

**IN THE CIRCUIT COURT  
OF THE TWENTIETH JUDICIAL CIRCUIT  
IN AND FOR LEE COUNTY, FLORIDA**

**CASE NO: 2012-CA-001807**

**LINDA S. BAXTER and KIM M. STONE,  
as Co-Personal Representatives of the  
Estate of JACQUELINE MARY BAXTER,**

**Plaintiffs,**

**vs.**

**R.J. REYNOLDS TOBACCO COMPANY,  
et al,**

**Defendants.**

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**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT ON PLAINTIFF'S WRONGFUL DEATH CLAIMS**

COME NOW Plaintiffs, LINDA S. BAXTER and KIM M. STONE, as Co-Personal Representatives of the Estate of JACQUELINE MARY BAXTER, by and through the undersigned counsel, and hereby file this Response to Defendants' Motion for Summary Judgment on Plaintiffs' Wrongful Death Claims, and state as follows:

**Introduction and Summary of Pertinent Facts**

Plaintiffs Linda Baxter and Kim Stone are the surviving daughters of Decedent smoker Jacqueline Baxter and they serve as the Co-Personal Representatives of her Estate. Jacqueline Baxter (nee Gilmour) was born in 1934 and she smoked cigarettes containing nicotine starting in the 1940s when she was a teen. By all accounts, Mrs. Baxter was a heavy smoker for approximately 45 years before she ultimately quit in 1993 after being diagnosed with her first lung cancer. Although Mrs. Baxter survived the surgery and treatment for her 1993 lung cancer,

Plaintiffs further allege that in 2010 Mrs. Baxter was diagnosed with another lung cancer that ultimately caused her death. Plaintiffs allege that Mrs. Baxter was an *Engle* class member because she was diagnosed with lung cancer in August 1993 that was caused by her addiction to nicotine in Defendants' cigarettes and that Defendants' cigarettes were a legal cause of Mrs. Baxter's 2010 lung cancer which resulted in her death.

To that end, Plaintiffs have already proffered evidence of record to support their allegations in conjunction with a motion to amend the complaint to add punitive damages. With leave of Court, Plaintiffs filed the Second Amended Complaint which includes claims for punitive damages. The Second Amended Complaint asserts claims for damages under the Florida Wrongful Death Act arising from the 2010 lung cancer and resulting death; and, alternatively asserts claims for survival action damages pursuant to Florida Statutes, Section 46.021 for the 1993 lung cancer.

### **Defendants' Motion and Legal Cause**

The gravamen of Defendants' Motion is that there is no admissible evidence to support Plaintiffs' allegation that the 2010 lung cancer that caused Mrs. Baxter's death was caused by her smoking Defendants' cigarettes. More specifically, Defendants contend that Plaintiffs' oncology expert, Dr. Ruckdeschel, cannot opine that smoking was a legal cause of Mrs. Baxter's second primary lung cancer that resulted in her death. Defendants further claim that Plaintiffs' expert has conceded that he cannot say "whether [Decedent's] 2010 cancer...was caused by her smoking that she stopped in 1993 or not..." and contends entitlement to judgment in their favor on the wrongful death claims.

To the contrary, Dr. Ruckdeschel did opine that smoking was a legal cause of Mrs. Baxter's second primary lung cancer that caused her death. For the reasons that follow, Defendants are

incorrect in that they mischaracterize the entirety of Dr. Ruckdeschel's testimony and improperly frame the issue of "legal cause" within their argument. Moreover, when the answer was given at the first session of his deposition, Dr. Ruckdeschel had been instructed by Plaintiffs' counsel that he was not being asked to give any opinions on the 2010 lung cancer and was to opine only on the 1993 lung cancer. Accordingly, he was not present at the first session to provide expert opinions on the 2010 lung cancer and was only later instructed to provide opinions on the 2010 lung cancer. Two additional deposition sessions followed, and Defendants were provided ample opportunity to ask Dr. Ruckdeschel questions about his opinions regarding the 2010 lung cancer and its relationship to Mrs. Baxter's history of smoking.

First, Plaintiffs need not prove that smoking cigarettes containing nicotine was "the" cause or the "only" cause of the 2010 lung cancer and death. The premise of Defendants' argument implies that Plaintiffs' burden of proof is to prove that smoking cigarettes was the "only" cause of the 2010 lung cancer that led to Mrs. Baxter's death, i.e. that the 2010 lung cancer was caused by **either** the smoking **or** exposure to secondhand smoke after Mrs. Baxter quit smoking. This is incorrect and ignores the definition of "legal cause" that the jury will be instructed to apply to the case.

