CASE NO. S172023

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

NIKKI POOSHS,

Plaintiff and Petitioner,

vs.

PHILIP MORRIS USA, et al.,

Defendants and Respondents.

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On Review From the Ninth Circuit Court of Appeals
Certified Questions of California Law

REPLY BRIEF ON THE MERITS

BRAYTON❖PURCELL LLP
222 Rush Landing Road
Novato, California 94948
Telephone: (415) 898-1555
Facsimile: (415) 898-1247

Alan R. Brayton, Esq., S.B. #73685
Gilbert L. Purcell, Esq., S.B. #113603
Lloyd F. LeRoy, Esq., S.B. #203502

Attorneys for Petitioner, NIKKI POOSHS

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BRAYTON❖PURCELL LLP
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Novato, California 94948
Telephone: (415) 898-1555
Facsimile: (415) 898-1247

Alan R. Brayton, Esq., S.B. #73685
Gilbert L. Purcell, Esq., S.B. #113603
Lloyd F. LeRoy, Esq., S.B. #203502

Attorneys for Petitioner, NIKKI POOSHS

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I.

INTRODUCTION

In her opening brief, Petitioner Pooshs presented the case law and policy explanations supporting the application of the separate and distinct injury rule in tobacco injury cases. Respondents, in their opposition brief, seek support in a line of cases which prevented second suits seeking increased damages from a single personal injury. Those cases avail them nothing because they do not address the court's question concerning separate and "distinct" personal injuries. Likewise, their claims that policy concerns prevent adoption of the rule ignore the countervailing express policy reasons for its adoption. As a final retrenchment they claim this Court may not change the statute, but must leave that to the legislature, as if Petitioner has presented any such issue at all.

Petitioner again demonstrates that the separate and distinct injury rule is supported by strong policy reasons, is consistent with a long history of application in the state and that it is well within not only the authority, but the duty of the Court to state its application to the certified question.

And of course, as has always been the case, Respondents do not present any answer to the question of when a lung cancer victim is supposed to be able to timely file a suit seeking damages for smoking induced lung cancer — lung cancer they actually suffer from — with clinical certainty born of diagnosis.

II.

DISCUSSION

Not surprisingly, the Respondents prefer to focus on cases which involve increasing degrees of damage from one disease or injury, rather than on the separate and distinct injuries posed in the court's question. When ***separate and distinct personal injuries*** are considered, the answer to the court's question must be no.

A. Respondents Fail to Distinguish the Separate and Distinct Injury Cases from the Increased Damages Cases.

Petitioner made clear in her opening brief that the rule she is asking the court to apply is the one at the heart of the Court's question and one that has been sensibly and equitably applied before. That rule would hold that when a separate and distinct personal injury arises from smoking tobacco, that injury constitutes a separate cause of action and is not barred by a statute of limitations

arising from a prior tobacco induced injury not made a subject of the case. The cases the Respondents mention in their brief are not separate disease or separate injury cases. They all are cases which barred a second action when the damages from the first injury increased.

Respondents rely on *Miller v. Lakeside Village Condominium Association, Inc.* (1991) 1 Cal.App.4th 1611, for the proposition that a single tort can be the foundation for but one claim for damages. As applied to the facts of that case, the proposition is sound. Plaintiff Miller developed an allergic reaction to mold in the condominium unit. Two years later she was diagnosed with a condition called immune dysregulation. The testimony of her own doctor was that the allergy symptoms she had suffered for two years were the manifestation of her immune dysregulation. *Id.* at 1618-19. Because it was not a separate and distinct injury, the action was time barred.

