FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-2549

R.J. REYNOLDS TOBACCO COMPANY,

Appellant,

v.

ROSENA NELSON,

Appellee.

On appeal from the Circuit Court for Gadsden County.
David Frank, Judge.

November 23, 2022

B.L. THOMAS, J.

R.J. Reynolds Tobacco appeals following a judgment in favor of Rosena Nelson, as personal representative of the estate of her deceased father, Mr. Roosevelt Gordon, in a non-*Engle* action. Because the trial court erred in denying Reynolds' motions for directed verdict on the strict liability claim and negligence claim, we reverse and do not address the other issues raised on appeal.

Mr. Gordon was born in 1941. He smoked cigarettes manufactured by Reynolds from 1954 until 2018, when he was diagnosed with chronic obstructive pulmonary disease (COPD). Mr. Gordon sued Reynolds for strict liability and ordinary negligence alleging a design defect of Reynolds' cigarettes caused

him to develop COPD. (He passed away in 2021, shortly after the jury trial in this case.)

In support of his strict liability claim and negligence claim based on a design-defect theory, Mr. Gordon alleged two defects: the use of flue-cured tobacco, which rendered the cigarettes inhalable, and the manipulation of nicotine to make its product more addictive. His negligence claim also asserted a second theory: that Reynolds failed to warn him of the risks of smoking before 1969, when warnings were posted on all Reynolds' cigarettes from that date forward. Mr. Gordon presented no evidence that a warning before 1969 would have in any way affected his smoking of Reynolds' cigarettes. He presented no evidence that a defect in the cigarette caused his COPD or that smoking prior to 1969 caused his COPD.

Despite the lack of any evidence of Reynolds' proximate cause of Mr. Gordon's fatal disease, the trial court denied Reynolds' motion for directed verdict. The jury found in Mr. Gordon's favor on the strict liability and negligence claims. As to the negligence claim, the jury returned a general verdict and did not specify whether the verdict was based on negligent design or negligent failure to warn.

We review the trial court's ruling denying the motion for directed verdict *de novo. Harris v. Soha,* 15 So. 3d 767, 769 (Fla. 1st DCA 2009) (affirming judgment where trial court correctly granted motion for directed verdict to doctor based on applicability of "Good Samaritan Act," section 768.13(2)(c)(1), Fla. Stat., under *de novo* standard of review).

Because the jury rendered a general verdict as to the negligence claim, in reversing we address the lack of evidence establishing causation for both the negligent design and failure-to-warn theory. Further, the failure to establish causation based on the alleged design defect requires reversal on the strict liability claim.

The "two issue" rule provides:

> where two or more issues are left to the jury, and of which [one] may be determinative of the case,

> and a general verdict is returned, making it impossible to ascertain the issue(s) upon which the verdict was founded . . . reversal is improper where no error is found as to one of the issues, as the appellant is unable to establish that he has been prejudiced.

Dean Witter Reynolds, Inc. v. Hammock, 489 So. 2d 761, 765 (Fla. 1st DCA 1986) (quoting *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181, 1186 (Fla. 1977)).

The proper statement of Florida law addressing product liability based on negligent design and negligent failure to warn as well as strict liability claims was concisely and recently described in the Middle District of Florida:

> Under Florida law, a strict products liability action based upon design defect requires the plaintiff to prove that (1) a product (2) produced by a manufacturer (3) was defective or created an unreasonably dangerous condition (4) *that proximately caused* (5) injury. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976). To prove any products liability claim sounding in negligence, whether negligent design or the negligent failure to provide adequate warnings or instructions, a plaintiff must establish (1) that the defendant owed a duty of care toward the plaintiff, (2) that the defendant breached that duty, (3) *that the breach was the proximate cause of the plaintiff's injury,* and (4) that the product was defective or unreasonably dangerous. *Cooper v. Old Williamsburg Candle Corp.*, 653 F.Supp.2d 1220, 1226 (M.D. Fla. 2009); *Marzullo v. Crosman, Corp.*, 289 F.Supp.2d 1337, 1342 (M.D. Fla. 2003) (citing *Stazenski v. Tennant Company*, 617 So. 2d 344, 345–46 (Fla. 1st DCA 1993)). The plaintiff has the burden of proof on each element. *Cooper*, 653 F.Supp.2d at 1226.

Brosius v. Home Depot Inc., 2022 WL 1272087, at *4 (M.D. Fla. Feb. 8, 2022) (emphasis added) (footnote omitted).

