Case No. 86501

In the Supreme Court of Nevada

SANDRA CAMACHO; and ANTHONY CAMACHO,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and the HONORABLE NADIA KRALL, District Judge,

Respondents,

and

PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to the AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC, a foreign corporation; and ASM NATIONWIDE CORPORATION, d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation,

Real Parties in Interest.

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District Court
Case No.
A-19-807650-C

LIGGETT GROUP LLC'S JOINDER AND ANSWER TO WRIT PETITION

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NRAP 26.1 DISCLOSURE

Counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed for the judges of this court to evaluate possible disqualification or recusal.

1. Liggett Group LLC'S sole member is VGR Holding LLC.

2. VGR Holding LLC's sole member is Vector Group Ltd.

3. Vector Group Ltd.'s stock is publicly traded on the New York Stock Exchange.

4. Liggett Group LLC has been represented in this litigation by J Christopher Jorgensen, Daniel F. Polsenberg, Abraham G. Smith, and Kory J. Koerperich of Lewis Roca Rothgerber Christie LLP; and Kelly Anne Luther and Maria H. Ruiz of Kasowitz Benson Torres LLP.

Dated this 22nd day of August, 2023.

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JOINDER AND ANSWER TO WRIT PETITION

Liggett Group LLC ("Liggett") joins Philip Morris USA, Inc.'s ("PM") answer to the petition. Liggett also responds separately in this answer to address plaintiffs/petitioners' argument that Liggett is liable under a negligence theory of failure to warn of the dangers of smoking before July 1, 1969, when the Federal Cigarette Labeling and Advertising Act began to preempt such claims.

Nevada law did not impose a special duty on Liggett to warn Sandra Camacho of the dangers of smoking. Regardless, there is no evidence that Liggett's failure to give such a warning before 1969 caused Ms. Camacho's injuries. She began smoking after the Surgeon General warned that smoking was dangerous, and then she continued to disregard warnings that cigarettes were dangerous for another fifty years until she was diagnosed with cancer. There is no justification to issue advisory mandamus to disrupt the district court's grant of summary judgment on these issues.

Further, plaintiffs have not established any conduct by Liggett that would warrant punitive damages that was not already resolved by the State of Nevada's claims against Liggett in 1997. Ms. Camacho quit

smoking Liggett brand cigarettes in 1990, and Liggett publicly stated the dangerous and addictive nature of cigarettes even before the State's complaint in 1997. Accordingly, the Court should also deny plaintiffs' request for extraordinary relief to reverse the district court's grant of summary judgment on plaintiffs' punitive damages claims.

RELEVANT FACTS

In January 1964, the Surgeon General issued a widely publicized report, which warned that "cigarette smoking is causally related to lung cancer." 1 PA 12; *see also* 15 PA 2454 (Surgeon General's 1984 Report indicating that the Surgeon General in 1964 "reported that cigarette smoking was causally associated with lung and laryngeal cancer in men"). Several months later, in April 1964, plaintiff Sandra Camacho turned eighteen. 10 PA 1632. Sometime after that, Ms. Camacho began smoking. 10 PA 1690.

A. Ms. Camacho's Friend Introduced Her to Liggett Brand

Ms. Camacho's friend introduced her to smoking. 10 PA 1745. Because her friend smoked Liggett's L&M brand, that is what she smoked too. 11 PA 1853 ("I smoked L&M because girlfriend gave it to

me."). Ms. Camacho smoked a Liggett-brand cigarette until 1990, when she moved to Las Vegas, and they became too hard to find. 11 PA 1954.

B. Ms. Camacho Ignored Fifty Years of Warnings

Beginning in 1966, every pack of cigarettes Ms. Camacho smoked came with a federally mandated warning. From 1966 to 1970, the warning said, "Caution: Cigarette Smoking May Be Hazardous to Your Health." 5 PA 938; 10 PA 1727. In 1970, the warning changed to "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." 5 PA 938; 10 PA 1727. Since 1985, cigarette packs now display a series of rotating warnings. 5 PA 938; 11 PA 1873. Beginning in 1997, Liggett additionally put a voluntary warning on its cigarette brands that smoking is addictive.[1] 1 PA 210.

Ms. Camacho did not remember any of these warnings, nor is there any evidence that she ever altered her behavior based on a warning. *See* 11 PA 1873–74, 1936–37. In fact, Ms. Camacho claimed she did not know that cigarettes could be harmful to her health until she

[1] On several occasions, including in 2008, 2013, and 2015, Ms. Camacho's doctors also advised her to discontinue smoking, but she was unwilling to quit. 10 PA 1689, 1732–37.

was diagnosed with stage four laryngeal cancer in 2018. 10 PA 1723; 10 PA 1730-31.

