

Third District Court of Appeal

State of Florida

Opinion filed July 15, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-0629
Lower Tribunal No. 17-17202

R.J. Reynolds Tobacco Company,
Appellant,

vs.

Paul E. Rouse,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Antonio Arzola,
Judge.

King & Spalding LLP., and Scott Michael Edson (Washington, DC) and
William L. Durham II (Atlanta, GA), for appellant.

The Alvarez Law Firm and Alex Alvarez and Nicholas Reyes; The Mills
Firm, P.A., and John S. Mills and Courtney Brewer (Tallahassee), for appellee.

Before SALTER, MILLER and LOBREE, JJ.

LOBREE, J.

In this Engle-progeny¹ case, R.J. Reynolds Tobacco Company (“RJR”) appeals from a final judgment entered pursuant to a jury verdict in favor of Paul E. Rouse (“Rouse”). We affirm on all issues but write to address RJR’s challenge to the denial of its motion for directed verdict on Rouse’s claim for civil conspiracy to commit fraudulent concealment on the basis that he failed to prove individual detrimental reliance as required for this claim.

Rouse sued RJR for strict liability, fraud by concealment, conspiracy to commit fraudulent concealment, and negligence, alleging that Rouse, an Engle-class member,² had developed coronary artery disease as a result of his addiction to smoking RJR’s cigarettes. He sought both compensatory and punitive damages, and the matter proceeded to a jury trial. Like the plaintiffs in the original Engle litigation, Rouse presented extensive expert testimony that beginning in the early 1950s and for several decades thereafter, large tobacco companies in the United States, including RJR, engaged in a massive disinformation campaign designed to conceal the health hazards of smoking cigarettes and the addictive nature of nicotine. More

¹ Engle-progeny cases arise from a class action brought by a group of smokers and their survivors against major cigarette companies and two industry organizations for smoking-related injuries, caused by an addiction to nicotine. See Engle v. Liggett Grp., Inc., 945 So. 2d 1246 (Fla. 2006).

² An Engle-class member in an Engle-progeny case is entitled to the benefit of some factual findings made by the Engle jury regarding liability “as a matter of res judicata without the need of further proof.” R.J. Reynolds Tobacco Co. v. Schleider, 273 So. 3d 63, 65 (Fla. 3d DCA 2018).

particularly, in or about 1953, when the tobacco companies' own scientific research first revealed that cigarettes caused cancer and other diseases and that the nicotine in tobacco was addictive, the tobacco companies bonded together to never reveal that cigarettes were harmful, and instead, they told the public that they would undertake an honest effort to determine the truth about whether there were any negative health consequences of smoking, and promised to share with the public the results of their investigation had it revealed that cigarettes caused harm. Further, not only did the tobacco companies hide information about the dangers of smoking available to them at that point, they subsequently started disseminating misleading information regarding the health effects of cigarettes to plant doubt in people's minds about whether smoking was indeed adverse to health, while still encouraging people to smoke through their pervasive marketing efforts. As part of this disinformation campaign, the tobacco companies, including RJR, also aggressively promoted filtered cigarettes, often using advertisements displaying features of filters as tools of persuasion, suggesting that filtered cigarettes were safer than unfiltered cigarettes, even though they knew that filters did nothing to make cigarettes healthier, as internal filtration was not possible.

Rouse testified about his personal background and life as a smoker. Born in 1954, he grew up in Rocky Mount, North Carolina, a small town where cigarette smoking was so prevalent that the town became known as the "heart of

tobacco land.” Rouse tried his first cigarette at age eight or nine and became a regular smoker by age fifteen, smoking one pack of cigarettes per day. By age seventeen, he smoked two packs per day. Throughout his teen years, Rouse was exposed to cigarette advertisements on television, radio, billboards, magazines, and park and bus stop benches. The overall message he was getting from these advertisements was that smoking was normal and “everyone was doing it.” Once he became a regular smoker, Rouse smoked Winston filtered cigarettes because he believed filtered cigarettes to be safe, as they were so advertised. He specifically recalled an advertisement featuring a cut-open filter with brown residue inside, which gave him an impression that the filter was indeed working. He further testified that if Winston cigarettes did not have a filter, he would have not smoked them. He also acknowledged that he was aware of and believed the warnings on the packages of cigarettes he was purchasing, informing him that he could get diseases and die from smoking, but they did not stop him from smoking.