The jury will be given the standard jury instructions on the definition of legal cause. These instructions will include instructions that addiction to the Defendants' cigarettes "need not be the only cause" of death in order to be regarded as the "legal cause" and that the addiction to Defendants' cigarettes may be a legal cause of the death "even though it operates in combination with some other cause if the other cause occurs at the same time as the addiction and if the addiction contributes substantially to producing such loss." See F.S.J.I. 401.12(a), (b), and (c). The Florida Standard Jury Instructions on "legal cause" include the following:

## 401.12 LEGAL CAUSE

### *a. Legal cause generally:*

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.

### *b. Concurring cause:*

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

### *c. Intervening cause:*

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause.\**

\*[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].

## **Summary of Argument**

Dr. Ruckdeschel has clearly testified that smoking cigarettes was a substantial contributing cause of both Mrs. Baxter's 1993 and her 2010 primary lung cancers. Defendants improperly frame the issue of Plaintiffs' burden of proof, suggesting that Plaintiffs must prove that smoking was the only cause of the 2010 lung cancer and death. Defendants motion relies upon questions about whether "the" cause of Mrs. Baxter's 2010 lung cancer was her history or smoking OR her exposure to secondhand smoke. Dr. Ruckdeschel responded that he could not determine that

because he lacks any data quantifying the secondhand smoke exposure. He nonetheless maintains in testimony elsewhere that her history of smoking was a substantial contributing cause of the lung cancer diagnosed in 2010. He further testifies, based upon his review of the imaging studies, that the 2010 lung mass was detectable by CT Scan sometime in 2008. This further makes it clear that the mass existed well before it was diagnosed, though Defendants did not ask Dr. Ruckdeschel when the 2010 lung mass was first present. There is nothing about Dr. Ruckdeschel's testimony regarding his inability to quantify the effects of secondhand smoke exposure that is irreconcilable with his ultimate opinion that smoking cigarettes substantially contributed in causing the 2010 primary lung cancer.

Though not directly relevant to Defendants' motion, Dr. Heitmiller, Mrs. Baxter's oncologist who treated her 1993 lung cancer in Maryland was also asked about risk factors for a second lung cancer and testified that a person who has one lung cancer that is successfully treated is still at increased risk of developing a second lung cancer at a later date.

There is ample testimony from Dr. Ruckdeschel establishing, at a minimum, genuine issues of material fact on the issue of whether Mrs. Baxter's smoking was a legal cause of the lung cancer diagnosed in 2010 and her death.

#### **Testimony of Dr. Ruckdeschel – Plaintiffs' Oncology Expert**

Dr. Ruckdeschel testified on several occasions that smoking cigarettes was a substantial contributing cause of the 2010 lung cancer. He explained that the lung cancer diagnosed in 2010 existed well before 2010 and the mass would have even been detectable with a CT Scan in 2008. He testified that smoking Defendants' cigarettes in combination with some unknown and

undetermined quantity of exposure to secondhand smoke both contributed to causing her 2010 lung cancer and that the 2010 lung cancer was a primary lung cancer.

*First Session of Deposition Testimony:*

(Pages 77:17 to 83:16)

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17

18 Q. Do you agree with this statement:

19 Stopping smoking, even into middle age such as age  
20 50, can avoid more than 90 percent of the risks  
21 attributable to tobacco use, specifically including  
22 lung cancer?

23 MS. BRIGGS: Object to the form of the  
24 question.

25 A. I don't know that the number is

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1 90 percent. It depends on the extent of damage that  
2 they had at the time they stopped smoking. So  
3 someone who has severe emphysema is never going to  
4 recover that. You can't repair the lining so  
5 there's not going to be a whole lot in there. As  
6 I've said before, you're going to have to get out  
7 there for a number of years. And I know I've said  
8 in the past between ten and 15, but I think it's  
9 probably longer, probably in the 15 end of that  
10 spectrum before you really begin to measure in  
11 really some of those things and be relatively  
12 certain about them. But generally stopping smoking  
13 over time reduces the risk of most of those.

14 BY MR. MONDE:

15 Q. And over a population of people, do you  
16 agree that stopping smoking even into middle age  
17 such as age 50 can avoid more than 90 percent of  
18 risks attributable to tobacco use including lung  
19 cancer?

