

Big Tobacco Case Tops Year's Largest Verdicts

Plaintiff's attorneys offer behind-scenes look at landmark win

By Phillip Bantz

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Two Boston trial lawyers took on Big Tobacco and won the largest jury verdict in the state last year in a wrongful death suit that exposed a disturbing campaign to distribute menthol cigarettes to inner-city children.

The \$152 million award in *Evans v. Lorillard* is nearly 10 times larger than 2009's top verdict of \$15.7 million in a patent case. The historic win against the third-largest cigarette maker in the nation came after thousands of working hours and late nights at the attorneys' downtown Boston law firm.

"We ate supper together a lot of nights — lots of Wagamama and B Good Burgers," said Thomas Frisardi, who tried the case with lead plaintiff's attorney Michael D. Weisman, both of Davis, Malm & D'Agostine.

Frisardi and Weisman faced off against Lorillard's stable of attorneys hailing from three firms: Nutter, McClennen & Fish and Prince, Lobel, Glovsky & Tye, both in Boston, and Shook, Hardy, Bacon in Kansas City.

In the courtroom, the disparity in plaintiff's and defense resources was glaring, Frisardi said. He and Weisman sat together at a small table. Behind them, sitting at two tables pushed together, were the four main defense attorneys. Another group of defense attorneys watched from the gallery.

An outmanned Weisman and Frisardi said the defense tried to bury them in paperwork, filing, for example, more than two dozen pre-trial motions, including eight motions for summary judgment, with briefs totaling 132 pages.

"That was an example of the way in which they conducted business," Weisman said. "There were more resources devoted to this case than any other case I've ever seen."

Messages left for the defendant's lawyers went unreturned. A Lorillard spokesman has said the company plans to appeal the verdict, which marks its first loss in a suit brought by an individual.

Winning factors

Before Marie Evans died, Weisman filed an emergency petition to record her testimony about Newport cigarette giveaways targeting black youngsters in Roxbury's Orchard Park in the 1960s.

Lorillard fought the request but lost.

Over the course of three days, Evans sat in front of a video camera at her home and talked about receiving free cigarettes from Lorillard representatives who approached children near a playground in the Orchard Park housing project where she lived.

Evans said she was 9 when she was given cigarettes. She smoked for more than 40 years before she was diagnosed with lung cancer, and her son, Willie Evans, a Boston lawyer, sued Lorillard.

She was in "extreme pain" during the video deposition, which unfolded over three days in 2002, but she delivered her testimony without drama, Weisman said. She died three weeks after the recording.

The video deposition played a crucial role in the case, as did internal Lorillard documents that evidenced an aggressive campaign to entice black youths to smoke Newports.

A subtler, though significant, factor in the plaintiff's win was the juxtaposition of cross-examination styles when third-party fact witnesses took the stand for either side, Weisman said.

He described a good-cop/bad-cop scenario playing out in the courtroom. Frisardi took a calm,



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Boston lawyers Michael D. Weisman (left) and Thomas Frisardi, who pulled in the biggest verdict of 2010

almost gentle, approach in dealing with Lorillard witnesses who testified that they did not remember the cigarette giveaways, while the defense attacked plaintiff witnesses who corroborated the handouts.

"It was dramatic — the difference between Tom's examination and theirs — and I don't think the jury liked it," Weisman said. "Lorillard cross-examined our witnesses as if they were lying."

Instead of trying to discredit Lorillard's witnesses, Frisardi said he showed jurors that many of them were actually being truthful in testifying that they didn't remember the giveaways, because they had daily routines that would have kept them away from the park.

"He did not attack the witnesses; he did not call

them liars,” Weisman said. “That was an important strategic decision that Tom made to treat them with dignity and respect. In the opening statement, I told the jury that this case is about dignity, that Marie Evans was a dignified person.”

Blue or green?

The most memorable moment of the trial for Weisman came during the cross of a Lorillard representative who showed jurors a copy of a Newport advertisement from a 1965 edition of *Ebony* magazine.

