

Products Liability Law Daily Wrap Up, STATUTES OF LIMITATIONS AND REPOSE—TOBACCO PRODUCTS—Fla. Dist. App: \$3.2M jury verdict affirmed, punitive damages award reversed by Florida appellate court in Engle progeny tobacco case, (Aug. 15, 2013)

By Susan Lasser, J.D.

A jury award of \$3.2 million in compensatory damages in favor of the widow/personal representative of a smoker against a tobacco company in an *Engle* (*Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006)) progeny case was affirmed by a Florida court of appeal (*R.J. Reynolds Tobacco Co. v. Ciccone*, August 14, 2013, Gross, R.). The appellate court ruled that the trial court did not err in charging the jury regarding the “manifestation” of the decedent’s peripheral vascular disease (PVD) for the purpose of determining the widow’s membership in the *Engle* class, and that it also did not err in instructing the jury that the decedent’s PVD “manifested” when he developed “symptoms.” In addition, the court of appeal held that while the trial court properly denied the tobacco company’s motion for a directed verdict, the lower court should not have allowed the jury to award punitive damages on the non-intentional tort claim of gross negligence.

Background. Pamela Ciccone, as personal representative of the Estate of George N. Ciccone, initiated her action against R.J. Reynolds Tobacco Company in 2004, two years after her husband, a smoker from the age of eight, died of lung cancer. She asserted seven counts: (I) strict liability; (II) breach of express warranty; (III) breach of implied warranty; (IV) civil conspiracy to fraudulently conceal; (V) fraudulent concealment; (VI) gross negligence; and (VII) negligence.

Following the *Engle* decision, in which the Florida Supreme Court ruled that certain jury findings from the class action could have *res judicata* effect in subsequent lawsuits by individual class members seeking damages from defendant tobacco companies, Ciccone amended her complaint to reflect her membership in the *Engle* class, alleging that, prior to the *Engle* cut-off date of November 21, 1996, her husband developed PVD, a smoking-related illness that results in the thinning of arteries and lack of circulation in the extremities.

After the close of Phase I of the trial, R.J. Reynolds moved for a directed verdict on the grounds that Ciccone failed to present sufficient evidence to establish her membership in the *Engle* class. The trial court submitted the fact question of class membership to the jury, which found that Ciccone was an *Engle* class member. The jury awarded \$3,195,222.35 in compensatory damages, reduced by the deceased’s 70 percent comparative fault, and \$50,000 in punitive damages for gross negligence.

Question of “manifestation.” Phase I of the trial focused on Ciccone’s assertion of *Engle* class membership. Specifically, the question examined was whether the onset of the decedent’s PVD “manifested” prior to November 21, 1996. The trial court rejected a definition of “manifested” in favor of defining “‘manifestation’ as occurring when the deceased either ‘experienced symptoms of [PVD] or was diagnosed with [PVD] by a physician.’” The representative was required to meet this burden only through expert testimony, and could not rely “‘just in general [on] any symptomology that some layman could take to’ be one ailment or another.”

Ciccone relied on two medical experts to establish the deceased’s manifestation of PVD caused by smoking: Dr. Michael Hirsch, the decedent’s treating physician, and Dr. Allan Feingold, the decedent’s pulmonologist. Dr. Hirsch began seeing George Ciccone in 1988, and by April 6, 1990, he had diagnosed the patient as having a nicotine addiction and recommended that he use certain medication and nicotine patches. In 1991, George reported chronic back pain and pain radiating down his leg and hip to the doctor. Tests conducted showed, among other things, the existence of spondylosis and vascular sclerosis, common signs of early stage PVD. Nevertheless, Dr. Hirsch testified that “nothing was done about it” because the deceased “wasn’t having any symptoms ... at the time” since the disease “takes a long time to develop,” particularly where it attacked the aortic area, as it did in the deceased. Subsequently, the decedent’s condition worsened, and in 1998, he reported the problems to his doctors, at which point he was sent to a neurosurgeon to address his back problems. From there, he went to a vascular surgeon to address his “claudication problems”—described by Dr. Hirsch as “pain that occurs ... with exertion that’s due to [PVD,] narrowing of the artery, [and] lack of blood flow to the area.” By 1999, George was finally diagnosed as having PVD. He had bypass surgery to address the

disease and it cleared up much of the symptoms that had manifested in his leg.

