

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

LUCILLE RUTH SOFFER, as  
personal representative of the  
Estate of MAURICE BENSON  
SOFFER,

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

CASE NO. 1D11-3724

Appellant/Cross-Appellee,

v.

R. J. REYNOLDS TOBACCO  
COMPANY, ET AL.,

Appellee/Cross-Appellant.

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Opinion filed October 24, 2012.

An appeal from the Circuit Court for Alachua County.  
Hon. Robert E. Roundtree, Jr., Judge.

John S. Mills, The Mills Firm, Tallahassee, Mark A. Avera, Rod Smith, Dawn M. Vallejos-Nichols, Avera & Smith, Gainesville, and James W. Gustafson, Jr., Searcy Denney Scarola Barnhart & Shipley, Tallahassee, for Appellant.

Robert B. Parrish, Moseley, Pritchard, Parrish, Knight & Jones, Jacksonville, and Gregory G. Katsas, Jones Day, Washington, D.C., for Appellee.

MAKAR, J.

Lucille Soffer, the personal representative of the estate of her deceased husband, Maurice Soffer, appeals the final judgment in this Engle-progeny

wrongful death action. Mrs. Soffer contests the trial court's disallowing a claim for punitive damages on negligence and strict liability theories. R.J. Reynolds cross-appeals, seeking a new trial based on evidentiary errors as well as reversal of the trial court's orders regarding its statute of limitations defense and the preclusive effect of the Engle class-wide jury findings. We affirm the cross-appeal, but address the question of whether Mrs. Soffer, as a member of the plaintiff class in Engle, is entitled to seek punitive damages as additional relief for her negligence and strict liability counts. We hold that she may not, but certify a question of great public importance.

## I

Mrs. Soffer is termed a "progeny plaintiff," meaning a member of the class approved in Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (also called the Engle Class). Those progeny plaintiffs who choose to bring actions pursuant to Engle do so, in large measure, because of the significant benefits that membership in the Engle Class confers upon them. First, progeny plaintiffs are entitled to the res judicata effect of certain factual findings made in Engle, thereby relieving them of the substantial burden, time, cost, and risk of proving the tortious-conduct elements of their actions against the defendants. Second, progeny plaintiffs are entitled to a lengthy tolling of Florida's statute of limitations, which ordinarily is two years. For example, the complaint in this case was filed on December 18,

2007, which is more than 15 years after Mr. Soffer died; absent the equitable tolling that Engle provides for progeny plaintiffs, Mrs. Soffer's action against the defendants would be time-barred by more than a decade.

The Engle Class based its theories of recovery on counts alleging negligence and strict liability as well as two intentional tort theories: fraud by concealment and conspiracy to commit fraud. The trial was tri-furcated: Phase I, during which the jury heard evidence in a year-long proceeding to resolve "issues of liability and entitlement to punitive damages for the class as a whole"; Phase II-A, which involved a determination of compensatory damages for the named plaintiffs; and, Phase II-B, which involved the determination of the amount of punitive damages for the class as a whole. Id. at 1256-57. Individualized determinations on issues of liability and compensatory damages were to take place in separate trials to separate juries for each of the class members, with punitive damages to be divided by the trial court amongst successful individual plaintiffs. Id. at 1258.

In Phase I, the jury in Engle made a range of specific factual determinations supporting the four theories of recovery mentioned above. Because the trial court in Engle denied as untimely the plaintiffs' motion to amend their complaint to seek punitive damages under negligence and strict liability theories, the jury did not address punitive damages as to these counts; instead, punitive damages for the Engle Class were limited to only the two intentional tort counts, which had been

timely asserted. On these latter two counts, the jury determined that the class was entitled to punitive damages, which were set at \$145 billion. Id. at 1256-57.

On appeal, the Third District reversed, decertifying the class and quashing the jury award. The supreme court, however, reversed in part and affirmed in part, holding that most of the Phase I factual findings were entitled to res judicata effect with respect to members of the Engle Class (with certain limitations). It also, in effect, equitably tolled the statute of limitations for all members of the Engle Class who brought actions “filed within one year of the mandate in this case.” Id. at 1277.

