

Philip Morris Aims To Undercut As Engle Plaintiff Rests Case

By **Nathan Hale**

Law360, Miami (January 15, 2015, 8:07 PM ET) -- Attorneys defending Philip Morris USA Inc. in the year's first Engle progeny trial on Thursday tried to undercut testimony from a medical expert and plaintiff Jose Vila's own cousin and indicated they would be filing a motion for a directed verdict as the sick smoker rested his case.

Vila, who suffered from laryngeal cancer, is seeking monetary damages, claiming he had no idea that cigarettes could cause cancer thanks to the marketing cover-up of smoking's adverse health effects perpetrated by the big tobacco companies beginning in the 1950s.

Plaintiff's counsel wrapped their case in state court in Miami with testimony from head and neck surgery specialist Dr. W. Jarrad Goodwin, who gave his expert opinion that smoking was the likely cause of Vila's laryngeal cancer, and from Carmen Vila, who provided a first-hand account of her first cousin's constant smoking habits as well as the pain and sorrow he experienced as he underwent radiation treatment for his cancer and saw his lifestyle permanently changed by the disease.

Vila is a member of the landmark Engle v. Liggett Group class that won a \$145 billion verdict against the tobacco companies. In 2006, the Florida Supreme Court overturned the verdict and decertified the class but allowed up to 700,000 individuals to rely on the jury's liability findings in their own suits.

He was first diagnosed with laryngeal cancer in 1994, according to his complaint. When the cancer returned two years later, Vila, who at one point smoked up to two packs of cigarettes per day, had to have his larynx removed. He now breathes through a stoma in his throat, cannot speak in his regular voice or sing as he once enjoyed doing, and has lost his sense of smell.

Philip Morris has countered that Vila's cancer may have been caused by the human papillomavirus, and has also argued that Vila, who was born in Cuba in 1954 and did not move to the United States until 1989, was not exposed to the advertising and statements that came out of the alleged conspiracy by the tobacco companies while he was doing the bulk of his smoking.

Philip Morris counsel Robert A. McCarter of Shook Hardy & Bacon LLP said that in its planned motion it would seek a directed verdict on the grounds that the plaintiff failed to prove his case on fraud and concealment claims, on the punitive damages claim, Vila's class membership status and preserving their position that the Engle findings cannot be used.

Goodwin, a professor in the Department of Otolaryngology at the University of Miami School of Medicine,

appeared as an expert witness, having reviewed Vila's medical records. He testified that smoking is the most common cause of cancer in the larynx, as Vila experienced, and held that HPV, a sexually transmitted virus that is a leading cause of cancer in the base of the tongue and tonsils, is extremely rare in the larynx.

McCarter presented Goodwin with research articles from respected medical journals to which he has contributed that have found 25 percent of patients with the type of laryngeal cancer that afflicted Vila had HPV present in their larynx. He also got Goodwin to acknowledge that as a male of European descent who reported numerous sexual partners and was diagnosed at age 39 with cancer that was, at least initially, not very invasive, Vila's experience checks off several observed high-risk factors for HPV-caused cancer.

Still, on redirect, Goodwin noted that other details of Vila's cancer, such as that the tumor was forming keratin, dispelled the notion of HPV as the source. He also noted that, statistically, most victims of HPV-related cancer are nonsmokers and said his opinion was not changed by the research McCarter presented.

"The presence of HPV in tissue in the throat doesn't mean it caused the cancer," he said.

Carmen Vila recounted on the stand how she reunited with her cousin as an adult after they had both landed in the Dominican Republic and then followed him to Miami several years later. While she had not been in contact with him when he started smoking, by the time they reconnected he was a chain smoker, puffing on Philip Morris-made Marlboro cigarettes from morning to late at night, as many as five to six during a conversation of two hours, she estimated.

"I do believe he was completely dominated by the cigarettes," she said at one point.

The defense tried to turn her testimony to its advantage as well, with mixed results. Prevented from asking her several questions during cross examination about her exposure to advertisements warning against smoking and discussions with Vila on the subject, Philip Morris' counsel called Carmen Vila back to the stand as its first witness, relying on procedural rules allowing it to treat her as an adverse witness given that she is related to the plaintiff.

But when co-counsel Miranda L. Soto of Shook Hardy asked her about having seen advertisements in newspapers in Cuba and later in the Dominican Republic that warned against smoking, Carmen Vila said that while she did not wish to contradict her deposition testimony that she had seen them, she now only remembered for certain seeing ads promoting various brands of cigarettes.

She also said that during her many long conversations with her cousin she had never spoken with him about his actually being addicted to cigarettes or wanting or trying to quit smoking.

Vila is represented by Allan B. Kaiser and Eric M. Tinstman of The Ferraro Law Firm PA.

Philip Morris is represented by Robert A. McCarter, Miranda L. Soto and Michael L. Walden of Shook Hardy & Bacon LLP.

The case is Vila v. Philip Morris USA Inc., case number 2013-12833-CA, in the Eleventh Judicial Circuit Court of Florida.

— Additional reporting by Carolina Bolado. Editing by Ben Guilfooy.

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