cancer. The letter claimed that “one by one these charges [against tobacco] have been abandoned for lack of evidence” - an outrageous lie, even then - and asserted plainly and falsely that “the products we make are not injurious to health.” Brown & Williamson flatly disputed that its products were dangerous, for the specific purpose of continuing the public’s consumption of its products.

The publication of the “Frank Statement” was the kick-off for the most successful and long-running corporate disinformation campaign in history. It continued for over forty years, until the late-1990's, when B&W reluctantly agreed that tobacco is both carcinogenic and addictive. Brown & Williamson spent hundreds of millions of dollars, directly and through lobbying and publicity arms, such as The Tobacco Institute and Project Lighthouse, to confuse the public with a phony and non-existent “debate” as to the hazards of smoking. The disinformation campaign was particularly seductive to susceptible people like Selma Rosen.

For example, Brown & Williamson's internal manual from 1979 (R. 1628) (by which time Selma Rosen had been smoking for 14 years) entitled "Tobacco: Issues, Answers, Actions", instructed B&W's employees on how to answer nagging questions like "How can you deny the overwhelming statistical evidence that smoking causes disease?" and "Does it bother your conscience to sell cigarettes?" It also instructs tobacco industry employees on how to participate in the industry's pro-tobacco "grass roots" lobbying structure, Tobacco Action Network. Brown & Williamson now argues that everyone has long been fully aware of the link between smoking and health, but in the Questions & Answers section of its manual pertaining to smoking and health, employees were told to say, over and over, that the case against smoking isn't proven, that it has been based on flawed statistics and unreliable data, and to analogize a statistical link between lung cancer and the use of electric razors:

QUESTIONS & ANSWERS

Individuals associated with the tobacco industry often are confronted by thought-provoking questions regarding smoking and health, public smoking and other issues which make up the controversy surrounding the industry. In the past, employees have not been adequately equipped to deal with these questions.

The following section contains questions and answers about smoking and health and other industry-related issues...

GENERAL SMOKING AND HEALTH

Q. Does smoking cause lung cancer, emphysema, cardiovascular disease and bronchitis?

A. No one knows. Scientific research has not established that smoking causes disease. We all know that many scientists have said smoking causes certain diseases, but other respected researchers believe cause has not been shown. One thing is clear--more research is needed.

Q. How can you deny the overwhelming statistical evidence that smoking causes disease?

A. The case against smoking is based almost entirely on inferences from statistics. But most scientists will agree that statistical associations cannot establish cause and effect...By the way, there is a statistical association between lung cancer and the use of electric razors. Obviously the questions are complex and only biological research can supply the answers.

Q. Is there such a thing as "smoker's lung"? Can't a doctor look at lung tissue and tell whether it came from a smoker?

A. Not according to expert testimony presented before a Congressional committee. One pathologist stated: "It is not possible, grossly or microscopically, or in any other way known to me, to distinguish between the lung of a smoker or a nonsmoker."...

Company: Brown & Williamson [underlining added], Bates No. 0000249440,³ (R. 1628)

³ *Hundreds of thousands* (literally) of incriminating documents are now in the public domain, freely available on the internet, as a result of other anti-tobacco cases, particularly the joint efforts of several states' attorneys-general that resulted in the multi-billion dollar tobacco settlement a few years ago. These documents are commonly organized and sorted by Bates stamp numbers, a convention that we follow herein. The few documents that we have appended to our motion papers, and which are reproduced in the Record on Appeal, were not intended to be a comprehensive display, which would entail warehouses full of papers, but are merely a sampling of the vast documentation that belies the defense's position.

William Kloepfer, Jr., the Director of Public Relations at the Tobacco Institute (the tobacco industry's public relations and lobbying association, co-sponsored by B&W) explained, "Our objective is to bring a seemingly closed subject [the link between smoking and disease] back to the level of controversy in the public's mind." (R. 1629)

Two Tobacco Institute advertisements (R. 1647-1650) appeared in the 1970s to cast doubt on the link between smoking and disease, by shifting the focus of tobacco-related illness to people's personality traits, to cast doubt on the link between smoking and disease. The ads are part of a campaign initiated in 1967 by the Brown & Williamson Tobacco Company, ironically named "Project Lighthouse," in which Brown & Williamson gathered studies and personal commentary to cast doubt on the link between smoking and health, and suggest that smoker's personalities, rather than tobacco, brought on their illnesses:

Statistics are the tools that scientists use, not to find answers, but to find clues. They recognize that they... may give as many false clues as true ones. Statistics have misled us into thinking some foods were dangerous. They once led us to suspect that corn caused pellagra...Ultimately, of course, we discovered that corn had nothing to do with it. A lack of niacin causes pellagra.

We have been misled many times about diseases. It may be that we have been seriously misled about those diseases and conditions of middle and old age which still confront us: heart disease, cancer and the aging process itself.

They have been variously linked with nearly an endless list: bread, butter, milk, sugar, salt, fatty meat, potatoes, liquor, cigarettes, our sedentary society, and our environment. While research on all these continues, as it must, it may be that we are looking in the wrong direction...

It is simply that the likelihood of developing disease may not result to much from any or all of these things but from the fact that the individual who uses them--and especially the one who uses them unthinkingly and excessively--is a special type of person.

He (although it may be a man or a woman) is a "hard driver," a perfectionist who sets high standards for himself and strives mightily to achieve them. He is more open and frank and, in some ways, more sensitive. While he demands more of himself, he is more tolerant of subordinates.

He suffers more, too, and this may be a key to his proneness to disease. He is under more pressure and stress to extend himself, and he is subject to more frustration and anger than the more easygoing. At some point in his life, generally in late middle age, whether he drinks or not, smokes or not, the constant stress he has endured may have used up his inherited capital of resistance to disease.

While it is still a theory, it is one that many scientists find helpful and hopeful. It helps explain many otherwise contradictory figures--why, for instance, non-smokers as well as smokers get the same diseases. And it gives us hope that we may achieve a fuller understanding of ourselves and our human condition.

In the meantime, it is a timely reminder for all of us, and especially for those valuable "hard drivers" among us, whether smokers or no, that easing up life's tensions is not just enjoyable, it may be a necessity.

These facts and statements are presented in the belief that while scientific research will finally resolve the cigarette controversy, pressing issues of public policy require discussion of all sides of our present knowledge. (R. 1647-1648)

For years, the tobacco industry had a perfect record in court, winning case after case, convincing jurors that there was no causal connection between smoking and cancer, or, at least, clouding the issue sufficiently that the plaintiffs could not meet their burden of proof. However, as the scientific proof that smoking causes cancer gradually became overwhelming, and the tobacco industry started to lose cases brought by smokers starting in the mid-late 1990's, the defendant realized that its denials were no longer believed by juries, and the ensuing loss of credibility damaged their defense. (R. 1632) As a result, the defense did a one-hundred-and-eighty-degree turnabout, and now not only admits the link between smoking and tobacco, and the addictive nature of its product, but says that “everybody knew it all along”, so that every smoker is responsible for their own illness. Brown & Williamson thereby would bury its decades of disinformation, ignoring the immense resources it poured into decades of deception, and pretend that nobody ever believed its lies, so that every smoker ignored the “universally-known fact” that tobacco is carcinogenic. Thus, while the defense brief accuses the “plaintiffs of seek[ing] to take ‘victim’ status to an unprecedented level,” the reality is B&W espouses the most hypocritical “blame the victim defense” imaginable.