When Ms. Camacho first tried to quit smoking in 1990, it was not because smoking was dangerous to her health. 11 PA 1828. She tried because cigarettes were getting expensive. 10 PA 1652; 11 PA 1819; *see also* 11 PA 1830 (testifying that she also tried to quit in the 2000s because cigarettes were "[g]etting expensive"). She also didn't like the smell. 10 PA 1684; 11 PA 1824.

Ms. Camacho's attempts to quit smoking—all of which happened after she moved to Las Vegas in 1990—never lasted more than a day. 11 PA 1825. She never tried to get help, whether from a professional or even just her friends. 11 PA 1826; 11 PA 1838 (admitting she could have tried harder to quit smoking sooner). She ultimately quit because of her cancer. 11 PA 1808; 10 PA 1723, 1760. She had surgery that removed her voice box, and she could no longer smoke. 11 PA 1834–35.

C. State Attorneys General Litigation and MSA

More than two decades before plaintiffs' complaint, on May 21, 1997, the State of Nevada sued cigarette manufacturers, including Liggett. 2 PA 240–367 (AG Complaint). Similar complaints were brought

in every state. The State's punitive damages claim included all of Liggett's conduct that plaintiffs allege in support of their claim for punitive damages here. *Compare* 1 PA 6–54 *with* 2 PA 241–367.

The State's suit, brought on behalf of Nevada residents, cited four bases for the Attorney General's authority. First, under NRS 598.0963(3) (1993),[2] "[i]f the attorney general has reason to believe that a person has engaged or is engaging in a deceptive trade practice, the attorney general may bring an action in the name of the State of Nevada." 2 PA 248–49. Second, under NRS 598A.070 (1989), the Attorney General "shall . . . institute proceedings on behalf of the State . . . or as parens patriae of the persons residing in the State" to enforce the unfair trade practices act. 2 PA 248–49. Third, under NRS 228.170(1) (1989), the attorney general has authority to bring suit "to protect and secure the interest of the state." 2 PA 248–49. And, finally, under "the common law authority of the Attorney General to represent the State of Nevada." 2 PA 248–49.

[2] As of July 1, 2023, NRS 598.0963(3) explicitly states that the recovery is "[a]s parens patriae of the persons residing [sic] this State." (AB 373, § 1.)

Liggett settled the State's claims before the other cigarette manufacturers. *See* 2 PA 233. Liggett had previously settled with other states as early as March 15, 1996, which was before Nevada brought its claims. *See* 2 PA 233. In fact, in 1997, Liggett was the first cigarette manufacturer to publicly state that smoking caused diseases. *See* 1 PA 209.

Later, on November 23, 1998, the states and the other cigarette manufacturers executed the Master Settlement Agreement ("MSA"). 3 PA 373–527 (Master Settlement Agreement). That same day, Liggett executed the General Liggett Replacement Agreement, wherein its earlier settlement with the State was replaced by the MSA. 2 PA 233–34. The MSA applies with equal force to Liggett as a "Subsequent Participating Manufacturer." *See* 2 PA 233–35 (Liggett Replacement Agreement dated November 23, 1998).

D. District Court Finds No Duty or Causation

Liggett does not set forth the entire procedural history of this case. As relevant here, Liggett moved for partial summary judgment on plaintiffs' negligence claim, which the district court granted. 1 PA 140–

56 (Liggett's motion); 30 PA 4653 (plaintiffs' response); 57 PA 8786 (Liggett's reply); 59 PA 8979 (district court's order). As for plaintiffs' claims that Liggett negligently failed to warn of the dangers of smoking before 1969, the district court found that there was no special relationship between plaintiff and Liggett giving rise to a duty on Liggett's part to disclose information to Ms. Camacho. 59 PA 8980.

Additionally, the district court found that "there is no evidence that Mrs. Camacho would not have started smoking or would have quit between 1964 and July 1, 1969 but for Liggett's failure to provide additional warnings." 59 PA 8980. Specifically, the district court found that "[t]here is no evidence that Mrs. Camacho's decision to start or continue smoking Liggett brand cigarettes were related to any statement made by Liggett." 59 PA 8980. Rather, she "started smoking Liggett's L&M brand because that is what her girlfriend smoked and gave her, she thought they were cool, and she continued to smoke L&M brand cigarettes until 1990 because that is what she was familiar with and because it was a milder smoker [sic]." 59 PA 8980.

Plaintiffs unsuccessfully sought reconsideration of the order granting summary judgment on the negligence claims. 59 PA 8982

(Plaintiffs' Motion); 59 PA 9136 (Liggett's Opposition); 60 PA 9218 (PM's Opposition); 61 PA 9547 (Order).

ARGUMENT

I.

