DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2013

PHILIP MORRIS USA INC., R.J. REYNOLDS TOBACCO COMPANY, and **LIGGETT GROUP LLC,**
Appellants,

v.

SHARON PUTNEY, as personal representative of the Estate of **MARGOT PUTNEY,** deceased,
Appellee.

Nos. 4D10-3606 and 4D10-5244

[June 12, 2013]

CONNER, J.

This is an *Engle*[1] progeny case. Philip Morris USA, Inc. and R.J. Reynolds Tobacco Company, together with Liggett Group LLC (collectively "the Tobacco Companies"), appeal the trial court's entry of an amended final judgment in favor of Sharon Putney, as personal representative of the estate of Margot Putney ("the Plaintiff"). The Tobacco Companies raise four grounds for reversing the final judgment. We affirm, without discussion, the Tobacco Companies' claim that the trial court abused its discretion in denying a cause challenge to a juror. Regarding the verdict holding the Tobacco Companies liable for conspiracy, we hold the trial court properly denied the post-trial motion for judgment in their favor. We also hold the trial court erred in denying a motion for remittitur of compensatory damages for loss of consortium, as the compensatory damage award was excessive compared to similarly situated cases. Lastly, we hold the trial court erred in entering summary judgment on the Tobacco Companies' affirmative defense regarding the statute of repose.[2]

Factual Background

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[1] *Engle v. Liggett Group*, 945 So. 2d 1246 (Fla. 2006).

[2] We also affirm without discussion two issues raised separately by Liggett and by Putney's cross-appeal.

The Plaintiff brought suit against the Tobacco Companies for the wrongful death of her mother, Margot Putney. In her second amended complaint, the Plaintiff alleged Margot's death was the result of small cell carcinoma of the lung and alleged claims of strict liability, negligence, fraud by concealment, and conspiracy to commit fraud by concealment. The Plaintiff sought recovery for the estate and for loss of consortium for herself and her two adult siblings. The Plaintiff also sought punitive damages.

Prior to trial, the trial court granted the Plaintiff's motion for summary judgment and determined that all of the Tobacco Companies' affirmative defenses, including the statute of repose, were not viable based on the preclusive *Engle* findings.

The jury returned a verdict finding for the Plaintiff on negligence, strict liability, and conspiracy to commit fraud by concealment. The jury found for the Tobacco Companies on the fraud by concealment claim. The jury found R.J. Reynolds 30% responsible for Margot's death, Philip Morris 15% responsible, Liggett 20% responsible, and Margot herself 35% responsible. The jury awarded Margot's estate $86,688.96 for medical and funeral expenses and five million dollars to each of Margot's three surviving children for loss of consortium. Further, the jury found punitive damages were warranted against R.J. Reynolds and Philip Morris, but not Liggett, on the conspiracy claim and assessed $2.5 million against each of them.

Post-trial, the trial court denied the Tobacco Companies' motion for a judgment in their favor on the conspiracy count. The trial court also denied their motion for remittitur on the consortium award by the jury.

Conspiracy Award Despite No Liability for Fraudulent Concealment

The Tobacco Companies argue that the trial court erred in denying their post-trial motion for judgment on the conspiracy to commit fraudulent concealment claim because the Plaintiff presented insufficient evidence to support the claim. More particularly, the Tobacco Companies argue that because the jury found for them on the fraudulent concealment claim, the conspiracy to commit fraudulent concealment claim must also fall. Quoting *Wright v. Yurko*, 446 So. 2d 1162, 1165 (Fla. 5th DCA 1984), the Tobacco Companies argue, "[a]n actionable conspiracy requires an actionable underlying tort or wrong." They further argue, referencing our words from *Palm Beach County Health Care District v. Professional Medical Education Inc.*, 13 So. 3d 1090, 1096 (Fla. 4th DCA 2009), that when "the counts regarding the goals of the

conspiracy . . . fail, so too the conspiracy count must fail." Additionally, the Tobacco Companies argue the Plaintiff failed to prove Margot relied upon any statements made by any of the co-conspirators.

