

[Products Liability Law Daily Wrap Up, EVIDENTIARY ISSUES—TOBACCO PRODUCTS—M.D. Fla: Sufficient evidence supported jury's findings and \\$16 million verdict against two cigarette manufacturers, \(Sept. 16, 2013\)](#)

Products Liability Law Daily Wrap Up

[Click to open document in a browser](#)

By Susan Lasser, J.D.

In an action brought by the estate of a deceased smoker alleging that the decedent's lung cancer was caused by her smoking cigarettes manufactured by two tobacco companies, Philip Morris USA, Inc., and R.J. Reynolds Tobacco Co., renewed requests by the tobacco companies for judgment as a matter of law and, in the alternative, for a new trial were rejected by a federal district court in Florida (*Searcy v. R.J. Reynolds Tobacco Co.*, September 11, 2013, Moore, K.). The court found sufficient evidence of brand usage was presented at trial to support the jury's findings, and upheld the \$16 million jury verdict.

Background. On April 1, 2013, following a trial, the jury returned a verdict finding for the estate of the decedent, Carol LaSard, on all tort claims—negligence, strict liability, fraudulent concealment, and conspiracy to fraudulently conceal—and awarded the estate \$6,000,000.00 in compensatory damages. The jury's findings included: that LaSard was addicted to cigarettes, that LaSard's addiction was a legal cause of her lung cancer and death, and that smoking cigarettes manufactured by Philip Morris USA, Inc., was a legal cause of the decedent's lung cancer and death. The jury apportioned 40 percent of fault that was a legal cause of LaSard's death to LaSard herself, 30 percent to R.J. Reynolds, and 30 percent to Philip Morris USA.

Phase II of the trial resulted in the jury's returning a verdict on punitive damages and finding that \$10,000,000.00 in punitive damages should be assessed against each defendant. The court subsequently ordered that Philip Morris and R.J. Reynolds were jointly and severally liable for the total amount of compensatory damages found by the jury, and that each was liable for the amount of punitive damages assessed against them.

Evidence of brand usage. Philip Morris argued that it was entitled to judgment as a matter of law because the decedent's estate failed to provide sufficient evidence to allow a reasonable jury to conclude that its cigarettes were the legal cause of LaSard's death. Specifically, the cigarette maker asserted that (1) insufficient evidence was presented to allow a jury to determine the quantity of its cigarettes that the decedent had smoked, and (2) there was no evidence that the deceased had smoked the manufacturer's brand of cigarettes before 1981, the date by which the estate's expert witnesses conceded it became more likely than not that LaSard would still have developed lung cancer even if she had quit smoking at that time. The estate argued that Philip Morris failed to meet its "heavy burden" of showing that there was no legally sufficient evidentiary basis for the jury's verdict against it.

The court found that, at trial, the jury was presented with evidence of LaSard's use of Philip Morris-manufactured cigarettes, expert testimony relating to the causation of LaSard's lung cancer, expert testimony on LaSard's addiction to cigarettes, and fact witness testimony that LaSard smoked Philip Morris's "health" and "light" cigarettes, thinking that they were safer and would help her quit smoking. In addition, the estate introduced into evidence the 2010 Surgeon General Report, which concluded: "The evidence on the mechanisms by which smoking causes disease indicates that there is no risk-free level of exposure to tobacco smoke."

The court also cited testimony by both LaSard's daughter and former son-in-law stating that LaSard smoked multiple Philip Morris brands. Thus, the court found that Philip Morris's assertion that the testimony on which brands LaSard smoked and when was purely speculative was without merit.

Moreover, one of the estate's experts, Dr. David Burns, a pulmonologist who had worked for decades with the Surgeon General's Office and other agencies, testified unequivocally that Philip Morris cigarettes caused

LaSard's lung cancer. The cigarette maker did not rebut the assertion. A second estate expert, Dr. Michael Cummings, specializing in nicotine addiction research, testified that LaSard was addicted to Philip Morris cigarettes, that the Philip Morris brand low-nicotine cigarettes the decedent smoked were engineered to deliver an addictive dose of nicotine, and that those specifically designed low-nicotine cigarettes maintained and sustained LaSard's addiction. The court concluded that based on the evidence, a reasonable jury could find that Philip Morris cigarettes were a legal cause of LaSard's death. Further, the court determined that the jury's specific findings were not against the great weight of the evidence such that a new trial should be ordered. Because there was sufficient evidence for the jury to conclude that LaSard smoked and was addicted to cigarettes manufactured by Philip Morris and that her smoking those cigarettes caused her lung cancer and death, the court denied Philip Morris's renewed motion for judgment as a matter of law.

Fraudulent concealment and conspiracy claims. The court additionally ruled that the decedent's estate presented sufficient evidence for a jury to determine that LaSard detrimentally relied on the misrepresentations and concealment of both Philip Morris and R.J. Reynolds regarding the health risks associated with smoking. The tobacco companies argued that the estate failed to provide evidence on the element of detrimental reliance, an essential element of fraudulent concealment under Florida law. However, the court pointed out that the findings under [Engle v. Liggett Group, Inc.](#), 945 So.2d 1246 (Fla. 2006), preclusively established that 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 court noted that a number of Florida appellate courts have recognized that a jury verdict in favor of an *Engle* plaintiff on her fraudulent concealment and conspiracy claims is not unreasonable when the plaintiff presents sufficient evidence from which the jury could infer that the smoker 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 [the smoker] relied on any specific statement from a specific co-conspirator." The estate presented direct evidence that decedent detrimentally relied on information put out by the tobacco companies omitting scientific findings on the harmful effects of smoking. Also, included in the evidence the jury heard was testimony from LaSard's daughter and former son-in-law that while LaSard may have known smoking could be harmful to her health, she turned to smoking low-tar and low-nicotine cigarettes because the cigarette manufacturers advertised them as safer and healthier than regular cigarettes. Therefore, the court found that the jury could reasonably infer from the evidence that the cigarette manufacturers' fraudulent concealment and conspiracy were a substantial factor in LaSard's failure to quit smoking successfully in time to avoid injury. Moreover, the court held that the jury's finding of reliance was not against the weight of the evidence, and, thus, the jury's verdict would not be disturbed.

Jury verdict supported by sufficient evidence. Finally, the court denied a renewed motion by both Philip Morris and R.J. Reynolds for judgment as a matter of law or, in the alternative, for a new trial. The tobacco companies had based their request on the argument that the *Engle* findings could not be used to remove the estate's burden to prove the elements of her claims and, therefore, that the estate failed to prove their claims. The court, however, pointed to a recent decision by the U.S. Court of Appeals for the Eleventh Circuit, [Walker v. R.J. Reynolds Tobacco Co.](#) (11th Cir., September 6, 2013), which had rejected these arguments. Thus, the court held that "with this clear, binding precedent," the cigarette makers' arguments failed and that the estate was entitled to rely on the *Engle* findings to establish the conduct elements of her claim, consistent with due process and Florida preclusion law.

The case number is [3:09-cv-13723](#).

Attorneys: Charlie Easa Farah, Jr. (Farah & Farah, PA) for Cheryl Searcy. Andrew S. Brenner (Boies, Schiller & Flexner, LLP), Dana G. Bradford, II (Smith, Gambrell & Russell, LLP), and David E. Kouba (Arnold & Porter, LLP) for R.J. Reynolds Tobacco Co. and Philip Morris USA, Inc.

Companies: R.J. Reynolds Tobacco Co.; Philip Morris USA, Inc.

Cases: CourtDecisions EvidentiaryNews TobaccoProductsNews FloridaNews