20 MS. BRIGGS: Object to the form of the  
21 question.

22 A. I don't know about the 90 percent number,  
23 but generically, yes, there is a reduction in the  
24 risk of all of those.

25

1 BY MR. MONDE:

2 Q. If not 90 percent, what is your best  
3 estimate?

4 MS. BRIGGS: Same objection.

5 A. Greater than 50.

6 BY MR. MONDE:

7 Q. After someone stops smoking, they're risk  
8 of smoking-related disease like lung cancer starts  
9 to go down?

10 A. Correct.

11 Q. And to your point a moment ago, the longer  
12 that person quits the lower the risk is for her of  
13 getting lung cancer or some other smoking-related  
14 disease?

15 A. Correct.

16 MS. BRIGGS: Object to the form of the  
17 question.

18 A. **The proviso that I would add to that is if  
19 you take a patient and they stop smoking and then  
20 you put them in a bubble so that they are not ever  
21 exposed to smoke again, then yes, those numbers drop  
22 in the time frame we're talking about. The problem  
23 is we can't measure what they're getting from family  
24 members, colleagues at work, well I only smoke  
25 outside, all the various excuses that people have**

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1 **for continuing to smoke.** Quite frankly if you were  
2 smoking a cigarette right now, then the other three  
3 of us are smoking as well, even though you're the  
4 one that's inhaling it.

5 BY MR. MONDE:

6 Q. Right. So by that what you mean is that  
7 if one person in a room is smoking a cigarette and  
8 inhaling it?

9 A. Yes.

10 Q. Other people in the room, depending on the  
11 size of the room and how close they are to the  
12 smoker, may inhale secondhand smoke, correct?

13 A. That's correct. And that complicates --  
14 to get to the point of your question -- that  
15 complicates that equation about okay, if I stop on  
16 this date then 15 years later everything fine.  
17 Because again, I can measure how many you put in  
18 your mouth, but I don't have as clear a measurement  
19 on a day to day basis other than in a scientific lab

20 of what each of us in the room are inhaling at that  
21 time. I just know there is further exposure.

22 Q. Nor to that point can you quantify what  
23 other exposures they may have to some of the risk  
24 factors you described earlier this morning?

25 A. That's correct.

81

1 Q. That can also cause lung cancer?

2 A. That's correct.

3 Q. All right. Then the longer a smoker quits  
4 and stays quit, the lower the risk of her getting  
5 lung cancer or some other smoking-related disease  
6 from her smoking, correct?

7 A. Yes, with the proviso that I just  
8 mentioned.

9 Q. But I just want to make sure we're on the  
10 same page, the proviso was regarding secondhand  
11 smoke exposure?

12 A. **If a patient stops smoking --**

13 Q. **Yes, sir?**

14 A. **-- in 1993, and all the family members**  
15 **quit and the exposure to smoke, incidental, walking**  
16 **by someone in a restaurant, then yes, that's a**  
17 **pretty straight curve down to about somewhere around**  
18 **15 years out they get back to the baseline risk.**

19 Q. **And by that you mean the same risk as a**  
20 **never smoker or nonsmoker?**

21 A. **Correct. But if during that 15 years they**  
22 **are -- they have a spouse or a family member who's**  
23 **smoking on a regular basis around them, there's**  
24 **smoking in the workplace or they work in a**  
25 **restaurant or a bar where there's smoking, then all**

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1 **bets are off because they really haven't stopped**  
2 **smoking.**

3 Q. **They've stopped smoking themselves but**  
4 **they're still being exposed to smoke from other**  
5 **sources?**

6 A. **Yes, they're still inhaling smoke.**

7 Q. **Okay. So any increased or elevated risk**  
8 **of that former smoker who's now quit beyond that**  
9 **curve you described?**

10 A. **Yes.**

11 Q. **Is due to their exposure to secondhand**  
12 **smoke, not due to their exposure to primary**  
13 **cigarette smoking, that is their own smoking,**



14 correct?

15 MS. BRIGGS: Object to the form of the  
16 question.

17 A. I don't think it's something we can be  
18 dogmatic about. Let me explain. I'm not trying to  
19 be evasive in my answer, I'm trying to give a  
20 factual answer here.

21 BY MR. MONDE:

22 Q. Sure.

23 A. If someone stops smoking says since 1993,  
24 we would normally have thought that by 2008 their  
25 risk would have returned to baseline.