WRIT RELIEF IS NOT APPROPRIATE ON THE NEGLIGENCE CLAIMS

This Court should summarily deny the writ petition as it relates to the pre-1969 failure-to-warn arguments. Traditional writ relief is not appropriate because plaintiffs have an adequate remedy through an appeal from final judgment. *See Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017) (recognizing that writ relief is "reserved for extraordinary cases" and should only issue "where there is not a plain, speedy and adequate remedy in the ordinary course of law"). Nor is advisory mandamus appropriate: the question presented by the pre-1969 claims for negligence—based on duties purported to exist before 1969, since superseded by federal law—are fact-bound and specific to this case, meaning this Court's resolution would have little to no import in other pending cases. *See id.* (acknowledging "[a]dvisory mandamus may be appropriate when 'an important issue of law needs clarification and considerations of sound judicial

economy and administration militate in favor of granting the petition"). Put simply, the considerations that could favor advisory mandamus on the punitive damages issue do not apply to plaintiffs' pre-1969 failure to warn claims against Liggett.

II.

THERE IS NO SPECIAL DUTY TO WARN AGAINST THE DANGERS OF SMOKING

When a manufacturer fails to warn of foreseeable and unknown dangers that could result from the use of its product, Nevada law provides a remedy in strict products liability, not negligence. Nevada does not recognize any special relationship or duty between Liggett and Ms. Camacho that would give rise to plaintiffs' claim for negligence.

A negligence theory of relief requires that the defendant owe a duty of care to the plaintiff. *Wiley v. Redd*, 110 Nev. 1310, 1315, 885 P.2d 592, 595. But "the law does not impose a general affirmative duty to warn others of dangers." *Id.* at 1316, 885 P.2d at 596. "[I]n failure to warn cases, defendant's duty to warn exists only where there is a special relationship between the parties, and the danger is foreseeable." *Id.* (quoting *Sims v. General Telephone & Electronics*, 107 Nev. 516,

521, 815 P.2d 151, 154 (1991)). Nevada does not recognize a special relationship between a manufacturer and a user of its products such that Liggett owed Ms. Camacho a duty to warn.

Instead, the Court views a failure to warn as a defect in the product that is remedied through strict products liability. *See Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966) (adopting strict liability for injuries resulting from defective products); *see also, e.g.*, *Outboard Motor Corp. v. Schupbach*, 93 Nev. 158, 163, 561 P.2d 450, 453 (1977) (agreeing that "the failure to warn may itself be deemed a defect causing injury"); *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 624, 668 P.2d 1075, 1080 (1983) ("Where the defendant has reason to anticipate that danger may result from a particular use of his product, and he fails to warn adequately of such a danger, the product sold without a warning is in a defective condition."), *disapproved of on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.3d 1259 (2000); *Ford Motor Co. v. Trejo*, 133 Nev. 520, 525, 402 P.3d 649, 653 (2017) (referring to strict products liability and common law negligence as "twin theories" but only the strict products liability theory went to trial); *Motor Coach Industries, Inc. v. Khiabani ex rel.*

Rigaud, 137 Nev. 416, 419, 493 P.3d 1007, 1011 (2021) ("In Nevada, those bringing a failure-to-warn claim must demonstrate 'the same elements as in other strict product liability cases.'").

There is no reason to recognize liability based on an independent duty of a manufacturer to warn a consumer of dangers from use of a product. *Cf. Young's Mach. Co. v. Long*, 100 Nev. 692, 694, 692 P.2d 24, 25 (1984) (recognizing that strict products liability does not require a showing of negligence and that "ordinary contributory negligence was not to be considered"). A plaintiff injured by a product can seek the same damages through strict products liability. *Cf. Carter v. Ethicon, Inc.*, 2021 WL 1226531, *3–4 (D. Nev. 2021) (finding that negligence-based claims were "subsumed by the strict liability claims"); *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) (holding the opposite in Iowa, which is that only the negligence claim goes to the jury, because both require the plaintiff to "prove a defendant knew or should have known of potential risks associated with the use of its product, yet failed to provide adequate directions or warnings to users" and any distinction between negligent failure to warn and strict products liability "is illusory"). Indeed, products liability actions are "an area of law

where this court has intentionally departed from traditional negligence analysis" because public policy supports strict liability instead. *Trejo*, 133 Nev. at 529, 402 P.3d at 656.

Accordingly, summary judgment was properly granted in Liggett's favor on plaintiffs' negligence claims for failure to warn before July 1, 1969, because Liggett did not owe a duty to warn Ms. Camacho of the dangerous nature of cigarettes. The remainder of plaintiffs' arguments relating to negligence claims—including federal preemption and design defect—are addressed in PM's answer, which Liggett joins.

III.

A FAILURE TO WARN DID NOT CAUSE PLAINTIFFS' INJURIES BECAUSE MS. CAMACHO WOULD NOT HAVE ADHERED TO DIFFERENT WARNINGS

In support of the negligent failure to warn theory, plaintiffs argue that "[t]he Cigarette Manufacturers' advertising practices were a substantial factor in influencing Sandra's decision to smoke." Pet. at 56. For the reasons argued above, there was no corresponding duty for Liggett to warn of the dangers of smoking. There is also no evidence that a different warning from Liggett would have prevented Ms. Camacho from smoking cigarettes or dying of cancer. As discussed below, Ms.