POINT I

PLAINTIFFS DID NOT SUE THE WRONG DEFENDANT

In the court below, B&W contended that Mrs. Rosen's use of other brands of tobacco during most of her smoking history somehow exonerated it from liability, that Selma sued the "wrong defendants". The defense position was that Selma Rosen should have sued the manufacturers of the cigarettes she smoked later in life. That untenable position has, apparently, been abandoned on appeal. The argument in the court below failed because the defense refused to recognize that it was *their product* that caused the addiction to tobacco that resulted in Selma Rosen's injuries.⁴

Three physical indicia define "addiction," as the term is used in NY:

There are three characteristic mental and physical responses which physicians look for in determining whether a person is an addict: (1)

⁴ The fact that Mrs. Rosen switched brands from time to time is irrelevant to plaintiffs' "theory of the case," because it is black-letter law that an initial tortfeasor is responsible for all the damages that flow from its tort, and cannot avoid liability by the saying that other, subsequent tortfeasors were involved, too. Thus, the car in the back of a "chain collision" is responsible for the injuries sustained by the people ten cars in front of it, if that last car pushed the nine cars ahead, one after another, into the first, like falling dominoes. Glaser v M. Fortunoff of Westbury Corp., 71 NY2d 643, 529 NYS2d 59, 524 NE2d 413; Derby v Prewitt, 12 NY2d 100, 236 NYS2d 953, 187 NE2d 556. Similarly, a tortfeasor whose negligence puts an accident victim into the hospital is liable for the subsequent medical malpractice of the doctors at the hospital, because "but for" the original negligence, the plaintiff would not have been hospitalized in the first place. *See, Siegel, N.Y. Practice*, §168c, "Medical Malpractice and 'Successive Tortfeasor' Cases.

Since B&W's product caused plaintiff's addiction, B&W is liable for all of the harms that followed, even though Selma Rosen switched to other manufacturer's brands later in life.

physical dependence (as evidenced by the occurrence of withdrawal sickness upon the termination of use ...); (2) tolerance ... [and] (3) emotional dependence or habituation.

People of the State New York v Osborne Fuller, 24 N.Y.2d 292, 248 N.E.2d 17 (1969).

Baby Selma Rosen did not display any of the three essential criteria that comprise addiction.

The defense's argument that she was "born addicted" is utterly without expert evidentiary support.⁵

In lieu of the required expert support, the defense substitutes the plaintiff's *lay opinion* that she was addicted at birth; however, Selma Rosen's speculations and beliefs as to her medical condition as a newborn - a time before her earliest memories - are incompetent and not admissible in evidence.⁶

⁵ Evidence of whether a person is "addicted", and timing when they became addicted, are matters beyond the ordinary knowledge and understanding of lay persons, and requires expert medical support. Matteson v. N.Y.C.R. Co., 35 NY 487 (1866).

⁶ "Although lay testimony may be properly used to *supplement* expert medical testimony, expert testimony is required as to all medical matters not within the realm of common knowledge and observation." Benders *N.Y. Evidence - CPLR*, "Expert Witnesses" ¶100.02[13][a], citing Matteson, *supra*.

In contrast, plaintiffs' addiction expert and treating psychiatrist, Dr. Arnold Mandelstam, chose his words with precision, which the defense misconstrues and blurs:

Ms. Rosen was exposed to the addictive substances in tobacco from conception to birth, even before she was born. Her mother smoked cigarettes throughout her pregnancy, while Ms. Rosen was a fetus in the womb. The addictive chemicals in the tobacco smoke inhaled by Ms. Rosen's mother crossed the placenta and more likely than not, affected Ms. Rosen's brain even before she was born, resulting in her being *born with a craving for tobacco smoke*, much as the baby born of a heroin or crack addict is born with his/her mother's drug addiction. This *craving* for tobacco smoke was intensified by Selma's parents and three older siblings smoking while Selma was an infant, further exposing baby Selma to these addictive chemicals through constant exposure to second-hand smoke. Furthermore, Selma's mother would blow smoke into her baby's face from time to time, yet furthering baby Selma's *propensity towards addiction* to tobacco.

As a result, even as an infant, Selma Rosen was adversely affected by tobacco smoke. Throughout her childhood, Selma was continually exposed to smoke at home, promoting, reinforcing, and sustaining her born cravings, and at the same time, inculcating an attitude that smoking was an accepted way of life. Selma has an early memory, as an infant, of being on the beach and finding a butt and asking her family for a light.

For the first four years of her smoking, Ms. Rosen smoked cigarettes manufactured by Brown & Williamson Tobacco Co.'s predecessor company, American Tobacco Co. **It was these**

cigarettes, for which Brown & Williamson Tobacco Co. is liable, that finalized the plaintiff's path to tobacco addiction.⁷

While Dr. Mandelstam analogized baby Selma's "craving" for tobacco smoke to the desire of a crack-addict's newborn for cocaine, he did not say, or even imply, that Selma was a "born addict." He simply said she had a "craving", which does not meet the legal or medical criteria for "addiction". There is no evidence in the Record on Appeal that newborn baby Selma suffered "withdrawal" or "dependence" or "tolerance" - the hallmarks of true addiction - as an addicted baby would. Dr. Mandelstam simply, and accurately, said that Selma was pre-disposed to becoming a tobacco addict; and that she in fact became addicted (the "propensity towards addictions" became "finalized") when she started smoking B&W's Lucky Strike cigarettes at age eleven and continued to smoke them for four years.

The defense's twisting of Dr. Mandelstam's words is a transparent effort to back-date Selma's addiction to the ante-natal period, and shift the blame from B&W to the manufacturer of her mother's cigarettes. This clever sophistry distorts plaintiffs' contentions, and is unsupported by any expert evidence. Despite the

⁷ Point II of the defense brief states that "it is undisputed that defendants [sic] did not cause Mrs. Rosen's addiction". This labeling of a key fact as "undisputed", when our expert directly attests to the causal connection, is characteristic of the defense's glib looseness with the truth.

abundance of expert witnesses on the defense's payroll, there is no expert affidavit from any defense expert stating this conclusion.

Timing exactly when Mrs. Rosen became an addict, is an evidentiary issue that requires expert testimony. It is a medical conclusion or medical diagnosis that a lay jury cannot assess on its own. A plaintiff may not testify to their own diagnosis; that is a function for an expert witness. The only expert evidence on this key point comes from Dr. Mandelstam, and it is contrary to the defense's calculated distortion.

Lacking the necessary expert support for this medical conclusion, the defense tries to substitute Mrs. Rosen's lay opinion as to when she became addicted. That's fine, except that Mrs. Rosen's opinion is incompetent to prove that Mrs. Rosen was "born addicted" - which was never plaintiffs' contention in the first place.

If one accepts the plaintiffs' "theory of the case" that B&W's cigarettes caused Selma Rosen's addiction, even if only *arguendo*, then there is no question that the plaintiffs sued the correct defendant. Our theory of the case is properly supported by the Expert Affidavit of Dr. Mandelstam. It is basic law that on a summary judgment motion, the opposing party's proof must be deemed to be true. The defense's claim that Selma was born addicted is unsupported by competent

proof. That being so, the defense's new argument that plaintiff should have sued the manufacturer of Selma's mother's cigarettes, and therefore sued the wrong defendant, must fail.

