IN THE SUPREME COURT OF THE STATE OF OREGON

MARILYN C. PEARSON and LAURA GRANDIN, individually and on behalf of all similarly situated persons,
Plaintiffs-Appellants,
Respondents on Review

v.

PHILIP MORRIS, INC., aka Philip Morris USA, Inc., a foreign corporation,
Defendant-Respondent,
Petitioner on Review

and

PHILIP MORRIS COMPANIES, INC., aka Altria Group, Inc., a foreign corporation,
Defendant.

Multnomah County Circuit Court
Case No. 0211-11819

Court of Appeals
A137297

S061745

RESPONDENTS' RESPONSE TO PETITIONER PHILIP MORRIS USA INC.'S REPLY BRIEF ON THE MERITS

En Banc Court of Appeals Decision, June 19, 2013
Decision on Reconsideration, August 23, 2013

Opinion by Armstrong, J., joined by Wollheim, Ortega, Sercombe, Nakamoto, and Egan, JJ.

Dissent by Duncan, J., joined by Haselton, CJ, and Schuman and Hadlock, JJ.

May 2014

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I. INTRODUCTION

Respondent Philip Morris, Inc. ("Philip Morris") argues that this is solely an affirmative misrepresentation case because plaintiff sought recovery for "representations" under the Unlawful Trade Practice Act. Philip Morris also contends that such representations can always be easily recharacterized as omissions to avoid a requirement of proof of reliance. Neither contention is accurate.

This case has always involved a claim for failure to disclose material information. The UTPA expressly states that a "representation" includes the failure to disclose information. ORS 646.608(2). Further, a rule of law that does not require proof of reliance in omission or "half-truth" cases is hardly radical or easily subject to abuse because it is supported by this Court's case law and other Oregon and federal cases.

Philip Morris also contends that plaintiffs restate findings of fact as conclusions of law. The Court of Appeals accurately concluded that an appellate court may draw its "own legal conclusion regarding the demonstrated cohesiveness of the class." *Pearson v. Philip Morris, Inc.*, 257 Or App 106, 157, 306 P3d 665 (2013). The evidence and the reasonable inferences to be drawn from that evidence demonstrate, as an issue of law, that the class is sufficiently cohesive.

II. ARGUMENT

A. Plaintiffs Accurately State the Record and, Ironically, Philip Morris's Argument Is Directly Contradicted by The Record.

Philip Morris first claims that plaintiffs misstate the record when arguing that Philip Morris's half-truths regarding "light" and "lowered tar and nicotine" cigarettes were misleading because they were only accurate in limited circumstances. Plaintiffs contend that the half-truths were based on FTC lab testing that Philip Morris knew did not translate to the real world. Ironically, Philip Morris both incorrectly characterizes plaintiffs' argument about the misleading nature of the half-truths and itself misstates the record.

Philip Morris contends that the "uncontradicted evidence establishes that the 'overwhelming majority of smokers' receive less tar and nicotine from light cigarettes * * * the trial court found that smokers 'on average' receive less tar and nicotine from each Lights cigarette as compared to a Reds cigarette." Reply Br. at 4. In fact, Dr. Neal Benowitz, an expert on nicotine compensation and addiction, testified that most people compensate (e.g., puff more intensely or frequently to take in more nicotine from "low tar" cigarettes) and take in the same amount of nicotine and toxins from "Lights" as regular cigarettes. Specifically, Dr. Benowitz testified, and the trial court quoted his testimony, that "on average, people take in the same amount of nicotine and other related toxins from light cigarettes as regular cigarettes." SER 86 (Benowitz Depo.,

p.10, lines 7-11) and ER 18 (trial court opinion quoting same testimony). Even on a per cigarette basis, Dr. Benowitz testified that most light smokers compensate. He testified that "most class members do compensate by taking in more per cigarette" and "the vast majority compensate primarily by taking in more per cigarette and secondarily by smoking a few more cigarettes per day."[1] SER 87 (Benowitz Depo., p. 16-17); SER 88 (Benowitz Depo., p. 19, lines 19-22). The trial court also noted Dr. Benowitz's testimony that "the most 'important' mechanism is smoking more intensely." ER 18.

While the trial court noted that Dr. Benowitz did not provide precise percentages of how various smokers compensate, the trial court never found that on average light smokers received less tar and nicotine than regular smokers either on a per cigarette basis or generally. ER 18-19. Dr. Benowitz testified otherwise and the trial court stated otherwise in quoting his testimony. ER 18-19.

As discussed below, this Court may consider the evidence to reach its own legal conclusions regarding whether the common issues predominate or a class action is superior to countless individual cases. Further, the issue before this Court is whether Philip Morris's statements were misleading and

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[1] The testimony was quoted from another case and the reference to "class members" does not refer to this case.

incomplete half-truths or affirmative misrepresentations that can be litigated on a common basis. Plaintiffs do not have to prove their case at this stage; they only need to demonstrate that a class action meets the basic requirements of ORCP 32A and is superior to other methods of adjudication under ORCP 32B.

