

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

R.J. REYNOLDS TOBACCO COMPANY,)
)
 Appellant,)
)
 v.)
)
 JANICE DURRANCE JONES and)
 JULIAN DALE DURRANCE, as)
 personal representative for the Estate)
 of Dorothy Watson Durrance,)
)
 Appellees.)
)
 _____)

Case No. 2D19-3537

Opinion filed March 3, 2021.

Appeal from the Circuit Court for
Hillsborough County; Martha J. Cook,
Judge.

Marie A. Borland and Troy A. Fuhrman of
Hill Ward Henderson, Tampa; and Jason
T. Burnette, Jones Day, Atlanta, Georgia,
for Appellant.

David J. Sales and Daniel R. Hoffman of
David J. Sales, P.A., Sarasota; James W.
Gustafson, Jr., Brian R. Denney, Laurie J.
Briggs, and T. Hardee Bass, III of Searcy
Denney Scarola Barnhart & Shipley, P.A,
West Palm Beach; and Hutch Pinder of
Whittmore Law Group, St. Petersburg,
for Appellees.

MORRIS, Judge.

R.J. Reynolds Tobacco Company appeals a final judgment entered after a jury trial in favor of Janice Durrance Jones and Julian Dale Durrance in their wrongful death action based on their mother's tobacco-related death in this Engle¹ progeny case. The jury awarded each of the plaintiffs \$250,000 in compensatory damages and a total of \$3.25 million in punitive damages. We affirm the final judgment in all respects but write to certify conflict with the Fifth District on an issue related to punitive damages.

On appeal, R.J. Reynolds argues that the trial court erred in applying and instructing the jury on the pre-1999 punitive damages statute, section 768.73, Florida Statutes. R.J. Reynolds contends that the more restrictive version, amended in 1999, should apply to the plaintiffs' claims in this case because it "applie[s] to all causes of action arising after the effective date of th[e] act," §768.73(5), Fla. Stat. (1999-2020), and the wrongful death cause of action arose in this case upon the decedent's death in 2000. R.J. Reynolds argues that we should revisit our decision in R.J. Reynolds Tobacco Co. v. Evers, 232 So. 3d 457 (Fla. 2d DCA 2017), which conflicts with a more recent case from the Fifth District, R.J. Reynolds Tobacco Co. v. Sheffield, 266 So. 3d 1230 (Fla. 5th DCA 2019), review granted, No. SC19-601 (Fla. Aug. 13, 2020).

In Evers, 232 So. 3d at 462-63, this court held that the pre-1999 punitive damages statute applied to a wrongful death action that was derivative of a tobacco-related injury suffered by a member of the Engle class prior to the certification of the class. This court reasoned that the wrongful death complaint related back to the Engle class-action complaint and that the plaintiff's right to file the wrongful death action was based on the decedent's status as an Engle class member, i.e., the "manifestation of a

¹Engle v. Liggett Grp., Inc., 945 So. 2d 1246 (Fla. 2006).

tobacco-related disease or medical condition" that qualified the decedent to be a member of the Engle class. See id. at 463. Because the plaintiff "was entitled to the res judicata effect of the Engle class, her cause of action was not controlled by the 1999 amendment to the punitive damages statute." Id. Our decision in Evers relied on the First District's decision in R.J. Reynolds Tobacco Co. v. Allen, 228 So. 3d 684 (Fla. 1st DCA 2017).²

The next year, the Fourth District "agree[d] with the First and Second District Courts of Appeal in holding that the pre-1999 version of section 768.73, Florida Statutes, applies in an Engle progeny personal injury suit that is converted into a wrongful death action upon the smoker's death." R.J. Reynolds Tobacco Co. v. Konzelman, 248 So. 3d 134, 135 (Fla 4th DCA 2018).³

²The original Allen opinion, 42 Fla. L. Weekly D491 (Fla. 1st DCA Feb. 24, 2017), cited by Evers was withdrawn on rehearing and substituted by a second opinion, 228 So. 3d 684, but the substituted opinion did not alter the analysis of this issue.

³But in Philip Morris USA Inc. v. Martin, 262 So. 3d 769, 775 (Fla. 4th DCA 2018), the Fourth District limited its holding in Konzelman:

In effect, Konzelman agreed with Allen and Evers to the extent that they recognized an exception to the general rule that a wrongful death claim accrues or arises upon the injured party's death, preserving an Engle class member's vested rights where the class member eventually dies of a tobacco-related illness that manifested before the 1999 amendment to section 768.73. In other words, the accrual date of an Engle class member's personal injury survivor claim effectively carries over to a merged or amended wrongful death claim upon death for purposes of determining when a cause of action arises.

The court held that the post-1999 version of the punitive damages statute applied under the facts in Martin:

[A]ll Engle wrongful death actions do not necessarily arise before the 1999 amendment to section 768.73, on the theory

Then, in 2019, the Fifth District decided Sheffield, 266 So. 3d 1230. The Sheffield court disagreed with Evers and Allen and held that the post-1999 punitive damages statute applied in that case because the wrongful death action accrued on the date of the decedent's death in 2007, not when his tobacco-related injury manifested in 1994. Id. at 1238. The Sheffield court reasoned that "Florida law is clear: a cause of action for wrongful death accrues on the date of the decedent's death." Id. at 1234. That combined with the express language of the statute—"that it applies to all causes of action arising after its effective date"—led to the conclusion that the post-1999 version of the statute applied. Id. at 1234. The Fifth District also concluded that our Evers decision "conflated 'manifestation' for purposes of class membership with the 'accrual' of a cause of action." Id. at 1237 (citing Evers, 232 So. 3d at 461). Sheffield certified conflict with our decision in Evers as well as the decisions in Allen and Konzelman. Id. at 1238.

Here, the decedent died of a tobacco-related disease—chronic obstructive pulmonary disease—in 2000, but she was a member of the Engle class based on the manifestation of COPD prior to the certification date of the class. In accordance with our decision in Evers, we hold that the trial court properly applied the pre-1999 version

that they all relate back to the 1994 Engle class action complaint. . . . Mrs. Martin qualified for Engle class membership based on her smoking-related heart disease that manifested in 1995, but she died from lung cancer that manifested in 2003. . . . Thus, because the smoking-related illness causing Mrs. Martin's death did not develop until after the 1999 amendment to section 768.73, we find that the post-1999 version of section 768.73 applies to this case.

Id. at 774, 776.

of the punitive damages statute to the wrongful death action in this case, and we certify conflict with Sheffield.

Affirmed; conflict certified.

LaROSE, J., Concur.

LUCAS, J., Concur in result only.