POINT II

THE STATUTE OF LIMITATIONS DID NOT EXPIRE

In another new argument that was not raised in the court below, and is again *dehors the record* and unpreserved for appeal, the defense contends that the plaintiff knew (or should have known) she was addicted many years ago, so that the three-year statute of limitations (CPLR 214-c) expired long before this suit was started.⁸ This new argument is simply irrelevant to plaintiffs' case, because Selma Rosen is

⁸ The statute of limitations defense is an affirmative defense on which the defendant has the burden of proof. The Record on Appeal has no defense representation as to exactly when B&W contends the statute expired. This deficiency in the papers before the lower court is enough to defeat the motion on strictly technical grounds, but as is shown *infra*, the case is timely, so that the defense's technical deficiencies don't matter.

In 1986, with the enactment of CPLR 214-c, the legislature adopted a "discovery" rule for personal injury cases based on "exposure" to a foreign substance. Under subdivision 2 of the statute, the three-year time period in such cases begins to run not from the exposure itself, but from the later time when the plaintiff discovers or with reasonable diligence should have discovered the injury. There is no outer time limit. As long as the claim is brought within three years from discovery, it makes no difference when the exposure first came about; it could have been decades earlier. In Rothstein v. Tennessee Gas Pipeline Co., 87 N.Y.2d 90, 637 N.Y.S.2d 674, 661 N.E.2d 146 (1995), for example, the exposure had been to a substance given the plaintiff 40 years earlier.

Selma Rosen's case was brought within three years of discovery of her cancer, and thus, is timely.

not suing for “addiction”.⁹ Selma Rosen is suing because the defendant’s product gave her lung cancer.

It is not up to the defense to decide for themselves what injuries the plaintiff is suing for. That prerogative is strictly ours. We sued for cancer and its consequences. Selma Rosen never sued for “addiction.”

The defense has deliberately confused a fact, or circumstance, of addiction, with an “injury”. Plaintiff is indeed addicted to tobacco, but her addiction is not an “injury”, or at least, it is not an injury for which she seeks compensation. She only seeks compensation for developing lung cancer, and the cancer’s consequences to her life. To understand this better, permit us to draw an analogy:

If the plaintiff were hurt in a two-car intersection accident with a massive impact, and sustained a fracture from the collision, no one would say that plaintiff is suing for an “impact”. Yet, it is the impact that caused the fracture. The collision, or impact, is the cause of the injury (the fracture), but the impact is not

⁹ Ordinarily, to see what “injuries” are being sued for, we would look to the “injuries paragraph” in the Bill of Particulars. However, the defense never demanded a bill of particulars, so there is no “injuries paragraph” to look at. Instead of demanding particulars, B&W served a set of factual Interrogatories, which pointedly made no inquiry as to what injuries are being claimed.

Since we have no bill of particulars to look to, we must look to plaintiffs’ Complaint, discussed *infra*.

the injury itself. The “injuries paragraph” of the plaintiff’s bill of particulars would list the fracture, and its sequella, as injuries. The fact of the collision, or impact, would appear in the “negligence paragraph”, not the “injuries paragraph”.

The defendant’s causing the plaintiff’s addiction is analogous to the defendant driver causing a collision. It is an act of negligence. The addiction is not the injury, any more than the impact is an injury, although both can be the *cause* of injuries.

It is so obvious in tobacco litigation that cancer patients are suing tobacco companies for causing them to develop cancers, that the defense *didn’t even ask* for an “injuries paragraph” in their Interrogatories. (R. 105-123) It is taken for granted that the plaintiff is suing because the plaintiff contends that tobacco caused their cancer.

In this case, two paragraphs in plaintiffs’ Complaint (R. 49-63) set forth the injuries that B&W’s tobacco is alleged to cause, and the injuries that Selma Rosen suffered. First is the list of tobacco-related diseases:

Propensity for harm: Defendants' cigarette products, when used as intended, were highly likely to cause, or contribute to in substantial fashion, the following human illnesses, injuries, and conditions:

- i. **bronchogenic carcinoma or lung cancer** of all cell types.
- ii. **chronic obstructive pulmonary disease** of all types, including emphysema, chronic bronchitis, and reversible airway obstruction.
- iii. **cardiovascular disease** including atherosclerosis and its consequences, including myocardial infarction (heart attack), cerebrovascular accident (stroke), peripheral vascular disease, aneurysm, and other conditions.
- iv. **cancers of the kidney, bladder, brain, larynx, and other organs.**
- v. **genetic damage** to cells of the airways, lungs, and other organs.
- vi. **impairment of lung function.**
- vii. other types of injuries. (R. 50-51)

Notably, addiction is not listed as an “injury” in this list of ailments caused by the defendant’s tobacco.

Then, Selma Rosen’s Complaint goes on to specifically state the “injuries” that Selma Rosen is suing for:

20. **As a direct and proximate result of plaintiff's use of the defendants' cigarette products, plaintiff suffered bodily injury, to wit: cancer, irreversible and reversible small and large airway obstruction, permanent cellular damage, genetic changes in lung and airway cells, cardiovascular injuries, and other injuries.** (R. 52)

Again, “addiction” is not listed as an “injury” for which compensation is sought.

Selma Rosen’s Complaint goes on to discuss that use of tobacco was likely to cause addiction so that B&W had a duty to warn smokers of the habituating nature

of its product, but at no time is “addiction” or “habituation” ever listed as an injury in the Complaint.

Thus, by claiming that Selma Rosen’s “injury” is “addiction,” the defense distorts plaintiffs’ contentions to suit their own purposes. The defense’s effort to mis-state and back-date Selma Rosen’s injury, to fabricate a statute of limitations defense, is false.

Selma Rosen was diagnosed with lung cancer in the Fall of 1995. Since that is the main injury (and chronologically, the first injury) for which she is suing, the three-year statute of limitations began to run when she was diagnosed with cancer in 1995, and did not expire until the Fall of 1998.

This case was put into suit in the summer of 1997, approximately two years after Selma Rosen was diagnosed with lung cancer. It is easily within the three-year statute of limitations. Thus, the defendant’s statute of limitations defense must fail.

POINT III

THE DEFENSE’S ARGUMENTS THAT “EVERYBODY KNEW THAT TOBACCO WAS DANGEROUS” CAN’T BE TIED TO THIS PLAINTIFF, AND, AT BEST, RAISE CONTESTED ISSUES OF FACT

Central to the defense of every tobacco case is the argument that every smoker caused their own injuries by smoking despite knowledge that smoking is harmful, a variant of “assumption of risk”. In furtherance of that defense, Brown & Williamson gave us a presentation by its hired historian, who has assembled masses of documents to the effect that the dangers of tobacco were reported in various media from time to time, so that every smoker had to be aware of those dangers and voluntarily accepted them.

