Third District Court of Appeal

State of Florida, July Term, A.D. 2011

Opinion filed September 28, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-1333
Lower Tribunal No. 07-46340

Martha Rey, as Personal Representative of the Estate of Fernando F. Rey, and for the use and benefit of herself, Martha Rey, as the decedent's surviving wife, and his two surviving children, Fernando C. Rey and Jennifer Rey,
Appellant,

vs.

Philip Morris, Inc., Lorillard Tobacco, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Maxine Cohen Lando, Judge.

Brannock & Humphries and Celene H. Humphries (Tampa); Austin Carr, for appellant.

Greenberg Traurig, and David L. Ross, Elliot H. Scherker and Brigid F. Cech Samole; Clarke Silverglate and Karen H. Curtis, for appellee.

Before RAMIREZ, SUAREZ and SALTER, JJ.

SALTER, J.

A personal representative for the estate of her late husband appeals a final summary judgment in favor of three tobacco company defendants[1] in this Engle-progeny[2] case. It is undisputed that the decedent, Mr. Rey, never smoked cigarettes manufactured by those three defendants, and thus that summary judgment was appropriate with respect to the traditional product liability claims against each company.

In this appeal, we are asked to review the trial court's determination that summary judgment in favor of those three companies was also appropriate under Engle on the "civil conspiracy to fraudulently conceal" claim asserted by Mrs. Rey against all defendants. We reverse the final summary judgment in favor of the three tobacco companies as to that claim and only that claim (Count IV of the Amended Complaint), based on our reconciliation of the holdings by this Court and our Supreme Court in Engle.

I. Preclusive Findings by the Florida Supreme Court

We begin—and ultimately end—with these findings by our Supreme Court in Engle:

> We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive

[1] Lorillard Tobacco Company, Liggett Group LLC, and Vector Group Ltd.

[2] Individual cases filed pursuant to Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1277 (Fla. 2006).

> pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), **4(a) (that the 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), 5(a) (that the 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)**, 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) (that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants), and 8 (that all of the defendants were negligent). **Therefore, these findings in favor of the Engle class can stand.**

Engle, 945 So. 2d at 1276-77 (emphasis added).

There is no dispute for this purpose that Mr. Rey was a member of the Engle Class; that he was addicted to, purchased, and smoked cigarettes designed, manufactured, advertised and marketed by some of the defendants (but not including the three defendants/appellees in the case at hand); and that he died of lung cancer in 1996. Additionally, the three defendants who obtained the final summary judgment below were all "defendants" for purposes of the preclusive Engle findings.[3] On the basis of those facts and prior findings, Mrs. Rey maintains

[3] Engle, 945 So. 2d at 1256 n.3.

that brand usage is not a required element of her civil conspiracy/concealment claim.

The three manufacturer appellees assert that other language in the original 2000 Engle class representative verdict and judgment in the trial court, this Court's 2003 reversal of that verdict and judgment, and the 2006 Engle decision by our Supreme Court, require an affirmance of the final summary judgment in their favor against Mrs. Rey. They argue that collectively those three prior rulings preclude a conspiracy/concealment claim against any defendants that did not actually provide cigarettes to the class member/plaintiff.

II. Conspiracy Versus Traditional Product Liability Claims

The three class representatives in the original Engle trials were Mary Farnan, Frank Amodeo, and the estate of Angie Della Vecchia. Each asserted a civil conspiracy/concealment claim against all defendants (including the three manufacturer appellees in the case at hand). In special interrogatory verdicts in 1999 and 2000, the jury found in favor of each representative plaintiff, and against all defendants, on the plaintiffs' civil conspiracy/concealment claims.

On appeal, this Court set aside all of the jury's findings against manufacturer defendant Liggett because, among other reasons, "none of the class representatives purchased or smoked Liggett/Brooke cigarettes." Liggett Grp., Inc. v. Engle, 853 So. 2d 434, 466 (Fla. 3d DCA 2003), aff'd in part and quashed in part, 945 So. 2d

1246. Although that ruling reversed the jury's civil conspiracy/concealment findings as well as those pertaining to the product liability claims by the class representatives, this Court narrowed its "brand usage" requirement to the product liability claims, explaining in a footnote:

> It is aphoristic that a plaintiff cannot prevail on claims for negligence, breach of warranty, or strict liability, unless the plaintiff establishes that the product which allegedly caused the plaintiff's injury was manufactured or sold by the defendant. See Mahl v. Dade Pipe and Plumbing Supply Co., Inc., 546 So. 2d 740 (Fla. 3d DCA 1989). Here, it is undisputed that the Liggett defendants did not manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives.

Id. at 467 n.46.

