[Cite as *State ex rel. Cordray v. R.J. Reynolds Tobacco Co.*, 2010-Ohio-86.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. [Richard Cordray],	:	
Plaintiff-Appellee,	:	
		No. 09AP-259
v.	:	(C.P.C. No. 97CVH-05-5114)
R.J. Reynolds Tobacco Company,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
Philip Morris, Inc. et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on January 14, 2010

Richard Cordray, Attorney General, and *Susan C. Walker*, for plaintiff-appellee.

Jones Day, Elizabeth P. Kessler, *Edward M. Carter*, and *Noel J. Francisco*, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, R.J. Reynolds Tobacco Company ("R.J. Reynolds"), from a judgment of the Franklin County Court of Common Pleas, finding R.J. Reynolds in violation of a consent decree, and awarding attorney fees in favor of plaintiff-appellee, Ohio Attorney General.

{¶2} The following factual background is taken primarily from the trial court's findings of fact as set forth in its decision filed July 30, 2008. In May 1997, appellee filed

an action against various tobacco companies, including R.J. Reynolds, seeking damages and injunctive relief in connection with health care costs associated with treating tobacco-related diseases. In November 1998, multiple states, including Ohio, settled lawsuits against the various tobacco companies by signing the Tobacco Master Settlement Agreement ("MSA"), and stipulating to the entry of a consent decree in the respective states and territories. In Ohio, the MSA was approved on November 28, 1998, as part of the consent decree entered by the court.

{¶3} Both the MSA and the consent decree contain express prohibitions regarding the use of cartoons in advertising, including definitions as to what images constitute "cartoons." Thus, participating tobacco manufacturers may not "use or cause to be used any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products." MSA, Section III(b). See also Consent Decree, Section V.B.

{¶4} In 2007, Rolling Stone magazine published three 40th Anniversary issues, dated May 3, July 12, and November 15, respectively. Each issue contained at least one "gatefold" advertisement. A typical gatefold advertisement consists of four pages of advertising; a lead-in page of advertising is followed by a page of editorial content. The editorial content is then followed by two opposing pages of advertising, which open to four pages of editorial content, followed by one page of "lead out" advertising.

{¶5} In the November 15, 2007 issue of Rolling Stone, R.J. Reynolds purchased a four-page gatefold advertisement that "wrapped around" or "enveloped" five pages of editorial content prepared by Rolling Stone. The R.J. Reynolds advertisement promoted the Camel Farm campaign, while the Rolling Stone editorial content consisted of a five-page feature listing independent rock music bands, entitled the "Indie Rock Universe."

The Rolling Stone editorial content was accompanied by illustrations prepared for Rolling Stone by artist/illustrator Benjamin Marra.

{¶6} The Camel Farm advertisement was created by R.J. Reynolds, working in conjunction with Kaart Marketing, based upon a pre-existing Camel Farm "creative platform." In the gatefold advertisement, R.J. Reynolds used a collection of photographs to display the following images: (1) radios growing from the ground; (2) an eagle carrying a mirror with a severed hand; (3) a farm tractor with film reels for wheels and a film projector for an engine; (4) television sets growing from the ground; and (5) two radios flying in the air.

{¶7} R.J. Reynolds purchased the gatefold advertisement as a "high impact" unit, designed to increase the odds of the advertisement being noticed by readers. When an advertiser purchases a gatefold advertisement, the advertiser does not include the editorial content located adjacent to the advertisement or otherwise within the gatefold. In the present case, R.J. Reynolds was aware that the November 15, 2007 issue of Rolling Stone would focus on independent music, and that the barn door gatefold would open up to a Rolling Stone editorial relating to independent music; R.J. Reynolds was not involved in the development of the editorial content, nor did it preview or prepare those pages. The publisher of Rolling Stone represented that "Camel was not involved in any way in the development of the editorial content." Further, "[t]he Indie Rock Universe editorial gatefold was independently illustrated and created by Rolling Stone and contained no content previewed, prepared by or paid for by R.J. Reynolds Tobacco Co."

{¶8} At a meeting between Rolling Stone and R.J. Reynolds on May 17, 2007, advertising salesmen for Rolling Stone informed R.J. Reynolds that it would not be permitted to preview the editorial content that would appear with the Camel Farm

advertisement; R.J. Reynolds was told "no" as a matter of both policy and practicality. While R.J. Reynolds paid for its four-page gatefold advertising, it did not pay for Rolling Stone's five-page editorial content.

