

SUPREME COURT OF OHIO

Marrone v. Philip Morris USA, Inc., 110 Ohio St. 3d 5, 2006-Ohio-3790

850 N.E.2d 31 (Ohio 2006) · Decided June 14, 2006

OPINION

STRATTON, J.

Lundberg Stratton, J. ¶ 1 Ohio’s Consumer Sales Practices Act (“CSPA”) prohibits unfair, deceptive, and unconscionable practices in consumer sales transactions. R.C. 1345.02 and 1345.03. A consumer has a cause of action and is entitled to relief for any violation of the CSPA. R.C. 1345.09. A consumer may, in an individual action, rescind the transaction or recover damages for a violation of the CSPA.

R.C. 1345.09(A). However, if the violation is an act or practice that was declared to be deceptive or unconscionable by a rule adopted by the Attorney General before the consumer transaction on which the action is based, or if the violation is an act or practice that was determined by a court to violate the CSPA and the court’s decision was available for public inspection in accordance with R.C.

1345.05(A)(3) before the consumer transaction, the consumer may seek additional relief, including damages or other appropriate relief in a class action under Civ.R. 23. R.C. 1345.09(B). ¶ 2 We must determine how similar the defendant’s conduct must be to the conduct that was previously determined to be deceptive in order for a consumer to qualify for class-action certification under R.C.

1345.09(B) for a violation of the CSPA. For the reasons that follow, we hold that a consumer may qualify for class-action certification under Ohio’s CSPA only if the defendant’s alleged violation of the Act is substantially similar to an act or practice previously declared to be deceptive by one of the methods identified in R.C. 1345.09(B).

Because the plaintiffs’ claims in this case did not meet that standard, we reverse the judgment of the court of appeals. ¶ 3 The plaintiffs-appellees, Catherine Marrone and Greg and Eva Phillips, filed class-action complaints against defendant-appellant, Philip Morris USA, Inc. (“PMI”), individually and on behalf of Ohio residents who purchased and smoked Virginia Slims Lights and Marlboro Lights cigarettes.

They alleged fraud, unjust enrichment, and violations of the CSPA related to PMI’s manufacture and sale of the “light” cigarettes. In particular, the plaintiffs alleged that PMI falsely represented

the cigarettes as light to mislead smokers into believing that the cigarettes delivered lower tar and nicotine and therefore were safer than their regular counterparts, Virginia Slims and Marlboros. {¶ 4} The plaintiffs also alleged that PMI failed to disclose that the light cigarettes delivered lower tar and nicotine levels only when tested by a machine, but not when smoked by consumers.

They alleged that the smoker's lips or fingers covered or blocked microscopic vent holes on the filter of the cigarettes under normal use, thereby negating any benefits of the design. The plaintiffs also alleged that PMI intentionally manipulated the design and content of the cigarettes to maximize, rather than lower, the amount of nicotine actually delivered during normal smoking. {¶ 5} The plaintiffs moved for class certification.

The trial court determined that they met the prerequisites to a class action under Civ.R. 23. The court certified a limited class of consumers from a six-county area in northeast Ohio on the CSPA claims only.¹ The trial court did not address R.C. 1345.09(B) or identify a rule adopted by the Attorney General or a court determination that these alleged acts or practices constituted deceptive or unconscionable practices prior to the alleged conduct. {¶ 6} PMI appealed the judgment certifying the class.

The court of appeals concluded that the plaintiffs had demonstrated that there had been prior determinations that the specific alleged conduct of PMI constituted a deceptive act or practice. The court relied on cases cited by the plaintiffs in which the defendant had represented a product to be of a certain quality or to have certain attributes that it did not: *Amato v. Gen.*

Motors Corp. (1982), 11 Ohio App.3d 124, 11 OBR 203, 463 N.E.2d 625; *State ex rel. Fisher v. Natl. Information Group* (Oct. 19, 1994), Franklin C.P. No. 93CVH09-6323; *State ex rel. Celebrezze v. Hi-Lo Oil Co., Inc.* (July 31, 1985), Franklin C.P. No. 85-CV-01-518; and *Brown v. Introductions Internatl., Inc.* (Sept. 29, 1975), Lucas C.P. 74-2529.

The appellate court affirmed the trial court's judgment certifying the class. {¶ 7} This cause is before this court upon our acceptance of a discretionary appeal. II {¶ 8} In order to maintain a class action, plaintiffs must meet the prerequisites set forth in Civ.R. 23.

The appellate court affirmed the trial court's determination that the plaintiffs had satisfied the Civ.R. 23 elements necessary for a class action.' That determination is not before us, and this opinion does not address whether the requirements of Civ.R. 23 were met.

We address only the narrow issue of whether defendant had sufficient notice for purposes of R.C. 1345.09(B) that its alleged conduct was deceptive. {¶ 9} R.C. 1345.09(B) provides that a consumer may qualify for class-action status only when a supplier acted in the face of prior notice that its conduct was deceptive or unconscionable.