Rouse first manifested symptoms of coronary artery disease, chest pains, in 1995, and eventually underwent triple bypass surgery in 1999. While he had previously made multiple attempts to quit smoking, he did not actually quit until after his surgery. To prove his addiction to cigarettes containing nicotine, and that such addiction was a legal cause of his coronary heart disease, Rouse presented expert testimony of Dr. Benjamin Toll, an addiction expert, and Dr. Theodore

Feldman, a cardiologist. Drs. Toll and Feldman had not previously treated Rouse, but reviewed medical records prepared by Rouse's former treating physicians. From these medical records, Dr. Toll concluded that prior to undergoing his bypass surgery, Rouse was a heavy tobacco user who was repeatedly counseled by his cardiologist and cardiac surgeon to stop smoking, which was a sign of addiction. Dr. Feldman used the records to conclude that Rouse's history of smoking was "by far and away the most significant risk factor" leading to his coronary artery disease. Dr. Feldman also concluded that Rouse's heart disease manifested before the Engle-class period closed on November 21, 1996, as the records reflected that Rouse had suffered from angina pectoris since 1995.

At the close of Rouse's case-in-chief, RJR moved for a directed verdict on the conspiracy claim, arguing that Rouse failed to show reliance on a specific false or misleading statement made by RJR or any other Engle defendant in furtherance of their agreement to conceal or omit information regarding the health effects of cigarettes or their addictive nature. The trial court denied the motion based on the First District Court of Appeal's decision in R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1069 (Fla. 1st DCA 2010), which held that an Engle-progeny plaintiff can prove reliance by showing that the smoker was exposed to the tobacco companies' broad scope of pervasive misleading advertisements.

The jury found that Rouse qualified as a member of the Engle class, returned a verdict in his favor on his conspiracy claim,³ and awarded him \$5 million in compensatory damages. Further, the jury found that the punitive damages were warranted and awarded Rouse \$2.25 million in punitive damages in the second phase of the trial. Thereafter, the trial court denied all of RJR's post-trial motions. While the jury found that Rouse was fifty percent responsible for his injuries, the court entered judgment on the full amount of the jury's verdict because Rouse prevailed on one of his intentional tort claims.⁴ This appeal ensued.

RJR argues that the court erred in denying its motion for directed verdict on the conspiracy claim because Rouse presented insufficient evidence to support it. More particularly, RJR contends that Rouse failed to prove that he relied upon any specific false or misleading statement made by any of the alleged co-conspirators in furtherance of their agreement to conceal or omit information regarding the health effects of cigarettes or their addictive nature. We review the issue de novo, "view[ing] the evidence and all inferences of fact in the light most favorable to the

³ On the verdict form, the jury answered in affirmative the question of whether "Rouse reasonably re[lied] to his detriment on any *act* taken in furtherance of RJR's agreement with other tobacco companies or organizations to conceal or omit material information concerning the health effects or addictive nature of smoking cigarettes." (emphasis added).

⁴ See Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294, 305 (Fla. 2017) ("[W]hen a jury finds for an Engle progeny plaintiff on intentional tort claims, the plaintiff's award may not be reduced by comparative fault.").

nonmoving party,” Kopel v. Kopel, 229 So. 3d 812, 819 (Fla. 2017), and reject this contention.