The three manufacturer appellees in this case argue two inferences to support their "brand usage" limitation. First, they assert that the only other possible reason for this Court's reversal of the civil conspiracy/concealment claim in 2003 (zero percent comparative fault findings in favor of Liggett regarding the product liability claims) did not apply to the conspiracy count, such that the conspiracy verdict must have been reversed because the class representatives did not use the Liggett brand. Second, they point to the Florida Supreme Court's approval of this Court's "conclusion that a directed verdict should be granted in favor of Liggett and Brooke" as to class representatives Farnan and Della

Vecchia,[4] with no carveout for the civil conspiracy/concealment verdict against those defendants.

Such inferences are unwarranted, however. First, this Court's opinion also reversed all counts as to all defendants because of "the prejudicial impact of the errors at trial which, combined with the improper conduct of counsel and the trial plan, compels reversal as to *all* defendants." Liggett Grp., Inc., 853 So. 2d at 467. Second, in reinstating the total money damage awards to Farnan and Della Vecchia in 2006 as to all defendants other than Liggett and Brooke, the Florida Supreme Court did not expressly address the status of the civil conspiracy/concealment claims against those defendants. On this record, it does not appear that Farnan or Della Vecchia asked the Florida Supreme Court to reinstate the awards against Liggett or Brooke (or the non-manufacturer defendants, the Council for Tobacco Research and Tobacco Institute) on the civil conspiracy/concealment claims.

Further, in Engle, the Florida Supreme Court did not impose a "brand usage" condition upon claims for civil conspiracy/concealment. To the contrary, Engle approved, and held binding in future Engle class lawsuits, the findings that all defendants concealed (or omitted) material information not otherwise known or available and that all defendants agreed to that concealment or omission. "All

[4] All of class representative Amodeo's claims were reversed by this Court—and the Florida Supreme Court affirmed the reversal—based on the statute of limitations. Engle, 945 So. 2d at 1276; Liggett Grp., Inc., 853 So. 2d at 455 n.23.

defendants" logically does not mean "only those defendants which manufactured the cigarettes used by the plaintiff." No Florida appellate decision "is authority on any question not raised and considered, although it may be involved in the facts of the case." Benson v. Norwegian Cruise Line Ltd., 859 So. 2d 1213, 1217 (Fla. 3d DCA 2003) (quoting State ex rel Helseth v. Du Bose, 128 So. 4, 6 (Fla. 1930)).

Our analysis is based also on our decisions regarding civil conspiracy claims generally. In Charles v. Florida Foreclosure Placement Center, LLC, 988 So. 2d 1157 (Fla. 3d DCA 2008), we examined the elements of a claim for civil conspiracy: "(a) an agreement between two or more parties, (b) to do an unlawful act or do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy." Id. at 1159-60 (quoting Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997)).

The alleged joint and several liability of the three manufacturer appellees in this case does not turn on Mr. Rey's use of those manufacturers' cigarette brands. The essential findings for the civil conspiracy/concealment claim have been approved as to Mr. Rey and other members of the Engle class. Those three manufacturers may not have supplied the cigarettes used by Mr. Rey, but they "concealed or omitted material information not otherwise known or available knowing that the information was false or misleading or failed to disclose a

material fact concerning the health effects or addictive nature of smoking cigarettes or both," and they "agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature." Engle, 945 So. 2d at 1277. In short, the preclusive Engle findings establish the agreement among all defendants and the unlawful acts committed (or unlawful means employed) by each defendant, including the three manufacturers involved here. The findings also extend to the causation between the acts of the co-conspirator defendants and the injuries suffered by Mr. Rey and his survivors.

Were we to hold otherwise, arguably culpable non-manufacturer defendants also could not be held liable for tobacco-related injuries—defendants such as the Council for Tobacco Research and the Tobacco Institute—for failure to satisfy the purported "brand usage" requirement. We discern no such intention or ruling in Engle.

III. Conclusion

The law of civil conspiracy is striking in its extension of liability to a co-conspirator which may not have caused any direct injury to the claimant. These principles have their origins in the policy that an entire group of conspirators acting collectively to achieve an unlawful goal—including consumer fraud—should be jointly and severally liable for the acts of all participants in the scheme.

Engle does not hold that traditional product liability theories are the only claims that may go forward against tobacco companies and their collectively-supported research or industry groups, or that all smoking-related claims may only proceed against those defendants which manufactured the specific brands consumed by a particular plaintiff. To the contrary, Engle has reaffirmed that existing civil conspiracy/fraudulent concealment claims are available to Engle-progeny claimants. For these reasons, we reverse the final summary judgment against Mrs. Rey as to Count IV ("civil conspiracy—fraud by concealment") only, and we affirm as to all other claims against these three manufacturer appellees.

Reversed in part, affirmed in part, and remanded for further proceedings in accordance with this opinion.