

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN RE: ENGLE CASES

Case No. 3:09-cv-10000-J-32JBT

THIS ORDER RELATES TO:

Aycock v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-10928-J-37JBT
Denton v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-10036-J-37JBT
Duke v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-10104-J-37JBT
Gollihue v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-10530-J-37JBT
Pickett v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-10116-J-37JBT
Starling v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-10027-J-37JBT
Waggoner v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-10367-J-37JBT
Walker v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-10598-J-37JBT
Young v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-11895-J-37JBT

ORDER

This cause is before the Court on the following:

1. Defendants' Motion for Summary Judgment on Each Plaintiff's Claims for Punitive Damages ("Motion") (Doc. 367), filed on November 15, 2011;
2. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment on Each Plaintiff's Claims for Punitive Damages (Doc. 400), filed on November 30, 2011;
3. Defendants' Reply in Support of Their Motion for Summary Judgment on Each Plaintiff's Claims for Punitive Damages (Doc. 404), filed on December 5, 2011; and
4. Plaintiffs' Motion for Leave to File Third Amended Complaints That Conform to Evidence Supporting Punitive Damages (Doc. 421), filed on December 16, 2011.

Defendants move for summary judgment in the nine activated cases on Plaintiffs' claims for punitive damages. They make three principal arguments in support of their motion. First, they argue that Plaintiffs' reliance on the *Engle* Phase I findings to support their punitive damages claims violates Defendants' due process rights. Second, Defendants assert that giving the Phase I findings preclusive effect and allowing juries to deliberate on Plaintiffs' punitive damages claims forces those juries to make their own inquiries into Defendants' specific tortious conduct, in violation of the Seventh Amendment's prohibition against reexamination. Third, they argue Plaintiffs have not sufficiently plead entitlement to punitive damages for their non-intentional tort claims.¹ While acknowledging that the constitutional arguments are interesting and the pleading sufficiency argument quite close, the Court is not persuaded that the punitive damages claims should be resolved by summary judgment and the Motion is, accordingly, due to be denied.

The Court initially addresses Defendants' final argument. Defendants assert that Plaintiffs have failed to adequately plead entitlement to punitive damages for their non-intentional tort claims because they do not set forth specific facts that would show Defendants acted with gross negligence. (Doc. 367, at 14.) Plaintiffs argue "Defendants' gross misconduct and wanton reckless disregard has been painstakingly detailed in the amended *Engle* class complaint, proved through evidence in the year-long *Engle* trial, set forth as findings by the *Engle* trial judge, stated in Plaintiffs' expert reports, and summarized in Plaintiffs' Declaration and Brown Proffer." (Doc. 400, at 19.) Nevertheless,

¹ These include claims for strict liability, breach of express and implied warranties, and negligence.

Plaintiffs filed a Motion for Leave to File Third Amended Complaints That Conform to Evidence Supporting Punitive Damages. (Doc. 421.)

Under Florida law, “a plaintiff must plead specific acts committed by a defendant” to allege entitlement to punitive damages. *Porter v. Ogden, Newell & Welch*, 241 F.3d 1334, 1341 (11th Cir. 2001). “Merely setting forth conclusory allegations in the complaint is insufficient to entitle a claimant to recover punitive damages.” *Id.* The Court finds that Plaintiffs’ complaints marginally, at best, sufficiently plead entitlement to punitive damages for their non-intentional tort claims. Plaintiffs’ efforts to meet their pleading obligation via incorporation by reference is more confusing than illuminating and results in a “short cut” that requires the Defendants and the Court to engage in a search for the specific conduct that is alleged to support a punitive damages claim. Nevertheless, in light of the long litigation history, together with the unique facts and circumstances of these cases, granting summary judgment based on a pleading deficiency would do injustice. The Defendants are undeniably familiar with the facts Plaintiffs allege entitle them to punitive damages. They are on notice regarding Plaintiffs’ experts’ testimony because the experts have been deposed in each case. Thus, there would be no surprise and no prejudice to Defendants if Plaintiffs’ claims for punitive damages for non-intentional torts proceed.