Under Florida law, “[a] claim for conspiracy to fraudulently conceal requires proof that the defendant and others agreed to do an unlawful act or to do a lawful act by unlawful means, an overt act was done to further the conspiracy, and the plaintiff[] w[as] damaged as a result.” Cote v. R.J. Reynolds Tobacco Co., 909 F.3d 1094, 1106 n.6 (11th Cir. 2018) (citing Martin, 53 So. 3d at 1068). Because the Engle findings conclusively established that RJR and other Engle defendants “agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment,” Engle, 945 So. 2d at 1257 n.4, to prevail on his conspiracy claim, Rouse was only required to show that he relied to his detriment on a misapprehension concerning a material fact that RJR and other co-conspirators had concealed about the health effects and/or addictive nature of smoking, and that his reliance was a legal cause of his coronary disease, see Cote, 909 F.3d at 1106; cf. Hess v. Philip Morris USA, Inc., 175 So. 3d 687, 698 (Fla. 2015) (“Engle-progeny plaintiffs must . . . prove detrimental reliance in order to prevail on their fraudulent concealment claims.”). Florida courts have long recognized that to prevail on a conspiracy claim in an Engle-progeny case, a plaintiff does not have to categorically demonstrate reliance on *a specific statement* from RJR or another co-conspirator

made in furtherance of their agreement. See Philip Morris USA, Inc. v. Duignan, 243 So. 3d 426, 440-41 (Fla. 2d DCA 2017) (stating that under facts of that case, plaintiff was only required to show reliance on misapprehension as to material facts or information concealed or omitted by tobacco companies, rather than on direct statement they made); Philip Morris USA Inc. v. Putney, 199 So. 3d 465, 469 (Fla. 4th DCA 2016) (holding that plaintiff adduced sufficient evidence to establish that deceased smoker relied on tobacco companies' misleading advertising campaigns in general without necessity of showing his reliance "on any specific statement from a specific co-conspirator"), disapproved of on other grounds by Odom v. R.J. Reynolds Tobacco Co., 254 So. 3d 268 (Fla. 2018); R.J. Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753, 766 (Fla. 4th DCA 2016) ("The instruction need not include reliance on 'a statement' unless the facts of the case warrant it."); Kerrivan v. R.J. Reynolds Tobacco Co., 953 F.3d 1196, 1211 (11th Cir. 2020) ("Engle progeny plaintiffs need not demonstrate that they relied on specific statements from cigarette companies to establish detrimental reliance for fraud-based claims."); Cote, 909 F.3d at 1106 (noting that type of evidence required to prove detrimental reliance necessarily depends on facts underlying conspiracy claim); cf. Philip Morris USA Inc. v. McCall, 234 So. 3d 4, 15 (Fla. 4th DCA 2017) (noting that jury instruction regarding reliance on "statements" was not improper, as plaintiff there testified about specific advertisements deceased smoker relied upon in forming his belief that

smoking filtered cigarettes was safe). But cf. R.J. Reynolds Tobacco Co. v. Whitmire, 260 So. 3d 536, 539 (Fla. 1st DCA 2018) (stating that “even with the benefit of the Engle findings, plaintiffs claiming fraudulent concealment must prove that they relied to their detriment on *false statements* from the tobacco companies”) (emphasis added); R.J. Reynolds Tobacco Co. v. Prentice, 290 So. 3d 963, 966 (Fla. 1st DCA 2019) (same). However, this court has recently rejected the First District’s decision in Whitmire “to the extent it appears to [categorically] require an Engle-progeny plaintiff to show that a smoker explicitly relied to his detriment on specific ‘false or misleading statements,’ as opposed to a smoker’s misapprehension concerning a material fact the conspirators concealed from the smoker in furtherance of their agreement,” as previously permitted by courts when warranted by the facts of a case. Philip Morris USA Inc. v. Chadwell, 45 Fla. L. Weekly D1314 (Fla. 3d DCA June 3, 2020).