Camacho's conclusory assertion that she would have quit smoking if she had been warned is not enough to defeat summary judgment. Accordingly, summary judgment was also proper because plaintiffs cannot establish a causal relationship between any failure to warn by Liggett and Ms. Camacho's injuries.

A. The Failure to Warn Must Cause the Injuries

A failure to warn claim—whether based in strict products liability or negligence—requires that the failure to warn cause the plaintiffs' injuries. Plaintiffs must show that Liggett's failure to warn Ms. Camacho of the dangers of smoking before July 1, 1969 caused her injuries. *See Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 192, 209 P.3d 271, 276 (2009) ("This court has consistently stated that the plaintiff must prove the element of causation."). Under Nevada law, there is no presumption that she would have heeded those warnings. *See Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 187-88, 209 P.3d 271, 273 (2009) ("Because a heeding presumption shifts the burden of proving causation from the plaintiff to the manufacturer, it is contrary to Nevada law."). It is plaintiffs' burden to establish "that a different warning would have altered the way the plaintiff used the product or would have 'prompted

plaintiff to take precautions to avoid the injury.'" *Rivera*, 125 Nev. at 191, 209 P.3d at 275 (quoting *Riley v. American Honda Motor Co., Inc.*, 259 Mont. 128, 856 P.2d 196, 198 (1993)). That is, plaintiffs must establish that Ms. Camacho would not have started smoking or would have quit smoking if Liggett gave her additional warnings before July 1, 1969.

B. A Conclusory Assertion is Not Sufficient to Create a Genuine Dispute of Material Fact

The Court generally does not make credibility determinations at summary judgment, and all inferences should be drawn in favor of the nonmoving party. But this Court has a long history of recognizing that "[c]onclusory statements along with general allegations do not create an issue of material fact." *Michaels v. Sudeck*, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1991); *Ortega v. Reyna*, 114 Nev. 55, 58, 953 P.2d 18, 20 (1998) (same) *abrogated on other grounds by Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007); *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 833, 897 P.2d 1093, 1094-95 (1995) ("We are cognizant, however, that conclusory statements along with general allegations do not create an issue of fact."); *Wayment v. Holmes*, 112 Nev. 232, 237, 912

P.2d 816, 819 (1996) (refusing to accept party's version of facts as true when it was "nothing more than conclusory allegations and general statements unsupported by evidence creating an issue of fact").

In *Clauson v. Lloyd*, the district court granted summary judgment in favor of a doctor in a medical malpractice case. 103 Nev. 432, 743 P.2d 631 (1987). After very little discovery, the doctor moved for summary judgment based on his own affidavit, in which he summarily concluded that he performed his duties according to the practice, learning, and skill ordinarily practiced by medical practitioners in the community. *Id.* at 433-35, 743 P.2d at 632-33. On appeal, the Court held that the affidavit was not sufficient for summary judgment, because "were [the court] to hold that the affidavit [was] strong enough to support a summary judgment motion, the effect would be chilling." *Id.* at 434, 743 P.2d at 633.

The Court later applied *Clauson*'s reasoning again in *Dennison v. Allen Group Leasing Corp.*, where it "refuse[d] to affirm a summary judgment that [was] premised upon a bare record and unsupported affidavits." 110 Nev. 181, 185, 871 P.2d 288, 291 (1994). And again, in

Serrett v. Kimber, where the Court required "something more than an unsupported affidavit." 110 Nev. 486, 492, 874 P.2d 747, 751 (1994).

Indeed, this Court has consistently stated—even when it is the nonmoving party relying on bare assertions—that "specific facts, rather than general allegations and conclusions, presenting a genuine issue of material fact must be shown to preclude summary judgment." *See, e.g.*, *Bird v. Casa Royale West*, 97 Nev. 67, 71, 624 P.2d 17, 19 (1981) (affirming summary judgment in favor of defendants when plaintiff made "bald assertion" relating to anticipatory repudiation); *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009) ("General allegations supported with conclusory statements fail to create issues of fact."); *King v. Cartlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1162-63 (2005) ("Mere allegations and conclusory statements like those included in [the non-moving party's] opposition are insufficient to survive summary judgment.").

As discussed immediately below, Ms. Camacho's conclusory and unsupported assertion that she never would have begun smoking is not sufficient to defeat summary judgment given the overwhelming evidence that a warning would not—and did not—change her behavior.

C. Failure to Warn Did Not Cause Ms. Camacho's Injuries

The undisputed evidence is that Ms. Camacho chose to smoke cigarettes, and then continued to smoke cigarettes, separate from Liggett's actions.