In the lower court, the defense brief did not lay out satisfactory specific proof that *Selma Rosen* knew the risks of smoking, far less accepted those risks. The defense did not show that *Selma Rosen* actually read any specific articles, heard any such radio announcements, etc.¹⁰ Instead of presenting concise and specific proof of Selma Rosen’s actual knowledge, their historian *inferred* that the plaintiff *might*

¹⁰ Now, on appeal, the defense has seen the error of their ways, and is attempting to correct their past deficiency. They have combed through the huge Record on Appeal and found a handful of passing comments buried in thousands of pages of deposition testimony, that show that over the course of forty years, Selma Rosen heard, or made, a half a dozen or so comments about the dangers of smoking.

have seen magazines or television programs or other materials that contained sometimes *might have* contained such information. But their motion papers contained absolutely no direct proof that this plaintiff actually saw, heard, read, or absorbed any information describing the health risks of smoking, or that if any such information that *happened to have been there*, that it was meaningful to her.¹¹ Furthermore, the defense made no effort to determine *when* Selma Rosen acquired her currently-held knowledge regarding the dangers of smoking. Selma has attended innumerable smoking-cessation classes in her various “quit attempts”, and had lengthy treatment for her lung cancer. Her experience led her to become an anti-smoking activist herself. She currently sponsors others who are trying to quit smoking through Nicotine Anonymous, and occasionally leads stop-smoking meetings. (R. 239-240) She has been engaged in this tobacco litigation, requiring her active involvement in case development, for years prior to her deposition. For

¹¹ The defense deposed every one of Selma Rosen’s surviving family members, including her husband, her ex-husband, her sons, her sisters and brother. Each was interrogated at length about “what did she know and when did she know it”. This exhaustive effort proved fruitless, however, as not one testified that Selma read or heard any articles or presentations that gave her any serious insight into the dangers of tobacco. On the contrary, each relative testified that Selma was not a “reader”, and paid little attention to the news on television or radio. Selma herself testified to that, too. (R. 364)

The occasional, fleeting mentions of the dangers of tobacco that these exhaustive EBTs elicited, spanning many decades of smoking, cannot possibly support the burden of proof on this “assumption of risk” affirmative defense such as to support summary judgment.

the defense to assess her current knowledge base at deposition, after her multiple, relatively recent experiences in which extensive anti-smoking information was received and dispensed, and impute that subsequently-acquired knowledge to events thirty or even forty years earlier, is grievously flawed logic and is flatly unfair.

Lacking direct proof of Selma Rosen's knowledge of the dangers of smoking, the defense substituted the self-serving *inference drawn from circumstantial evidence* assembled by their historian. And that *inference* is speculative, conjectural, and defective for at least two independent reasons: **(1)** The defense is estopped from claiming that information describing smoking's dangers was in the public domain, because they spent decades actively disputing the accuracy of that information; and **(2)** Selma Rosen's addiction to tobacco made her powerless to stop smoking, regardless of whatever information that she did, or did not, have.

A. BROWN & WILLIAMSON IS ESTOPPED FROM ARGUING THAT SELMA ROSEN "KNEW" OF THE DANGERS OF TOBACCO - DANGERS THAT THE DEFENDANT SPENT YEARS DENYING EXISTED.

Until recently, Brown & Williamson Tobacco Co., its predecessor, American Tobacco Co., and its fellow tobacco companies, vigorously denied that tobacco was harmful. (R. 1626) Those who can remember 1970's and 1980's, can remember

the tobacco companies constantly challenging the connection between tobacco and cancer; the fight at first to prevent, and later, to dilute, the Surgeon General's warnings on cigarette packages; the fight to continue print and television advertising; the advertisements contending that "The Jury Is Still Out" on the connection between tobacco and illness, etc. (R. 1626) Indeed, the tobacco industry's longstanding efforts to cast doubt on the harmfulness of its products through its public relations arm, "The Tobacco Institute", is such generally-recognized and widespread common knowledge as to be subject to judicial notice.

For example, in 1954 (one year before eleven-year-old Selma Rosen began smoking Lucky Strikes) the major cigarette makers jointly published the notorious "Frank Statement to Cigarette Smokers" (reprinted in its entirety at R. 1646). The signature of Brown & Williamson Tobacco Co. is proudly affixed. This open letter to the American public claimed that "eminent doctors and research scientists" had critiqued the "'theory' that cigarette smoking is in some way [linked] with lung cancer in human beings," and directly denied that smoking causes cancer. The letter asserted that "one by one these charges [against tobacco] have been abandoned for lack of evidence" - an outrageous lie, even then - and asserted plainly and falsely that "the products we make are not injurious to health." Brown & Williamson flatly

disputed that its products were dangerous, for the specific purpose of continuing the public's consumption of its products.

As detailed in plaintiffs' Counter-Statement of Facts, *supra*, Brown & Williamson's internal manual from 1979 (by which time Selma Rosen had been smoking for 14 years) entitled "Tobacco: Issues, Answers, Actions", was a primer for employees on how to answer nagging questions like "How can you deny the overwhelming statistical evidence that smoking causes disease?" and "Does it bother your conscience to sell cigarettes?" It instructed B&W's employees on how to participate in the industry's pro-tobacco "grass roots" lobbying structure, Tobacco Action Network. Brown & Williamson now argues that everyone has long been fully aware of the link between smoking and health, but in the Questions & Answers section of its manual pertaining to smoking and health, employees were instructed to say, over and over, that the case against smoking isn't proven, that it has been based on flawed statistics and unreliable data.

From Page 33, Bates No. 0000249440:

Q. Does smoking cause lung cancer, emphysema, cardiovascular disease and bronchitis?

A. No one knows. Scientific research has not established that smoking causes disease. We all know that many scientists have said smoking causes certain diseases, but other respected researchers believe cause has not been shown. One thing is clear--more research is needed.

Q. How can you deny the overwhelming statistical evidence that smoking causes disease?

A. The case against smoking is based almost entirely on inferences from statistics. But most scientists will agree that statistical associations cannot establish cause and effect....By the way, there is a statistical association between lung cancer and the use of electric razors. Obviously the questions are complex and only biological research can supply the answers.

Q. Is there such a thing as "smoker's lung"? Can't a doctor look at lung tissue and tell whether it came from a smoker?

A. Not according to expert testimony presented before a Congressional committee. One pathologist stated: "It is not possible, grossly or microscopically, or in any other way known to me, to distinguish between the lung of a smoker or a nonsmoker."...

William Kloepfer, Jr., Director of Public Relations at the Tobacco Institute (the tobacco industry's public relations and lobbying association): "Our objective is to bring a seemingly closed subject [the link between smoking and disease] back to the level of controversy in the public's mind."

Two advertisements (annexed as Exhibit "C" to plaintiff's opposing papers, reproduced at R. 1648-1650) were publishing in the 1970s to cast doubt on the link between smoking and disease, shifting the focus of tobacco-induced illnesses to smokers' personality traits, to cast doubt on the link between smoking and disease. The ads are part of a campaign initiated in 1967, ironically called "Project

Lighthouse,” by Brown & Williamson, to cast doubt on the link between smoking and health:

Statistics are the tools that scientists use, not to find answers, but to find clues. They recognize that they... may give as many false clues as true ones...

We have been misled many times about diseases. It may be that we have been seriously misled about those diseases and conditions of middle and old age which still confront us: heart disease, cancer and the aging process itself.

They have been variously linked with nearly an endless list: bread, butter, milk, sugar, salt, fatty meat, potatoes, liquor, cigarettes, our sedentary society, and our environment. While research on all these continues, as it must, it may be that we are looking in the wrong direction...

It is simply that the likelihood of developing disease may not result to much from any or all of these things but from the fact that the individual who uses them--and especially the one who uses them unthinkingly and excessively--is a special type of person.

He (although it may be a man or a woman) is a "hard driver," a perfectionist who sets high standards for himself and strives mightily to achieve them. He is more open and frank and, in some ways, more sensitive. While he demands more of himself, he is more tolerant of subordinates.

He suffers more, too, and this may be a key to his proneness to disease. He is under more pressure and stress to extend himself, and he is subject to more frustration and anger than the more easygoing. At some point in his life, generally in late middle age, whether he

drinks or not, smokes or not, the constant stress he has endured may have used up his inherited capital of resistance to disease.

