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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA - TAMPA DIVISION  
CASE NO. 97-2987-CIV-T-26B

BARBARA VASS, as Personal  
Representative for the Estate of  
CHARLES VASS, deceased,

Plaintiffs,

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION,  
individually and as successor by merger  
to THE AMERICAN TOBACCO COMPANY, a  
foreign corporation; LORILLARD TOBACCO  
COMPANY, a foreign corporation; and PHILIP  
MORRIS INCORPORATED, a foreign  
corporation, and WINN-DIXIE STORES, INC.,  
a Florida corporation.

Defendant(s).

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS COUNTS V & VI  
OF PLAINTIFF'S COMPLAINT

COMES NOW Plaintiff, by and through undersigned counsel, and hereby opposes Defendants' Motion to Dismiss Conspiracy Counts V and VI of Plaintiff's Complaint. Defendants in their Motion raised three points and Plaintiff will respond to them in the order presented.

First, Defendants erroneously contend Plaintiff is relying upon strict liability as a basis for the civil conspiracy claim.

The Defendants incorrectly construe the Complaint for their own self-serving purposes. Rather than rely upon strict liability, Plaintiff contends that the Defendants committed a wrongful act which would give rise to civil conspiracy by intentionally concealing and intentionally refusing to warn about their

inherently dangerous products for the purpose of addicting Plaintiff (or, if applicable, Plaintiff's decedent) to known carcinogens.

The intentional selling of a known defective and unreasonably dangerous product without adequate warning of its potential hazards is a wrongful act that has been recognized as an appropriate basis for a civil conspiracy claim. It was one of the issues in the landmark Florida products liability case regarding asbestos manufacturer Johns-Manville. Johns-Manville Sale Corp. v. Janssens, 463 So.2d 242 (Fla. 1st DCA 1984). The allegations of Plaintiff's Complaint involve the same legal issues. In Janssens the Court said:

Since the manufacturer is legally obligated to make statements of warnings to users of its product which are known to be dangerous to health, a manufacturer's intentional refusal to warn users of known dangers inherent in its products, even where the exact extent of its capacity to cause injury is not definitely known, is not unlike the tort of fraudulent misrepresentation. (At note 4). [emphasis added]

In a warning context, the Court in Janssens also held that not only did the product manufacturer have a continuing duty to warn:

Evidence of repetition and concealment of offensive conduct after it initially occurred it is indicative of malice or evil intent sufficient to support punitive damages. At 256. [emphasis added]

Like the conduct of the asbestos industry, the conduct of the tobacco industry alleged by Plaintiff constitutes a civil wrong pursuant to Janssens and fully supports the charge of civil conspiracy.

The Southern District Court of Florida has also indicated that a civil conspiracy claim may be based upon fraudulent misrepresentation and concealment regarding the dangerous nature of a manufacturer's product and for "misrepresenting and concealing" the extent of the injury that might be caused by the defective products. In re Asbestos Litigation, 679 F.Supp. 1096 (S.D. Fla. 1987). Also see Hoffman v. Allied Corp, 912 F.2d 1379 (11th Cir. 1990) (conspiracy to conceal information was a proper subject for litigation). Hence, the tobacco company Defendants' contention in point one of their motion is without merit.

Secondly, the Defendants erroneously contend that indirect reliance is not sufficient to plead actual fraud. Where fraud exists from a failure to speak, reliance that the truth was told is assumed. See In re U.S. Oil & Gas Litigation, All Cases, Case No. 83-1702-A1-CIV-Hoeveler, (S.D. Fla. 1988), Lexis 2217 (the allegations of omissions and non-disclosure of material facts substitute the need to plead and prove actual reliance). Also see Johns-Manville Sales Corp. v. Janssens, supra.

In a fraud based upon concealment, reliance on a specific statement is not required because no statement was made.

Additionally, the Complaint alleges that Plaintiff had the right to rely that the cigarette manufacturers' products were not unreasonably harmful or addictive. "Plaintiff relied upon the assumed safety of cigarettes and he relied upon the Defendant manufacturers and their co-conspirators to fully and truthfully disclose to him the whole truth about the harmful effects and

addictiveness of cigarettes."

It is also alleged in the Complaint that Plaintiff was induced to purchase tobacco products, relied upon the manufacturers' superior knowledge regarding tobacco products and was impliedly or expressly instructed in their use by Defendants' advertising, marketing and other efforts. Plaintiff detrimentally relied upon the deceptive positions of the Defendants and their co-conspirators by purchasing, smoking and continuing to smoke Defendants' cigarettes.

Plaintiff also detrimentally relied upon the apparent, stated and advertised safety of cigarettes and he detrimentally relied upon the Defendant manufacturers and their co-conspirators to fully and truthfully disclose to him the information they concealed and suppressed including the whole truth about the harmful effects and addictiveness of cigarettes. (This was especially true in the 1950's and 1960's).

Hence, reliance is sufficiently pled as it relates to the omissions and concealment of the Defendants.