"The gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is done pursuant to the conspiracy and which results in damage to the plaintiff." *Id.* (citing *Liappas v. Augoustis,* 47 So. 2d 582, 582 (Fla. 1950)). However, in *Palm Beach County Health Care District*, we made reference to an exception to the general rule, citing *Liappas* and *Snipes v. W. Flagler Kennel Club, Inc.,* 105 So. 2d 164, 165 (Fla. 1958). 13 So. 3d at 1096 n.3. In *Liappas*, our supreme court recognized an independent tort of conspiracy "where mere force of numbers acting in unison or other exceptional circumstances may make a wrong." *Liappas*, 47 So. 2d at 583 (citing *DesLauries v. Shea*, 13 N.E.2d 932 (1938)). The court said, "in order to prove an independent tort for conspiracy upon the basis of 'mere force of numbers acting in unison,' it must be shown that there was some 'peculiar power of coercion of the plaintiff possessed by the defendants in combination which any individual standing in a like relation to the plaintiff would not have had.'" *Id.* (citation omitted).[3]

Three *Engle* findings relevant to this case are entitled to res judicata effect: "(ii) 'that nicotine in cigarettes is addictive;' . . . (iv) 'that the [*Engle*] defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both;' (v) 'that the [*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[.]' " *Phillip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 434 (Fla. 2013). In combination, those *Engle* findings preclusively establish the Tobacco Companies engaged in a conspiracy to conceal or omit information regarding the health effects of cigarettes and their addictive nature with the intention that smokers and the public would rely on the information to their detriment. The *Engle* findings also establish there were other companies besides the Tobacco Companies involved in this case, including other companies producing tobacco products, who were co-conspirators. *Id.* Given the number of co-conspirators involving the major players in the tobacco industry, the breadth of the conspiracy, and the addictive nature of cigarettes, we conclude that the conspiracy sued

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[3] The recognition of an independent tort for conspiracy based on mere force of numbers was again discussed by the supreme court in *Snipes.*

upon in this case is an independent tort of conspiracy "where mere force of numbers acting in unison or other exceptional circumstances may make a wrong." The unified actions of the conspirators, coupled with the addictive nature of cigarettes, resulted in the conspirators exerting a "peculiar power of coercion" over Margot, the decedent.

Regarding the contention that the Plaintiff failed to prove that Margot relied upon any statements made by any of the co-conspirators, the Plaintiff points out that the jury verdict included the following two questions:

> 3. Please state as to each defendant whether Margot Putney reasonably relied to her detriment *on a statement by that defendant* which concealed or omitted material information and, if so, whether such reliance was a legal cause of her death.
>
> 4. Please state as to each defendant whether Margot Putney reasonably relied to her detriment *on a statement made in furtherance of that defendant's agreement* to conceal or omit material information and, if so, whether such reliance was a legal cause of her death.

(emphasis added). The Plaintiff then argues that *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), supports the denial of a judgment in favor of the Tobacco Companies on this issue of proof of reliance. We agree. Similar to the situation in *Martin*, the record in this case contains sufficient evidence from which the jury could decide that Margot relied (1) on pervasive misleading advertising campaigns for cigarettes in general and (2) on the false controversy created by the tobacco industry during the years she smoked (aimed at creating doubt among smokers that cigarettes were hazardous to health) without the necessity of proving Margot relied on any specific statement from a specific co-conspirator. *See also Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145 (Fla. 4th DCA 2012) (despite the plaintiff's inability to recall a specific statement by an *Engle* conspirator, her testimony that relied on billboard and magazine advertising was sufficient to deny a post-trial motion for directed verdict); *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 14 n.2 (Fla. 4th DCA 2012); *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012). Thus, we hold the trial court did not err in denying the Tobacco Companies' motion for judgment in their favor on the conspiracy claim.

Remittitur on Consortium Damages

The Tobacco Companies argue that the trial court abused its discretion in not granting their motion for remittitur on the five million dollar awards to each of the three surviving children for loss of consortium. They contend the awards are excessive compared to those in similar cases and were improperly motivated by passion and prejudice. A trial court's ruling on a motion for remittitur is reviewed for abuse of discretion. *City of Hollywood v. Hogan*, 986 So. 2d 634, 647 (Fla. 4th DCA 2008). "Remittitur cannot be granted unless the amount of damages is so excessive that it shocks the judicial conscience and indicates that the jury has been influenced by passion or prejudice." *Progressive Select Ins. Co. v. Lorenzo*, 49 So. 3d 272, 278 (Fla. 4th DCA 2010) (citations omitted) (internal quotation marks omitted).

