

1989

Non-Supplying Cigarette Manufacturers, Their Trade Association, and Public Relations Group May Be Held Liable for Wrongful Death Under a Theory of Civil Conspiracy

Thomas V. Laprade

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Thomas V. Laprade *Non-Supplying Cigarette Manufacturers, Their Trade Association, and Public Relations Group May Be Held Liable for Wrongful Death Under a Theory of Civil Conspiracy*, 1 Loy. Consumer L. Rev. 110 (1989).

Available at: <http://lawcommons.luc.edu/lclr/vol1/iss4/10>

This Recent Case is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

DEBT COLLECTION SERVICE (from page 109)

In sum, the appellate court held that the trial court erred in dismissing the State's action against Datacom and in enjoining the DRE's administrative action against Datacom. In addition, the trial court should have dismissed Data-

com's third-party complaint seeking declaratory relief against the DRE. The appellate court remanded the case to the trial court for further proceedings.

David Colaric

NON-SUPPLYING CIGARETTE MANUFACTURERS, THEIR TRADE ASSOCIATION, AND PUBLIC RELATIONS GROUP MAY BE HELD LIABLE FOR WRONGFUL DEATH UNDER A THEORY OF CIVIL CONSPIRACY

In *I.D. Rogers v. R.J. Reynolds Tobacco Co.*, 761 S.W. 2d 788 (Tex. Ct. App. 1988), the Texas Court of Appeals held that non-supplying cigarette manufacturers, their trade association and their public relations organization were not entitled to summary judgment in a case involving a smoker's death. The court held that substantial issues of material fact existed as to whether plaintiffs' decedent wife and mother would have quit smoking if she had known of the dangers of smoking, and as to whether defendants were liable on the theory of civil conspiracy.

Background

From sometime in the early fifties until 1982, decedent, Marjorie Rogers, regularly smoked one pack of cigarettes or more per day. In the early sixties, as media publicity of the dangers of smoking increased, Mrs. Rogers began to realize that she should cut down on her smoking or try to quit. Apparently, Mrs. Rogers took comfort in the fact that cigarette warnings stated that smoking *may be* hazardous to one's health as opposed to stating that smoking *is* hazardous to one's health. Mrs. Rogers quit smoking in November of 1982 after being diagnosed as having lung cancer. She died of the disease on December 17, 1983.

Mrs. Roger's surviving husband and children brought a products liability suit against six major American tobacco industries ("the Big-6"), their trade association, the Tobacco Institute, Inc. ("the TI"), and their research and public relations organization, the Council for Tobacco

Research-U.S.A., Inc. ("the CTR"). In the mid-1950s, five of the Big-6 industries (the sixth subsequently joined) took the position that smoking cigarettes did not cause lung cancer. Shortly thereafter, the Big-6 formed what was originally known as the Tobacco Industry Research Committee, now known as the CTR, for the purposes of researching the relationship between tobacco smoking and health and providing factual information on smoking to the public. In 1958, the Big-6 formed the TI for the purpose of collecting and disseminating scientific and medical material relating to tobacco, its use, and health.

The Rogers brought this suit alleging that the defendants had entered into a civil conspiracy or concert of action with a twofold purpose: (1) to conceal and suppress scientific and medical information regarding tobacco use and health; and (2) to establish a vehicle by which the Big-6 were able to take a strong and pervasive stance that smoking-caused disease had not been proven. The Rogers' claims were based on alleged cigarette design and marketing defects, misrepresentations, negligence and fraud.

In the trial court, the Rogers' attempted to establish that the Big-6, the TI and the CTR had acted to suppress information which would have made the dangers of smoking apparent to Mrs. Rogers. They offered the affidavit of Dr. Richard I. Evans, a prominent social psychologist, in which he stated that, in his opinion, Mrs. Rogers would have stopped smoking in 1965 if she had fully understood the dangers of smoking at the time. Appellees moved for summary judgment pursuant to a Texas statute. Tex. R. Civ. P. Ann. r. 166a(c) (Vernon 1976). The statute provides for summary judgment as a matter of law when the court determines that there is no genuine issue as to any material fact. The trial court granted the motion based on its findings that the Rogers raised no genuine issues of fact under their various theories.