The supreme court made two holdings as to punitive damages. First, it was error for the jury to consider entitlement to punitive damages during Phase I of the trial; doing so violated principles of due process because the jury’s determination of the lump sum award of \$145 billion in Phase I occurred before the jury made any determination about the ultimate liability of individual defendants in Phase II. This was legal error because there was “no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed.” Id. at 1262. It was also error because the jury’s punitive damages award preceded any finding that the “plaintiffs had established causation and reliance.” Id. Second, the court held that the amount of the punitive damages was excessive; thus, even if the finding of entitlement to punitive damages in Phase I

had been permissible, the classwide punitive damages award was “clearly excessive” and would “result in an unlawful crippling of the defendant companies.” Id. at 1265 and n.8. The court in Engle did not pass upon whether progeny plaintiffs were entitled to assert claims for punitive damages under the negligence and strict liability theories previously and specifically disallowed to members of the Engle Class as untimely.

## II

Maurice Soffer died in May of 1992 of lung cancer caused by smoking. Mrs. Soffer brought this wrongful death action against R.J. Reynolds seeking to take advantage of the Engle Class findings. She asserted causes of action identical to those asserted in Engle: negligence, strict liability, and the two intentional tort theories. As in Engle, the trial court allowed the jury to consider punitive damages on the two intentional tort counts, but disallowed them as to the negligence and strict liability counts. The trial court found the punitive damages claims, as to the negligence and strict liability causes of action, were barred by the statute of limitations; because the lead plaintiffs in Engle had not timely asserted such claims, therefore, the trial court reasoned, they are unavailable to progeny plaintiffs. The jury found for Mrs. Soffer on the strict liability and negligence counts, awarding \$2,000,000 in compensatory damages; the jury rejected recovery

on the intentional tort counts, thereby making it unnecessary to consider an award of punitive damages on those counts.<sup>1</sup>

In this appeal, Mrs. Soffer asserts that Engle does not preclude progeny plaintiffs from seeking awards of punitive damages on negligence and strict liability theories, which—as a general matter under ordinary circumstances—may be sought under Florida law. The causes of action in this case, Mrs. Soffer argues, are identical to those asserted in Engle; only the requested additional remedy—punitive damages for the non-intentional tort counts—is different. She claims she is not bound to the remedies timely sought in Engle and that principles of equitable tolling do not apply to bar her assertion of punitive damages for the negligence and strict liability theories upon which she prevailed (the jury in her case having rejected the intentional tort theories for which the Engle Class sought and initially was awarded punitive damages).

R.J. Reynolds argues, on the other hand, that progeny plaintiffs—as members of the Engle Class—may assert only those timely claims and remedies previously pursued and ultimately approved by the Florida Supreme Court in its path-breaking decision. In doing so, progeny plaintiffs receive substantial benefits

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<sup>1</sup> In pertinent part, the jury instructions read: “Punitive damages may be awarded against R.J. Reynolds Tobacco Company based only on your findings that Reynolds is liable to Mrs. Soffer for fraudulent concealment or agreement to conceal. You may not find that punitive damages are warranted against Reynolds based upon Mrs. Soffer’s claim for negligence or strict liability.”

and must “take the bitter with the sweet”; they cannot unilaterally accept the enormous benefits of equitable tolling and the res judicata effect of Phase I findings without accepting the limitations, express and implied, in that decision. To allow new claims for punitive damages at this late date would fundamentally alter the character of this unprecedented litigation. As members of the Engle Class, progeny plaintiffs are subject to the posture of the case as it exists, which includes the established prohibition on punitive damages for the negligence and strict liability theories as to all class members; principles of equitable tolling do not revive claims for punitive damages that were not timely presented in the first instance. We agree with each of these points.

In doing so, we do not agree with Mrs. Soffer’s assertion that punitive damages—simply because they are generally permitted for negligence and strict liability—are merely an additional remedy that members of the Engle Class may pursue. While we have no dispute with the general proposition that plaintiffs who assert negligence and strict liability counts normally are permitted to plead and perhaps prove entitlement to punitive damages under applicable standards, this point only takes us so far. It does not thereby follow that progeny plaintiffs as members of the Engle Class, who are part of one of the most uniquely structured and extraordinarily adjudicated cases in the state’s history, are thereby entitled to the benefits that might occur or be available in the usual course of a routine case

that is litigated by an individual plaintiff from start to finish. To us, the unique context of Engle matters.