Defendants assert that because Plaintiffs rely on the generalized *Engle* Phase I findings to impose compensatory liability upon Defendants, due process and Florida law preclude their claims for punitive damages, which must be based on the specific conduct that gave rise to the compensatory damages. (Doc. 367, at 2.) Adopting the rationale of Judge Corrigan’s Order (*Waggoner v. R.J. Reynolds, et al.*, 3:09-cv-10367-J-37JBT, Doc. 116) on the alleged deprivation of due process engendered by the *Engle* progeny trial

procedure, the Court declines to embrace Defendants' argument. Defendants also make the argument that *Engle* progeny juries' utilization of the Phase I conduct findings as a spring board to proving conduct that would support a punitive award constitutes a violation of their Seventh Amendment rights. (Doc. 367, at 9.) The Court finds that the Seventh Amendment is not offended by progeny juries determining entitlement to punitive damages, especially where, as here, they are also making the determination of causation, comparative fault, and entitlement to compensatory damages based on additional evidence. This procedure preserves the basic institution of jury trial in its most fundamental elements. See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). Plaintiffs are reminded that they may not seek to impose punitive damages based solely upon the generalized conduct established by the *Engle* findings. Further, Plaintiffs may not rely on Defendants' conduct toward a nonparty, and instead must ultimately prove that Defendants' conduct harmed the particular Plaintiff.² In other words, Plaintiffs are required to demonstrate specific conduct by specific Defendants, independent of the *Engle* findings, egregious enough in nature to support entitlement to punitive damages. See Fla. Stat. § 768.72(2) ("A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence"); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 2d 1060, 1070 (Fla. 1st DCA 2010) (upholding a \$25 million punitive damage award against R.J. Reynolds because the plaintiff "produced sufficient evidence independent of the *Engle* findings to allow the jury to find [R.J. Reynolds] guilty of intentional misconduct or gross

² Third party harm may be admissible to demonstrate reprehensibility, but cannot support punitive damages without a showing of direct harm to Plaintiffs. See *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

negligence”).

Additionally, Defendants argue that Plaintiffs cannot seek punitive damages for their non-intentional tort claims because they failed to do so in Phase I. (*Id.* at 12.) The Court declines to adopt this argument. Given that the Florida Supreme Court wiped the punitives slate clean in *Engle*, Defendants’ argument that Plaintiffs should be barred from recovering punitive damages on that basis is not compelling.

Accordingly, it is hereby **ORDERED**:

1. Defendants’ Motion for Summary Judgment on Each Plaintiff’s Claims for Punitive Damages (Doc. 367) is **DENIED**.
2. Plaintiffs’ Motion for Leave to File Third Amended Complaints That Conform to Evidence Supporting Punitive Damages (Doc. 421) is **DENIED** as moot.
3. In order to address Defendants’ stated concerns that they are unable to identify with precision the non-intentional conduct Plaintiffs will rely upon to support their punitive damages claims, Plaintiffs are hereby **ORDERED** to provide, in their pretrial statement, a description of the conduct of each Defendant they intend to establish at trial to support a claim for punitive damages.
4. Because the Court finds that no prejudice will come to Defendants and in light of the fact that all pleadings merge with pretrial statements,³ the Court adopts the above procedure. Plaintiffs in the group of twenty-two (22)

³ Pursuant to Local Rule 3.06(e), “all pleadings filed by any party prior to filing of the pretrial statement shall be deemed to be merged therein, or in any subsequent pretrial order entered by the Court. The pretrial statement and pretrial order . . . will control the course of the trial.”

activated cases, and those later activated, should not expect the same procedure and are advised, if they wish to do so, to request leave to amend their complaints to more adequately plead entitlement to punitive damages for non-intentional tort claims.

DONE AND ORDERED in Chambers in Jacksonville, Florida, on December 20, 2011.



ROY B. DALTON JR.
United States District Judge

Copies:

Counsel of Record