Panos v. Great Western Packing Co. (1943) 21 Cal.2d 636, on which Respondents also rely, was distinguished by Petitioner in her opening brief. *Panos* involved a second claim for damages based on the very same injury but alleging a different theory of causation. It was not a second injury case and therefore not helpful to the issue

here. *Davies v. Krasna* (1975) 14 Cal.3d 502 was not even a personal injury case. Like *Panos*, however, it involved a repeat action in which plaintiff tried to assert a new theory of liability for the same economic injury. It likewise is not helpful for Respondents. Nor does *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011 advance their argument. There, the mental trauma inflicted on a minor girl by her step-grandfather's sexual abuse was known to her at the time she became an adult and the statute began to run. Her subsequent conclusion that this trauma had led to the substantial emotional problems in her adult life was barred by the statute as an extension of the same injury. Similarly, Respondents' reliance on *Spellis v. Lawn* (1988) 200 Cal.App.3d 1075, is misplaced. In that case, also not a personal injury case, the plaintiffs sought to collect past-due support payments from the defendant who was the father and ex-husband of the plaintiffs. They knew for 16 years he had failed to make the payments and defrauded them of the entitlement to those payments by changing his name and avoiding the obligation. The fact that damages were much higher after the prolonged absence did not extend the statute of limitations for this single injury.

Respondents likewise find no support for their position in *Nodine v. Shiley, Inc.* 240 F.3d 1149 (9th Cir. 2001). In that case, the plaintiff had a mechanical heart valve implanted of a type that was subsequently identified to be potentially defective. She accepted a settlement with the manufacturer based on her fear of catastrophic failure of the valve and potential resulting death. Eventually, her fear became too great and she had the valve removed. Her subsequent claim for additional damages for removal and replacement of the valve was barred because she had already resolved that claim and this was the same personal injury - just greater damages. That is not the case here, nor in the question posed by this Court. At issue here are separated and distinct personal injuries

B. Respondents Misinterpret Petitioner's Position on the Public Policy Reflected in the Repeal of the Tobacco Immunity Statute.

In her Opening Brief, Petitioner pointed out that the public policy of the State of California is to ensure that there is no "statutory bar" to recovery for tobacco related injuries by California smokers. This position is based on the legislative findings that the people of California have endured "physical and mental suffering and staggering expenses inflicted by tobacco-related illness" *Myers v.*

Philip Morris Companies, Inc. (2002) 28 Cal.4th 828, 831 and the determination to remove the statutory immunity to enable the claims to be "determined on their merits." Civil Code section 1714.45.

Contrary to the position taken by Respondents here, (RB at 16-18) Petitioner is not claiming that the legislature eliminated the statute of limitations in tobacco cases when it eliminated the immunity period. What the Respondents ignore, but what the legislature actually did, is express the policy of the state that tobacco cases should be decided on their merits. This strong and direct policy statement demonstrates that Petitioner's position, that the court should interpret the statute to apply the separate and distinct injury rule, is supported by the public policy of the state. The interpretation of the statute advanced by Petitioner will enable those facing the physical and mental suffering and the staggering expenses of tobacco related diseases to have a meaningful opportunity to have their cases heard on the merits.[1]

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[1]As a revealing aside, when Respondents argue that Petitioner's diagnosis with COPD in 1989 and periodontal disease in 1990 triggered the statute of limitations, they don't point out the fact that those diagnoses occurred during the statutory immunity period when Pooshs was prevented from bringing an action. In essence, consistent with their assault leitmotif, Respondents have advanced a two tiered procedural bar to her claims by asserting this case is barred by the prior disease diagnoses which themselves were barred

As Petitioner noted in her opening brief, this public policy has long been supported by cases which have applied the separate and distinct injury rule in a variety on contexts. Petitioner also pointed out that the tobacco defendants are particularly motivated to defeat cases on any procedural basis, even the most absurd interpretation of the statute of limitations, given the fact that any defense on the case merits is particularly problematic for them. (Petitioner's Opening Brief (POB) at 29, footnote 11)

C. Policies Behind the Statute of Limitations Will Not be Adversely Affected by the Court's Recognition of the Separate and Distinct Injury Rule.

Respondents repeatedly return to their mantra that the interpretation of the statute of limitations endorsed by Petitioner would defeat the substantial policy considerations behind the statute. (Respondents' Brief (RB) at 1, 13, 30-35) Of course, the policy on which Respondents focus is the policy of giving defendants repose and protection from stale claims. They claim that the separate and distinct injury rule would allow "dilatory plaintiffs" to argue that they are timely suing for separate and distinct injuries. And, say the Respondents, it would encourage plaintiffs to parse their injuries into

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by the statutory immunity.

smaller and smaller segments to claim each was a separate and distinct new injury. Respondents do not identify how the separate and distinct injury rule would create more questions than a rule which requires a Court to determine whether the prior injury was "appreciable and actual" and thus triggered the statute. Nevertheless, the Respondents' argue defendants would be overwhelmed with frivolous complaints against which they could not defend due to the inordinate passage of time. Remarkably, the Respondents have used the "floodgate" argument without actually invoking the word.