Progeny plaintiffs wear the same shoes, so to speak, as the plaintiffs in Engle because they *are* the plaintiffs from Engle.<sup>2</sup> Progeny plaintiffs thereby must accept the status and procedural posture of the Engle litigation as they find it; they must accept the parameters that are framed by that litigation—including the absence of a timely claim for punitive damages under negligence and strict liability theories. The supreme court’s decision in Engle vacated the punitive damages award that was supported by and linked solely to the intentional tort theories of recovery; it thereby could be said to have wiped the slate clean as to punitive damages for those two counts. The decision says nothing to suggest, however, that the supreme court intended to preserve for the progeny plaintiffs anything other than the claims and remedies properly and timely asserted in that litigation.

This result is far from unfair. As members of the class, Engle progeny plaintiffs are in the same position they would have been in had they filed a complaint identical to the Engle class-action complaint on the same date the original complaint was filed. Here, Mrs. Soffer is not merely seeking to take advantage of Engle via the filing of a new and independent claim; rather, she was a

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<sup>2</sup> See Nat’l Lake Devs., Inc. v. Lake Tippecanoe Owners Ass’n, Inc., 417 So. 2d 655 (Fla. 1982) (individual members of plaintiff class may choose to opt out and not be bound by a court’s judgment; members not opting out “are bound by the resulting decree” even if they are absent from the proceeding).

party to Engle and, to the extent her claims differ from those in that case, she must meet the requirements for amending her complaint, which she cannot do. There is no indication in Engle that our supreme court intended to extend its decision beyond the claims and remedies that had actually 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; they were authorized only for the two intentional tort counts of fraud by concealment and conspiracy to commit fraud. If the supreme court had intended that its decision be so open-ended as to allow claims for punitive damages not otherwise made available in the course of Engle, it would have said so; it has not and we decline to expand the breadth of possible remedies or benefits available to progeny plaintiffs absent clearer direction from our supreme court.

### **III.**

In conclusion, progeny plaintiffs, such as Mrs. Soffer, may choose to accept the preclusive benefits of the Phase I findings in Engle and the benefits of that decision's tolling of the statute of limitations, but in doing so they are constrained to the punitive damage claims timely sought in the operative class-action complaint; they may not tack on additional punitive damage claims lest they unjustifiably broaden the intended scope and effect of Engle and change the nature of the litigation. Progeny plaintiffs may assert punitive damage claims to the same

extent as allowed in Engle, as Mrs. Soffer did here; but they may not assert such claims based on strict liability and negligence theories. To do so would provide an unjustifiable and potentially unintended windfall by expanding Engle beyond its existing parameters, which is not a task for this Court in the first instance under the circumstances presented. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (noting that district courts may certify questions of great public importance where appropriate). In recognition of our role in Florida's appellate system, we certify the following question as one of great public importance for the supreme court's consideration:

ARE MEMBERS OF THE CLASS IN ENGLE V. LIGGETT GROUP, INC., 945 SO. 2D 1246 (FLA. 2006) ENTITLED TO PURSUE AN AWARD OF PUNITIVE DAMAGES UNDER THEORIES OF NEGLIGENCE OR STRICT LIABILITY?

AFFIRMED.

DAVIS, J., CONCURS. LEWIS, J., CONCURS IN PART AND DISSENTS IN PART.

LEWIS, J., concurring in part, and dissenting in part.

I agree with the majority that the issues raised by R.J. Reynolds Tobacco Company (“Reynolds”) on cross-appeal must be affirmed. I also agree with the majority to certify a question to the Florida Supreme Court. However, for the reasons that follow, I would reverse the trial court’s ruling that punitive damages can only be awarded on the intentional tort claims and remand for a new trial on the issue of Mrs. Soffer’s entitlement to punitive damages on her negligence and strict liability claims only, and, if so, the amount of punitive damages.

Mrs. Soffer, as personal representative of the Estate of Maurice Benson Soffer, brought this action pursuant to Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (“Engle III”), alleging that she was a member of the Engle class and asserting claims of negligence, strict liability, fraud by concealment, and conspiracy to commit fraud by concealment. Mrs. Soffer sought compensatory and punitive damages. As a basis for punitive damages, Mrs. Soffer alleged that Reynolds “engaged in conduct that was fraudulent and conspired to engage in such conduct, or engaged in conduct, with such gross negligence as to indicate willful and wanton disregard for the rights of others, including [Mrs. Soffer.]” Mrs. Soffer’s demand for punitive damages was not limited to any one claim.