In this case, the jurors heard evidence about the tobacco industry’s multi-decade, pervasive misleading advertising campaign and the false controversy it perpetrated during the years Rouse smoked, aimed at creating doubt among the smokers over the adverse health effects of smoking and the addictive nature of nicotine. The expert testimony also established that the tobacco companies’ aggressive promotion of filtered cigarettes was a major part of their disinformation campaign. The jurors then heard Rouse’s own testimony about his exposure to the

tobacco companies' pervasive cigarette advertisements in general, including advertisements concerning filtered cigarettes. Further, Rouse specifically recalled one advertisement displaying features of a filter, which made him believe that a filter indeed made cigarettes safe. Rouse also testified that if Winston cigarettes did not have a filter, he would have not smoked them. This evidence was sufficient to sustain an inference of detrimental reliance. See Kerrivan, 953 F.3d at 1211 (affirming finding of reliance where jurors heard evidence about tobacco industry's pervasive disinformation campaign and former smoker's own testimony about his exposure to cigarette advertisements in general, which influenced his decision to switch to filtered cigarettes, indicating he would have never started smoking and probably had quit sooner had he know how bad cigarettes were for him); Cote, 909 F.3d at 1101, 1109 (holding that reasonable jury could have inferred that former smoker might have never started smoking or would have quit earlier had she known true facts about adverse effects of smoking, where evidence established, among other things, that her exposure to pervasive cigarette advertisements imparted notion that "[smoking] wasn't that bad"); see also Philip Morris USA, Inc. v. Hallgren, 124 So. 3d 350, 353 (Fla. 2d DCA 2013) (holding that record contained ample evidence of misleading advertising campaigns, from which reliance element could be inferred, as well as evidence of deceased smoker's direct reliance on that misleading advertising); cf. Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67, 81 (Fla. 3d DCA

2013) (noting that evidence at trial further supported deceased smoker's reliance on tobacco company's statements that its new filtered Kent cigarette reduced risk to smokers and reassured public that they were safe, where smoker chose to smoke those cigarettes because he considered them safe due to their filters).

We also find that Rouse's testimony that he read and believed the warnings on the packages of cigarettes did not rebut a reasonable inference that the tobacco companies' misleading advertising campaign, including their advertisements concerning filtered cigarettes, could confuse Rouse's full understanding about the health dangers of cigarette smoking to his detriment, and nevertheless made him believe that filtered cigarettes were safer than nonfiltered cigarettes. See Philip Morris USA, Inc. v. Naugle, 103 So. 3d 944, 947 (Fla. 4th DCA 2012) (affirming jury finding of smoker's detrimental reliance where smoker testified that she "was aware that smoking **could have been** dangerous to her health") (emphasis in original), disapproved of on other grounds by Philip Morris USA, Inc. v. Russo 175 So. 3d 681 (Fla. 2015); Kerrivan v. R.J. Reynolds Tobacco Co., 953 F.3d at 1213 n.10 (affirming finding of reliance where smoker was *generally aware* of health risks of smoking but did not fully comprehend all its dangers, such as that smoking filtered cigarettes would further his addiction) (emphasis added).

In sum, not only did Rouse present evidence that he was exposed throughout his life to the tobacco companies' broad-based misleading advertising campaign, he

also testified that his decision to smoke Winston filtered cigarettes was influenced by the way the tobacco companies promoted filtered cigarettes in their advertisements. From this evidence, a reasonable jury could have inferred that Rouse might have never started smoking Winston filtered cigarettes or would have quit earlier had he known true facts about filtered cigarettes. See Kerrivan, 953 F.3d at 1212-13. Thus, we conclude that the trial court properly denied RJR's motion for directed verdict on Rouse's conspiracy claim. See Kopel, 229 So. 3d at 819 ("We must affirm the denial of the motion 'if any reasonable view of the evidence could sustain a verdict in favor of the non-moving party.'") (quoting Meruelo v. Mark Andrew of Palm Beaches, Ltd., 12 So. 3d 247, 250 (Fla. 4th DCA 2009)). Unlike Chadwell, based on the strength of the evidence adduced to show reliance in this case, we find no conflict with Whitmire and Prentice.

Affirmed.