

**Closing Argument of Robert Moore
Counsel for Plaintiff
Linkovitch v. Executive Inn, 91 CI 4682
Food Server Negligence
Verdict: \$75,000
Jefferson Circuit Court
12-5-97**

Case Summary

A Brown Forman executive, reporting for his first day of work in Louisville, was eating breakfast at the Tudor Room at the Executive Inn operated by the Home Supply Corporation. The restaurant served him pancakes with syrup. Unfortunately, the Tudor Room accidentally placed oven cleaner in the syrup bowl, and plaintiff suffered a loss of taste and smell as a result of ingesting same. Liability for the incident was no issue, and the jury awarded plaintiff medical bills of \$15,000 and suffering damages of \$60,000. It was learned after trial the jury arrived at the \$60,000 figure by a poll method.

Mr. Moore's Closing Argument

The only issue in this case is the amount of damages that you are going to award Jerry Linkovitch in this case for Home Supply's admitted negligence. Now, the last couple of days, you've heard through no fault of his own, Home Supply took from him his sense of taste and smell. I know that Mr. Miller has tried to make his some arguments that Jerry didn't lose his taste or smell, because it was due to something else. I'll address those in a few minutes, and after I do, I think you'll be satisfied, that in fact, Home Supply did cause Jerry to lose his taste and smell. You heard Ms. Allen testify that back in 1990, Home Supply only verbally told its employees that containers in restaurants had to be labeled. They only verbally told its employees that you couldn't store cleaning supplies with foods. That's all they did. There's no written policy, there was no warning on the wall. Yet in court, they admit that's a good idea, we're a restaurant with a lot of turnover here, to make sure it's up on the wall so that everyone sees it.

Of course, the defense representative has told you that now, Home Supply, does have those warnings up on the wall and I submit to you that this was at my suggestion during deposition in 1997. I'll submit to you that it's an awfully strange coincidence that in between his deposition and the trial of this matter, Home Supply has put that warning up on the wall. I submit that this is a case of foxhole religion.

Let's go to the Tudor Room six months from now. Will the warnings still be on the wall? I have to wonder. Anyway, in spite of all the verbal warnings Tudor Room employees supposedly got, a day or two before the injury to Jerry, that somehow, this container got down to the food closet. The defense has admitted the following violations occurred. First of all, the person who took the oven cleaner out of the box had to see that it was unlabeled, but they didn't stop at that time to see that it was labeled. The person who used it, it may have been the same person that took it out, I don't know, they didn't stop and say this jug isn't labeled. It needs to be labeled. It's got oven cleaner in it. The person who put it in the closet didn't stop and say, there's no label on this, I don't what it is. I need to put a label on it, or this oven cleaner that I just used, I'll put it next to the syrup.

Ms. Allen the morning of the 25th got the jug

Keypoint: Emphasizing the Wrongdoing
Moore describes in detail the comedy of errors that resulted in the oven cleaner being served and the dramatic effect upon plaintiff.

of oven cleaner off the shelf, right next to the syrup and she says I'm sure I saw that it was unmarked but she didn't take the time to say, hey, we need to label this. That's another violation. The final violation is when Ms. Guthrie again saw that it was unlabeled, but despite that, she poured it into the pan to be heated so that it could be served to Jerry with his french toast. I guess it's incredible to me that there were five violations of company policy and regulations, with this one jug that resulted in permanent injury to Jerry Linkovitch. He can no longer smell flowers in his wife's garden or any of her cooking.

You've heard he wished he could taste her roast beef. Now, Mr. Miller in his opening, seemed to say that it's no big deal that we served this oven cleaner, because we admitted it. Now, I guess I have to wonder, what is the good of an admission if you don't say, we did it and I'm sorry. You didn't hear anyone say they're sorry to Jerry until Ms. Allen testified on the stand, seven years later, I'm sorry this happened to you.

I'd certainly submit to you that this is a big deal. You heard Jerry testify that he put one bite into his mouth, and had the second bite up to his mouth, he felt this blinding white flash in front of him. He felt his mouth start to burn and gurgle. He almost fainted. He spit out the french toast. I'm sure he tried to get it all out. Who wouldn't try to get it all out when your mouth feels like it's on fire. Common sense tells you

that french toast with syrup on it, even after you spit it out, of course there will be syrup in your mouth. He started drinking water to put out the fire, I'm sure while he was drinking water to put out the fire, there was still oven cleaner in his mouth. Where did it go? We don't know.

