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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LEONARD WHITELEY, Plaintiff and Respondent, v. PHILIP MORRIS INC. et al., Defendants and Appellants.	A091444 (San Francisco County Super. Ct. No. 303184) **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion certified for publication and filed herein on April 7, 2004, be modified as follows:

1. Footnote 5 on pages 5 and 6 should be deleted in its entirety and replaced with a new footnote 5, to read as follows:

> 5. We are using the term "addicted" as shorthand. We do not here declare as a judicial fact that tobacco is addictive in any settled medical sense. That question is not before us. The jury could find that tobacco was addictive in the sense supported by the evidence and supportive of the judgment.

2. In footnote 10 on page 17, the last full paragraph of the footnote citing to *Henley v. Philip Morris, Inc., supra,* 114 Cal.App.4th 1429, 1441-1444, should be deleted.

3. On page 52, in the second paragraph, the citation to "*Henley v. Phillip Morris Inc., supra,* 114 Cal.App.4th at p. 1467" should be deleted. The new citation following the quote in the second paragraph should now begin with:

(See *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605 . . . .)

4. The paragraph commencing at the bottom of page 65 with "Recently, Division Four of this court . . ." and ending at the top of page 66 with ". . . more ready to believe defendants than were nonsmokers" is modified to read as follows:

> Furthermore, the question here is not whether the *public* adequately appreciated the health risks of smoking to excuse defendants' misrepresentations and false promises. Instead we will presume in support of the judgment that the jury found on substantial evidence that even if there were ample information in the public domain to convince reasonable observers of the hazards of smoking, defendants and their agents deliberately interfered with the *assimilation* of that information, particularly by smokers and prospective smokers. It was this class to which Whiteley belonged and to which defendants presumably owed a primary duty not to mislead. Nonsmokers were far less directly affected by the issue. Evidence was presented in this case that smokers were less attuned to warnings and more ready to believe defendants than were nonsmokers.

5. On page 66, the first full paragraph commencing with "*Henley* also observed: . . ." should be deleted in its entirety.

6. The paragraph commencing at the bottom of page 66 with "A fortiori, in this case . . ." and ending at the top of page 67 with ". . . was reasonable in the circumstances" is modified to read as follows:

> In this case, where we review fraud verdicts premised upon affirmative misrepresentations and false promises regarding the health risks of smoking and what actions defendants were taking and would take with respect to the "controversy," we believe that substantial evidence supports the jury's determination that Whiteley's reliance was reasonable in the circumstances.

7. On page 70, in the last full paragraph, the point page in the cite to *Rutherford, supra,* 16 Cal.4th 953, should be modified to read "977."

8. On page 78, the first full paragraph should be modified to read as follows:

> Nevertheless, we need not determine whether the *Rutherford* variant on proof of causation applies here, because it is clear that the evidence is insufficient

to support the jury's finding even under that standard. (See *Kennedy v. Southern California Edison Co.* (9th Cir. 2001) 268 F.3d 763, 770.) Increased risk alone is not actionable. In toxic tort cases generally, "plaintiffs must establish, to a *reasonable medical probability, their illnesses* were caused by the toxic exposure. The fact the chemicals increased the possibility of sickness in the overall population does not suffice to provide a causal link with plaintiffs' illnesses." (Flahavan et al., supra, [¶] 2:985.1, p. 2-316.4.)

There is no change in the judgment.

Respondent's petition for rehearing is denied.

KLINE, P.J.

Trial Court:	San Francisco County Superior Court
Trial Judge:	Honorable John E. Munter
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