Non-Supplying Manufacturer Can Be Held Liable if Found to be a Party to a Civil Conspiracy

Upon review, the Texas Court of Appeals first considered whether the trial court had used the proper standard in granting the appellees' motion for summary judgment. The court of appeals found, based on Texas law, that the proper standard for ruling on a summary judgment motion is to consider whether the appellees had established that the Rogers' claims had failed to establish a cause of action. Applying this standard, the court held that it would not concern itself with the probative force of the Rogers' evidence. Instead, it was the appellees' burden to demonstrate that the Rogers had failed to raise a genuine fact issue.

The Big-6, the TI and the CTR contended that this case was solely a products liability case and that the Rogers had abandoned all claims except their conspiracy and concert of action claims. The court deemed this contention erroneous, and instead found that the torts supporting the claims of conspiracy and concert of action included actionable claims of strict liability, failure to warn, misrepresentations, negligence and fraud.

The Big-6 argued that a conspiracy cannot be maintained in the absence of an underlying intentional tort. The court disagreed, reasoning that it is possible to have a conspiracy to commit an unintentional tort or a conspiracy to be negligent. The court concluded that the conspiracy here "has a life of its own [namely,] to engage in attractive, enticing advertisements promoting the smoking of cigarettes." 761 S.W.2d at 796. In this case, it was the appellees' negligent breach of duty that served as the underlying tort.

The appellees also contended that they had no legal duty to warn or inform Mrs. Rogers of the dangers of smoking cigarettes because they did not supply the particular brand of cigarettes which she used. They asserted that there is no duty to warn about a competitor's product. Further, there was no proximate cause between the use of their products and Mrs. Rogers' use of a competitor's product. The court again disagreed, stating that these principles do not apply when the non-supplying cigarette manufacturers act in the course of a conspiracy or concert of action. The court relied on *Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1986), which considered whether a party to a conspiracy to suppress information about the dangers of asbestos pro-

ducts could be held liable for injury caused by a competitor's product. The Nicolet court held that liability attaches to conspirators who engage in the act of suppressing information concerning a product. Similarly, the Texas court held that if a civil conspiracy is proven, then the non-supplying manufacturer can be held liable. The court made short shrift of appellees' proximate cause argument, succinctly stating that there is an established causal relationship between cigarette smoking and lung disease.

Appellees Minimized Risks of Smoking in Their Representations to the Public

Finally, the court examined the specific activities of the CTR, the Big-6, and the TI to determine the validity of the tort claims underlying the civil conspiracy claim. The court found evidence of negligence on the part of CTR from the testimony of one of CTR's scientists. This scientist testified that CTR had a "master plan" to stop and suppress attacks on cigarette smoking. The evidence also showed that CTR intentionally suppressed research projects and grants which would have revealed the detrimental effects of cigarettes. The court reversed the order granting summary judgment in favor of the CTR and remanded the case for a new trial.

In examining the activities of the Big-6, the court considered that the Big-6 formed CTR primarily to confront the claims linking cigarette smoking with health problems. Many of the CTR executives were concurrently executives of the Big-6. The Big-6 also controlled the funding for the CTR. Because of this close relationship, the court imputed the claims raised against the CTR to the Big-6. Furthermore, the court found that the Big-6 expressly had taken the position that they would assume responsibility for consumer health as part of their normal business affairs, and that tobacco use was not harmful to one's health. Again, the court reversed the judgment in favor of the Big-6 and remanded the matter to the lower court for trial.

The court then examined the position and activities of the TI. The TI had taken the position that filter-tipped cigarettes reduced any health risks associated with smoking at the same time this position was strongly disputed by an eminent American doctor. The doctor claimed that filter-tipped cigarettes actually heightened the risks of disease by causing an increase in carbon monoxide intake. The doctor also stated that his

(continued on page 112)

CIGARETTE MANUFACTURER (from page 111)

studies indicated the risks of cigarette smoking are so great that smoking should not be done at all. A representative from the TI took exception to the doctor's findings, claiming that the doctor's study was based upon conjecture rather than upon valid statistics. The TI representative added that the doctor's study was not reputable because it did not appear in scientific literature. The doctor rejoined that it was the practice of the tobacco industry to condemn all unfavor-

able studies, and that, contrary to the claims of the TI, his study was scientifically accurate. Because this scientific evidence raised a question of fact, the court concluded that Rogers had a cause of action against the TI. As in the case of the other defendants, the court reversed the judgment in favor of the TI and remanded the case for trial.

Thomas V. Laprade