83

1 Q. You mean that of a never smoker?

2 A. A never smoker. Assuming no other  
3 exposure. And if we take that out for a second, it  
4 doesn't mean that at year 15, woop, clear, no  
5 worries, no issues. Whatever previous damage is  
6 there is there. So there are a handful of people  
7 who from that risk period goes out further. And I  
8 can't distinguish in this case whether her 2010  
9 cancer was just the tail end of that original  
10 smoking or the original smoking plus whatever  
11 exposure she had in the environment after that.  
12 There's no way for anyone to quantitate which part  
13 of that was there. If you told me that she had been  
14 in a bubble with no other exposure and then she  
15 developed a cancer 21 years later, I'd say it can  
16 happen.

(Pages 83:22 to 84:7)

83

22 Q. And so what you're saying is you don't  
23 have any way of saying whether her 2010 cancer, even  
24 if you were here to give opinions about that, was  
25 caused by her smoking that she stopped in 1993 or

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1 not because you don't have information about her  
2 secondhand exposure; is that correct?

3 A. Yes. I have information that she had  
4 secondhand exposure, but I don't have any  
5 quantification of it.

6 Q. But with that caveat, I'm correct?

7 A. Yes.

A fair interpretation of Dr. Ruckdeschel's testimony is that he cannot quantify the effects of the subsequent exposure to secondhand smoke in terms of any causal relationship to the 2010 lung cancer that caused death. Clearly, his testimony is that the cellular damage done by the prior smoking is there and doesn't go away. Further, people don't live "in a bubble", and neither did Mrs. Baxter. The damage done by Mrs. Baxter's years of smoking never disappeared after she stopped smoking. The cellular damage caused by her years of smoking was still there. The only fair reading of his testimony in its entirety is that the lung mass diagnosed in 2010 existed in her lung years before the diagnosis; therefore, the lung cancer diagnosed in 2010 was present well within the referenced 15 years of declining risk of lung cancer after the alleged 1993 quit year.<sup>1</sup>

At the second session of his deposition, Dr. Ruckdeschel was questioned further about the 2010 lung cancer and certain radiology studies:

*Second Session of Deposition Testimony:*

(Pages 267:13 to 268:12)

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13 Q. And we are going to take a short break  
14 to discuss this, but, Dr. Ruckdeschel, **in your**  
15 **judgment, when was the 2010 cancer first**  
16 **detectable on CT scan?**

17 A. **Probably somewhere in 2008.**

18 Q. **What's your basis for that?**

19 A. **Given the size of the metastatic lesions**  
20 **that we saw, the size of the lung lesions that**  
21 **were reported, just doing a straightforward,**  
22 **doubling time in my head without actually having**  
23 **the measurements in front of me and doing that**  
24 **doubling time, it would be about that period of**  
25 **time that it would first be visible.**

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1 Q. All right. And -- and during the break,

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1 This testimony was elicited by Defendants even when Dr. Ruckdeschel had been instructed that he was not being asked to give any opinions on the 2010 lung cancer. Indeed, Plaintiffs' counsel didn't have him elaborate upon this issue since at the time he had been instructed that the 2010 lung cancer was not an issue for his consideration.

2 I would ask you to put pencil to paper to sharpen  
3 that up if -- if you want to.  
4 **When do you believe that the 2010 cancer**  
5 **was first detectable on chest x-ray?**  
6 **A. Sometime later than that, for the same**  
7 **reasons I gave for the other one.**  
8 **Q. Was it sometime during 2009?**  
9 **A. Yes.**  
10 **Q. Can you say reasonably, more likely than**  
11 **not, during the first half of 2009?**  
12 **A. Yes.**

Thus, Dr. Ruckdeschel, upon being shown color copies of PET Scan imaging at this second session of his deposition, testified that the lung cancer diagnosed in 2010 actually existed in Mrs. Baxter's body well before that and would have been detectable by CT Scan in 2008.