Respondents' reliance on the policy of repose ignores the other policy reasons behind the statute of limitations. As this court stated in *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 806 there are two major policies which the statute of limitations is designed to serve. The second is to "stimulate plaintiffs to pursue their claims diligently." Respondents have not, nor can they demonstrate how application of the statute in their preferred way would stimulate a plaintiff to pursue a claim for lung cancer thirteen years before the cancer occurs. There is no concept of the law which permits or even endorses such a practice. Yet, that is the

practice that would be mandated by enforcement of the statute as the Respondents deem it should be enforced.

Some commentators postulate that there is yet a third public policy to be advanced by statutes of limitation. That policy is to protect the courts from having to hear stale claims when their time could be better spent on more recent, and thus more important, disputes. *See*, *State v. Lonardo Bros.* (2009) 2009 Conn. Super. LEXIS 389. The rule supported by Respondents would adversely affect this policy in a uniquely perverse way. While it would not burden the court with stale claims, it would burden the court with anticipatory claims that would have to be asserted or forever lost. Every person who alleged any injury from smoking would have to allege all possible potential smoking related injuries at that time or they would be forever barred. That person's attorney would risk facing allegations of malpractice if the claims were not raised and the statute ran as Respondents say it should. To complete the trap created by Respondents, if a plaintiff did file a complaint for such speculative claims, the very real probability exists of sanctions being imposed for filing a cause of action without factual support. *See*, *Fox v. Ethicon Endo-Surgery, supra,* 35 Cal.4th at 816.

This court recognized that quandary in its decision in *Grisham v. Philip Morris* (2007) 40 Cal.4th 623. Quoting from its decision in *Fox*, the court repeated:

> In sum, the interest of the courts and of litigants against the filing of potentially meritless claims is a public policy concern that weighs heavily against the *Bristol-Myers Squibb* formulation of the discovery rule.

40 Cal.4th 645 That public policy still weighs heavily. The very considerations involved there are involved here. The law should never be interpreted to require an impossible or futile act. *Cf,* Civil Code sections 3531 and 3532.

Moreover, the tobacco companies have no competing justifications for adopting a rule which would categorically preclude a suit based on a separate and distinct personal injury. This court made that point very directly in *Grisham.*

> Philip Morris cites no authority, and we have found none, for the proposition that the rule that the statute of limitations commences with the infliction of appreciable injury bars suits based on a later manifesting injury of a different type.

40 Cal.4th 644. Public policy supports application of the separate and distinct personal injury rule, and there is no authority for a rule to the contrary. The Court should make clear that the law of California comports with the public policy and leave no doubt that when

multiple distinct personal injuries arise from smoking, the earliest injury does **not** trigger the statute of limitations for later injuries.

D. This Court Most Certainly Has the Authority to Interpret the Statute of Limitations to Apply Individually to Separate and Distinct Personal Injuries.

The Respondents repeatedly take the position that the legislature must change the statute of limitations in order to apply the rule advocated by Petitioner. (RB at 2, 11, 14-16) But that is clearly not the case.

Petitioner does not seek to have the court change the statute of limitations. The statute, as codified at Code of Civil Procedure sections 312, 335, and 335.1 is sufficiently clear and does not need to be changed. It provides plaintiffs two years from the date the cause of action accrues to commence their action. The only change the petitioner is seeking is a change in the interpretation of that statute by the district court in this action. There should be no doubt that this Court has that authority and responsibility.

> It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.

Marbury v. Madison (1803) 5 U.S. 137, 177 [2 L. Ed. 60]; *cited in,*

McClung v. Employment Development Department 34 Cal. 4th 467, 469-70.