I don't think it really matters if he swallowed the french toast or not, or whether it went into his stomach. We're not saying he suffered any burns to his stomach. We're not saying he's suffered any burns to his intestines. We're just saying that he suffered first and second degree burns to his mouth, and went up into his nose and damaged the nerve that provides for smell. We're saying those damages were caused by the oven cleaner. Now, you know that Jerry went to the ER right after this happened, and had to be carried out of the Tudor Room on a stretcher. I submit to you, that I wouldn't want to be carried out of any restaurant on a stretcher. I'd certainly find that embarrassing and humiliating. Of course, he had to wait at the hotel for a significant period of time before EMS could transport him to the hospital to find out what was going on. When you look at the records from EMS, you will see, that EMS arrived at the scene at 7:16. They were not able to depart from the scene until 7:50. They didn't get to the ER until 8:02. That's a long time to be wondering what's going on.

Dr. Gardner of course testified when he came in, that as early as 8-2-90, Jerry was experiencing an alteration in his taste. The ER doctor was not able to fully examine his mouth because of the swelling and that's why Dr. Gardner examined him and performed the esophogram. I'd like to address the issue of whether or not the issue of Jerry ingesting this oven cleaner into his mouth and then spitting it out after it started burning, I'd like to address whether or not it caused him to lose his sense of taste and smell. You know from the testimony and the admissions of the defendant, it caused first and second degree burns, and that on August 2 he was experiencing an alteration of taste. You all know from his testimony up here yesterday, that he was at work, and everyone else where he was working smelled fumes where carpet had been cleaned, and he couldn't smell it. Those events show that shortly after the incident, Jerry was already suffering an alteration in his taste and smell. Another thing that you have to look at, you have to look at, his wife's testimony. She testified that after this incident, Jerry started complaining about her food that it was bland, tasteless, he started putting all kinds of hot sauces on it to get some reaction when he ate. That certainly indicates that this loss of sense of taste and smell was caused by the ingestion of the oven cleaner.

Now Mr. Miller tried to and made a big deal that at an examination in 1991, where he indicated he was still suffering from a loss of taste, and he states in here, let me find, he does have a chance of a return due to the fact that he had no damage to his sense of smell. We don't know what if any tests Dr. Gardner did on Jerry to determine if there was damage to his sense of smell. I think you all heard that Dr. Gardner is a fine surgeon, but he certainly has no expertise in the study of smell. He didn't do any tests on Jerry.

Interestingly, Mr. Miller says that Jerry didn't say anything to a doctor about his sense of smell problems until he hired an attorney. I'd point out that Dr. Gardner, as early as January 1991, had set Jerry up to see Dr. Winkstadt at the University in the taste and smell lab. At this time he was already being set up to see a doctor about his taste and smell, and you've heard Jerry say that Dr. Gardner found out that he had lost his sense of taste and smell and there was no treatment that Dr. Winkstadt could give him. I'd like you all to look at that carefully back in the jury room.

I guess, when you look at Dr. Gardner's notes, if anything, they're more consistent with the oven cleaner causing Jerry to alter his sense of taste and smell as inconsistent. He was definitely experiencing a difference in his taste, and he was set up with Dr. Winkstadt about the loss of the sense of taste and smell.

Now, you all heard the testimony of Dr. Hirsch. I found Dr. Hirsch to be very entertaining. But more than that, Dr. Hirsch is one of the leading experts dealing with the issue of the loss of taste and smell. We have his resume for you to look through to see all the work he's done in this area. Dr. Hirsch came up here to testify that the ingestion of this poisonous oven cleaner would cause Jerry to lose his sense of taste and smell, and I don't think the defendant was able to show anything to discredit Dr. Hirsch. In 1992 and again in 1997, Dr. Hirsch examined Jerry, and in both times, he found out that Jerry had suffered a very big impact on his ability to taste and smell. Now, Mr. Miller again makes a big deal of the fact that Dr. Hirsch was recommended to him by his former attorney, George Salem, if you'll recall, Jerry went to Salem after Winkstadt said there was no treatment, is there anyone I can go to that can help treat this problem, so that I can be cured, and that's how they found Dr. Hirsch. He went to Hirsch for treatment. Not to set up testimony for this case. In fact, Hirsch did try to treat Jerry with two types of prescriptions after both meetings with him, and you'll recall both of those treatments were unsuccessful.

It's interesting that the defendant attacked Dr. Hirsch's credibility today because he doesn't know if

the loss of taste and smell was caused by the oven cleaner. Certainly the defendant had the opportunity to bring in testimony and show that Jerry's loss of taste and smell was caused by something else. That Jerry had been in a car accident two weeks before on July 25, 1990, and that a blow to his head had caused this loss. They could have brought someone in to show that Jerry suffered epileptic seizures prior to this. But they didn't. I submit that no such incidences occurred and the only thing that happened to cause Jerry to lose his sense of taste and his sense of smell was the ingestion of that poisonous oven cleaner.