At the third session of his deposition, Dr. Ruckdeschel was questioned further about the 2010 lung cancer and was ultimately questioned by Plaintiffs' counsel to establish his ultimate opinions. There was ample opportunity for Defendants to question Dr. Ruckdeschel after Plaintiffs' cross-examination, but instead of questioning him thoroughly about his opinions, Defendants elected to merely refer him to certain specific lines of the transcript of his first deposition session:

*Third Session of Deposition Testimony:*

(Pages 317:14 to 318:6)

317

14 Q Yep. Let's start it again. So on page  
15 83, on August 23rd, you were asked this question.  
16 And so what you're saying is, you don't have any way  
17 of saying whether her 2010 cancer, even if you were  
18 here to give opinions about that, was caused by her  
19 smoking that she stopped in 1993 or not, because you  
20 don't have information about her secondhand  
21 exposure, is that correct? And you answered yes, I  
22 have information that she had secondhand exposure,  
23 but I don't have any quantification of it.

24 Question: But with that caveat I'm  
25 correct? Answer: Yes.

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1 Having reviewed the 2010 radiology  
2 that you have, is that still your opinion?  
3 A Yes.

Page 407

11 Q Okay. So do you agree that lung cancer in  
12 people who have never smoked cigarettes themselves  
13 by putting a lit cigarette to their lips, is the  
14 sixth leading cause of cancer related deaths in the  
15 United States?

16 A I don't know whether it's sixth or not.  
17 It's up there. I mean, it's common enough, but I  
18 don't know whether it's sixth. I don't know the  
19 data for that.

20 Q All right. And you've already testified  
21 that you can't quantify the level, duration and  
22 intensity of Jacqueline Baxter's exposure to  
23 secondhand smoke after 1993. Don't want to repeat  
24 that.

25 A Correct.

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19 Q **Can you tell us whether it was**  
20 **Mrs. Baxter's own smoking that she stopped in 1993,**  
21 **or her exposure to secondhand smoke that caused the**  
22 **cell mutations that lead to her 2010 cancer?**

23 A I believe it was both.

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1 Q **And you can't quantify more than saying**  
2 **that they were both contributing factors, correct?**

3 A Correct.

Page 411

8 Q Right. But your -- but what you're also  
9 saying is that without the secondhand smoke exposure  
10 after 1993, you're unable to say whether or not she

12

11 would have developed the 2010 cancer. Correct?  
12 MR. WRIGHT: Form.  
13 THE WITNESS: I can't tell either way.

420

14 I just wanted to follow up on your  
15 testimony concerning environmental tobacco smoke.  
16 If Mrs. Baxter had avoided exposure to environmental  
17 tobacco smoke from 1993 onward, is it more likely  
18 than not that she would have avoided getting cancer  
19 in 2010?  
20 MR. WRIGHT: Form.  
21 THE WITNESS: I believe that's the case,  
22 yes.

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**6 Do you also have an opinion within a  
7 reasonable degree of medical probability as to  
8 whether Mrs. Baxter's history of smoking cigarettes  
9 was a substantial contributing cause to her  
10 diagnosis with a 2010 primary lung cancer?**

**11 MR. MONDE: Objection.**

**12 THE WITNESS: Yes.**

**13 EXAMINATION BY MR. WRIGHT:**

**14 Q And what is that opinion?**

**15 MR. MONDE: The same.**

**16 THE WITNESS: My opinion is that the  
17 combination of her original smoking history,  
18 and then whatever other secondhand smoke she  
19 picked up, caused her second lung cancer that  
20 was fatal for her in 2010.**

21 EXAMINATION BY MR. WRIGHT:

**22 Q And so it's fair to say then that in  
23 2000 -- as far as the 2010 lung cancer is concerned,  
24 it certainly was a cause of her death. Is that  
25 correct?**

426

**1 A Yes.**

2 MS. VOSS: Object to the form.

3 EXAMINATION BY MR. WRIGHT:

**4 Q And do you an have opinion based upon a**

5 reasonable degree of medical probability as to what  
6 caused her death in 2010?

7 MR. MONDE: Objection.

8 THE WITNESS: Yes.

9 EXAMINATION BY MR. WRIGHT:

10 Q And what was that?

11 MR. MONDE: Objection.

12 THE WITNESS: Metastatic lung cancer.

13 EXAMINATION BY MR. WRIGHT:

14 Q And was her history of smoking, as you  
15 understand it, having quit in 1993, a cause of her  
16 2010 primary lung cancer?

17 MR. MONDE: Objection.

18 THE WITNESS: Could you repeat that?

19 EXAMINATION BY MR. WRIGHT:

20 Q Was her history of smoking and having --  
21 after having quit -- strike that.

22 Was her history of smoking and having  
23 quit in 1993 a cause of her 2010 primary lung  
24 cancer?

25 MR. MONDE: Objection.

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1 THE WITNESS: Yes.