Third, Defendants erroneously contend that constructive fraud is not a wrong which supports civil conspiracy. Plaintiff contends that constructive fraud under the circumstances alleged constitutes a sufficient unlawful act. A conspiracy to intentionally addict Plaintiff to known carcinogens is in and of itself, intent enough.

Plaintiff has properly pled the elements of civil conspiracy which are: (1) a conspiracy between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) doing

some overt act in pursuance of the conspiracy; and, (4) damage to Plaintiff as a result of the acts done under the conspiracy. Bond v. Koscot Interplanetary, Inc., 246 So.2d 631 (Fla. 4th DCA 1971).

In Harrell v. Branson, 344 So.2d 604 (Fla. 1st DCA 1977) the Court suggested constructive fraud is:

. . . a term which is applied to a great variety of transactions that equity regards as wrongful, to which it attributes the same or similar effects as those that follow from actual fraud and for which it gives the same or similar relief. [emphasis added]

Contrary to the erroneous assertion of the Defendants, a valid claim for civil conspiracy does not require an allegation of culpability stronger than the doing of " . . . an unlawful act or . . . a lawful act by unlawful means." See Bond, supra. The gist of the action for conspiracy is a "civil wrong" which can be proven by circumstantial evidence. Dozier & Gay Paint Co., Inc. v. Dilley, 518 So.2d 946 (Fla. 1st DCA 1988). Pursuant to Harrell, supra, constructive fraud is a "wrongful" act and therefore it is sufficient to support the charge of conspiracy.

The primary thrust of Defendants' Motion to Dismiss is that constructive fraud is not an intentional tort and therefore it cannot support a Civil Conspiracy claim. Defendants argue erroneously that "an essential element of constructive fraud is the breach of a duty under a confidential or fiduciary relationship" and that Plaintiff's allegations of same are insufficient. If it is assumed Defendants are correct that a breach of fiduciary duty is essential to state a cause of action for constructive fraud, Defendants' position that constructive fraud is not an intentional

tort is defeated because a breach of fiduciary duty is an intentional tort! Swerhun v. General Motors Corporation, 812 F.Supp. 1218, 1222, 1223 (M.D. Fla. 1993); Tunner v. Foss, 655 So.2d 1151 (Fla. 3d DCA 1995); Halkey-Roberts Corp. v. Mackal, 641 So.2d 445 (Fla. 2d DCA 1994); Allerton v. State Dept. of Ins., 635 So.2d 36 (Fla. 1st DCA 1994). Therefore, a constructive fraud must be considered a sufficient unlawful act to support civil conspiracy.

Plaintiff has pled a sufficient relationship to create a basis for constructive fraud:

Defendant manufacturers were experts in the design and promotion of cigarettes. They and their co-conspirators conspired to addict and/or to continue addicting plaintiff and others to known carcinogens which were highly likely to cause disease and death for the purpose of making money. Defendants' cigarettes delivered the drug, nicotine, in sufficient pharmacologically active doses to alter and effect the structure and function of the human body including that of plaintiff. Cigarettes were intended by the defendants to be self dosing drug delivery devices. The multitude of extremely potent carcinogens in cigarettes have been the subject of numerous research studies conducted by the defendants or their agents and representatives since the 1940's. Addiction to nicotine alters the smoker's decision making process and eliminates his ability to have complete freedom of choice regarding whether or not to continue smoking. The addiction may be unconscious. The effects of nicotine are similar to cocaine, morphine and amphetamines. At all material times the information about nicotine as described in this Complaint was well known to the defendants, yet they did not disclose it to plaintiff and others.

By and through addicting plaintiff to their cigarettes, defendants and their co conspirators created and established a special

relationship, and/or a relationship of confidence and/or a fiduciary relationship of obligatory reliance and trust. One who addicts another to a pharmacologically active, poisonous and dangerous drug which he continues to offer and supply has a moral, social, domestic, or personal duty to make full and fair disclosures regarding all of the health hazards associated with the addiction.

A special relationship, and/or a relationship of confidence and/or a fiduciary relationship was also created by the conspirators' false or deceptive statements in conjunction with their suppression of medical and scientific information.

The Defendants further erroneously argue that Plaintiff did not properly allege a confidential or fiduciary relationship. The Defendants seek to have this Court construe such a relationship as narrowly as that of attorney and client or, guardian and ward. Again, the Defendants are wrong since:

The terms 'fiduciary' or 'confidential relation' are given wide applications by Courts of equity in cases involving fraud. But the Courts have carefully avoided creating limitations on the meanings of such terms, recognizing that new cases involving an abuse of a confidence, might not be covered by literal definitions. The origin of the confidence giving rise to a confidential or fiduciary relationship is immaterial. [emphasis added]

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There is ordinarily a fiduciary relation between parties where trust or confidence is reposed by one and accepted by the other. The relationship and the correlative duties of a fiduciary need not be formal but may be moral, social, domestic or merely personal; the reposing of trust and confidence is the significant thing - not the nature of the transaction between the parties. And a fiduciary relation may result from an offer of assistance, where the nature of the proposal



is one that is naturally calculated to repose confidence and trust in the one making the proposal. 27 Fla.Jur 2d, §15-16. [emphasis added]

Whether or not a sufficient relationship exists is always a question of fact. Because Plaintiff has pled such a relationship, the issue is for the trier of fact to determine. Sherhun v. General Motors Corp., supra; Morton v. Young, 311 So.2d 755 (Fla. 3d DCA 1975).