{¶9} According to industry practice, advertisers do not review editorial content, nor do they have a role in the preparation of editorial content. Moreover, advertisers have no opportunity to preview, approve or reject editorial content regardless of whether an advertiser purchases a "premium placement" such as a gatefold advertisement.

{¶10} While the Camel Farm advertisement and the Rolling Stone editorial portray independent music, the look and feel of the two pieces is very different from an artistic standpoint: specifically (1) the editorial content does not contain photographs, while the Camel Farm advertisement consists of a photographic collage or montage; (2) the editorial content consists of hand-drawn illustrations, whereas the Camel Farm advertisement does not contain any hand-drawn illustrations; and (3) the editorial content employs a "futuristic" look in contrast to the Camel Farm advertisement's "retro" look.

{¶11} Several states, including Ohio, began discussing aspects of the Camel Farm campaign with R.J. Reynolds; on August 15, 2007, the National Association of Attorneys General sent a letter to R.J. Reynolds raising concerns about the campaign.

{¶12} On November 16, 2007, appellee purchased a copy of the November 15, 2007 40th Anniversary issue of Rolling Stone magazine. On December 4, 2007, appellee filed a motion for issuance of a show cause order in contempt against R.J. Reynolds regarding the Camel Farm advertisement on the ground that it violated the cartoon ban under Section V.B. of the consent decree. Appellee alleged that R.J. Reynolds violated the consent decree's permanent injunction against the use of cartoons in three ways: (1) by using cartoons in the Camel Farm advertisement; (2) by using the same cartoon

images on the website www.thefarmrocks.com; and (3) by causing cartoons to be used in the editorial content within the gatefold to promote the Camel® brand.

{¶13} On July 30, 2008, the trial court issued its decision and entry on appellee's motion for issuance of show cause order in contempt. The trial court determined that R.J. Reynolds did not violate the consent decree by using the Camel Farm imagery found on pages 64, 66, 67, and 72 of the November 15, 2007 issue of Rolling Stone (i.e., the Camel Farm advertisement), but the court further determined that R.J. Reynolds violated the consent decree when it "used" or "caused to be used" the cartoons in the November 15, 2007 Rolling Stone editorial "because it was so intertwined with the Camel® brand advertisement that it was used to promote Camel® cigarettes." The trial court rejected appellee's request for a sanction of $100 for every copy of the November 15, 2007 issue Rolling Stone sold in Ohio, but awarded attorney fees and costs to appellee.

{¶14} On appeal, R.J. Reynolds presents the following two assignments of error for this court's review:

> 1. The trial court erroneously held Reynolds in contempt based on its conclusion that the Consent Decree's Cartoon provision clearly and unambiguously prohibited Reynolds from purchasing a gatefold advertisement in the November 15, 2007, issue of *Rolling Stone* because the advertisement was placed in the gatefold next to a *Rolling Stone* editorial feature that contained Cartoon illustrations.
>
> 2. The trial court made numerous erroneous factual findings that were central to its finding of contempt.

{¶15} Under the first assignment of error, R.J. Reynolds contends the trial court erred in finding that the consent decree prohibited it from purchasing a gatefold advertisement in the November 15, 2007 issue of Rolling Stone. R.J. Reynolds maintains

that there was no evidence it was aware the Rolling Stone editorial, placed next to the R.J. Reynolds' Camel Farm advertisement, would contain cartoon illustrations.

{¶16} In general, in an action for civil contempt, the standard of proof is clear and convincing evidence, and "an abuse of discretion standard of review applies to both discretionary and factual determinations in a civil contempt appeal." *Williamson v. Cooke,* 10th Dist. No. 05AP-936, 2007-Ohio-493, ¶11. Courts have noted that " 'consent decrees are essentially contractual agreements that are given the status of a judicial decree' "; as such '[c]ontract principles are generally applicable' " in a court's analysis. *Save the Lake v. Hillsboro,* 158 Ohio App.3d 318, 2004-Ohio-4522, ¶14, quoting *Hook v. Arizona* (C.A.9, 1992), 972 F.2d 1012.

{¶17} The consent decree at issue in this case imposed a permanent injunction against "using or causing to be used within the State of Ohio any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products." Consent Decree, Sec. V.B. The consent decree incorporates the MSA's definition of "Cartoon." Section II(l) of the MSA states as follows:

> (l) "Cartoon" means any drawing or other depiction of an object, person, animal, creature or any similar caricature that satisfies any of the following criteria:
>
> (1) [T]he use of comically exaggerated features;
>
> (2) [T]he attribution of human characteristics to animals, plants or other objects, or the similar use of anthropomorphic technique; or
>
> (3) [T]he attribution of unnatural or extrahuman abilities, such as imperviousness to pain or injury, X-ray vision, tunneling at very high speeds or transformation.