In this third and final session, Dr. Ruckdeschel made clear that a combination of her history of smoking for many years and her exposure to secondhand smoke operated in combination to cause her 2010 lung cancer and death. While he cannot quantify the effects of the secondhand smoke because of a lack of measurable data of exposure to secondhand smoke, his testimony is clear that Mrs. Baxter's history of smoking Defendants' cigarettes for many years was a substantial contributing factor in causing her 2010 lung cancer and death. He did not, for example, testify that exposure to secondhand smoke, alone, absent the history of smoking Defendants' cigarettes, was the sole cause of her 2010 lung cancer. At a minimum, genuine issues of material fact exist upon the issue of whether Mrs. Baxter's history of smoking Defendants' cigarettes was a substantial contributing cause of her second lung cancer diagnosed in 2010.

Though not directly relevant to Defendants' motion, the testimony of Mrs. Baxter's treating oncologist corroborates that there is an increased risk of developing a second primary lung cancer after experiencing a first primary lung cancer:

**Testimony of Dr. Heitmiller – Plaintiff's Treating Oncologist**

Dr. Heitmiller is an oncologist who treated Mrs. Baxter's 1993 lung cancer in Maryland. He was asked limited questions on the risk of a second lung cancer after having been diagnosed with a first lung cancer and testified as follows:

(Pages 30:7 to 31:2)

30

7 After you did the surgery, did you  
8 have issue examined by the pathology department to  
9 determine and confirm whether there was any  
10 metastasis?

11 A. Well, yes. The pathologist looked at  
12 what I gave them and read it out, and looked at the  
13 specimen. They commented on the margins. They  
14 commented on the cellular appearance of the tumor,  
15 and they commented on the lymph nodes.

16 Q. Okay. Does that mean that a patient  
17 like Mrs. Baxter would never get lung cancer again  
18 down the road?

19 A. No. No. I mean, first of all, even

20 resecting somebody who appears to be completely  
21 resected and stage 1, it's not 100 percent  
22 unfortunately. Tumors are unpredictable.

23 Q. Okay.

24 A. So the tumor could come back, or down  
25 the road, a person who has had one lung tumor is

31

1 certainly at risk for developing another one,  
2 independently.

(Pages 99:20 to 101:14)

99

20 Q. Again, is there anything about the  
21 surgery that she had in 1993 that would prevent  
22 Mrs. Baxter at that time from being at risk for a  
23 second future primary lung cancer?

24 MR. MONDE: Form.

25 A. That would prevent her from.

100

1 Q. Being at risk?

2 A. No.

3 Q. Nothing curative, in other words, about  
4 that surgery in that regard?

5 MS. VOSS: Objection.

6 A. This particular surgery is one event in  
7 time, and doesn't -- not necessarily -- in itself,



8 the surgery does not impact what transpires beyond  
9 that particular tumor.

10 Q. Even as it relates to a second primary  
11 lung cancer?

12 A. A person who has one lung cancer is at  
13 greater risk of developing a second one. I can't  
14 tell you exactly what the risks are over and above  
15 the person who has never had a lung cancer.

16 Q. Nothing about this surgery would have  
17 changed her risk of developing a second, primary  
18 lung cancer in the future, even in the other lung;  
19 would it?

20 MS. VOSS: Objection.

21 MR. MONDE: Objection.

22 A. Wouldn't have affected those risks one  
23 way or another.

24 Q. Okay.

25 A. What I did.

101

1 Q. Let me ask that one a different way,  
2 just to make sure I have it.

3 Was there anything about the surgery  
4 you performed in 1993 that would have affected  
5 positively or negatively Mrs. Baxter's risk of  
6 developing a second, future primary lung cancer in

7 her other lung?

8 MR. MONDE: Form.

9 A. No.

10 Q. To be fair, how long were you her

11 doctor?

12 A. It looks like from 4/28 to 5/14.

13 Q. Two to three weeks?

14 A. Yes.

(Page 101:20 to 101:23)

101

20 Q. Dr. Heitmiller, do you know the elevated

21 risk of somebody who has had a primary lung cancer

22 to develop a second lung primary?

23 A. I don't.

### **Summary Judgment**

The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every reasonable inference in favor of the party against whom a summary judgment is sought. A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985); *Davis v. Bruhaspati, Inc.*, 917 So. 2d 350 (Fla. 1st DCA 2005). Particular caution should be employed when granting summary judgment in negligence actions. *Lindsey v. Bill Arflin Bonding Agency, Inc.*, 645 So. 2d 565 (Fla.