I guess, it's really difficult for me to see that anyone would come up here and tell you all and suggest that someone who ingests super institutional equipment cleaner that is designed to clean grease and baked and caked on residues from ovens and freezer shelving. That's what that stuff is designed to do. Just think what it did to Jerry's mouth and his nerve for smell.

You have heard about the problems that were caused directly by his loss of taste and smell, and you heard that testimony from Jerry, and from his wife, and you have heard that it has impacted his whole life, and that his loss is forever. It actually happened when he was 47. He's 53 now. Look at him. He's in good health. He's going to be here a long time without his sense of taste and smell, and he's going to have to live with that on a daily basis.

You've heard that it has impacted his social life. He's withdrawn. He's not interested in socializing with other people. When two of your senses are gone, and you can't experience what others experience, I'm sure it's depressing to be around other people and they say boy, smell that popcorn, can you smell those flowers. He's withdrawn from people because of this. And that is particularly true here, where his social life turned around having people over for dinner, and we know this from his wife's testimony, and his testimony.

It has already impacted his professional life. He's worked in the distilled spirits for years, and one of the things we all know that people that make alcoholic beverages, they try to distinguish their product from someone else's product. How could Jerry know if those products are different if he can't taste or smell them. One valuable way to make a contact in the distilled spirits industry, is to serve on taste panels. You network and form relationships with people that will help you in your business. Jerry can't do that anymore.

I guess what I consider more important, that due to the extreme negligence of Home Supply, Jerry's

home life has been significantly impacted. I showed you yesterday that there was a real strain on his marriage when she was cooking meals for Jerry and he didn't know that his sense of smell was nearly gone. Until he was examined by Dr. Winkstadt, he didn't completely realize how bad the problem was. And you heard Jerry testify to that. So here they are, his wife is cooking the same meals she always put on, and Jerry's criticizing them, he nitpicks them. Everyone's gone home, and someone prepares a meal for you, and you criticize it, and I submit to you that the person that prepared the meal can get pretty upset. I've seen it happen at my house. Of course, his wife testified that although they know exactly what's going on, Jerry's still changed. Their marriage is changed because he's no longer the person she married. He's not his old self. He's irritable, not interested in socializing. The list goes on and on. Even his children have seen the changes and find him to be more irritable.

You heard both Dr. Hirsch and Dr. Wagner testify about the depression from which Jerry suffers, and both of them testified, that when a sense is lost, to have depression that you no longer have something you used to have, while it's not clinical depression where you can't get out bed, it is still significant enough that it has impacted his whole life. What's interesting, the further from we are from 7-25-90, the more we realize the permanence of this injury; it's impact has gotten greater and greater, and that impact on himself has gotten greater and greater. The one thing you wouldn't think about, but in this case, besides his loss of taste and smell, he's lost his dream for retirement.

Jerry always wanted to retire with his wife, and open a winery and do the work themselves and make money. We all have to have dreams. It's what keeps us going, but it was taken away. He feels depression every day because he's lost his sense of taste and smell. It's not just the family and the social, he's in danger everyday because of the loss. Well he's not going to be in a fire everyday and he won't be subject to a horrible chemical explosion everyday, but when do you know when a fire's going to happen. When do you know when you'll walk through an area where a chemical has been spilled. When do you know that you're going to be served improperly prepared food. You have to have those senses on a daily basis. Here, Jerry can't smell spoiled foods anymore, he sure couldn't notice the leak in the gas in his bedroom. That's not made up. The LG& E employee testified that there was a gas leak in Jerry's house and his bedroom of all places in 1996. Jerry couldn't detect it because he can't smell or taste.

I mentioned gas and a chemical spill, but one

of the simplest things, Jerry couldn't smell the spaghetti on the stove when it was burning. He couldn't even smell that. I wish I had a dollar for every time I smelled my toast and my bagel burning. The reason I can do that is because I can smell it. Jerry's loss of sense of taste and smell, and the pain and embarrassment he's suffered, the horrible impact on his family and marriage, the impact on his professional life, the depression he suffers are all very real. Of course, Mr. Miller has tried to minimize all this saying you can't connect it to the loss of taste and smell, but Dr. Hirsch and Dr. Wagner sure testified to that.

There may be questions as to whether this is something subjective. It's not like a broken arm where you can look at it, and see that there is in fact an injury. You've seen Jerry testify. You can judge his credibility and tell he's not lying. If you think he's in here looking for a big pot of money, think about his other incidents of food poisoning where he never filed a lawsuit. He only filed a lawsuit here because he suffered a permanent injury. One other thing about whether the effects on Jerry are real or not.