During the charge conference, Reynolds argued that the jury should be instructed that it may only consider punitive damages on the intentional tort claims

(the concealment and conspiracy claims). Mrs. Soffer urged the trial court to allow the jury to consider awarding punitive damages on all claims. The trial court rejected Mrs. Soffer's request for such instruction and ultimately instructed the jury, in pertinent part, as follows:

Punitive damages may be awarded against R.J. Reynolds Tobacco Company based only on findings that Reynolds is liable to Mrs. Soffer for fraudulent concealment or agreement to conceal. You may not find that punitive damages are warranted against Reynolds based upon Mrs. Soffer's claim for negligence or strict liability.

The jury returned a verdict for Mrs. Soffer on the negligence and strict liability claims, but for Reynolds on the concealment and conspiracy claims. Pursuant to the trial court's instruction, the jury did not answer the question of whether punitive damages were warranted on Mrs. Soffer's claim for negligence or strict liability.

#### I.

Whether a claim may support an award of punitive damages is reviewed de novo. See Estate of Williams ex rel. Williams v. Tandem Health Care of Fla., Inc., 899 So. 2d 369, 376 (Fla. 1st DCA 2005). "Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999). Pursuant to section 768.72(2), Florida Statutes (2005), a defendant

may be held liable for punitive damages, if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. See also Ballard, 749 So. 2d at 486 (finding that “punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others.”); R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1070 (Fla. 1st DCA 2010) (noting that punitive damages may be awarded for intentional misconduct or gross negligence), *rev. denied*, 67 So. 3d 1050 (Fla. 2011).

Reynolds does not dispute this point, but argues that Engle class members are different and cannot, as a matter of law, request punitive damages on their negligence and strict liability claims because the class demand for punitive damages in Engle was based only on the intentional tort claims and not the class claims for negligence and strict liability. Reynolds further argues that “preclusion principles” therefore prohibit an Engle class member from seeking punitive damages on these claims. In essence, Reynolds seeks to expand the res judicata effect of the Engle III holding in arguing that because the Engle class only sought punitive damages on the intentional tort claims, Mrs. Soffer’s claim for punitive damages was likewise limited. Reynolds argues that Mrs. Soffer secured various benefits by filing a complaint pursuant to Engle; therefore, she was also subject to

Engle's limitation. Reynolds further argues that since Mrs. Soffer secured benefits from filing a complaint pursuant to Engle, she should not be entitled to recover punitive damages on negligence and strict liability claims. Reynolds' arguments are without merit. In my view, Engle class members are not prohibited from recovering punitive damages on their negligence and strict liability claims.

#### A. Identical Claims

The first benefit that Mrs. Soffer secured was the benefit of invoking the res judicata effect of the Phase I findings. Particularly, she was able to rely on the Engle jury's Phase I findings and did not have to independently prove up the conduct elements of her claims or demonstrate the relevance of the findings to her lawsuit. See Martin, 53 So. 3d at 1067-69. The Phase I findings established the conduct elements of her strict liability and negligence claims, and she was required only to prove legal causation and damages. See R.J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707, 717-18 (Fla. 4th DCA 2001).

Reynolds argues that, by Mrs. Soffer securing the aforementioned benefit, she was required to limit her claims to those pled by the Engle class and was bound by the restrictions that the Engle trial and appellate courts imposed on the Engle class members. As such, Reynolds argues that Mrs. Soffer was required to limit her punitive damage claims to the intentional torts because the Engle class members did not seek punitive damages on strict liability and negligence, and, when the

Engle class sought to expand their claim to do so, the trial court denied their request.

Engle III does not impose a blanket requirement that Engle progeny plaintiffs must file identical claims to the original class. Rather, it suggests that in order to take advantage of the Phase I findings, progeny plaintiffs must file the same claims. Here, Mrs. Soffer was able to take advantage of the Phase I findings because she, in fact, filed the same claims as the original class (strict liability, negligence, fraud, and conspiracy to commit fraud). The only difference is the remedy. The fact that her remedy of punitive damages was more extensive than that sought by the Engle class is not necessarily fatal. First, a claim for punitive damages is “not a separate and distinct cause of action but is auxiliary to, and dependent upon, the existence of an underlying claim.” See Liggett Group Inc. v. Engle, 853 So. 2d 434, 456 (Fla. 3d DCA 2003) (“Engle II”), *quashed in part by Engle III*, 945 So. 2d at 1254; *see also Country Club of Miami Corp. v. McDaniel*, 310 So. 2d 436, 437 (Fla. 3d DCA 1975). Second, her reliance on the Phase I findings was not relevant to her claim for punitive damages, which she had to independently prove. *See e.g., Brown*, 70 So. 3d at 717-18 (clarifying that the plaintiff must prove legal causation and damages). Third, the supreme court retained most of the jury’s Phase I findings, except that it did not retain the finding on entitlement to punitive damages, which it found to be premature. *See Engle III*,

945 So. 2d at 1269. The supreme court vacated the \$145 billion punitive damage award holding, in pertinent part, as follows:

Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials.