1st DCA 1994). Here, Defendants have glossed over the significant burden they carry as the movant. It is black letter law in Florida that Defendants, as the movants, have “the burden to prove the non-existence of genuine triable issues . . . and the burden of proving the existence of such issues is not shifted to the opposing party [Plaintiffs] until the movant[s] ha[ve] successfully met [their] burden.” *Holl v. Talcott*, 193 So. 2d 40, 43 (Fla. 1966). In reviewing the submissions, the Court must draw every possible inference in favor of Plaintiffs against whom a summary judgment is sought. *Moore v. Morris*, 475 So. 2d at 668. Defendants have failed in their burden; there exist genuine issues of material fact; and their Motion should be denied.

### **Conclusion**

Genuine issues of material fact exist from which a jury could conclude that Mrs. Baxter’s history of smoking Defendants’ cigarettes was a substantial contributing cause of her second primary lung cancer diagnosed in 2010. Dr. Ruckdeschel testified very clearly that smoking cigarettes was a substantial contributing cause of both Mrs. Baxter’s 1993 lung cancer and her 2010 lung cancer, together with any undetermined quantity of exposure to secondhand smoke after she quit smoking approximately 1993.

While Dr. Ruckdeschel testified generally about the declining risk of lung cancer after a smoker stops smoking for good, he was not asked by Defendants’ counsel about the declining risk in this particular case. Dr. Ruckdeschel did, however, testify that the 2010 lung mass existed well before it was diagnosed in 2010 and would have even been detectable by CT Scan in 2008. Accordingly, the 2010 lung mass existed within the stated 15 years after which a hypothetical former smoker’s risk of developing lung cancer would have been reduced to the risk level approaching that of a “never smoker.” Dr. Ruckdeschel also clearly testified that, though he

couldn't quantify the effects or extent of secondhand smoke exposure, he was of the opinion that the 2010 lung cancer was caused by a combination of the prior smoking history and any environmental exposure.

Defendants are free to cross examine Dr. Ruckdeschel on the effects of secondhand smoke and his inability to quantify those effects, but genuine issues of material fact exist that decedent's long history of smoking Defendants' cigarettes was a substantial contributing cause of the 2010 lung cancer and death. There is nothing about Dr. Ruckdeschel's testimony regarding his inability to quantify the effects of secondhand smoke exposure that is irreconcilable with his ultimate opinion that smoking cigarettes substantially contributed in causing the 2010 primary lung cancer so as to be a legal cause of the 2010 lung cancer and death.

WHEREFORE, Plaintiffs respectfully requests this Court enter an order denying Defendants' Motion for Summary Judgment on Plaintiffs' Wrongful Death Claims.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Electronic Mail, this 21<sup>st</sup> day of March, 2018, to: Trae Weingart, Esq., Troy A. Fuhrman, Esq., and Benjamin H. Hill IV, Esq., Hill Ward & Henderson, P.A., 101 E. Kennedy Boulevard, Suite 3700, Tampa, FL 33602, [Trae.weingardt@hwlaw.com](mailto:Trae.weingardt@hwlaw.com), [troy.fuhrman@hwlaw.com](mailto:troy.fuhrman@hwlaw.com), [reynolds@hwlaw.com](mailto:reynolds@hwlaw.com), [sberesheim@jonesday.com](mailto:sberesheim@jonesday.com), [Ben.hill4@hwlaw.com](mailto:Ben.hill4@hwlaw.com), [ktakas@hwlaw.com](mailto:ktakas@hwlaw.com); David M. Monde, Esq., Jones Day, 1420 Peachtree Street NE, Suite 800, Atlanta, GA 30309-3053, [dmmonde@jonesday.com](mailto:dmmonde@jonesday.com); Paul D. Koeth, Esq., Jones Day, 901 E Lakeside Avenue, Cleveland, OH 44144; Michael J. Corso, Esq., Henderson Franklin Starnes & Holt, P.A., 1715 Monroe, Post Office Box 280, Fort Myers, FL 33902, [michael.corso@henlaw.com](mailto:michael.corso@henlaw.com), [sherry.zellner@henlaw.com](mailto:sherry.zellner@henlaw.com); Jennifer M. Voss, Esq., Shook Hardy

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