While it is still a theory, it is one that many scientists find helpful and hopeful. It helps explain many otherwise contradictory figures--why, for instance, non-smokers as well as smokers get the same diseases. And it gives us hope that we may achieve a fuller understanding of ourselves and our human condition.

In the meantime, it is a timely reminder for all of us, and especially for those valuable "hard drivers" among us, whether smokers or no, that easing up life's tensions is not just enjoyable, it may be a necessity.

These facts and statements are presented in the belief that while scientific research will finally resolve the cigarette controversy, pressing issues of public policy require discussion of all sides of our present knowledge.

Contrary to the defendant's position, it was the dangerous lack of common knowledge of smoking's dangers that prompted congressional action. The defense has it exactly backwards, putting the proverbial cart before the horse, arguing that the warnings on cigarette packages (which didn't exist at all for the first eleven years that Selma Rosen was smoking) prove that "everybody" knew smoking was dangerous. However, the history of those mandated warnings demonstrates precisely the opposite: The warnings were needed because people did NOT appreciate the dangers of smoking.

There were no cautionary labeling or warnings on cigarettes until 1966, when the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), Pub.L. 89-92, §§ 2, 79 Stat. 282 (1966), required cigarette packages to have the tentative "Caution: Cigarette Smoking *May* Be Hazardous to Your Health." Congress subsequently found that the 1966 Act and its bland warning language, failed to adequately apprise the public of the health risks of smoking - largely because of the tobacco industry's continued, systemic efforts to nullify public awareness of tobacco's health risks. Thereafter, Congress passed successive amendments strengthening the Labeling Act, in hopes of broadening public awareness of tobacco's dangers. In 1969, Congress amended the Labeling Act to require that cigarette packages read "Warning: The Surgeon General Has Determined That Cigarette Smoking *Is* Dangerous to Your Health." Public Health Cigarette Smoking Act of 1969, Pub.L. 91-222, 84 Stat. 87, as amended, 15 U.S.C. §§§§ 1331-1340. Even then, the dreaded word "cancer" was never used. To provide greater specificity regarding the risks of smoking, Congress further amended the Labeling Act in 1984, mandating a set of four rotating labels, including: "Surgeon General's

Warning: Smoking Causes Lung Cancer, Heart Disease, and Emphysema." Pub.L. 98-474, 98 Stat. 2200, 2201.

These continued amendments to the Labeling Act demonstrate the Congressional finding that long before Selma Rosen started smoking, and as late as 1984,¹² the public did NOT possess adequate knowledge as to the dangers posed by cigarette smoking. In enacting the 1966 Labeling Act and its successive amendments in 1969 and 1984, Congress recognized that the link between smoking and lung cancer was not "common knowledge." The Labeling Act created a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health," and was explicitly designed to ensure that "the public may be adequately informed that cigarette smoking may be hazardous to health." Pub.L. 89-92, §§ 2, 79 Stat. 282 (codified at 15 U.S.C. §§ 1331); *see Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146 L. Ed. 2d 121, 120 S. Ct. 1291, 1309 (2000).

¹² By the time the 1984 warnings came out, using the word "cancer" for the first time, Selma Rosen had been smoking almost 30 years!

Still, Brown & Williamson continued to challenge the evidence that smoking caused illness. In 1992, the Tobacco Institute issued a white paper (R. 1657-1660) assailing the methodology used by the Environmental Protection Agency that linked smoking and disease, part of the continuing strategy to cast doubt on that relationship, mislead the public, and perpetuate smokers' consumption of tobacco products.

Thus, we see a decades-long, concerted campaign by Brown & Williamson, united with other tobacco companies, individually and collectively through The Tobacco Institute, to dispute the dangers of smoking. That organized, orchestrated crusade of lies was only abandoned in the last few years, when the combined weight of overwhelming scientific proof of tobacco's dangers, the settlement of the multi-state tobacco cases brought by attorneys-general around the country, and the first jury verdicts holding tobacco company's liable for smokers' (and second-hand smoke-induced) cancers, made the continued denials look foolish.

So, the tobacco companies did a 180-degree reversal, and abandoning years of denying the dangers of tobacco, and foregoing their enormous prior efforts to deceive the public into doubting the link between smoking and disease, now claim

instead that “everybody” knew how dangerous tobacco was and therefore is responsible for their own illnesses as a matter of “freedom of choice.” Evidently, the hundreds of millions of dollars spent arguing that the link between smoking and cancer was illusory, was totally ineffectual. The hypocrisy and disingenuousness of the argument is astounding.

These facts *estop* Brown & Williamson from arguing that the plaintiff knew of tobacco’s dangers. In essence, the defense is arguing that Selma Rosen should be non-suited because she was gullible enough to believe the defendant’s concerted dis-information campaign to challenge and question the growing body of scientific proof linking tobacco to lung cancer and other diseases. Such an argument is offensive in its hypocrisy, and easily fulfills all of the elements for estoppel.

B. SELMA ROSEN’S ADDICTION RENDERED HER HELPLESS TO HAVE “FREE CHOICE”.

The Expert Affirmation from Dr. Arnold Mandelstam, a licensed physician and Selma Rosen’s psychiatrist of many years, explains that:

The defense typically mis-characterizes a plaintiff's smoking as a "freedom of choice" issue. That philosophical argument is medically incorrect and misleading. People who are addicts, such as Selma Rosen, have no "freedom of choice". They are "hooked" on tobacco, just as a drug addict is "hooked" on narcotics, cocaine, or crack.

For the first four years of her smoking, Ms. Rosen smoked cigarettes manufactured by Brown & Williamson Tobacco Co.'s predecessor company, American Tobacco Co. It was these cigarettes, for which Brown & Williamson Tobacco Co. is liable, that finalized the plaintiff's path to tobacco addiction. Accordingly, Ms. Rosen's addiction to tobacco, and the catastrophic consequences that addiction caused to her health, can be laid squarely at the foot of Brown & Williamson Tobacco Co. That Ms. Rosen switched brands and used other manufacturer's products from time to time over the next thirty-two years is of no consequence, as it was the defendant's (mis)conduct that substantially caused her addiction and led to her lung cancer.

As a result, the defense's. position that their products did not cause Ms. Rosen's long cancer or other injuries, is mistaken, false, and misleading. Brown & Williamson Tobacco Co.'s products (or those of its predecessor) set in motion the addiction that resulted in Ms. Rosen's injuries. Therefore, Brown & Williamson Tobacco Co. proximately caused Selma Rosen's lung cancer, and is responsible for her cancer-related injuries herein.

This medical proof destroys the defense's "freedom of choice" argument.

C. THESE SAME DEFENSE ARGUMENTS WERE REJECTED BY COURT AFTER COURT, IN OTHER CASES.

The defense's arguments for summary judgment are not new or novel. Despite its whopping length, the motion is largely "boiler plate," recycled material that was proffered to other courts, and soundly rejected. There is persuasive precedent calling for the rejection of the same arguments here.

In another case defended by the same moving defense firm (Chardbourne & Parke, LLP), the court found:

Public awareness of a broad-based and ambiguous risk that smoking might be tenuously connected to lung cancer does not suggest "common knowledge" of the known scientific fact that cigarette smoking is a strong precipitant of lung cancer. See, e.g., Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1526 (D. Kan. 1995) (rejecting assertion "that because there is general common knowledge that cigarettes are dangerous, users of cigarettes are therefore imputed with knowledge of the extent and nature of all dangers relating to cigarettes"). It is one thing to be aware generally that a product might have an attenuated and theoretical connection with a deadly disease like lung cancer; it is another altogether to comprehend that it is the cause of an overwhelming majority of lung cancer cases. See J.A. at 501. The "common knowledge" requirement is emasculated if a defendant may show merely that the public was aware that a product presented health risks at some vague, unspecified, and undifferentiated level.