{¶18} As noted under the facts, the trial court did not find R.J. Reynolds in contempt for the imagery contained in its Camel Farm advertisement. The court did find,

however, that R.J. Reynolds "used and/or caused to be used images that fall under the definition of Cartoon through its use of the gatefold advertisement in its entirety." Specifically, the court held, the Rolling Stone editorial content in the "Indie Rock Universe" advertisement, appearing adjacent to the R.J. Reynolds advertisement, "clearly uses Cartoons and it is very apparent that Reynolds intended to 'piggyback' off of and use the editorial content to advertise and/or promote its Camel brand tobacco products." The trial court further held: "Reynolds was indirectly using the Editorial Content, which unarguably contains Cartoons as defined by the Consent Decree," in order to advertise its tobacco products.

{¶19} R.J. Reynolds argues that the undisputed facts show: (1) it was not involved in any way in the development of the five-page "Indie Rock Universe" editorial content; (2) it lacked any knowledge that Rolling Stone's editorial would include cartoons, and did not intend for it to include cartoons; (3) its lack of knowledge and involvement regarding Rolling Stone's substantive editorial content reflects standard magazine industry practice; and (4) beyond the knowledge that readers of Rolling Stone's editorial would be interested in the general subject of independent music, R.J. Reynolds had no knowledge of the form or content of Rolling Stone's editorial.

{¶20} R.J. Reynolds notes that the state of Ohio was not alone in filing this lawsuit, as eight other states filed similar litigation on the same day as appellee. R.J. Reynolds also notes that courts in four other states have issued decisions pertaining to litigation arising out of the Camel Farm advertisement in Rolling Stone. R.J. Reynolds maintains that three of the four states have rejected the position taken by the trial court in the instant case.

{¶21} We begin with a review of those cases. In *Washington v. R.J. Reynolds Tobacco Co.* (2009), 151 Wash.App. 775, the Washington Court of Appeals affirmed in part and reversed in part the trial court's finding that R.J. Reynolds did not violate the cartoon ban and did not cause Rolling Stone's use of cartoons in the Camel Farm advertisement contained in the November 15, 2007 edition of Rolling Stone magazine. Specifically, while the appellate court held that the images in the Camel Farm photo collage violated the plain language of the MSA,[1] it further held that R.J. Reynolds "did not affirmatively cause *Rolling Stone's* use of cartoons" in the "Indie Rock Universe" editorial content. Id. at 786.

{¶22} In deciding the latter issue, the appellate court initially noted that "[n]o provision of the MSA or the consent decree applies to or imposes restrictions upon third parties." Id. The court cited findings by the trial court that "Reynolds did not prepare, preview, or pay for the five pages of Indie Rock Universe content," and that R.J. Reynolds "had no intent for that ad to enfold a cartoon, no knowledge that it would do so, and, in fact, had been shown examples of previous gatefolds that led it to assume that only traditional text and photographs would appear there." Id. at 787. The trial court had also cited R.J. Reynolds' understanding, at the time the ad space was purchased, "that the enclosed content would address the subject of independent music but, given the separation between editorial and advertising staffs as well as their differing deadlines, the way in which this would be done was both unknown and unknowable." Id. The trial court in the Washington case, in analyzing the language of the consent decree, also held that "[b]oth 'using' and 'causing' are active verbs and the Consent Decree's agreed language

[1] In the instant case, appellee has not challenged, by way of cross-appeal, the trial court's finding that the images in the Camel Farm advertisement did not violate the MSA and, therefore, that issue is not before this court on appeal.

thus must be read to prohibit RJR from certain affirmative conduct." *Washington v. R.J. Reynolds* (June 2, 2008), King Cty., Wash.Super.Ct. No. 96-2-15056-8 SEA (slip opinion).

{¶23} In addressing the state's argument that R.J. Reynolds' duty was absolute, and that the issue of its foreseeability was irrelevant, the appellate court held that, "absent a reasonable foreseeability that *Rolling Stone* would use cartoons, it does not follow that Reynolds had a duty to include a cartoon restriction in its insertion order." *Washington v. R.J. Reynolds* at 787. The court noted that Rolling Stone had shown R.J. Reynolds a gatefold advertisement used in one of the earlier 40th Anniversary issues in 2007, and that inside a "Patron tequila" gatefold shown to Reynolds, the Rolling Stone content consisted of traditional text and photographic material. Id. In light of the above "unchallenged findings of fact," the appellate court agreed with the trial court's conclusion that "Reynolds' failure to prevent the use of cartoons in *Rolling Stone's* copy did not amount to causing the gatefold to include cartoons." Id.