1. Ms. Camacho's Friend Caused Her to Begin Smoking, Not Liggett's Failure to Warn

There is no evidence that Liggett actually influenced or could have influenced Ms. Camacho's decision to begin smoking. Ms. Camacho did not begin smoking or choose to smoke Liggett's brand because of a Liggett advertisement.[3] *See* 11 PA 1849–53. The undisputed evidence is that she began smoking cigarettes because her friend gave her one,

[3] Ms. Camacho first testified that she did not remember ever seeing an advertisement specifically from Liggett. 11 PA 1908. Later, through questioning from her own lawyer, Ms. Camacho testified that two L&M ads were "similar" to ones that she had seen in magazines and billboards "growing up in the '50s and '60s." 11 PA 1947–48.

Ms. Camacho also testified about television advertisements from an unspecified brand in the late 80s and early 90s saying cigarettes were safe, which are irrelevant to plaintiffs' pre-1969 failure to warn claims against Liggett. *See* 11 PA 1845; *see also* 11 PA 1908 (testifying: "Like I said, don't remember names [of who ran the advertisements], just that no proof of cigarettes are harmful, so I smoked believing them liars.").

which was coincidentally Liggett's brand. *See* 10 PA 1745; 11 PA 1853 ("I smoked L&M because girlfriend gave it to me.").

Further, Ms. Camacho believed that filtered cigarettes were safe because that is what her friend told her, not because of a Liggett advertisement. *See* 11 PA 1852–53, 1919–20. Further undermining plaintiffs' claim, she still tried unfiltered cigarettes anyway, but she did not like their taste or that the "tobacco stuck in [her] mouth." 10 PA 1746–49.

Finally, there was widespread coverage of the risks of smoking before Ms. Camacho began smoking. She began smoking after the Surgeon General's January 1964 report admonishing the United States public that smoking is causally related to various diseases. 15 PA 2454. Although plaintiffs challenge whether smokers were generally heeding that admonishment at the time, it is undisputed that the report was widely publicized. *See* 15 PA 2454, 2456, 2479 (statistics showing smokers' knowledge in 1964 of health risks). The truth is that Ms. Camacho did not make a health-based decision before smoking; she smoked with her friends because it was "the cool thing to do then." 11 PA 1807 ("My first cig I did because it was the cool thing to do then.").

Put simply, there is no evidence that a warning from Liggett would have prevented Ms. Camacho from smoking her first cigarette. Liggett's advertising practices and any failure to warn were irrelevant to her decision to smoke.

2. Ms. Camacho Continued Smoking Despite Adequate Warnings

Ms. Camacho's conduct over the next fifty years shows that she would have ignored any warning and continued smoking cigarettes. Less than two years after Ms. Camacho began smoking, in 1966, she received a warning on every pack of cigarettes: "Caution: Cigarette Smoking May Be Hazardous to Your Health." 5 PA 938; 10 PA 1727; 1 PA 14. There is no evidence that this warning gave her pause or that she altered her behavior in response. Then, about five years after she began smoking, in 1969, she received an even stronger warning on every pack of cigarettes that said: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." 5 PA 938; 10 PA 1727. There were similar warnings on every pack of cigarettes she smoked until the day she quit.

Ms. Camacho received legally adequate warnings on every pack of cigarettes she smoked between July 1, 1969 and when she finally quit due to her cancer. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992) ("[I]nsofar as claims under either failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted."). Yet there is no evidence that Ms. Camacho changed her behavior—or even attempted to do so—after any of these warnings.

She never once tried to quit smoking for health reasons; the few times she tried to quit were because cigarettes were an expensive and smelly habit. *See* 10 PA 1652, 1684; 11 PA 1819, 1824, 1830. In fact, she did not even remember the warnings on the boxes. 10 PA 1727–28. She even failed to make serious efforts to quit in 1997, when Liggett admitted that smoking caused disease and was addictive, nor did she try to stop smoking in 2000 when the remaining domestic cigarette manufacturers publicly admitted the very things she claimed she wished cigarette manufacturers would have warned her about. 10 PA 1725–26. Instead, she repeatedly maintained that she did not know smoking was

dangerous until she was diagnosed with cancer. 10 PA 1723–25; 10 PA 1730-31. As she admitted at one point in her deposition, no one could have said anything to make her quit smoking cigarettes sooner. 11 PA 1877.

3. Ms. Camacho's Conclusory Assertion is Not Sufficient to Defeat Summary Judgment

The only possible support for finding that Ms. Camacho would have heeded a different warning is her own statement that she would have, which was made after she had cancer and surgery and during the pendency of her lawsuit. *See* 10 PA 1721; 11 PA 1838, 1968. That is not enough. Ms. Camacho's self-serving and conclusory pronouncement that she would have never began smoking is meaningless given fifty-plus years of conduct in which she ignored every warning provided. *Cf., e.g.*, *R.J. Reynolds Tobacco Company v. Nelson*, 353 So.3d 87, 92-93 (Fla. 1st DCA 2022) (reasoning that testimony that plaintiff was "risk averse" was not enough to create an issue for the jury when plaintiff ignored warning on cigarette packages for forty-nine years). In reality, she never once even attempted to quit in response to a warning that

smoking was dangerous to her health. *Cf., e.g.*, *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 790 (Mo. Ct. App. 2008) (holding that jury could find causation where "evidence was presented that [a smoker] quit smoking immediately upon being advised to do so by her doctor"); *Mulholland v. Philip Morris USA, Inc.*, 598 Fed.Appx. 21, 23 (2d Cir. 2015) (summary order) (plaintiff made several attempts to quit once learning of smoking hazards and also wore protective safety equipment while painting and welding, "indicating that he did avoid risks when he knew about them").