Thus, in Tompkin v. American Brands, et al., 219 F.3d 566; 2000 U.S. App. LEXIS 17722; 2000 FED App. 0245P (6th Cir.); CCH Prod. Liab. Rep. P15, 857,

the court denied summary judgment, holding that “Viewing the "common knowledge" issue through the proper lenses, we conclude that a rational jury could find the absence of "common knowledge," between 1950 and 1965, of the nature of the link between smoking and lung cancer.” The same applies directly here.

D. THE SECOND DEPARTMENT HAS ALREADY RULED THAT CONSUMERS WERE CONFUSED BY THE DEFENDANT’S DISINFORMATION CAMPAIGN. THE DEFENSE IS COLLATERALLY ESTOPPED FROM RE-LITIGATING THE SAME ISSUE.

In Miele v. American Tobacco Co., *N.Y.L.J.* 7484-02, Jan. 6, 2004, the Second Department reversed a Nassau County Supreme Court decision awarding summary judgment to the defendants, and reinstated the plaintiff’s cause of action for fraudulent concealment, which allegedly occurred after the 1969 warning law, and the plaintiff’s design defect claims. The decision addressed the manufacturers’ duty to warn before the 1969 enactment of the Public Health Cigarette Act. The appeals court found that conflicting evidence precluded summary judgment:

We find ... that the plaintiff, in opposition to the motion, raised issues of fact as to whether consumers were fully aware of the health hazards posed by smoking cigarettes when the decedent began smoking, particularly considering that the respondents disseminated information, at the relevant time, disputing the validity of the scientific evidence linking cigarette smoking to cancer and other diseases.

The Second Department also wrote that the lower court in *Miele* improperly disregarded the plaintiff's evidence¹³ that showed that consumers were uncertain about smoking's health hazards:

“[I]n cases where reasonable minds might disagree as to the extent of plaintiff's knowledge of the hazard, the question is for the jury.” Liriano v. Hobart Corp., 92 N.Y.2d 232, citing Jiminez v. Dreis & Krump Mfg. Co., 736 F.2d 51, 55-56 [2nd Cir. 1984].

Having litigated this very issue to an unsuccessful conclusion before this Court in *Miele*, the matter is *res judicata*. The defense is collaterally estopped from relitigating the issue in *Rosen*.

¹³ The defense may argue that *Miele* is distinguishable because the plaintiff in *Miele* rebutted the presentation from the defense's tobacco historian with a counter-presentation by an opposing historian, whereas Selma Rosen did not.

We respectfully suggest that it is not always necessary to fight fire with the same kind of fire. Instead of producing battling historians, Selma Rosen developed a record that clearly documented public confusion through the Congressional intent to “un-confuse” the public with labelling laws; that B&W fought tirelessly to emasculate those laws; that B&W's spent millions of dollars in public relations to raise and preserve popular doubts about the link between smoking and disease; etc. Our Record on Appeal adequately demonstrates public confusion about the dangers of smoking just as surely as would the affidavit of another tobacco historian.

POINT IV

PLAINTIFFS' "FAILURE TO WARN" CLAIMS ARE PROPERLY SUPPORTED

The defense's argument that it had no duty to warn is explicitly dependent on the defense's premise that Selma Rosen knew (or should have known) of the addictive nature of cigarettes even before she started smoking Lucky Strikes at age eleven years. (Defense Brief Point III(b), at page 25.) However, there is no evidence that 11-year-old Selma had any meaningful awareness of tobacco's addictive or carcinogenic properties. In fact, it is doubtful that an eleven year old child has the legal capacity of understanding such complex matters *as a matter of law*. The defense's argument that the infant Selma Rosen "knew or should have known" of dangers that B&W vociferously denied existed at the time, is absurd.

As discussed in Point III, *supra*, the same "common knowledge" argument was discarded by the Court, rejecting the defense motion for summary judgment, in Tompkin v. American Brands, et al., 219 F.3d 566; 2000 U.S. App. LEXIS 17722; 2000 FED App. 0245P (6th Cir.); CCH Prod. Liab. Rep. P15, 857. The defense's effort to impose such alleged "common knowledge" on the then-infant plaintiff must fail.

Likewise, the defense's efforts to shift the burden of proving that warning would have deterred infant Selma from smoking, must also fail. At trial, the burden of proving the elements of her claims is on the plaintiff. But on summary judgment, the burden of proving entitlement is on the movant. The opponent is given the benefit of every doubt. Summary judgment is often termed "a drastic remedy," and will not be granted if there is any doubt as to the existence of a triable issue. Moskowitz v. Garlock, 23 A.D.2d 943, 259 N.Y.S.2d 1003 (3d Dep't 1965).

The defense's contention that proper warnings - which were absent - would not have stopped Selma Rosen from smoking, is hopelessly speculative. That Selma Rosen smoked her first cigarette at the behest of a friend, that she wanted to look "cool", etc., begs the question. Selma Rosen was no different than the scores of millions of smokers who started smoking in ignorance of the dangers of what they were doing. Some might have been deterred by proper warnings, others not. One cannot extrapolate that any individual smoker, far less Selma Rosen in particular, would have done the same had she been properly warned. One cannot assume that her friend would have offered Selma the first cigarette, had the friend been properly warned. There is no evidence, not even an answer to a hypothetical question posed of the defense's psychiatrist, to support the defense's contention that Selma Rosen

would have started smoking despite warnings. The defense substitutes conjecture for evidence. The “Frank Statement” (described in detail at page 43, *infra*) shows that the defendant was falsely assuring the public that “our products do not cause disease” - *the perfect opposite of a proper warning*. And the first tepid warnings on cigarette packages did not appear until Selma had long been a habitual smoker.

The defense’s contention that all failure-to-warn claims must fail after federally-mandated warnings were imposed on cigarette packages, cannot be applied to Selma Rosen, particularly in light of this Court’s holdings in *Miele*. The public’s awareness of the risks of smoking circa 1955, when Selma Rosen first started, is uncertain and subject to much argument. Dr. Mandelstam explained, without contradiction, that Selma Rosen’s addiction deprived her of freedom of choice. (R. 1638-1641) Plaintiffs agree that once Selma Rosen was long-addicted, the package warnings did not deter her from continuing to smoke. But Selma Rosen’s smoking started in 1955, one year after Brown & Williamson co-sponsored the notorious “Frank Statement” discussed *infra* - an “anti-warning” falsely proclaiming the *safety* of cigarettes. Selma Rosen was seduced by her pre-disposition to smoking, coupled

with the defendant's public campaign of lies.¹⁴ By the time that warning labels on cigarettes , the inexorable course leading to her cancer was set.