If you'll recall, when Dr. Hirsch testified, he talked about a test he did on Jerry, he pointed out that Jerry's score is way below the normal levels, and this shows that he is a credible witness. When you heard Dr. Wagner testify, and she's trained as a clinical psychologist to know when people aren't telling the truth, Dr. Wagner found Jerry to be very credible. Interestingly, instead of exaggerating his claims, Dr. Wagner found that he actually understated his problems. So both Wagner and Hirsch conclude that Jerry was truthful. Did the defense come up with any way to show he was lying? They did not.

A couple of mornings ago, you all agreed that

Keypoint: Suffering Damages

In detail, Moore describes the everyday effects of losing the sense of taste and smell upon his client.

just because Jerry's loss is not something that you can see like a broken arm or a broken leg, that you could still award him a fair amount in damages for his injury, and you also agreed when I asked you, that the loss of even one sense is significant. There's five senses. I had to write them down so I wouldn't forget them. We've got the sense of sight, the sense of hearing, the sense of smell, the sense of touch and the sense of taste, and Jerry's lost two of these senses. He's only got three left, and that's because Home Supply served the oven cleaner.

When he gets up in the morning he can't smell the coffee brewing or the bacon cooking, or taste it. He

can't even taste toothpaste. If he's like I am, if he wants a chocolate donut before lunch, he can't taste that. If he wants a breath mint, does it taste good? At lunch, he can't taste a ham sandwich, the vegetable soup. Can he taste any kind of cookies? That's gone. An afternoon snack? Popcorn? There's nothing better than smelling popcorn to keep you going at work. He can't smell that. What about supper? He can't taste his wife's cooking. Into the evening, he can't taste ice cream. Think about a day like today. I got up today, it's cold today, how would a cup of rich hot chocolate taste on a day like today? He can't taste that. That's the sense of taste.

What about the sense of smell? How many times a day do you detect the scent of a pleasant perfume? What about when you wake up in the morning and go outside, can you smell when it's going to rain? What about when you're with your grandchild, can you smell her hair? What about the delicious smell of the bakery when you walk by, and you smell the pastries in there cooking. That's gone for Jerry. It's hard to imagine the impact on Jerry's life. Every single day he misses the good time of life that the rest of us enjoy and which is so important to us, and which can't be given back, and has been taken away from him, and that's been taken away from him by Home Supply's extreme negligence on this day.

Under our system, you all are the only group that can compensate Jerry for his loss. He can't go to the government and get compensation. He can't go to the state and get compensation. In this case, the doctors can't even help him. Only you have that ability. You heard that Jerry had to pay \$13,000 in medical expenses. He also had to pay a significant amount of money to see Dr. Hirsch. I submit to you that when you go to one of the leading experts in the U.S. and the world on a medical problem, you're going to need a lot of money. I don't know how much you have to pay when you go to the Mayo Clinic, but I bet it's a lot of money.

Jerry would rather not be here today. His wife would rather not be here today. They'd rather be on with their life, with him not injured, able to taste things and smell things. But that's not the case. I'm confident you'll award Jerry the money necessary to compensate him for his out of pocket expense that he's paid doctors. But in this case, Jerry must be compensated for the loss of taste and smell, and the problems that flow directly from that, which you've heard about. It's impossible to put an exact dollar on what his sense of taste or smell is worth to him. It would be impossible for anyone to say exactly how much it is worth to him.

But here we'd ask you to consider this sum. I

Keypoint: Quantifying Suffering Damages

Moore asks the jury to send a message to the defendant with a verdict of \$1.5 to \$2 million dollars, again noting the company still hadn't changed policies.

think it's a proper amount, or I wouldn't be asking you for it. I think you need to award Jerry an amount between 1.5 million and 2 million dollars. I'm going to let you decide within that range how much to compensate Jerry for his loss of taste and smell and all the damages caused by Home Supply in this case. Now, there's no doubt that Home Supply's typical protective policies resulted in Jerry's injuries. Incredibly, Ms. Allen testified that since this incident, Home Supply has still been cited for failing to properly label food products. You'll recall that, and she did testify that it's hard to keep labels on food bins. That doesn't make sense to me. I'd ask you to send Home Supply a loud and unmistakable message.

I'd ask you to consider all the evidence you've heard up here in determining what to award. Last of all, I apologize for not doing this first, this is a simple case, what you have to do, is determine whether the injuries that have been testified about were proved to a preponderance of the evidence, that's 51% of the evidence. We don't have to prove this beyond a reasonable doubt like a criminal case. This is a civil case. I believe that we have met this burden, and finally, I'd like to thank you for your patience and attention to this matter. It's extremely important to Jerry and his wife, and they'd like to thank you as well.