The prior notice may be in the form of (1) a rule adopted by the Attorney General under R.C. 1345.05(B)(2) or (2) a court decision *8made available for public inspection by the Attorney General under R.C. 1345.05(A)(3). {¶ 10} PMI argues that the acts or practices described in the prior notice must be industry- or conduct-specific for the notice to be meaningful and to give a supplier fair warning of conduct that violates the CSPA.

According to PMI, no court ruling or Attorney General rule satisfied that requirement here. PMI contends that the cigarette industry is highly regulated by the federal government, and, therefore, generic or nonspecific rules or court decisions do not provide notice for purposes of R.C. 1345.09(B). {¶ 11} The plaintiffs, however, contend that R.C. 1345.09(B) refers only to “an act or practice” and does not require specificity.

They argue that the prior notice need only be sufficient to put the offending party on notice. The plaintiffs argue that *State ex rel. Celebrezze v. Hi-Lo Oil, Inc.*, Franklin C.P. No. 85-CV-01-518, *Amato v. Gen. Motors Corp.*, 11 Ohio App.3d 124, 11 OBR 203, 463 N.E.2d 625, and Ohio Adm.Code 109:4-3-10 gave notice to PMI that its manufacturing and labeling of “light” cigarettes violated Ohio law. {¶ 12} As discussed below, the conduct described in these cases is not substantially similar to PMI’s alleged conduct, and the Administrative Code section describes a generic prohibition.

Consequently, they do not provide prior notice to PMI of deceptive and unconscionable acts or practices for purposes of R.C. 1345.09(B). A. Publicly Available Court Decisions {¶ 13} Prior notice may be in the form of “an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and * * * made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code.” R.C.

1345.09(B). {¶ 14} R.C. 1345.05(A)(3) provides that the Attorney General must “[m]ake available for public inspection all rules * * * together with all judgments, including supporting opinions, by courts of this state * * * determining that specific acts or practices violate section 1345.02 or 1345.03 of the Revised Code.” {¶ 15} *State ex rel. Celebrezze v. Hi-Lo Oil*, Franklin C.P.

No. 85-CV-01-518, involved a defendant that was representing to consumers that it was selling two different grades of gasoline from two different pumps when in fact all the gasoline came from one underground tank. The trial court determined that this was a deceptive and unconscionable practice. {¶ 16} *Amato v. Gen. Motors Corp.* involved an automobile manufacturer that allegedly sold Oldsmobile automobiles that contained engines manufactured by its Chevrolet division.

The trial court certified *Amato* as a class action, finding prior notice in administrative rules that generically prohibited advertising that did not *9clearly and conspicuously state any material

omissions or modifications and a rule that forbade bait-and-switch tactics. Amato, 11 Ohio App.3d at 131, 11 OBR 203, 463 N.E.2d 625.

The Amato court decided that, although the rules did not mention motor-vehicle parts, they were “sufficient to put a reasonable person on notice of the prohibition.” Id. {¶ 17} The appellate court held that these court decisions were “sufficient to constitute prior determinations, within the meaning of R.C. 1345.09(B).” Marrone v. Philip Morris USA, Inc., Medina App.

No. 03CA0120-M, 2004-Ohio-4874, ¶ 12. We disagree. These cases did not involve the cigarette or tobacco industries. The industries and conduct in these cases were too dissimilar to PMI’s to have afforded PMI advance notice that its acts or practices had been declared deceptive under the CSPA. {¶ 18} Other courts have required that the prior determination be specific and that it involve conduct similar to the alleged conduct at issue.

In Mihailoff v. Ionna (May 6, 1987), Hamilton App. No. C-860040, 1987 WL 10889, the court concluded that a prior case involving the sale and repair of household appliances was insufficient notice for purposes of R.C. 1345.09(B) to persons in the real estate business.

The court reasoned that “the specific wrongful acts and practices in the appliance business are not uniformly relevant in operative detail to acts and practices in the sale and improvement of real estate.” Thus, the court concluded, the prior case did not give “fair warning in advance about deceptive or unconscionable acts.” {¶ 19} In Lewis v. ACB Business Servs., Inc. (C.A.6, 1998), 135 F.3d 389, the court rejected as prior notice cases involving conduct that was too dissimilar to the conduct at issue.

The court reasoned that “[t]o read [the cases] as broadly as Lewis suggests and without reference to the specific acts in those cases would allow the recovery * * * under the [CSPA] whenever there is any arguable misstatement of fact, a result the Ohio courts and legislature surely did not intend.” Id. at 405. {¶ 20} In Nicols v. R.J. Reynolds Tobacco Co. (Aug.