Accordingly, Ms. Camacho's summary conclusion that she would have never started smoking if warned of the dangers of cigarettes is insufficient as a matter of law to defeat summary judgment. *Cf. Bird*, 97 Nev. at 71, 624 P.2d at 19 (holding that "bald assertion . . . absent any specific facts . . . does not give rise to a material issue of fact"); *King*, 121 Nev. at 928, 124 P.3d at 1162-63 ("Mere allegations and conclusory statements like those included in [the non-moving party's] opposition are insufficient to survive summary judgment."); *Catrone v. 105 Casino Corp.*, 82 Nev. 166, 170-71, 414 P.2d 106, 109 (1966) (rejecting affidavit

in opposition to motion for summary judgment, in part, because it consisted of "a conclusion without factual support in the record"); *Bond v. Stardust, Inc.*, 82 Nev. 47, 50, 410 P.2d 472, 473 (1966) (holding that a "conclusory statement [of the nonmoving party] in his affidavit in opposition to the motion for summary judgment does not create an issue of material fact"); *Havas v. Long*, 85 Nev. 260, 263, 454 P.2d 30, 32 (1969) (same), *superseded on other grounds by amendments to NRCP 12 as stated in Fritz Hansen A/S v. Eighth Judicial District Court*, 116 Nev. 650, 653, 6 P.3d 982, 983-84 (2000).

4. Plaintiffs' Substantial-Factor Arguments Miss the Point

Plaintiffs' reliance on the substantial-factor test is a distraction. *See* Pet. at 58, n. 10. This case is not about whether a failure to warn was a negligible or substantial factor in causing the plaintiffs' injuries, because it was not a factor at all.

The substantial-factor test applies only when there are multiple causes for an injury, each of which would have been sufficient on its own to cause the injury. *Wyeth v. Rowatt*, 126 Nev. 446, 464, 244 P.3d

765, 778 (2010) ("A substantial-factor causation instruction is appropriate when 'an injury may have had two causes, either of which, operating alone, would have been sufficient to cause the injury.'") (quoting *Johnson v. Egtedar*, 112 Nev. 428, 435, 915 P.2d 271, 275–76 (1996)). It is not appropriate in circumstances like these, where a defendant's actions did not contribute to the injury at all. *See Iliescu v. Hale Peek Dennison & Howard Prof. Corp.*, Docket No. 76146, 2020 WL 406781 (Order of Affirmance, January 23, 2020) (unpublished disposition) (refusing to apply substantial factor test where defendant's conduct "was not sufficient, by itself, to bring about the" injury).

Regardless of whether the but-for test or substantial-factor test applies, the outcome is the same: Liggett's failure to warn between 1964 when she started smoking and July 1, 1969 was not a factor in Ms. Camacho's decision to smoke. Plaintiffs' argument otherwise is conjecture and speculation refuted by the evidence of how she actually began and continued smoking.

Even plaintiffs' petition cannot draw an actual causal connection between Ms. Camacho's beliefs and Liggett's advertising. At best, plaintiffs argue that Ms. Camacho's belief that filters were safe and

smoking was cool was "[c]onsistent with the Cigarette Manufacturers' advertisements." Pet. at 57. In other words, Liggett (and other cigarette manufacturers) engaged in advertising that failed to warn of the dangers of cigarettes at the same time Ms. Camacho was smoking cigarettes, and her beliefs about cigarettes were purportedly similar to what was portrayed in the industry-wide advertisements. That is not enough to establish that Liggett's advertisements caused Ms. Camacho to smoke or that she would have heeded a warning from an advertisement before July 1, 1969.[4]

The undisputed facts are that Ms. Camacho made smoking decisions completely unrelated to her health. She began smoking because it was the cool thing to do with her friends. She chose filtered over unfil-

[4] Many of plaintiffs' theories rely on a conspiracy in which all cigarette advertisements are attributed to every defendant in creating a culture around smoking. Indeed, Ms. Camacho blamed "all cigarette makers" for her injuries, even if she did not smoke their cigarettes. 11 PA 1938. Plaintiffs' conspiracy theory against Liggett was debunked by the district court and was not challenged in the writ petition. Even the complaint itself excludes Liggett from the meeting in December of 1953 at the Plaza Hotel where the conspiracy was allegedly formed. *See* 1 PA 10.

tered because they tasted better. When she switched brands, it was because her original brand was hard to find. When she tried to quit, it was because cigarettes were expensive and smelled bad. In other words, "warnings appear irrelevant to [her] decision-making." *Prado Alvarez v. R.J. Reynolds Tobacco Co., Inc.*, 405 F.3d 36, 43 (1st Cir. 2005).