Under facts similar to those alleged by Plaintiff, a conspiracy of the asbestos industry has been previously permitted. The circumstances of In re North Dakota Personal Injury Asbestos Litigation, 737 F.Supp. 1087 (N.D. No. Dak. 1990) involved a multitude of Plaintiffs alleging civil conspiracy based upon fraud allegations. The asbestos Plaintiffs alleged a concerted action to suppress information concerning the health risks of asbestos. The Court held that the manufacturers had a duty to warn and as such, that duty arose under a "fiduciary" relation between the manufacturer and the consumer. Also see Nicolet, Inc. v. Nutt, 525 A.2d 146 (De. 1987).

The duty to disclose under a constructive fraud theory also arises for other alternative reasons under additional pleadings. For example:

This duty (to disclose) arises where there is a purpose or design motivating the non disclosure and usually involves circumstances where the person responsible for the concealment has superior knowledge, or acts in a confidential or fiduciary capacity. See Harrell, supra at 607. [emphasis added]

The Defendant tobacco companies are experts as a matter of law

with respect to their injury causing products. Advance Chemical Co. v. Harter, 478 So.2d 444 (Fla. 1st DCA 1985). Hence, the Defendants must be deemed to have superior knowledge as Plaintiff has both pled that the Defendants had superior knowledge and that Plaintiff did not have such knowledge. The purpose or design motivating non-disclosure was also pled. Therefore, the Defendants owed a duty to disclose irrespective of a "confidential or fiduciary" relationship and their non-disclosure was constructive fraud.

Additionally, a duty to disclose the whole truth arises where the Defendant voluntarily undertakes to disclose only limited information. See Moldofsky v. Stregack, 449 So.2d 918 (Fla. 3d DCA 1984). Plaintiff has pled that the Defendants undertook to disclose limited self-serving information about cigarettes and health, but breached their duty and defrauded Plaintiff by failing to disclose the entire truth of which they were aware. Also, the Defendants expressly accepted "responsibility" for providing complete information as pled by Plaintiff. Hence, Plaintiff's fraud allegations are well grounded upon the predicate duty to fully and truthfully disclose.

The Defendants further erroneously assert they owed no duty to disclose by citing various commercial cases which are off point. The defense cited cases involving arms length commercial transactions between buyers and sellers, debtors and creditors, etc. They do not involve the recognized duties in personal injury and death cases or the alleged conduct of the tobacco industry.

However, one of the "arms length transaction" cases cited by the Defendants, Watkins v. N.C.N.B National Bank of Florida, N.A., 622 So.2d 1063 (Fla.App. 3d DCA 1993), held that even a Bank only avoided a duty to disclose to a debtor in a creditor/debtor relationship where there was an absence of trick or artifice to prevent investigation of the facts. Watkins is in keeping with:

The principal that a mere non disclosure, in the absence of a duty to speak, does not constitute fraud is inapplicable where a trick or artifice is used to throw the other party off guard and to lull him into a false feeling of security. Stated otherwise, a concealment is fraudulent when it is effected or accompanied by words or acts that suppress or disguise the truth or withdraw the other person's attention from the real facts.  
27 Fla.Jur 2d, §40.

An arms length transaction is one where the facts lie equally open to both parties, with equal opportunity of examination. 27 Fla.Jur 2d, §36. Plaintiff has pled facts indicating that Plaintiff did not have an equal opportunity for examination of the expert medical and scientific information available to the tobacco industry. The information was not equally open to Plaintiff as a lay person in comparison to the expertise of the tobacco manufacturers. Moreover, Plaintiff cited several false statements made by tobacco industry representatives "which were contrived to lull Plaintiff into a false sense of security about the safety of cigarettes." Plaintiff also pled that the tobacco industry induced and obtained his/her reliance on the false statements and that many of the tobacco industries statements and actions were intended to "disguise the truth or withdraw the Plaintiff's attention from the

truth." Hence, Plaintiff's allegations demonstrate a legal obligation beyond a mere arms length transaction on the part of the tobacco industry to make full disclosure of the knowledge they had regarding the health hazards of their products.

Conclusion

For all of the foregoing reasons, Defendants' Motion to Dismiss Counts V and VI of Plaintiff's Complaint should be denied.

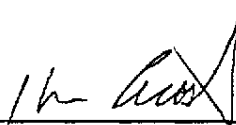
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by regular U.S. Mail to counsel of record listed on the attached service list this 7th day of January, 1998.



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