FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2586

PHILIP MORRIS USA INC.,

Appellant,

v.

SABRINA CUDDIHEE, as Personal Representative of the Estate of Gil Cuddihee,

Appellee.

On appeal from the Circuit Court for Duval County.
Katie L. Dearing, Circuit Judge.

May 4, 2022

OSTERHAUS, J.

Philip Morris USA, Inc. appeals the trial court's denial of its motion for directed verdict in an *Engle*-progeny case where the jury found for the plaintiff. The jury concluded that the company conspired to conceal or omit material information about the risks or addictive nature of cigarette smoking, which led to the death of Gil Cuddihee. Philip Morris argues that Appellee failed to prove that her late father detrimentally relied on any health-related statements made in furtherance of the conspiracy. But we affirm because Appellee presented detrimental reliance evidence that sufficiently tied the decedent's smoking, cancer, and death to misleading advertisements for innovative cigarette products

developed by tobacco companies in response to public health concerns.

This is another in a line of *Engle* cases involving the evidence required for plaintiffs to prove detrimental reliance on the misleading actions of tobacco companies in the sale of cigarettes. This court reviews such cases under a de novo standard. *See, e.g., R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536, 538 (Fla. 1st DCA 2018). This time, we possess the added benefit of a recent on-point decision by the Florida Supreme Court. *See Prentice v. R.J. Reynolds Tobacco Co.*, --- So. 3d ---, 47 Fla. L. Weekly S78, 2022 WL 805951 (Fla. Mar. 17, 2022) (approving *R.J. Reynolds v. Prentice*, 290 So. 3d 963 (Fla. 1st DCA 2019)). According to *Prentice*, to prevail on concealment or concealment conspiracy claims, "an *Engle* progeny plaintiff must prove reliance on a statement that was made by an *Engle* defendant (for a concealment claim) or co-conspirator (for a conspiracy claim) and that concealed or omitted material information about the health effects or addictiveness of smoking cigarettes." 2022 WL 805951 at *3.

When an *Engle* defendant unsuccessfully challenges the sufficiency of the detrimental reliance evidence in the trial court, it can prevail on appeal if no proper view of the evidence or inference from the evidence supports the verdict. *Whitmire*, 260 So. 3d at 538; *see also Whitney v. R.J. Reynolds Tobacco Co.*, 157 So. 3d 309, 311–12 (Fla. 1st DCA 2014) (noting that on appeal the facts and inferences are weighed in the light most favorable to the non-moving party). In *Whitmire*, for instance, this Court reversed an *Engle* plaintiff's verdict because the detrimental reliance evidence failed to connect any misleading statements made by tobacco companies with real-life smoking decisions made by the decedent smoker. Because the plaintiff's witnesses couldn't say whether the decedent smoker had paid any attention to misleading statements made by tobacco companies, detrimental reliance wasn't proven:

> Appellee testified that he did not know whether the decedent was influenced by cigarette advertisements and that they had never discussed any statements by tobacco companies; Appellee's son testified that he could not

> recall the decedent ever expressing interest in a statement from a tobacco company; and Appellee's sister-in-law testified that she had never heard the decedent mention a cigarette advertisement. While Appellee testified that he was "sure" the decedent saw cigarette advertisements on television, he also testified that he did not know if she saw any "statements" from any tobacco companies. Thus, *no testimony* connected the decedent's smoking to the false information disseminated by the tobacco companies.

Whitmire, 260 So. 3d. at 539–40. The fact that the decedent smoker in *Whitmire* had simply been exposed to false advertising wasn't enough to infer that the decedent had "internalized the false statements in the advertisements and changed [his or her] behavior accordingly." *Id.* at 541. We thus concluded that before tobacco defendants can be held liable for concealing or conspiring to conceal the health dangers of tobacco products, some direct or circumstantial evidence must "connect[] the decedent's smoking to the false information disseminated by the tobacco companies." *Id.* at 540; *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015) ("*Engle*-progeny plaintiffs must certainly prove detrimental reliance in order to prevail on their fraudulent concealment claims."). This same reliance principle underpins the Florida Supreme Court's recent decision in *Prentice*. It requires plaintiffs to show that a smoker "'received, believed, and acted upon' a misrepresentation by the defendant." *Prentice*, 2022 WL 805951 at *4 (quoting John C.P. Goldberg et al., *The Place of Reliance in Fraud*, 48 Ariz. L. Rev. 1001, 1007 (2006)).