9, 2000), Summit C.P. No. CV 99-11-4539, a case against another cigarette manufacturer, the trial court refused to certify the case as a class action because the plaintiff failed to satisfy the prerequisite of prior notice in R.C. 1345.09(B). Specifically, the trial court rejected the argument that Ohio Adm.Code 109:4-3-02 and 109:4-3-10 provided prior notice because neither one sets forth a specific act or conduct. {¶ 21} We believe that these cases correctly interpret R.C.

1345.09(B). Cases that involve industries and conduct very different from the defendant’s do not provide meaningful notice of specific acts or practices that violate the CSPA. Therefore, the plaintiffs have cited no publicly available court decision that would satisfy R.C. 1345.09(B). *10B. Rule Adopted by Attorney General (¶ 22} Prior notice may also be in the form of “an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code.” R.C.

1345.09(B). R.C. 1345.05(B)(2) authorizes the Attorney General to “[a]dopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate sections 1345.02 and 1345.03 of the Revised Code.” In so doing, the Attorney General must give “due consideration and great weight” to the “federal trade commission orders, trade regulation rules and guides, and the federal courts’ interpretations of subsection 45(a)(1) of the ‘Federal Trade Commission Act,’ 38 Stat. 717 (1914), 15 U.S.C.A.

41, as amended.” R.C. 1345.05(B)(2). {¶ 23} The plaintiffs rely on Ohio Adm.Code 109:4-3-10, which states that it is a deceptive act or practice for a supplier to make any representations in the absence of a reasonable basis in fact.

However, as did the court in *Nicols v. R.J. Reynolds*, Summit C.P. No. CV 99 —11—4539, we hold that this rule is insufficient to provide prior notice under R.C. 1345.09(B) because it does not refer to any particular act or practice. A general rule is not sufficient to put a reasonable person on notice of the prohibition against a specific act or practice.

To permit a generic rule to constitute prior notice for purposes of R.C. 1345.09(B) would allow any previous determination of a deceptive act or practice to qualify as prior notice for any subsequent alleged deceptive act or practice. {¶ 24} “For class certification to be proper, the prior decision or previously promulgated rule must have put the defendant on notice that the specific conduct at issue violated” the Act.

Delahunt v. Cytodyne Technologies (S.D.Ohio 2003), 241 F.Supp.2d 827, 837. The question before us is what degree of similarity is necessary for purposes of R.C. 1345.09(B). We hold that there must be a substantial similarity between a defendant’s alleged violation of the Act and an act or practice previously declared deceptive by either a rule promulgated by the Attorney General or a court decision that was publicly available when the alleged violation occurred. “Substantial similarity” means a similarity not in every detail, but in essential circumstances or conditions.

See *W.F. Corbin & Co. v. United States* (C.A.6, 1910), 181 F. 296, 301, citing 1 *Wigmore on Evidence*, Section 442. “Substantial similarity” is the standard used in a variety of legal contexts, but perhaps most applicable here is the use of that standard in products-liability cases when determining whether to admit evidence of past incidents to demonstrate that a defendant had notice that its product was dangerous or defective.

Renfro v. Black (1990), 52 Ohio St.3d 27, 31, 556 N.E.2d 150, citing *McKinnon v. Skil Corp.* (C.A.1, 1981), 638 F.2d 270, 277; *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 349-350, 15 OBR 468, 474 N.E.2d 291 (Holmes, J., concurring). *11 {¶ 25} The acts or practices determined to be deceptive in *Celebrezze* and *Amato* are not substantially similar to the allegations against PMI.

Ohio Adm. Code 109:4-3-10 is a generic prohibition that does not refer to any specific act or practice. Consequently, the plaintiffs failed to identify any prior rule or court - decision that would have put PMI on notice that its conduct violated the CSPA. Ill {¶ 26} The absence of prior rules or court decisions that address the cigarette industry may be due in part to the comprehensive regulations of the industry by the Federal Trade Commission (“FTC”).

Ohio’s consumer-protection laws defer to FTC pronouncements, R.C. 1345.11(B) and 1345.05(B) (2), and such deference is particularly appropriate here, given the expertise that the FTC has developed in the past 70 years of regulating the tobacco industry, see *Flanagan v. Altria Group, Inc.* (Oct. 25, 2005), E.D.Mich.S.D. No. 05-71697, 2005 WL 2769010, *3. Part of that comprehensive regulation calls for the FTC to oversee the testing methods and advertisements that are implicated by the plaintiffs’ claims.² {¶ 27} As other courts have recognized, the FTC persuaded all cigarette manufacturers to agree to use the identical testing method for measuring the amount of tar and nicotine in cigarettes.

See, e.g., *Flanagan*, 2005 WL 2769010 at *3-4. That testing method is the same test that the putative class complains of here. It is well established that the FTC recognized that no one test could accurately determine the amount of tar and nicotine to which an “average” smoker would be exposed, but it also recognized that if one standardized test was used by all cigarette manufacturers, then consumers could compare the tar and nicotine amounts of different brands.