B. The Essential Questions Regarding the Cohesiveness of the Class and Predominance of Common Issues Are Questions of Law.

The Court of Appeals correctly concluded that an appellate court may draw its "own legal conclusion regarding the demonstrated cohesiveness of the class." *Pearson*, 257 Or App at 157. In its reply brief, Philip Morris quotes a single sentence from *Bernard* that states that a trial court's determination that "five per cent" of the class had notice of a particular practice "would constitute a finding of fact." *Bernard v. First National Bank of Oregon*, 275 Or 145, 153-54, 550 P2d 1203 (1976). The trial court here did not make any factual findings that are akin to finding that a particular percentage of class members understood that the only way to *ensure* they received lower tar and nicotine was to smoke "Light" cigarettes as they were "smoked" in the FTC/Cambridge Testing Method. Even more importantly, Philip Morris neglects to cite the *immediately subsequent* sentences in *Bernard*:

> However, a deduction therefrom that the common questions predominate over questions affecting only individual members of the proposed class would be a conclusion of law. We are not bound by the trial court's conclusion regarding predominance of

> common questions because whether the facts justify such a conclusion is a matter of law.

Id. at 154. This Court and the Court of Appeals are not bound by the trial court's conclusions regarding whether the evidence presented and the reasonable inferences from that evidence demonstrate that class issues predominate over individual ones.

This Court may assess the evidence on its own to determine whether it is more suitable to litigate the common issues in one case or through countless individual cases arising from identical misleading half-truths made to hundreds of thousands of Oregon consumers regarding the defining feature of Philip Morris's product.

C. Plaintiffs' Omission Claims, Alleged Below, Do Not Require Proof of Reliance.

Philip Morris argues that plaintiffs must prove reliance in part because plaintiffs' claim is based on "express representations" actually made. Philip Morris then cites to passages in plaintiffs' briefing and pleadings that refer to certain "representations." Philip Morris's argument overlooks the text of the UTPA as well as the import of plaintiffs' arguments in their brief (Resp Br on Merits at 16-19). The UTPA expressly states that a "*representation * * * may be* any manifestation of any assertion by words or conduct, including, but not limited to *a failure to disclose a fact*." ORS 646.608(2) (emphasis added). Further, this Court has concluded that the requirement to prove a representation

does not necessarily include the requirement to prove reliance where the representation takes the form of the failure to disclose information:

> In many cases plaintiff's reliance may indeed be a requisite cause of any loss, i.e. when plaintiff claims to have acted upon a seller's express representations. But an examination of the possible forms of unlawful practices shows that this cannot invariably be the case. Especially when the representation takes the form of a 'failure to disclose' under [ORS 646.608] subsection 2, as in this case, it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure.

Sanders v. Francis, 277 Or 593, 598, 561 P2d 1003 (1977). *Sanders* contemplates that courts may distinguish between purely affirmative misrepresentations, which may require proof of reliance, and representations that primarily involve the failure to disclose material information, which do not.

Philip Morris also suggests that a rule that distinguishes between purely affirmative misrepresentations and representations with omissions of material fact is a radical departure that will allow for easy abuse because it would "eliminate the reliance requirement from *all* UTPA claims." PM Merits Reply Br, p. 9 (emphasis in original). As an initial matter, this was not a concern expressed in *Sanders* or other cases that provide for a distinction between purely affirmative misrepresentation cases and omission or half-truth cases. *See* Respondents' Merits Brief, pp. 19-20 (citing state and federal cases eliminating proof of reliance in omission cases). There has not been a flood of

UTPA cases for which courts have been unable to determine the necessary elements.

Plaintiffs also proposed a clear rule, from the Restatement (Second) of Torts, that would provide guidance to courts to distinguish an affirmative misrepresentation from an omission: an omission or half-truth is a representation that states the truth, *so far as it goes*, but is nonetheless misleading because the statement omits additional qualifying material information. *See* Respondents Merits Br., p. 17.

Philip Morris's representations of its cigarettes as "Light" and "lowered tar and nicotine" is misleading precisely because it may be true in very particular circumstances, but is not always or necessarily the case. A diet, low-calorie can of soda or beer is always low-calorie compared to a regular soda or beer *no matter how it is consumed*. A representation that a particular soda was lower in calories than the same brand's regular soda can be proved or disproved as stated; it is either true or false. A representation that a cigarette is "Light" or "lowered tar and nicotine" compared to a regular cigarette is misleading as a half-truth and material omission precisely because it is not invariably true; its 'truth" to the purchaser depends on additional information, omitted by Philip

Morris, regarding how a Light cigarette is to be smoked to ensure the results produced by the FTC test.[2]

Philip Morris also misstates or misunderstands plaintiffs' argument with respect to the representations made here. Plaintiffs have conceded that there would be no UTPA case here if Philip Morris made *no* representations at all. It is also true that most, but not all, UTPA claims necessarily involve some form of representation, as a representation or advertisement is an element of most claims under ORS 646.608(1). The issue, as stated by *Sanders*, is whether this case involves a purely affirmative misrepresentation for which proof of reliance is required or whether the "representation takes the form of a 'failure to disclose' under [ORS 646.608] subsection 2" where "it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure." 277 Or at 598.