In this case, Appellant argues in favor of reversing the judgment for the same reliance evidence-related shortcomings identified in the *Whitmire* case. We agree with the trial court, however, that the facts here are different. When viewed in the light most favorable to Appellee, the non-moving party, the detrimental reliance evidence connects statements made by the co-conspirator tobacco company with the decedent smoker's decision to switch to a supposedly low-tar, less-addictive brand of cigarettes for health reasons. Specifically, according to family witnesses, Decedent switched to low-tar Merits after developing a cough and discovering what he believed to be a more healthful, less-addictive

smoking alternative. Decedent's former wife attributed his switch to low-tar Merits because they were "a lighter cigarette, thinking it did not have all the tar and nicotine that the regular full strength had." Additionally, Decedent's daughter expressly identified tobacco advertisements as the source of the information prompting Decedent's switch to Merits because he used words "almost match[ing] verbatim" the language of the advertisements.[1] Other evidence showed that Decedent was on Appellant's mailing list and personally engaged with Appellant's various marketing campaigns by signing up for promotions, returning postcards, filling out surveys, and maintaining a jar full of cigarette coupons distributed by Appellant.[2] The packaging of the cigarettes smoked by

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[1] Record evidence indicated that tobacco companies made a strategic decision to market filtered and low-tar brands, or "reassurance brands," to retain and reassure health-conscious smokers who were being swayed by aggressive anti-smoking campaigns. One witness indicated that these "brands were targeted to the health concerned end of the market for people to switch to as [tobacco companies] became more concerned about the health risks of smoking. And Merit was positioned as a switching brand to keep people in the Marlboro family . . . as a . . . low tar/nicotine cigarette." Manufacturers of filtered, low-tar brands advertised these health-related features as innovations without disclosing that these cigarettes delivered no less tar or nicotine than other cigarettes. Apparently, Merits were engineered to deliver more nicotine than regular cigarettes. The *Engle* findings recognized this problem of companies making "false or misleading statement[s] of material fact with the intention of misleading smokers" and "conceal[ing] or omitt[ing] material information not otherwise known or available knowing that the material was false or misleading or fail[ing] to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both." *Whitmire*, 260 So. 3d at 538 (quoting *Engle*, 945 So. 2d at 1257 n.4).

[2] Evidently, Merits were Appellant's most advertised cigarette for a time. Marketed as having the full flavor of traditional cigarettes with the benefits of lower tar levels, multiple press releases and print ads contained in the record urge smokers to switch to "low-tar" cigarettes from "high-tar" ones. One ad, for instance, described Merits as possessing the lowest tar levels on

Decedent also highlighted the filtered and low-tar features that prompted Decedent's switch to supposedly less-harmful and less-addictive cigarettes.[3]

According to the Florida Supreme Court, "[w]hat matters" in these cases "is that the defendant intend[ed] to induce the plaintiff's reliance by creating a false impression in the plaintiff's mind." *Prentice*, 2022 WL 805951 at *4. And here, we see no error in the trial court's determination that the detrimental-reliance evidence sufficiently supported the plaintiff's concealment-conspiracy claim. From the evidence, a jury could properly infer that the decedent relied to his detriment on Appellant's advertising statements made as part of a wider conspiracy by tobacco companies to market filtered, low-tar brands of cigarettes "that concealed or omitted material information about the health effects or addictiveness of smoking cigarettes." *Id.* at *3; *cf. Kerrivan v. R.J. Reynolds Tobacco Co.*, 953 F.3d 1196, 1212–13, 1213 n.10 (11th Cir. 2020) (noting that smoking filtered and light cigarettes furthered addiction rather than helping a smoker to quit).

We affirm, too, with respect to Appellant's inconsistent verdict argument. Appellant needed to preserve this argument by making a contemporaneous objection prior to the release of the jury. *See Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 643–45, 649 (Fla. 2015) (emphasizing that, without exception, a party must make a verdict consistency objection prior to the jury's release, or the argument will be deemed waived). Moreover, "[a] jury's verdict in a civil case is generally 'clothed with a presumption of regularity.'" *Id.* at 643 (quoting *Republic Servs. of Fla., L.P. v. Poucher*, 851 So. 2d 866, 869 (Fla. 1st DCA 2003)). Here, the verdicts did not involve "mutually exclusive" findings or a "fatal conflict." *Id.* Rather, the

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the market and as the "first major step since the filter." These marketing efforts highlighted apparently healthy innovations that persuaded smokers to choose low tar cigarettes for health reasons.

[3] We are mindful here of *Whitmire*'s conclusion that the words printed on a cigarette pack cannot by themselves support a concealment-based plaintiff's verdict. 260 So. 3d at 540.

jury apparently found the story of Appellant's malfeasance compelling within the broader context of an industry-wide "low-tar/reassurance brand" agreement to conceal, and not based upon its unilateral actions, statements, or omissions standing alone. Verdicts on these counts needn't have risen or fallen together. *Cf. Rey v. Philip Morris, Inc.*, 75 So. 3d 378, 380–83 (Fla. 3d DCA 2011) (alleging a conspiracy claim without corresponding claims against individual companies).

Finally, we affirm as to both Appellant's due process and implied preemption arguments under the authority of *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), and *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017), respectively.

AFFIRMED.

RAY and NORDBY, JJ., 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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