"Strict liability is not, and never has been, liability without causation." 65 C.J.S. *Negligence* § 244 (2020). And "in all tort cases, be they strict liability or ordinary negligence cases, causation must be established before recovery will be allowed." *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233, 1240 n. 11 (5th Cir. 1977) (overruled on other grounds). In short, a product liability claim, whether based on strict liability or negligence, requires the plaintiff to establish causation.

The north star of the law of causation is the landmark supreme court decision in *Gooding v. University Hospital Building, Inc.,* 445 So. 2d 1015, 1020 (Fla. 1984), which resolved a conflict in the district courts. There the supreme court held: "The plaintiff must show that the injury *more likely than not* resulted from the defendant's negligence in order to establish a jury question of proximate cause." *Id.* The supreme court explained:

> The plaintiff must show that the injury *more likely than not resulted from the defendant's negligence in order to establish a jury question on proximate cause*. In other words, the plaintiff must show that what was done or failed to be done probably would have affected the outcome. In the case under review Mrs. Gooding failed to meet this test by presenting evidence *of a greater than even* chance of survival for Mr. Gooding in the absence of negligence. The district court properly ruled that the trial court should have granted the hospital's motion for directed verdict.

Id. (emphasis added).

The supreme court has never receded from its decision in *Gooding.*[*] And that court does not overrule its precedent *sub*

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[*] The Eleventh Circuit recognized that *Gooding* remains good law, where a plaintiff argued that *Ruiz v. Tenet Hialeah Healthsystem*, Inc., 260 So. 3d 977 (Fla. 2018), created an "exception" to *Gooding:*

> As explained below, we conclude that the district court properly applied *Gooding* and that *Ruiz* created no exception to a plaintiff's obligation to introduce legally

silentio. Miller v. State, 265 So. 3d 457, 460 n. 1 (Fla. 2018) ("This court does not reverse itself *sub silentio.*").

It merits reviewing the district court decisions that were *disapproved* in *Gooding*. In *Clinica Pasteur,* a treating cardiologist testified that had his treatment been provided earlier by the defendant clinic, it could "probably and possibly" have prevented the decedent's later fatal myocardial infarction. That witness further testified that the negligent treatment provided by the Clinica Pasteur's resident "would increase the damage" to the decedent's condition. The defense successfully argued that the court was required to grant a directed verdict, asserting that "plaintiff never proved that the deceased could have been saved, regardless of what was done." *Hernandez v. Clinica Pasteur, Inc.*, 293 So. 2d 747, 749 (Fla. 3d DCA 1974), *disapproved of by Gooding*, 445 So. 2d at 1015. The Third District reversed with direction to reinstate the verdict for the plaintiff because:

> there is expert testimony in this record upon which a jury of reasonable men could have found that the cause of death *was occasioned* by the failure of the defendants, considering the manifestation of clear symptoms, to properly diagnose decedent's heart condition, combined with the presumption of exercise rather than the proper medical treatment. It further appears that once the

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> sufficient evidence of proximate causation where the defendant's negligent act or omission is not the primary cause of the injury.
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> . . . Indeed, *Ruiz* relied upon *Gooding* for the statement of law that in order to show proximate cause, a defendant's conduct must have substantially contributed to the injury. *See Ruiz*, 260 So. 3d 982–83.

Prieto v. Total Renal Care, Inc., 843 Fed. Appx. 218, 224–28 (11th Cir. 2021).

> malpractice was established, the question of causation for the decedent's demise within hours of the malpractice was one which was properly submitted to the jury.
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> . . . .
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> . . . The issue of proximate cause was as to whether appellees' malpractice contributed to the cause of death. In this connection, the testimony that appellant's decedent *would have had a better chance* to survive if he had received prompt medical attention was sufficient to form a basis for the submission of the issue to the jury.

Clinica Pasteur, 293 So. 2d at 750 (emphasis added).

Similarly in *Dawson v. Weems*, the Fourth District cited *Clinica Pasteur* to support a holding that a jury could properly find that a hospital caused a patient's death by giving him bank blood instead of the fresh blood requested, thereby depriving the patient of his "best chance" to survive, notwithstanding the plaintiff's failure to prove this deprivation either contributed to the patient's death or made his survival unlikely. *Dawson v. Weems*, 352 So. 2d 1200, 1203 (Fla. 4th DCA 1977), *disapproved of by Gooding*, 445 So. 2d at 1015.