This court emphatically adopted that principle in *McClung* and made clear that "[u]nder fundamental principles of separation of powers, the legislative branch of government enacts laws. . . . But interpreting the law is a judicial function." *Id.* at 470. That is the function which petitioner seeks to have performed and obviously the one the court has set for itself by posing the specified question of law in the manner it has. This is not, as Respondent's argue, an attempt to change the law. It is rather a request to interpret the law that was written in a manner which comports with the public policies behind the law and provides meaningful access to the courts for California's citizens.

CONCLUSION

Nikki Pooshs' January 13, 2004 suit for lung cancer, filed within one year of her first lung cancer diagnosis, is timely under California law.

California courts have applied the separate and distinct injury rule in a variety of contexts for over fifty years. The Respondents have presented no reason why the rule is or should be prohibited by the statute of limitations passed by the legislature. The sound policy

reasons favoring the rule weigh heavily in favor of this court clarifying that it is the law of California. Stated in the specific terms of the restated certified question: when multiple distinct personal injuries arise from smoking tobacco, the earliest injury does not trigger the statute of limitations for those claims based solely on a later manifest injury.

Respectfully submitted,

Dated: August 7, 2009

BRAYTON ❖ PURCELL LLP

By: ____________________
Lloyd F. LeRoy

CERTIFICATE OF WORD COUNT
[Cal. Rules of Court, Rule 8.204 (c)(1)]

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Dated: June 7, 2009

BRAYTON❖PURCELL LLP

By:
Lloyd F. LeRoy
Attorneys for NIKKI POOSHS

PROOF OF SERVICE

I am employed in the County of Marin, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 222 Rush Landing Road, Novato, California 94948-6169.

On August 10, 2009, I served the attached:

REPLY BRIEF ON THE MERITS
Nikki Pooshs v. Philip Morris USA, et al
California Supreme Court Case No. S172023

on the interested parties in this action by transmitting a true copy thereof in a sealed envelope, and each envelope addressed as follows:

Philip Morris USA, Inc.
Nabisco Group Holdings Corp.
Daniel P. Collins, Esq.
Munger, Tolles & Olsen LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Judge Phyllis J. Hamilton
U.S.D.C. - Northern Dist.
450 Golden Gate Ave.
San Francisco, CA 94102
(Case No. 04-1221)

United States Ninth Circuit Court of Appeals
95 7th Street
San Francisco, CA 94102
(Case No. 08-16338)

Brown & Williamson Tobacco Corp.
R.J. Reynolds Tobacco Company
Peter Larsen, Esq.
Jones Day
555 California St., 26th Floor
San Francisco, CA 94104
(415) 626-3939
(4165) 875-5700 Fax

Brown & Williamson Tobacco Corp.
R.J. Reynolds Tobacco Company
Paul Crist, Esq.
Jones Day
North Point
901 Lakeside Ave.
Cleveland, OH 44114
(216) 586-3939
(216) 579-0212 Fax

Hill & Knowlton, Inc.
Liggett & Meyers Tobacco
Stan G. Roman, Esq.
Krieg Keller Sloan Reilley & Roman
114 Sansome Street, 4th Floor
San Francisco, CA 94104
(415) 249-8330
(415) 249-8333 Fax

Liggett Group, Inc.
Safeway, Inc.
James L. Dumas
Lindsay, Hart, Neil and Weigler
1300 Southwest Fifth Ave., Ste. 3400
Portland, OR 97201

Lorillard Tobacco Company
Philip Morris USA, Inc
British American Tobacco Co. PLC
Michael K. Underhill
Alicia J. Donahue, Esq.
Shook, Hardy & Bacon
333 Bush Street, Ste. 600
San Francisco, CA 94104
(415) 544-1900
(415) 391-0281 Fax

BRAYTON◆PURCELL
ATTORNEYS AT LAW
222 RUSH LANDING ROAD
NOVATO, CALIFORNIA 94945
(415) 898-1555

WASHINGTON LEGAL FOUNDATION
Daniel J. Popeo, Esq.
Richard A. Samp, Esq.
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

DNA Plant Technology Corp.
Joanne L. Castella
McDonough Holland & Allen PC
1901 Harrison Street, 9th Floor
Oakland, CA 94612

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Executed this **August 10, 2009** at Novato, California.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

JANE EHNI