"Under Florida law an award of non-economic damages must bear a reasonable relation to the philosophy and general trend of prior decisions in such cases." *Cohen*, 102 So. 3d at 14 (quoting *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008)). The Plaintiff argues the verdict is not excessive, relying on *Martin*, in which the surviving spouse was awarded five million dollars in compensatory damages. Putney also cites to some unpublished jury verdicts, including an eight million dollar compensatory damages verdict awarded to the surviving daughter of a smoker in *Webb v. R.J. Reynolds Tobacco Co.*, Case No. 382009CA001285 (Fla. 8th Cir. Ct. 2010). However, on appeal, the First District found that verdict excessive. *Webb*, 93 So. 3d at 338. The court in *Webb* explained its reasoning:

> Of the thirty-five *Engle* cases we examined in which the jury awarded compensatory damages, the juries awarded compensatory damages as great as $7 million in only eight cases. Of these eight cases, three were cases in which the plaintiff was the cigarette smoker and the verdicts included economic damage awards. In the others, the decedents died at a much younger age than Mr. Horner did, or were survived by a spouse, by spouse and child, or by two or more children. Our research has failed to uncover a single case in which an adult child received a wrongful death award of this magnitude that was affirmed on appeal (either in *Engle* progeny cases or other wrongful death actions).

Id. at 337-38.

As noted by the Tobacco Companies, all of Margot's children were

adults at the time of her diagnosis and death, and none of them testified that they lived with her or relied on her for support. Appellate decisions that have upheld large consortium awards in tobacco cases involve much closer relationships between the parties and the decedents during the decedent's illness. For example, in *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012), the First District upheld a 10.8 million dollar compensatory award to the wife of the deceased smoker. They had been married for 39 years. The wife had to stay in Florida while the husband traveled to Chicago for treatment in order to support the family and then had to personally care for him "as he lay dying during the final six months." *Id.* at 312. The husband was diagnosed just as the wife was about to retire, so they could not "realize their life-long dream of traveling together." *Id.*

The Plaintiff argues the loss of consortium awards were supported by the evidence presented at trial. One of Margot's sons testified how he visited his mother as often as he could once he heard of her lung cancer diagnosis, but it was difficult to do because he had his own family. He further testified that his mother never forgot birthdays and she gave all three of her children a goodbye letter on her last birthday. Another of Margot's sons testified that his mother's diagnosis had an emotional impact on him, and he would visit or call every day. Not surprisingly, he misses his mother most on special occasions such as holidays and birthdays. The Plaintiff, Margot's daughter, testified that when she learned of her mother's diagnosis, she was too emotional to talk about it. She accompanied her mother to chemotherapy treatments, which "killed" her on the inside, because it made her think about losing her mother. The Plaintiff also told the jury how her mother was so ill on the Plaintiff's birthday that her mother could not say "happy birthday," and she went into a coma soon after, dying nine days later. The Plaintiff's boyfriend testified how upset the Plaintiff had been since her mother's death and how it devastated her.

While the above testimony may establish that Margot's adult children are entitled to a consortium award, we agree with the Tobacco Companies' argument that the loss of consortium awards were excessive compared to those in similar cases and shock the judicial conscience because none of them testified that they lived with her or relied on her for support. The trial court erred in failing to grant remittitur.

Statute of Repose Defense

Similar to arguments raised in *Kayton*, the Tobacco Companies argue in this case that the trial court erred in striking its statute of repose

defense based on the generalized *Engle* Phase I findings. As we held in *Kayton*, the statute of repose is an individualized defense that can be adjudicated only based on the particular circumstances of each plaintiff. *Kayton*, 104 So. 3d at 1150. Similar to *Kayton*, the entry of a partial summary judgment on the statute of repose defense deprived the Tobacco Companies of their right to defend on that issue and have the jury make the determination. *Id.* at 1151. Thus, we reverse the punitive damages award because it was based on the conspiracy claim. Like the situation in *Kayton*, the punitive damage award was not excessive, and we will allow the award to stand if on re-trial prevails on the statute of repose issue. *Id.*; *see Cohen*; *see also Elmore v. Fla. Power & Light Co.*, 895 So. 2d 475, 479 (Fla. 4th DCA 2005) (holding that trial court erred by granting a directed verdict on statute of limitations defense and remanding for a new trial on the statute of limitations only).

Conclusion

We affirm the trial court's denial of the Tobacco Companies' motion to set aside the verdict and for judgment in their favor on the conspiracy claim. We hold the trial court erred in failing to grant the motion for remittitur as to the loss of consortium award and in striking the Tobacco Companies' statute of repose affirmative defense. We remand the case for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings.

TAYLOR and LEVINE, JJ., concur.

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Consolidated appeals and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jeffrey E. Streitfeld, Judge; L.T. Case Nos. 07-36668 CV (19) and 08-80000 (19).

Gary L. Sasso of Carlton Fields, Tampa, and Stephen N. Zack and Andrew S. Brenner of Boies, Schiller & Flexner LLP, Miami, for appellant Philip Morris USA Inc.

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Not final until disposition of timely filed motion for rehearing.