PROOF OF A SAFER DESIGN ALTERNATIVE:

The defense's Appellate Brief *assumes* arguments that were not made in the lower court. It *assumes* that the underlying summary judgment motion contained movant's arguments and proof that no safer design was possible - an essential element needed for summary judgment - but the defense made no such argument, and offered no such proof. The burden of rebuttal does not shift to the plaintiff until/unless the defense makes out a case requiring rebuttal. In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the U.S. Supreme Court held that the resisting party need not come forward with proof to sustain its claim until the moving party has demonstrated something tending to show some basic element missing from the claim. B&W not only failed to do so in the lower court, they failed to even *try*. That being so, they may not raise such an argument for the first time on appeal. (See Point V, *infra*),

¹⁴ The defendant's disinformation campaign worked. At deposition, Mrs. Rosen testified that "there was information... that clouded the definitiveness of the Surgeon General's information, and [made me] doubtful about the Surgeon General['s Report]... Just being in a state of doubt, you know, like I'm not so sure that this is true, and then went on about my business; and every time the drug [nicotine] called my name, I would light up another cigarette, and I wouldn't care about anything except getting my next cigarette into my mouth and the nicotine into my body" (R. 372-373)

PROOF OF CONSPIRACY AND FRAUD:

The defense argues that plaintiff failed to offer evidence of conspiracy between B&W and other tobacco manufacturers. They are right, but only insofar as their summary judgment motion never sought dismissal for lack of proof of conspiracy or fraud! Again, the defense is raising issues on appeal for the first time, that were never addressed in the lower court. Plaintiffs had no duty to offer proof of conspiracy and fraud in the lower court, because the defense never brought it up.

However, even without conspiracy and fraud being at issue in lower Court, plaintiffs produced the notorious “Frank Statement to Cigarette Smokers”(R. 1646), co-sponsored by B&W. The Frank Statement was a full-page advertisement casting doubts on the dangers of smoking, placed in 448 newspapers in over 200 cities around the country on January 4, 1954 by the “Tobacco Industry Research Committee” representing all of the major American tobacco manufacturers (including defendant B&W). This event started the most successful and long-running corporate disinformation campaign ever. B&W was an active participant. Since that time (1954), more than 20 million American smokers have died from diseases that the industry once insisted are not smoking-related. (That B&W’s website now freely admits what it previously vehemently denied, is succinct proof of its prior fraud.) According to the

Center for Disease Control, whose findings are properly subject to judicial notice, tobacco kills more than 442,398 people annually in the United States alone. The Frank Statement, and disinformation campaign worked. Smokers continued to smoke; others took up the habit. According to expert reports submitted by the Department of Justice in its upcoming RICO case against the industry, the tobacco industry's disinformation conspiracy produced between \$552 billion to \$926 billion in additional profits for the tobacco industry and its stockholders. Thus, Brown & Williamson had a mighty motivation to engage in this conspiracy to delude and defraud the public. And Selma Rosen, in particular, was misled and victimized by the defendant's lies. B&W encouraged the American people to choose "which side of the debate" to believe, and Selma Rosen believed B&W's false publicity. She was pre-disposed to believe it, and the uncontradicted testimony is that she did believe it. Mrs. Rosen was asked at deposition why she continued to smoke even though she had some vague, general awareness that smoking was dangerous. She testified:

Q. I wanted to know whether there was some source of information that you held onto, to support your denial of health risks.

A. Throughout the years, not only in '95, but throughout the years, the sources were arguments in the media. You know, for every argument that there was - that health risks in fact existed and were viable, there were also arguments saying that there's no conclusive evidence, this - you know, nothing's been proven, the jury is still

out on that. And I, of course, since I had this need for this drug [tobacco], would much rather believe that than the other, so I did.

* * * * *

Q. And therefore, you chose to believe the people who were questioning the health risks of smoking, correct?

A. Yes. [Plaintiff's deposition at pages 119-120, R. 263)]

Of course, those people "who were questioning the health risks of smoking," contending that "nothing's been proven," and that "the jury is still out on that", were none other than the spokesmen of Brown & Williamson and its paid lobbyists/spokesmen, The Tobacco Institute.

It is no coincidence that Mrs. Rosen's answer closely parallels the arguments made in the Frank Statement.¹⁵ **Her testimony proves that she was actually defrauded by B&W's "Frank Statement" falsely denying the dangers of smoking.**¹⁶

¹⁵ The plaintiff's explanations - "there's no conclusive evidence", "nothing's been proven", "the jury's still out on that" - are a near-*verbatim* repetition of B&W's "company line". Although the plaintiff does not remember specifically seeing the "Frank Statement", it is obvious that she absorbed its false message.

¹⁶ Brown & Williamson actually quoted this very same testimony in their motion papers (R. 34) to show that Mrs. Rosen was a fool who had "assumed the risks" of smoking. We think it shows just the opposite: Mrs. Rosen was fooled and misled by the defendant's deliberate campaign of lies.

B&W's signature at the bottom of the Frank Statement is direct evidence that was before the lower court, of an "actual agreement" entered into by B&W with its co-conspirators, to mislead the American public (including Selma Rosen, who was particularly susceptible to the industry's lies) about the dangers of smoking.

Fifteen years later, (and five years after warnings first appeared on cigarette packages) in on September 4, 1969, American Tobacco Co. (before it merged with defendant B&W) published a full-page ad in the *New York Times*, withdrawing its advertising from the newspaper, defiantly declaring:

Sure there are statistics associating lung cancer and cigarettes. There are [also] statistics associating lung cancer with divorce, and even with lack of sleep. But no scientist has produced clinical or biological proof that cigarettes cause the diseases they are accused of causing. After 15 years of trying, nobody has induced lung cancer in animals with cigarette smoke.

We believe the anticigarette theory is a bum rap. And each time the Congress of the United States has held Hearings [sic] on the cigarette controversy, distinguished independent scientists have gone to Washington to say so.

Therefore, we are not going to knuckle under to the Times or anybody else who tries to force us to accept a theory which, in the opinion of men you should know, is half-baked. ... We think the New York Times was wrong in 1884! We think it is wrong in 1969!

[signed, The American Tobacco Company]

As recently as 1994, the presidents of the seven major tobacco companies (subsequently derided as “the seven dwarfs”) stood before the U.S. Congress, and uniformly swore under oath that their cigarettes did not cause cancer.

In marked contrast to these historical conspiracies to lie about the dangers of their products, B&W’s website now concedes exactly the opposite:

Smoking and Disease

Smoking cigarettes is a cause of lung cancer, emphysema, heart disease and other diseases.

Cigarette Smoking and Addiction

Smoking cigarettes is addictive and many smokers find it difficult to quit.

Thus, B&W’s argument that there was no proof of an “actual agreement” to support the charges of conspiracy and fraud, is mistaken. The joint publication of the “Frank Statement” denying that smoking is dangerous was part of an “actual agreement,” an overt and very public conspiracy, to delude and defraud. The collective funding of “Tobacco Industry Research Committee” to further mislead the public for the next twenty years was part of an actual conspiracy. The seven company presidents denying the dangers of tobacco before Congress, using identical words in a scripted text, was part of an actual conspiracy.

Recent Developments in NY Tobacco Litigation:

The defendant's orchestrated campaign of lies suffered two recent, devastating setbacks in New York. Just a few weeks ago, on December 18, 2003, a Brooklyn jury returned a verdict in Frankson v. Brown & Williamson Tobacco Co. Decedent Harry Frankson smoked Lucky Strikes, the same as Selma Rosen, starting in 1954 until 1998, resulting in his death from lung cancer in 1999. He began smoking at the age of 13. He tried to quit (and failed) many times. Harry Frankson was born in 1941 and died in February 1999, at age 58. The jury awarded \$350,000 for compensatory damages against Brown & Williamson as the successor to the American Tobacco Company. In the punitive damages phase, the jury awarded \$8,000,000.00 for Brown & Williamson's fraudulent concealment of the risks of smoking.