For all of the reasons above, just as the district court found, additional warnings from Liggett before 1969 would not have prevented Ms. Camacho from smoking. The Court should therefore deny the petition's request for relief relating to negligence claims against Liggett for failure to warn before July 1, 1969.

IV.

THE 1997 LITIGATION AND MASTER SETTLEMENT AGREEMENT BAR PLAINTIFFS' PUNITIVE DAMAGES CLAIM

Liggett joins PM's answer, which demonstrates that plaintiffs' punitive damages claims are barred by claim preclusion and the terms of the MSA. Liggett answers separately to reinforce that punitive damages are a public right, and there is no evidence that Liggett engaged in

punitive-worthy conduct after the State vindicated that right in the MSA.

A. Punitive Damages Serve a Public Interest

The Court has always viewed punitive damages as a public interest that serves a purpose separate from compensating the plaintiff. *See Quigley v. Central Pacific Railroad Company*, 11 Nev. 350, 365 (1876) (noting a scholar who advocated for punitive damages "in the extreme cases, where the law blends the interests of the party injured with the interests of the public"). The Court recognized punitive damages in 1913 in *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 P. 753 (1913).

The Court relied in part on reasoning from *Cady v. Case*, 26 P. 448 (Kan. 1891) that described punitive damages as a process where "[t]he party injured pursues the wrong-doer to punishment when society is too careless to do so." *Forrester*, 36 Nev. 247, 134 P. at 761. *Forrester* also relied on a Pennsylvania case, which held that "[i]n cases of personal injury, [exemplary] damages are given not to compensate but to punish." *Id.* at 762. In light of the reasoning from those cases, and a long line of examples, the Court held that "the jury are allowed, and indeed it is their duty in all such cases where the law provides no other penalty, to

consider the interests of society, as well as justice to the plaintiffs, and by their verdict, while they make just compensation for the private injury, *also to inflict proper punishment for the disregard of public duty*." *Id.* at 247, 134 P. at 770 (emphasis added).

In sum, *Forrester* considered punitive damages as a remedy distinct from compensation for private injuries, which was meant to punish defendants for disregard of their public duties, and which could be pursued by a plaintiff when society itself was unable or "too careless" to punish the defendant.

Since then, the Court has reaffirmed the public purpose of punitive damages by consistently holding that punitive damages are not to compensate a plaintiff, but are rendered "to punish and deter the defendant's culpable conduct."[5] *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006); *New Hampshire Ins. Co. v. Gruhn*, 99 Nev. 771, 773, 670 P.2d 941, 942 (1983) ("[P]unitive damages are not awarded to compensate the plaintiff for harm incurred."); *Countrywide*

[5] NRS 42.005(1) itself provides that a plaintiff "in addition to compensatory damages, may recover damages for the sake of example and by way of punishing the defendant."

Home Loans, Inc. v. Thitchener, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008) ("Punitive damages are designed to punish and deter a defendant's culpable conduct and act as a means for the community to express outrage and distaste for such conduct."); *see also Nev. Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973) (holding that punitive damages should be awarded in "an amount that would promote the public interest").

"Punitive damages are not awarded as a matter of right to an injured litigant. . . ." *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44, 846 P.2d 303, 304 (1993). Rather, the underlying purpose is "public policy concerns unrelated to the compensatory entitlements of the injured party." *Id.* at 44, 846 P.2d at 305. In particular, "[p]unitive damages provide a means by which the community . . . can express community outrage or distaste for the misconduct." *Bongiovi*, 122 Nev. at 580, 138 P.3d at 450 (quoting *Ace Truck v. Kahn*, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987)). Such awards "also provide[] a benefit to society by punishing undesirable conduct that is not punishable by the criminal law." *Kahn*, 103 Nev. at 506, 746 P.2d at 134.

Consistent with Nevada's view, the U.S. Supreme Court upholds punitive damages under state tort law because they serve a public purpose by "further[ing] a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996). The Supreme Court has referred to punitive damages as "private fines" to punish and deter future wrongdoing. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

True, those "private fines" are awarded to a private plaintiff, not the public.[6] But that's a function of how the public interest is enforced through tort law. For example, courts note that "punitive damages reward individuals who serve as 'private attorneys general' in bringing wrongdoers to account." *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986); *In re School Asbestos Litigation*, 789 F.2d 996, 1003 (3d Cir. 1986) (plaintiff seeking punitive damages "serves somewhat as a private attorney general."). In effect, the monetary

[6] Notably, however, punitive damage awards—unlike compensatory damages—are taxable as gross income. *See* 26 U.S.C. § 104(a)(2).

award above compensatory damages serves "as a 'bounty' that encourages private lawsuits seeking to assert legal rights.'" *In re Simon II Litigation*, 407 F.3d 125, 136 (2d Cir. 2005) (quoting *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting)).

