

Products Liability Law Daily Wrap Up, TOP STORY—TOBACCO PRODUCTS—Fla. App.: \$30 million punitive damages award in *Engle* smoker case must be trimmed, (Nov. 5, 2015)

By Susan Lasser, J.D.

A \$30 million punitive damages award was ruled excessive by a Florida court of appeal in an *Engle* progeny case brought by the wife of a deceased smoker. Because the ratio of the punitive damages award to the compensatory damages award was too high compared to the ratios of the awards upheld in similar cases, the trial court was directed to grant remittitur to the tobacco company. In addition, reduction of the wife's compensatory damages under the Florida comparative fault statute was affirmed. (*R.J. Reynolds Tobacco Co. v. Schoeff*, November 4, 2015, Damoorgian, D.).

Background. The wife and estate representative of a deceased smoker brought suit against R.J. Reynolds Tobacco Company (RJR)—along with several other tobacco companies which were all, except RJR, dismissed before trial—stemming from her husband's death from lung cancer “caused by his addiction to cigarettes.” She asserted membership in the *Engle* class, pursuant to *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), and alleged causes of action for strict liability, fraud by concealment, conspiracy to commit fraud by concealment, negligence, and gross negligence. She admitted that her husband shared some fault for his smoking-related injuries and represented that she would “seek apportionment of fault, pursuant to the principles of comparative fault, on the counts for negligence and strict liability; however not with respect to the counts constituting intentional torts as pled” in the action.

Trial. The case proceeded to trial in two phases, as approved in *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 714 (Fla. 4th DCA 2011). In the first phase, the jury found that the decedent smoker was addicted to nicotine, his addiction was a legal cause of his lung cancer and death; and that the negligence of RJR, along with the defective and unreasonably dangerous cigarettes manufactured by RJR, was a legal cause of the smoker's lung cancer and death. The jury allocated 25 percent of the comparative fault to the decedent for his injuries; it also found that the decedent detrimentally relied on statements made by RJR that concealed or omitted material information and that this reliance was a legal cause of his cancer and death. As a result, the jury awarded the decedent's wife \$10.5 million in compensatory damages and found that punitive damages were warranted.

The trial's second phase focused on punitive damages. During closing arguments in this phase, plaintiff's counsel asked the jury to award the spouse \$25 million in punitive damages and no more. In spite of counsel's urging, the jury returned a verdict assessing \$30 million in punitive damages against RJR.

Post-trial motions and rulings. After the trial, RJR asked the court to reduce the compensatory damages award to reflect the comparative fault that the jury assigned to the decedent. In opposition, the wife argued that the comparative fault statute should not apply because the jury found RJR committed the intentional tort of fraudulent concealment. The tobacco company also moved for a new trial on evidentiary grounds, and in the alternative, moved for remittitur of both the compensatory and punitive damages awards, arguing that they were both excessive and not supported by the evidence. The trial court granted RJR's motion to enter judgment consistent with the jury's finding on comparative fault, and denied the new trial motion and the motion to remit the compensatory and punitive damages awards. In granting the motion to reduce the jury's compensatory award by the decedent's comparative fault, the court found that the representative waived her argument regarding comparative fault based on representations counsel made to the jury. Alternatively, the court ruled that even if she had not waived her argument, the intentional tort exception to the comparative fault statute would not apply because her suit was a products liability suit at its core. In denying the motion to remit the punitive damages award, the court recognized that there was no logical basis for the jury to award a larger amount than the decedent's representative had requested, but found that the jury's award was “NOT infected by bias, prejudice, passion or any other sentiment against Defendant.” The trial court entered final judgment awarding the decedent's wife \$7,875,000 in compensatory damages and \$30 million in punitive damages, for a total of \$37,875,000.

RJR appealed, arguing first that the trial court erred in denying its motion for a directed verdict because the representative failed to prove addiction causation. Second, the company asserted that certain comments made by the plaintiff's counsel during closing arguments necessitated a new trial. Third, RJR argued that the trial court erred in denying its motion to remit the jury's compensatory and punitive damages awards. Finally, the tobacco maker contended that the lower court's application of the *Engle* findings violated its due process rights. The decedent's representative cross-appealed, arguing that the court erroneously reduced the jury's compensatory damages award based on her husband's comparative fault.