The parallels between Harry Frankson's case and Selma Rosen's case, are frightening. If the *Frankson* verdict is sustained on appeal, the issues of negligence, design defect, conspiracy, and the like, may be *collateral estopped* against B&W in Selma Rosen's case. And just as *Frankson* was allowed to go to a jury, *Rosen* should be allowed to go to a jury.

Also, just in January, in Miele v. American Tobacco Co., *N.Y.L.J.* 7484-02, Jan. 6, 2004, the Second Department reinstated claims against Brown & Williamson,

along with several other tobacco companies, asserting that they failed to warn consumers about the dangers of smoking prior to the 1969 federal law that required warnings on packaging. The court's 3-1 reversal also upheld the plaintiff's claims -- asserted under a negligence theory -- that the manufacturers acted in concert to conceal the risks of smoking. The decision reinstated the plaintiff's cause of action for fraudulent concealment, which allegedly occurred after the 1969 warning law, and the plaintiff's design defect claims. The decision addressed the lack of appellate guidance on the manufacturers' duty to warn before the 1969 enactment of the Public Health Cigarette Act. The appeals court found that conflicting evidence precluded summary judgment:

"We find ... that the plaintiff, in opposition to the motion, raised issues of fact as to whether consumers were fully aware of the health hazards posed by smoking cigarettes when the decedent began smoking, particularly considering that the respondents disseminated information, at the relevant time, disputing the validity of the scientific evidence linking cigarette smoking to cancer and other diseases."

The Second Department also wrote that the lower court in *Miele* improperly disregarded evidence presented by the plaintiff's expert, which indicated that consumers were uncertain about smoking's health hazards.

However, in the case at bar, the lower court correctly construed plaintiffs'

evidence in a light most favorable to the one moved against, the plaintiffs. Weiss v. Garfield, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dep't 1964). Summary judgment may be granted without a trial only if no genuine, triable issue of fact is presented (Werfel v Zivnostenska Banka, 287 NY 91; CPLR 3212, subs [b], [c]). Although the defense did not the issue in the lower court, there was more than sufficient proof, both direct and circumstantial, of conspiracy and fraud to find that the plaintiffs' proof raised issues of fact. The Court was correct in refusing the defendant's request for summary judgment.

POINT V

THE DEFENSE'S BRIEF IGNORES BASIC PRINCIPLES OF NEW YORK LAW REVIEW

A. THE DEFENSE'S NEW ARGUMENTS ARE NOT PERMISSIBLE ON APPEAL

It is basic law that the appellate court is confined to reviewing the issues argued below, and a party may not to change its theory on appeal. 4 N.Y.Jur. § 600 *et seq*; Melnick v. Kukla, 228 A.D. 321, 239 N.Y.S. 16 (1930); Commercial Credit Corp. v. Wells, 228 A.D. 402, 240, N.Y.S. 139 (1930); Simpson v. Atlantic Coast Shipping Co., 191 A.D. 844, 182 N.Y.S. 311, *aff'd*. 232 N.Y. 533, 134 N.E.560 (1920). Questions and issues not raised in the court below will not be considered for the first time on appeal. United State ex rel. Matthews v. Massachusetts Bonding & Ins. Co., 238 N.Y. 334, 144 N.E. 631, *reh. den.* 239 N.Y. 507, 147 N.E. 172; Groves v. Warren, 233 N.Y. 160, 135 N.E. 230; Martin Mechanical Corp. v. P.J. Carlin Construction Co., 132 A.D.2d 688, 518 N.Y.S.2d 177 (2nd Dept., 1987). The function of the appellate court is to determine whether, based on the materials before the lower court, the lower court erred. The Record on Appeal must contain everything necessary to the resolution of the issues presented to the appellate court. Coulter v

Michelin Tire Corp. (Mo. App.) 622 SW2d 421, *cert. den.* 456 U.S. 906, 72 L. Ed. 2d 162, 102 S. Ct. 1752. Absent a motion for leave to expand the Record on Appeal, both sides are limited to the contents of the Record on Appeal. Hewitt v. N.Y. N.H. & H.R.Co., 284 N.Y.117, 29 N.E.2d 641 (1940). No such motion was made herein.

In violation of these fundamental principles, the defense now asks the appellate court to consider all manner of new arguments, new theories, and new materials that are unpreserved for review, and *dehors* the Record on Appeal. The argument that Selma was “born addicted”, so that she should have sued the manufacturer of her mother’s cigarettes was never raised before. (We cannot cite a page reference to the Record on Appeal, because it doesn’t appear in the Record on Appeal!) The contention that “addiction” was an injury that started the statute of limitations was never raised before. The arguments that the plaintiff failed to prove fraud or conspiracy (or conspiracy to commit fraud) also are new, and cannot be found in the Record on Appeal. The defense may have intentionally withheld these arguments and materials until after they lost their motion, to get “a second bite of the apple” before a court that cannot hear such arguments.

B. STANDARD OF REVIEW ON SUMMARY JUDGMENT.

Any form of evidence, documentary or otherwise, may be considered on a motion for summary judgment. Wilkinson v. Skinner, 34 N.Y.2d 53, 356 N.Y.S.2d 15, 312 N.E.2d 158 (1974). Summary judgment may be granted without a trial only if no genuine, triable issue of fact is presented (Werfel v Zivnostenska Banka, 287 NY 91; CPLR 3212, subds [b], [c]). If a key fact turns on an item of evidence whose admissibility at the trial is arguable, summary judgment must be denied. Gallo Painting, Inc. v. Aetna Insurance Co., 49 A.D.2d 746, 372 N.Y.S.2d 699 (2d Dep't 1975). Because of the drastic nature of the remedy, a rule has even arisen that occasionally permits the court to consider incompetent evidence, i.e., evidence that would be inadmissible at a trial, but only if it tends to defeat the motion. (It will not be considered in support of the motion.)

There was easily sufficient evidence of each element of plaintiff's case before the lower court. The court was charged with viewing that evidence in the light most favorable to the plaintiff. The court did so, and found that there were issues of fact requiring a trial for resolution. The lower court was correct. The Order Appealed From should be affirmed.

CONCLUSION

The defense's arguments depend on misconstructions of the plaintiff's contentions.

The plaintiff was not "born addicted", and therefore did not sue the wrong manufacturer. By suing the cigarette-maker whose product produced her addiction, the plaintiff sued the correct manufacturer.

The suit was started well within three years of the time of plaintiff's injury (cancer). The plaintiffs are claiming cancer, not "addiction," as the injury for which they have sued. The defense has no right to decide for themselves what injuries the plaintiff is suing for. Their effort to back-date the time of injury to suit their own purposes is without color of right.

The defense's main arguments are new and unpreserved for appellate review. They should not be considered.

There was abundant proof in opposition to summary judgment, on which the lower court could properly decide that there are questions of fact requiring trial resolution. Viewing the evidence in the light most favorable to the plaintiffs, the factual disputes clearly preclude summary judgment.

The Order Appealed From was correctly decided, and should be affirmed.

Respectfully submitted,

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APPELLATE DIVISION - SECOND DEPARTMENT
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I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing Brief was prepared on a computer using WordPerfect 11.0.

Type: A proportionally-spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point Size: 14
Line Spacing: Double

Word Count: The total number of words in this Brief, inclusive of point headings and footnotes and exclusive of pages containing the Table of Contents, Table of Citations, and this Statement, is 13,910.

Dated: New York, NY
January 30, 2004

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