Dr. Feingold corroborated much of Dr. Hirsch's observations, testifying that the deceased's first manifestation of PVD was evidenced by a 1991 lumbar spine x-ray. He opined that by 1994 through 1995, the pain experienced by George in his right leg while walking was consistent with symptoms of intermittent claudication caused by PVD. The doctor also testified that by the time George had the surgery, his PVD had reached a serious and late stage.

The tobacco company called their own expert, Dr. David Charles Brewster, a vascular surgeon, who opined that the deceased's PVD symptoms first arose in early 1998.

R.J. Reynolds argued that the trial court erred in handling the issue of Ciccone's class membership, contending that the court abused its discretion by erroneously instructing the jury that the deceased's manifestation of PVD occurred when he had "symptoms" of the disease, instead of when the deceased was on notice of the causal connection between his smoking and his PVD.

The Florida Court of Appeal disagreed with the cigarette maker, explaining that the correctness of the trial court's charge to the jury regarding class membership turned on the proper definition of "manifestation," a term derived from the *Engle* decision, in which the Florida Supreme Court emphasized that diagnosis by a physician prior November 21, 1996, the date the trial court in *Engle* recertified the class at issue to include the approximately 700,000 Florida "citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine."

After a review of prior cases, the appellate court found that the use of the term "manifested itself" by the Florida Supreme Court in *Engle*, did not indicate an intent to import a definition from the "creeping disease" (i.e., "a disease acquired over a period of years as a result of long-term exposure to injurious substances") statute of limitations cases.

However, the court also agreed with a prior Florida Supreme Court decision which supported the term "manifest" with a notice requirement to a potential plaintiff, such that the cause of action accrued when the accumulated effects of the deleterious substance manifested themselves to the plaintiff in a way that provided evidence of a causal relationship to the manufactured product. The appellate court determined that given the imprecise nature of isolating when the relationship between a "creeping disease" and a deleterious substance becomes evident, and the resulting difficulty this places upon the accrual of a statute of limitations, the policy behind the state supreme court's creating such a definition in these situations reflected common sense since one purpose of a statute of limitations is to spur a plaintiff into acting, and it is both illogical and unfair for the statute to begin to run before the plaintiff knows or should have known of the causal connection that is the basis for his suit, the appellate court said. The court concluded that the requirements for class membership are (1) that the plaintiff was a Florida resident, (2) that he or she either suffered or was suffering from a smoking-related illness before November 21, 1996, and (3) that his or her addiction to nicotine caused the disease. The court pointed to another case in which an *Engle* class representative remained undiagnosed with lung cancer until 1997, and the *Engle* court found her class membership sufficiently proven. Knowledge of the disease was not mentioned by the court; all that was required was that her medical records showed that she had been suffering from a tobacco-related disease prior to the time of class certification.

Thus, the appellate court found that the trial court did not err in instructing the jury that the deceased's PVD "manifested" when he developed "symptoms" because exhibiting "symptoms" of PVD created the implication that the decedent was "suffering" from PVD. It followed that such a showing would be sufficient for the purposes of class membership. The court stated that the issue was a question of fact for the jury to be decided with the assistance of expert testimony, and the trial court's instruction was neither erroneous nor incomplete.

Punitive damages. The court additionally ruled that the trial court erred in permitting the jury to award punitive damages to Ciccone under a theory of gross negligence since that cause of action was not pled in the original *Engle* class case and the jury found for the defense on the concealment and conspiracy claims. The appellate court agreed with another district's court of appeal which held that *Engle* progeny plaintiffs could recover punitive damages only on claims for concealment or conspiracy. There was no indication that the Florida Supreme Court in *Engle* intended to extend its decision beyond the claims and remedies that had been timely asserted in the first place. Punitive damage claims under negligence and strict liability theories were untimely and not authorized

as part of the *Engle* litigation.

The case number is 4D11-3807.

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Companies: R.J. Reynolds Tobacco Co.

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