

Fla. Appeals Court Upholds Defense Verdict In Smoker Suit

By **Shayna Posses**

Law360, New York (October 19, 2016, 3:52 PM EDT) -- A Florida appeals court on Wednesday affirmed a defense verdict in favor of Philip Morris USA Inc. and R.J. Reynolds Tobacco Co. in an Engle progeny suit, concluding that the issues raised in an appeal brought by the daughters of a smoker who died of lung disease lacked merit.

In a one-paragraph order, the Third District Court of Appeal upheld a jury's finding that the tobacco companies weren't liable for Phyllis Frazier's death from chronic obstructive pulmonary disease because her cigarette addiction didn't legally cause her death.

Philip Gerson of Gerson & Schwartz PA, who represents Frazier's estate, told the panel on Oct. 4 that the trial court erred in its instructions to the jury, but the judges on Wednesday found "no merit to the claims of error raised" by the smoker's daughters, Tina Russo and Cherie Westgate, who sought \$14 million in damages.

As such, the judges said, there was no need for them to address the tobacco company's cross-appeal, which centered around the trial court's ruling that Frazier's daughters could rely on the landmark Engle class action's findings to establish the conduct elements of their claims.

Those findings include conclusions that tobacco companies hid the dangers of smoking, and R.J. Reynolds and Philip Morris argued that letting the daughters rely on them violated the companies' due process rights.

Gerson told Law360 on Wednesday that they are "disappointed that the court didn't do more to answer some very important questions that are now left unanswered."

Unfortunately, Gerson said, without a substantive explanation of what the court's reasoning was behind affirming the decision, there's no basis to ask for rehearing or to petition for certiorari.

"We felt that it was such an important case," the attorney added, saying the litigation has had a "tortured history."

Representatives for the tobacco companies didn't immediately return a request for comment Wednesday.

After a weeklong trial in April 2015, the jurors found in favor of the tobacco companies and denied the damages requested by Frazier's daughters for having to endure watching their mother waste away for more than 20 years with COPD.

Gerson told the panel this month that flawed instructions to the jury resulted in a “somewhat confusing” finding that Frazier was addicted to cigarettes but that her addiction was not a legal cause of her death.

But William Geraghty of Shook Hardy & Bacon LLP, who argued for the tobacco companies, told the court that the jury was informed correctly that there could be more than one legal cause of Frazier's death.

“In this particular case, the plaintiff cannot carry her heavy burden of showing that the trial court abused its discretion by not giving a concurring cause instruction,” he said.

Frazier had the ability to control her smoking and had quit for several months in 1964 before choosing to resume and then finally quitting for good in 1992, Geraghty said.

“Her addiction was not a substantial cause of her continued smoking and not enough to be a legal cause of her COPD,” he said.

The case is one of thousands stemming from the Engle class action against tobacco companies. The Florida Supreme Court decertified the class in 2006 and overturned a \$145 billion verdict, but it allowed up to 700,000 people who could have won judgments to rely on the jury's findings to file suits of their own.

Frazier's estate is represented by Edward S. Schwartz and Philip M. Gerson of Gerson & Schwartz PA.

Philip Morris is represented by Geoffrey J. Michael of Arnold & Porter, and William P. Geraghty and Rachel A. Canfield of Shook Hardy & Bacon LLP.

R.J. Reynolds is represented by Gregory G. Katsas of Jones Day, Geoffrey K. Beach and Howell A. Burkhalter of Womble Carlyle Sandridge & Rice LLP, and Jeffrey A. Cohen of Carlton Fields Jordan Burt.

The case is *Russo v. Philip Morris USA Inc. et al.*, case number 3D15-1348, in the Third District Court of Appeal of Florida.

--Additional reporting by Carolina Bolado and Brandon Lowrey. Editing by Aaron Pelc.