Id. at 1269, 1276.

Accordingly, in my view, the supreme court did not intend to give res judicata effect to punitive damages claims and specifically allowed class members to initiate “individual damages actions.”

#### B. Equitable Tolling

After decertification, Engle III allowed individual plaintiffs within the class to proceed individually so long as the action was filed within one year of the mandate in the case. 945 So. 2d at 1277. Reynolds argues that since Mrs. Soffer secured the benefit of equitable tolling of the two-year wrongful death statute of limitations, she would no longer be entitled to the benefits of equitable tolling if she were permitted to recover punitive damages on her strict liability and negligence claims.

Reynolds relies on Hromyak v. Tyco International Ltd., 942 So. 2d 1022 (Fla. 4th DCA 2006), in support of its argument that equitable tolling only applies where the former class member brings a claim that is identical to the one pursued by the class itself. There, construing American Pipe & Construction Co. v. Utah,

414 U.S. 538 (1974), and Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983), the Fourth District held that the trial court did not err in determining that class action tolling did not apply to the stockholder's suit because the new claims were not identical to the class' claims. Hromyak, 942 So. 2d at 1023. The Fourth District interpreted American Pipe to require that the claims in the later action be the same as those alleged in the earlier action for tolling to apply. Id. Here, Mrs. Soffer asserted the exact same claims as were asserted in Engle, and the only difference is the kind of damages she sought. Engle II, 853 So. 2d at 441. As noted by Mrs. Soffer, Reynolds' argument on this point is based on the faulty premise that a demand for punitive damages is an independent claim. But punitive damages are merely a remedy and can only be recovered pursuant to a substantive claim. See e.g., Country Club of Miami Corp. v. McDaniel, 310 So. 2d 436, 437 (Fla. 3d DCA 1975). The principle of law from Hromyak is exclusively tied to the statute of limitations, and there is no separate statute of limitations for a demand of punitive damages. The statute of limitations for each underlying claim is what controls. Mrs. Soffer's demand for punitive damages was filed as a continuation of the litigation begun by the Engle class. As such, because Mrs. Soffer asserts the same substantive claims as those asserted by the Engle class, the principle in Hromyak is satisfied.

Accordingly, Mrs. Soffer's demand for punitive damages on the negligence and strict liability claims was merely a different type of remedy than that sought in Engle, rather than a separate cause of action. The statute of limitations bars only the right to enforce a cause of action. § 95.11, Fla. Stat. (2005). A remedy, on the other hand, is the method by which the court addresses a legal injury. Because the statute of limitations operates to bar enforcement of causes of action, not to determine which remedies are available, in my view, the trial court erred in instructing the jury not to determine entitlement to punitive damages if they found for Reynolds on the intentional tort claims.

## II.

Reynolds asserts that if Mrs. Soffer is entitled to seek punitive damages on her negligence and strict liability claims, this Court should also reverse the trial court's judgment awarding compensatory damages and remand for a new trial on all claims. I disagree. In my view, on remand, the new trial should be limited to the issue of punitive damages. There is ample authority for allowing a new trial limited to the issue of punitive damages. Stephens v. Rohde, 478 So. 2d 862, 863 (Fla. 1st DCA 1985) (disagreeing with a claim that compensatory damages and punitive damages were so intertwined as to require a new trial on both; thus, reversing the trial court's action in striking the appellant's punitive damages claim and remanding for a new trial on the issue of whether such damages should be imposed

and, if so, the amount thereof); Estate of Canavan v. Nat'l Healthcare Corp., 889 So. 2d 825, 827 (Fla. 2d DCA 2004) (remanding for new trial on amount of punitive damages only); Rappaport v. Jimmy Bryan Toyota of Fort Lauderdale, Inc., 522 So. 2d 1005, 1006 (Fla. 4th DCA 1988) (remanding for new trial on entitlement and amount of punitive damages only).

Accordingly, I would reverse the trial court's ruling that punitive damages can only be awarded on the intentional tort claims and remand for a new trial on the issue of Mrs. Soffer's entitlement to punitive damages on her negligence and strict liability claims only, and, if so, the amount of punitive damages.