See *Price v. Philip Morris, Inc.* (2005), 219 Ill.2d 182, 189-190, 848 N.E.2d 1 (“The record is clear that both the FTC and the cigarette manufacturers were aware [at the time the FTC adopted the standard method (‘the FTC method’)] that no method of measurement, including the FTC method, could accurately predict the actual exposure of individual smokers who smoked any particular brand of cigarette”); *Virden v. Altria Group, Inc.* (N.D.W.Va.2004), 304 F.Supp.2d 832, 839, quoting FTC News Release (Aug.

1, 1967), “FTC to Begin Cigarette Testing” (“The FTC further noted that, because ‘[n]o two human smokers smoke in the same way,’ the ‘FTC Method’ was not an attempt ‘to gauge the test to the amount of smoke, or tar and nicotine, which the “average” smoker will draw from any particular cigarette’ ”); *Watson v. Philip Morris Cos., Inc.* (C.A.8, 2005), 420 F.3d 852, 855 (“From its initial development, the FTC was aware that the testing method did not measure the amount of tar or nicotine that an individual smoker may receive.

The purpose of the test was not to replicate human smoking but to provide a basis for comparison”); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm.* (C.A.6, 1983), 710 F.2d 1165, 1168 (“The FTC method was never intended to provide precise measurements of ‘tar’ and nicotine delivery to each smoker because consumers smoke cigarettes in different fashions.

Instead, the tests were designed to provide consumers with figures by which to compare the many brands of cigarettes on the market”). {¶ 28} Despite its knowledge that the test did not accurately reflect the amount of tar and nicotine a smoker would consume, the FTC required that the measurements obtained through such testing be reported in all cigarette advertisements.

Watson, 420 F.3d at 858-860; Flanagan, 2005 WL 2769010 at *5. And although the FTC is well aware of the years of litigation and debate over cigarette manufacturers’ marketing strategies, to date it has not directed manufacturers to refrain from using quantifier adjectives — terms such as “low,” “lower,” and “reduced” — in describing tar and nicotine levels in advertisements for their cigarettes.

Watson, 420 F.3d at 861-862; Flanagan, 2005 WL 2769010 at *3-5. {¶ 29} Although it appears that the FTC has neither permitted nor forbidden characterizations like “low” tar, Flanagan, 2005 WL 2769010 at *4-5, the information about average tar and nicotine levels used in the advertisements comes directly from testing practices that are “required or specifically permitted by federal trade commission orders [and] trade regulation rules and guides.” See R.C.

1345.11(B). Because the cigarette industry is highly regulated by the federal government, PMI was obligated to follow federal mandates and standards for light cigarettes. IV {¶ 30} The ultimate question in this litigation is whether, notwithstanding the FTC’s imprimatur on those testing methods, PMI used the data to deliberately deceive consumers into believing that Marlboro Lights and Virginia Slims Lights are safer than other cigarettes.

That issue is not before us, and our opinion should not be read to suggest that we find that the conduct at issue was deceptive or otherwise violated Ohio law. The plaintiffs may be entitled to pursue class-action relief under Civ.R. 23; however, they have failed to identify any prior rule or court decision that would entitle them to pursue CSPA relief under R.C.

1345.09(B). *13{¶ 31} In conclusion, we hold that the court of appeals erred in determining that there had been a prior determination that conduct sufficiently similar to the alleged acts of PMI violated R.C. 1345.02 or 1345.03.

We hold that to satisfy R.C. 1345.09(B), a plaintiff must show that the defendant’s alleged conduct is substantially similar to an act or practice that was previously declared to be deceptive. The plaintiffs do not meet that standard to qualify for class-action certification under R.C. 1345.09(B).

Therefore, we reverse the judgment of the court of appeals. Judgment reversed. Moyer, C.J., O’Connor and O’Donnell, JJ., concur. Grady and Lanzinger, JJ., concur in part and dissent in part. Pfeifer, J., dissents. Thomas J. Grady, J., of the Second Appellate District, sitting for Resnick, J..

The claims of fraud and unjust enrichment are not part of this appeal.. Indeed, Congress has expressly preempted any prohibition by the states on the advertising or promoting of cigarettes.

See Federal Cigarette Labeling and Advertising Act, Sections 1331 and 1334(b), Title 15, U.S.Code; Lorillard Tobacco Co. v. Reilly (2001), 533 U.S. 525, 545-546, 121 S.Ct. 2404, 150 L.Ed.2d 532.

Retrieved from lawtools.ai · <https://lawtools.ai/cases/state/ohio-supreme-court-of-ohio/2006/marrone-v-philip-morris-usa-inc-110-ohio-st-3d-5-2006-ohio-k5t5pesg>