The supreme court expressly rejected the erroneous legal analyses underlying these two disapproved decisions: that where evidence could show that a defendant's actions "occasioned" such an injury, or that a plaintiff could present evidence that absent a defendant's negligence, a plaintiff had a "better chance" of avoiding such an injury, such evidence was enough to submit a question of proximate causation to a jury:

> Neither *Hernandez* nor *[Clinica Pasteur]* contains any reasoning or authority to support a rule relaxing the more likely than not standard of causation in medical malpractice actions although they do hold that a plaintiff may go to the jury on proximate cause merely by showing that the defendant decreased the chances for survival, no matter how small. Those cases are *antithetical to our concept of proximate cause* and are disapproved.

Gooding, 445 So. 2d at 1019 (emphasis added).

The supreme court firmly rejected such a "relaxation" of proximate-cause law:

> Relaxing the causation requirement might correct a perceived unfairness to some plaintiffs who could prove the possibility that the medical malpractice caused an injury but could not prove the probability of causation, *but at the same time could create an injustice*. Health care providers could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result. No other professional malpractice defendant carries this burden of liability without the requirement that plaintiffs prove the alleged negligence probably rather than possibly caused the injury. *See, e.g., Freeman v. Rubin,* 318 So. 2d 540 (Fla. 3d DCA 1975) (plaintiff in legal malpractice action must show that, but for the attorney's negligence, the plaintiff had a good cause of action in the underlying suit). We cannot approve the substitution of such an obvious inequity for a perceived one.

Id. at 1019–20 (footnote omitted). The court then announced the rule that controls our decision here and all courts in Florida: to allow a plaintiff's case to be presented to a jury, evidence must have been admitted that could prove that, absent the defendant's negligence or alleged defect design, the plaintiff more likely than not would not have been injured and suffered damages.

Thus, Appellee was required to present evidence that Appellant's design or Appellant's failure to warn the decedent of the health risks of smoking prior to 1969 would have "more likely than not" caused the decedent to suffer his ultimately fatal lung disease. Based on a review of the evidence in a light most favorable to Appellee and drawing all inferences in Appellee's favor, we hold that the trial court erred in denying Reynolds' motion for a directed verdict, based on the lack of evidence of any proximate cause under either theory.

As noted, Appellee smoked cigarettes manufactured by Appellant from 1954 until 2018, when he was first diagnosed with COPD. As mandated by the federal "Public Health Cigarette Smoking Act of 1969," effective on July 1, 1969, Reynolds and all tobacco manufacturers were required to provide a stark warning that smoking cigarettes was "dangerous" to the smoker's health. This federal mandate pre-empted any state common-law claims that such a warning was inadequate or negligent. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992) ("Thus, insofar 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.").

And here, there was *no evidence* presented below by Appellee that Appellant's failure to warn Appellee of the dangers of smoking before 1969 caused his COPD. *See Ashby Div. of Consol. Aluminum Corp. v. Dobkin*, 458 So. 2d 335, (Fla. 3d DCA 1984) (holding where the undisputed evidence shows the "plaintiff did not read the instructions," any "failure to warn could not, as a matter of law, be the proximate cause of plaintiff's injuries"). In fact, the evidence tended to prove only the opposite proposition.

Appellee testified that Mr. Gordon ignored the warnings provided by Reynolds on the cigarettes he smoked after 1969. He testified he did not read the warnings, he "just smoked." He paid them "no mind." Then the day he was diagnosed with COPD, he quit smoking, apparently quite easily.

No evidence was therefore presented that had Mr. Gordon been warned for the fifteen years before 1969, he would have read the warnings and stopped smoking. Thus, any failure to warn by Appellants from 1954 to 1969 cannot sustain a verdict of negligence, when viewing the evidence in a light most favorable to Appellee, including all reasonable inferences drawn therefrom. *See Whitney v. R.J. Reynolds Tobacco Co.,* 157 So. 3d 309, 311–12 (Fla. 1st DCA 2014) (appellate court must review the evidence in a light most favorable to the non-moving party, including all inferences drawn therefrom). There was no evidence presented that could sustain a reasonable inference, again considering all the evidence in a light most favorable to Appellee, that Appellee would have

refrained from smoking, given that once he was warned, he ignored such warnings for forty-nine years. While a witness testified that Appellee was "risk averse," this alone cannot as a matter of law support a ruling denying a motion for a directed verdict when all the evidence showed that Appellee ignored warnings for almost five decades and did not quit smoking until he was diagnosed with COPD in 2018. *See Jackson Cnty. Hosp. Corp. v. Aldrich,* 835 So. 2d 318, 328 (Fla. 1st DCA 2002), *case dismissed sub nom. Bay Anesthesia, Inc. v. Aldrich*, 863 So. 2d 310 (Fla. 2003) (holding an expert opinion "based upon pure speculation and conjecture" was insufficient to support a verdict).