Philip Morris also contends that this case did not initially involve a claim for failure to disclose information and that plaintiffs' theory has somehow

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[2] Philip Morris claims that plaintiffs cannot prove causation on a classwide basis. As discussed in plaintiffs' opening brief on the merits, transaction causation (that a misrepresentation caused a particular purchase) is not an element where there has been a material omission of fact. This Court has not required affirmative proof of reliance on information not supplied. Resp Br on Merits, 25-26. To the extent plaintiffs have to prove loss causation, they can present expert evidence at trial that class members suffered a loss by purchasing a Light cigarette that lacked a promised and critical feature that "Light" and "lowered tar" cigarettes did not, in fact, have.

changed from the trial court. As discussed in earlier briefing, plaintiffs alleged both an affirmative misrepresentation and non-disclosure case in their complaint. Respondents Merits Br., p. 15; ER 8-9. The trial court, while rejecting plaintiffs' argument on the merits, acknowledged that plaintiffs were pursuing an omission or half-truth case. ER 14 ("Plaintiffs characterize Philip Morris's alleged misrepresentation as a failure to disclose or half-truth.").

Finally with respect to the omission issue, the United States Supreme Court's decisions in *Altria Grp Inc. v. Good*, 555 US 70 (2008) and *Cipollone v. Liggett Grp., Inc.*, 505 US 504 (1992) do not impact this case whether this Court concludes it is based on affirmative misrepresentations or material omissions. In *Cipollone*, the state law claim alleged that the tobacco company concealed material facts. 505 US at 528. A plurality of the Court held that the Federal Cigarette Labeling and Advertising Act (Labeling Act) did not preempt state fraud laws that derive from the general state law obligation not to deceive. *Id*. at 528-529. *See Altria*, 555 US at 81 (stating that in *Cipollone* a "plurality held that the plaintiff's claim that cigarette manufacturers had fraudulently misrepresented and concealed a material fact was not pre-empted.").

In *Altria*, plaintiffs brought claims for fraud under the Maine UTPA for Philip Morris's misleading statements about Light cigarettes. *Altria* also involved omission claims. The *Altria* plaintiffs alleged Philip Morris violated the UTPA by "fraudulently concealing * * * information and by affirmatively

representing, through the use of 'light' and 'lowered tar and nicotine' descriptors, that their cigarettes would pose fewer health risks." 555 US at 74. The Court held that such common law fraud claims were not preempted and "[n]othing in the Labeling Act's text or purpose or in the plurality opinion in *Cipollone* suggests that whether a claim is pre-empted turns in any way on the distinction between misleading and inherently false statements." 555 US at 82. Whether the court ultimately determines this is an affirmative misrepresentation or omission case, the Labeling Act's preemption provisions relating to cigarette labeling and warnings do not apply.[3]

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[3] Philip Morris contends that plaintiffs cannot establish common proof of ascertainable loss or injury. There was extensive briefing on this issue in the Court of Appeals and this Court. *See e.g.*, Resp Br on Merits (Or S Ct), pp. 42-49. Plaintiffs argued both that proof of damages is not required at the class certification stage and that if plaintiffs have to establish common proof of an *ascertainable loss*, a court may infer from the evidence that a person who purchases a product that lacks a promised feature suffers an ascertainable loss. *Id*., *citing Scott v. Western Int'l Surplus Sales, Inc.,* 267 Or 512, 517 P2d 661 (1973), among other cases.

Philip Morris also contends that potential statute of limitation issues defeat certification in Oregon, but cites no Oregon case law that so holds. *Bernard* does not analyze statute of limitation defenses and *Saenz v. Pittenger*, 78 Or App 207, 715 P2d 1126 (1986) is an individual case. As discussed in the opening brief, the Court of Appeals correctly concluded that any raised statute of limitation defenses can be addressed following the litigation of the vast common liability issues presented. If this Court adopts a rule of law that a claimed statute of limitation defense defeats certification, it will be impossible for any case to be certified when a defendant claims class members may have knowledge sufficient to raise a limitation defense.

III. CONCLUSION

For the reasons stated above and in plaintiff's earlier brief, plaintiffs respectfully request this Court affirm the Court of Appeals and reverse and vacate the prior judgment.

DATED this 22nd day of May, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2,455 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE AND FILING

I certify that on May 22, 2014, I filed the foregoing **RESPONSE TO PETITIONER PHILIP MORRIS USA INC.'S REPLY BRIEF ON THE MERITS** with the Appellate Court Administrator in .PDF, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

I further certify that on May 22, 2014, I served two true and correct copies of said document on the party or parties listed below, via first class mail, postage prepaid, and addressed as follows:

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