{¶24} In *Maine v. R.J. Reynolds Tobacco Co.* (Jan. 2, 2009), Maine Super.Ct. No. CV-97-134 (slip opinion), the Superior Court of Maine, in addition to concluding that "[n]one of the imagery contained in the Camel Farm creative platform, including the Camel Farm advertisement in November 15th issue of *Rolling Stone* and the 'Farm Rocks' website, falls within the MSA definition of 'Cartoon,' " further determined that R.J. Reynolds did not " 'use' or 'cause to be used' " the cartoons appearing in the Rolling Stone editorial. More specifically, the court held:

> Although Reynolds sought to establish a synergy with *Rolling Stone* and emphasize its support of independent music, it did not "use" or "cause to be used" the Cartoons in the *Rolling Stone* editorial. The MSA Cartoon ban employs two active verbs, prohibiting Reynolds from "using" Cartoons or

> "causing" Cartoons to be used in advertising tobacco products. This language prohibits Reynolds from engaging in affirmative conduct. * * * Regarding Reynolds' role in the *Rolling Stone* editorial content, at most, Reynolds had knowledge, and desired, that the enclosed editorial content would address independent music. Beyond this, however, given the separation between editorial and advertising departments at *Rolling Stone,* Reynolds did not, and indeed could not, know the editorial content would contain Cartoons. Indeed, the witness testimony in this case demonstrated Reynolds' lack of control regarding the placement of their advertising and, more importantly, the editorial content with which it appeared. Witnesses testified that it was standard industry practice for an advertiser such as Reynolds to be in the dark as to the editorial content that would appear with its advertising. Without any involvement in or knowledge of the stylistic content in the *Rolling Stone* editorial, Reynolds cannot be said to have been "using" Cartoons or "causing" them to be used.

{¶25} The court in that case also found significant that R.J. Reynolds "was shown examples of previous *Rolling Stone* gatefolds, including editorial content, which employed only traditional text and photographs." Id. The court held that, "[g]iven what Reynolds knew and reasonably expected at the time, the court cannot view Reynolds['] failure to specifically request that the *Rolling Stone* editorial content not contain Cartoons as 'causing' Cartoons to be used in advertising tobacco products." Id. The court further held that, "[e]ven applying a negligence standard, Reynolds was not unreasonable in assuming that the gatefold would be similar to the examples that were shown."

{¶26} In *California v. R.J. Reynolds Tobacco Co.* (Feb. 25, 2009), San Diego Cty., Cal.Super.Ct. No. JCCP 4041 (slip opinion), the Superior Court of California held that "Reynolds was not responsible for the Marra cartoons [in the Rolling Stone editorial content] since Reynolds was not involved in their creation and did not know of their cartoon content before publication." The court further found that "since the MSA/Consent Decree contains no proscription based on adjacency to cartoons, * * * Reynolds did not

violate the MSA/Consent Decree because its advertisement was adjacent to the Marra cartoons." In its holding, the court cited with approval the Washington trial court's analysis that " '(b)oth "using" and "causing" are active verbs and the Consent Decree's agreed (upon) language thus must be read to prohibit (Reynolds) from certain affirmative conduct.' "

{¶27} In *Commonwealth of Pennsylvania v. Philip Morris, Inc.* (May 12, 2009), Philadelphia Cty., Pa.C.P.Ct. No. 2443 (slip opinion), the Court of Common Pleas for Philadelphia County ruled that the Camel Farm ad page contained cartoons, and that "*the Farm* advertisement pages envelope, integrate and cross-pollinate the undisputed cartoons in the 'editorial content' of *Rolling Stone's* Indie Rock Universe pages so completely as to constitute a single integrated whole." The court further held that "R.J. Reynolds had the ability and the duty to avoid such indivisible commingling of its tobacco advertising and promotions with such indisputable cartoons," and thus the advertisement "must be deemed to be in violation of the Consent Decree and the Master Settlement Agreement."