Appellate rulings. Without comment, the court of appeal affirmed the trial court's denial of RJR's motion for directed verdict, motion for a new trial, and motion to remit the jury's compensatory damages award. The appellate court also affirmed the lower court's application of the *Engle* findings in accordance with *Brown* and the Florida Supreme Court's decision in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013). In its opinion, the court of appeal only addressed the issues relating to the punitive damages award and the trial court's reduction of the compensatory award based on the decedent's comparative fault.

Punitive damages. The court of appeal held that the \$30 million punitive damages award was excessive. Although the amount of punitive damages is an issue left to the jury's discretion, the imposition of a punitive damage award is subject to limitations. Under Florida law, the courts evaluate the extent of a punitive damages award by considering certain factors, including whether the amount of the award is so excessive as to be "out of all reasonable proportion" to the conduct. Also, guideposts were identified by the U.S. Supreme Court for consideration, including the ratio between compensatory and punitive damages.

With a number of *Engle* cases already resolved, the appellate court looked at appellate cases with the highest affirmed punitive damages awards, finding that a \$25 million punitive damages award was upheld with a 7.58 to 1 ratio to the \$3.3 million compensatory damages award, and another \$25 million punitive damages award was upheld that bore a 2.5 to 1 ratio to a remitted compensatory damages award of \$10 million. In another case, the current court of appeal affirmed a jury's initial \$25 million punitive damages award (subsequently remitted to \$15,705,000), as compared to a \$5,235,000 compensatory damages award, finding it not so excessive as to violate due process. However, a \$40.8 million punitive damages award was found excessive alongside a \$10.8 million compensatory damages award, even though the evidence of the tobacco company's bad conduct was the same as that presented in one of the other cases in which the punitive damages award was upheld and the ratio was less than the others upheld.

The award in the decedent's wife's case—\$30 million punitive award in light of a \$10.5 million compensatory award, a 2.9 to 1 ratio) fell between the affirmed and reversed awards, the court determined. The appellate court held that in light of the \$10.5 million compensatory damages award, the \$30 million punitive damages award fell on the "excessive side of the spectrum."

Further, the court said that even if the award was not unconstitutionally excessive, remittitur should have been granted. The representative's counsel had begged the jury not to award her more than \$25 million in punitive damages and the trial court found that there was "no logical or sound reason for the jury to have exceeded the award sought by [plaintiff's] counsel." The appellate court said that this finding in and of itself compelled remittitur. Therefore, the court remanded to the trial court with directions to grant the tobacco company's motion for remittitur, and, if the company did not agree with the remitted amount, to hold a new trial on punitive damages.

Comparative fault. On the representative's cross-appeal of the trial court's order reducing the compensatory damages award based on the jury's finding that the decedent was 25 percent at fault for his lung cancer, the court agreed with the tobacco company that her damages were subject to a 25 percent reduction under the comparative fault statute. The representative had asserted that because the jury found RJR committed the intentional tort of fraudulent concealment, Florida law barred application of her husband's comparative fault to reduce damages. The Florida Statutes provide, in part, that in "negligence cases," "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." The substance of the action determines whether it is a "negligence case" under the statute, and the statute does not permit the reduction of compensatory damages by a plaintiff's comparative fault where the suit is based upon an intentional

tort.

The court of appeal ruled that the trial court did not abuse its discretion when it found that the representative waived her intentional tort exception argument. She waived the argument in her pleadings, in her representations to the jury, and in the jury instructions. Therefore, the court affirmed the trial court's reduction of the compensatory award by the decedent's comparative fault.

Applicability of the comparative fault intentional tort exception. Although the court affirmed the lower court's reduction of the compensatory award by the decedent's comparative fault based on the representative's waiver of her argument that the intentional tort exception applied to her case, the court of appeal addressed the trial court's alternative finding that the intentional tort exception in fact did not apply to the case. Looking at prior case law, the appellate court noted that the issue was whether an action comprehending one or more negligent torts actually had at its core an intentional tort by someone. The court of appeal agreed with the trial court and held that at its core, the decedent's spouse's suit was a products liability suit based on conduct grounded in negligence, and, thus, the exception did not apply to her case.

The case is No. 4D13-1765.

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Companies: R.J. Reynolds Tobacco Co.

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