To uphold the trial court ruling would require this court to indulge in unsupportable speculation that contradicts evidence to the contrary and would be contrary to the Florida Supreme Court's precedent in *Food Fair Stores, Inc. v. Trusell*, 131 So. 2d 730, 733 (Fla. 1961):

> The petitioner urges our rule to the effect that circumstantial evidence in a civil action will not support a jury inference if the evidence is purely speculative and, therefore, inadequate to produce an inference that outweighs all contrary or opposing inferences. We think there is merit to the position of the petitioner.

(citations omitted).

We relied on *Trusell* in *R.J. Reynolds Tobacco Co. v. Whitmire,* where we stated that "circumstantial evidence cannot merely raise an unfounded suspicion or legally sufficient speculation that allows an intentional-tort claim to be submitted to a jury." *Whitmire*, 260 So. 3d 536, 540 (Fla. 1st DCA 2018).

And regardless of whether Appellant was negligent in failing to warn Appellee before 1969, no expert testified that Appellee's condition resulted from smoking before 1969. Thus, it fails under *Gooding*.

Neither did Appellee present any evidence that that Reynolds' Winston cigarettes had a "design defect" that proximately caused Mr. Gordon to suffer any injury before 1969. A design-defect plaintiff must show that "but for the defect, the injury would not

have occurred." *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 513 (Fla. 2015).

First, there was no "defect" in Appellant's product, which was in fact designed to be "inhalable" and to contain nicotine. Thus, Appellant could not be liable under strict liability. *West v. Caterpillar Tractor Co., Inc.,* 336 So. 2d 80, 86–87 (Fla. 1976) ("[S]trict liability should be imposed *only* when a product the manufacturer places on the market, knowing that it is to be used without inspection for *defects, proves* to have a *defect* that *causes injury* to a human being.") (emphasis added).

Producing cigarettes with flue-cured tobacco, a process begun in 1908, so that cigarettes are inhalable is not a "defect." *See Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. 4th DCA 1986), (affirming a trial court ruling granting a motion for a directed verdict based on a complaint that a gun had been used to commit a crime against the plaintiff: "The essence of the doctrine of strict liability for a defective condition is that the product reaches the consumer with something 'wrong' with it."). There was no competent evidence below that there was something "wrong" with Appellant's product. Cigarettes are made to be inhaled and to contain nicotine. Had the cigarettes not been inhalable or contained no nicotine, to the typical smoking consumer that would be a "design defect." Thus, Appellee's purported evidence did not meet its burden of persuasion to prove negligence or strict liability on the basis of a design defect under *Gooding*.

And most importantly, regardless of whether a rational jury could find this design to be defective, Appellee did not present any evidence that Appellant's design involving nicotine manipulation caused Appellee's illness. None of Appellee's experts could testify that any alleged manipulation of the nicotine in Appellant's products had any probative linkage to Appellee's COPD, much less that it more likely than not caused his COPD. Rather, they could simply testify that *nicotine* is linked to COPD.

In denying the motion for a directed verdict, the trial court erred in relying on this court's decision in *Whitney v. R.J. Reynolds Tobacco Co.,* 157 So. 3d 309 (Fla. 1st DCA 2014). In *Whitney,* we relied on the language in *Cox v. St. Joseph's Hospital,* 71 So. 3d 795, 801 (Fla. 2011), in holding "Appellant 'presented evidence

that could support a finding that [Appellees] more likely than not caused' her lung cancer, making a directed verdict improper." *Whitney*, 157 So. 3d at 314 (citing *Cox,* 71 So. 3d at 801). We held that the trial court in *Whitney* impermissibly reweighed the evidence by finding the expert "'disavowed' his testimony on direct, [and thus], it was not a proper ground for a directed verdict because it would go to the weight of the evidence, which is for the jury to consider." *Whitney*, 157 So. 3d at 314 (citing *Hildwin v. State,* 141 So. 3d 1178, 1187 (Fla. 2014) (parenthetical omitted)).

In conclusion, there was no evidence to support a finding that defects or a failure to warn more likely than not caused Mr. Gordon's COPD. No witness testified that Appellant's purported design defects or the failure to warn Appellee of the dangers of smoking Appellant's products before 1969 resulted in Appellant developing COPD. As such, Appellant correctly asserts that the jury was left to speculate in violation of the holding in *Gooding*.

Because Appellee failed to establish causation related to the failure-to-warn theory or the design theory, the trial court is directed to grant a directed verdict on both the negligence claim and the strict liability claim.

REVERSED.

ROWE, C.J., and LONG, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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