{¶28} Thus, three of four courts that have analyzed the language of Section V.B. of the consent decree (i.e., "using or causing to be used" any cartoon), citing the decree's use of active verbs, have construed such language as expressing an intent to prohibit "affirmative conduct." We note that the decision by the Pennsylvania trial court in *Commonwealth v. Philip Morris* does not contain analysis of the consent decree language itself; the court found, however, that, even if R.J. Reynolds had no knowledge of the editorial content, "the only reasonable reading of the Consent Decree and the MSA is that Reynolds had an affirmative duty to insure that its advertising was not integrally linked with prohibited cartoon images." Id.

{¶29} In the present case, in considering whether the conduct of R.J. Reynolds violated the consent decree, we find significant the trial court's findings that: (1) when an advertiser purchases a gatefold advertisement, it does not include the editorial content that is adjacent to the advertisement; (2) R.J. Reynolds was aware that Rolling Stone's November 15, 2007 issue would focus on independent music; (3) R.J. Reynolds was aware that the barn door gatefold would open up to a Rolling Stone editorial relating to independent music; (4) R.J. Reynolds was not involved in the development of the editorial content of the Indie Rock Universe editorial gatefold which was independently illustrated and created by Rolling Stone and which contained no content previewed, prepared or paid for by R.J. Reynolds; (5) R.J. Reynolds was told, at a May 17, 2007 meeting with Rolling Stone representatives, that it would not be permitted to preview the editorial content that would appear with the Camel Farm advertisement; (6) R.J. Reynolds paid for four pages of its gatefold advertising, but did not pay for Rolling Stone's five pages of editorial content; (7) per industry practice, advertisers do not prepare or review editorial content, nor do they have the opportunity to preview, approve, or reject editorial content; and (8) the look and feel of the Camel Farm advertisement and the Rolling Stone editorial is very different from an artistic standpoint.

{¶30} We note that many of the trial court's factual findings in this case parallel findings of the courts in *Washington v. R.J. Reynolds* and *Maine v. R.J. Reynolds,* including findings by those courts that: (1) R.J. Reynolds did not "prepare, preview, or pay for the five pages of Indie Rock Universe content," *Washington v. R.J. Reynolds* at 787; (2) R.J. Reynolds was not involved in the "development, creation, or execution of the editorial content," *Maine v. R.J. Reynolds*; (3) neither R.J. Reynolds nor any of its employees "previewed the editorial content prior to the printing of the magazine," id.; (4) a

"separation" between advertising and editorial decision-making is standard industry practice, id.; and (5) at the time ad space was purchased, it was understood that the enclosed content would address the subject of independent music but, "given the separation between editorial and advertising staffs," the manner in which this would be done was "both unknown and unknowable." *Washington v. R.J. Reynolds* at 787.

{¶31} Further, similar to the facts in *Maine v. R.J. Reynolds,* there was evidence in the present case that representatives of Rolling Stone showed R.J. Reynolds examples of the gatefold used in the May 2007 40th Anniversary issue in which an advertisement for Silver Patron Tequila was placed adjacent to Rolling Stone editorial content (pertaining to 40 influential songs); that content consisted of text and photographs, and did not contain any cartoons. Also similar to the above cases, the record in this case simply does not suggest that R.J. Reynolds had knowledge that the Rolling Stone editorial would include cartoons.

{¶32} In the present case, the trial court concluded that R.J. Reynolds violated the consent decree because it was "indirectly" using the editorial content by allowing its advertisement to be placed adjacent to the Rolling Stone editorial content. However, we find persuasive those cases that, in analyzing the relevant language of the consent decree, interpret the active verbs "using or causing to be used" as requiring some type of "affirmative conduct" or knowledge. *Maine v. R.J. Reynolds; Washington v. R.J. Reynolds*. Upon review, we conclude that the relevant factual findings do not show, by clear and convincing evidence, that R.J. Reynolds engaged in affirmative conduct such that it used or caused to be used the cartoons in the Rolling Stone editorial content. Rather, as found by the court in *Maine v. R.J. Reynolds* "[w]ithout any involvement in or

knowledge of the stylistic content in the *Rolling Stone* editorial, Reynolds cannot be said to have been 'using' Cartoons or 'causing' them to be used."

{¶33} Accordingly, we find that the trial court erred in holding R.J. Reynolds in contempt of the consent decree, and we sustain the first assignment of error.

{¶34} Given our disposition of the first assignment of error, the second assignment of error, in which R.J. Reynolds argues that the trial court made numerous erroneous factual findings, is rendered moot.

{¶35} Based upon the foregoing, the first assignment of error is sustained, the second assignment of error is rendered moot, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings in accordance with law, consistent with this decision.

Judgment reversed and cause remanded.

BRYANT and McGRATH, JJ., concur.

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