In this instance, the State was not too careless to pursue the cigarette manufacturers for punitive damages to punish and deter their conduct. Liggett therefore joins in PM's analysis of claim preclusion in its answer. Liggett also adds that Ms. Camacho stopped smoking Liggett's brand many years before the MSA and there is no post-MSA conduct establishing punitive damages against Liggett.

B. The State Resolved the Public's Interest in Punitive Damages Against Liggett

The State already sued Liggett for punitive damages on behalf of its residents, including plaintiffs. The 1997 complaint expressly relied on the State's authority to represent Nevada's residents, including its common law authority. *See* 2 PA 248–49. The State's common law authority includes bringing an action as *parens patriae* of Nevada residents. *See State v. Moore*, 46 Nev. 65, 207 P. 75, 76 (1922) ("[T]he office of the Attorney General in this state has all of the powers belonging to

it at common law, in addition to those conferred by statute."); *State ex rel. Johnson v. Reliant Energy, Inc.*, 128 Nev. 483, 486, 289 P.3d 1186, 1188 (2012) (recognizing the State sued "in its capacity as parens patriae on behalf of [Nevada] residents"); s*ee also Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (recognizing that "[t]he concept of parens patriae is derived from the English constitutional system . . . [and] has been greatly expanded in the United States beyond that which existed in England"); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 771 (7th Cir. 2011) (recognizing that parens patriae "is rooted in the English common-law concept of the 'royal prerogative'"); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600–07 (1982) (explaining *parens patriae* standing).

The State was the quintessential party to resolve punitive damages claims against the tobacco industry. *Cf. Maryland Cas. Co. v. Tiffin*, 537 So. 2d 469 (Ala. 1988) (considering the State as the true party plaintiff in punitive damages claim). Although the State had no standing to resolve claims for Ms. Camacho's future personal injuries, it did have standing to pursue the public's interest in punishing and deterring Liggett's conduct through punitive damages. *See Brown & Williamson*

Tobacco Corp. v. Gault, 627 S.E.2d 549, 551 (Ga. 2006) ("[T]he State and its citizens can be privies only with regard to public claims; they cannot be privies with regard to private claims."). Indeed, the State could uniquely seek punitive damages against the entire tobacco industry on behalf of all residents.

Here, plaintiffs have not established any public interest in punishing and deterring Liggett beyond those already asserted in the State's 1997 complaint. Plaintiffs have previously implied that because Ms. Camacho was not diagnosed with cancer until 2018, the claims are based on different facts. That is misleading. Even if her specific injury manifested after the MSA, the conduct plaintiffs seek to punish occurred before it. Indeed, plaintiffs have introduced no evidence of Liggett's post-MSA conduct that would indicate they are seeking punitive damages for anything other than the same conduct resolved by the MSA.

Ms. Camacho stopped smoking Liggett brand cigarettes about eight years before the MSA. 11 PA 1954. And Liggett publicly stated the dangerous effects and addictive nature of cigarettes before the MSA. 1 PA 209–10. There can be no serious argument that Liggett engaged

in any post-MSA conduct that might support plaintiffs' claim for punitive damages.

Rather, plaintiffs seek a private windfall from an award of punitive damages for claims the State already pursued and resolved against Liggett. While some states might give plaintiffs that right—by awarding punitive damages as a private interest or individual right[7]—Nevada does not. The district court therefore properly granted summary judgment in Liggett's favor on plaintiffs' claim for punitive damages. *See Mulholland v. Philip Morris USA, Inc.*, 598 Fed.Appx. 21, 24 (2d Cir. 2015) (summary order) (recognizing that "[b]oth New York Appellate Divisions to consider this issue have concluded that punitive damages are public, not private, and private plaintiffs are barred from seeking punitive damages for the same course of conduct against the same defendants as were involved in the MSA").

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[7] Plaintiffs' reliance on *Laramie v. Philip Morris USA Inc.*, 173 N.E.3d 731, 744 (Mass. 2021) ignores that Massachusetts law entitles a plaintiff to a minimum punitive damages award when the elements are established. *See* M.G.L.A. 229 § 2. That directly contradicts Nevada law that a plaintiff is never entitled to punitive damages. *See Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 380, 989 P.2d 882, 887 (1999) ("A plaintiff is never entitled to punitive damages as a matter of right. . . .").

CONCLUSION

Liggett joins PM's answer. In addition, this Court should reject plaintiffs' pre-1969 negligent failure to warn arguments. Additionally, plaintiffs presented no evidence that Liggett engaged in conduct warranting punitive damages that was not already resolved by the MSA. Accordingly, the Court should deny the petition.

Dated this 22nd day of August, 2023.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 21(d) because, except as exempted by NRAP 32(a)(7)(C), it contains 6,796 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

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