In the copy, the pack of cigarettes was blue.

That was a problem for the plaintiff. Many of the witnesses who remembered the giveaways could not recall the brand of cigarettes they were given as children, but they testified that the packs were green.

“If the pack was blue, it couldn’t have been Newport,” Weisman said.

But Weisman and Frisardi had the actual magazine ad. The package was green.

Weisman showed the Lorillard rep the magazine and asked him if he had compared his copy to the real ad.

“He said he had not,” Weisman said.

He asked whether Lorillard had intentionally altered the color of the Newport ad to deceive the jury. The defense objected, and Superior Court Judge Elizabeth M. Fahey sustained the objection.

But the damage was done.

“It made it look as though the defense didn’t really care whether the jury got the facts,” Frisardi said. “And this happened right in the middle of the defense’s case.”

Choice and addiction

Before Weisman took the Evans case, he believed anyone could stop smoking.

“It was simply a matter of willpower,” he said.

Frisardi himself smoked for 20 years before quitting.

But Marie Evans had been unable to quit.

She readily admitted that she shared fault with Lorillard. But her addiction was stronger, more difficult to shake, because Lorillard had started her young, Frisardi and Weisman argued.

“I learned that there are fundamental changes in the brain that happen if you start smoking as a child, as Marie Evans did,” Weisman said. “It is much more than willpower.”

Both sides called addiction experts to the stand. The plaintiff’s experts testified that addiction means different things for different people, while a defense expert flown in from the Medical University of South Carolina told jurors that anyone can quit smoking and that it’s just a matter of motivation.

“She ended up being a better witness for us than for them,” said Weisman, who confronted the MUSC expert with a document that showed Lorillard had recruited youth smokers in the ’60s.



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The plaintiff’s team, from left: Michael D. Weisman, Kendra Kinscherf, Joshua S. Grossman and Thomas Frisardi

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Negligence & tort

Evans v. Lorillard

Suffolk Superior Court

Date of verdict: Dec. 14, 2010 (compensatory award); Dec. 16 (punitive award)

Plaintiff’s attorneys: Michael D. Weisman, Thomas Frisardi, Joshua S. Grossman and Kendra Kinscherf, Davis Malm & D’Agostine, Boston

Status of verdict: Awaiting entry of final judgment

“She was visibly taken aback on the stand,” Frisardi said. “I would say her facial expression said she was upset, and I think the jury saw that.”

The verdict

Neither side knew whether any of the jurors were smokers or ex-smokers, which is what Frisardi and Weisman wanted.

They had filed a motion in limine to prevent the defendants from having jury consultants conduct online research on the jurors, such as visiting their Facebook pages or blogs.

Judge Fahey allowed limited online research, but she ordered that the lawyers submit affidavits detailing every website that was visited during the inquiry. And in the end, Lorillard never did the research, according to the plaintiff’s team.

Meanwhile, Frisardi and Weisman successfully opposed Lorillard’s request to make jurors answer detailed questionnaires. The jury was simply read a description of the case and asked if they could be fair and impartial.

“We pushed very hard for a simple process,” Weisman said. “We did not think it was necessary to pry into jurors’ backgrounds or personal habits. They swore they could be impartial, and that was good enough for us.”

The jury, which took three days to seat, deliberated for six days before deciding compensatory damages. It determined that Lorillard was negligent for marketing Newports to children and failing to warn Marie Evans of the health risks; that the company committed breach of warranty by distributing a dangerous product; and it acted in a malicious, willful and wanton manner.

The jury awarded \$71 million in compensatory damages: \$50 million for Marie Evans’ estate and \$21 million for Willie Evans. Following a one-day hearing on punitive damages, the jury awarded another \$81 million to the plaintiff, mirroring five days of net sales for Lorillard.

Fahey is deciding whether additional damages are appropriate under the plaintiff’s statutory claim alleging Lorillard breached consumer protection law. The judge recently ordered Lorillard to keep at least \$270 million in liquid assets on hand until the lawsuit is finalized.

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