UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Judith Berger,

Plaintiff,

Case No.: 3:09-cv-14157

v.

ORDER

Philip Morris USA, Inc.,

Defendant.

Carr, D.J. [1]

This is an "*Engle*-progeny"[2] lawsuit by Plaintiff Judith Berger ("Plaintiff"), a former smoker of cigarettes, against the manufacturer of those cigarettes, Defendant Philip Morris USA, Inc. ("PM USA"). The matter is before me on Plaintiff's Motion for Relief from Judgment, pursuant to Rule 60(b), Federal Rules of Civil Procedure. (Doc. 190).[3] After the benefit of oral argument on May 10, 2016, the motion is due to be denied because the error of law that is the subject of the motion is appropriate for correction on appeal.

---

1 Senior U.S. District Judge, N.D. Ohio, sitting by designation.

2 I refer to the cases filed pursuant to the Florida Supreme Court's opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (*Engle III*), as "*Engle*-progeny cases." There, the Court decertified a statewide class of smokers and their survivors, but allowed members of the decertified class one year in which to file individual lawsuits, referred to as "the *Engle* savings period." *Id.* at 1277. For a detailed history of the *Engle* litigation, see *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1326-29 (11th Cir. 2010), and *Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F. Supp. 2d 1244 (M.D. Fla. 2011). I presume the reader's familiarity with the *Engle*-progeny litigation.

3 Unless otherwise noted, a citation that reads "Doc. __" refers to a docket entry in the case of Judith Berger vs. Philip Morris USA, Inc., Case No. 3:09-cv-14157.

I. Background

Plaintiff sued PM USA on theories of negligence, strict liability, fraudulent concealment, and conspiracy-to-conceal. After a trial, the jury returned a verdict for Plaintiff on all four theories, and found that PM USA was liable to her for $6.25 million in compensatory damages (though it also found that Plaintiff was 40% comparatively at fault, thus reducing her compensatory recovery to $3.75 million). (Doc. 92).

Consistent with Florida's First District Court of Appeals, *see Soffer v. R.J. Reynolds Tobacco Co.*, 106 So. 3d 456 (Fla. 1st DCA 2012) ("*Soffer I*"), and a prior court order governing *Engle*-progeny cases, *see* Case No. 3:09-cv-10000, Doc. 1344 at 3, ¶ 5, the Court instructed the jury that it could only consider whether to award punitive damages with respect to Plaintiff's fraudulent concealment and conspiracy-to-conceal claims (Doc. 127 at 39-40). The Court instructed the jury that it "should not consider the conduct underlying Plaintiff's claims for strict liability or negligence" in deciding whether to award punitive damages. (*Id.* at 40).

In accord with those instructions, the jury did not decide whether Plaintiff's negligence and strict liability claims warranted punitive damages. The jury did, however, conclude that the conduct underlying Plaintiff's fraudulent concealment and conspiracy-to-conceal claims called for punitive damages. (Doc. 92 at 4). The Court then held a separate trial on the matter, after which the jury returned a punitive damages verdict for $20,760,000.14. (Doc. 100).

After the punitive damages trial, PM USA moved for judgment as a matter of law with respect to the fraudulent concealment and conspiracy-to-conceal claims. (Doc. 136). PM USA argued that the testimony in the liability phase showed that Plaintiff did not rely on PM USA's misrepresentations about the hazards of cigarettes, and therefore she could not satisfy the elements of her two intentional tort claims. After reviewing the trial record, I agreed with PM USA. (*See*

Doc. 155). Accordingly, I granted the motion, and entered judgment for PM USA as a matter of law on the fraudulent concealment and conspiracy-to-conceal claims. (Doc. 155, Doc. 172). That decision did not affect the compensatory damages award, which the liability verdicts on negligence and strict liability still supported. However, by granting judgment as a matter of law on the fraudulent concealment and conspiracy-to-conceal claims, I vacated the punitive damages award (Doc. 155 at 27, ¶ 2), because the fraudulent concealment and conspiracy-to-conceal claims were the foundation of the punitive damages verdict. In doing so, though, I noted that *Soffer I* (which held that *Engle*-progeny plaintiffs could not seek punitive damages with respect to negligence and strict liability claims) was on appeal before the Florida Supreme Court. (Id. at 27 n.21). I reserved that if the Florida Supreme Court overturned *Soffer I,* and "[s]hould a new trial on punitive damages be deemed appropriate, [Plaintiff] is granted leave to move for such relief." (*Id.*).

I entered Final Judgment on November 19, 2015. (Doc. 172). PM USA filed a notice of appeal on December 18, 2015 (Doc. 176), and Plaintiff filed a notice of cross-appeal on January 4, 2016 (Doc. 179). The case seemed to be progressing on appeal.

On March 17, 2016, the Florida Supreme Court overturned *Soffer I* in *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219 (Fla. 2016) ("*Soffer II*"). The Florida Supreme Court held that *Engle*-progeny plaintiffs *could* seek punitive damages with respect to their negligence and strict liability claims, as well as on their fraudulent concealment and conspiracy-to-conceal claims. *Id.* at 1221, 1227. Four days later, Plaintiff filed a notice of supplemental authority, which alerted me to *Soffer II,* and indicated that Plaintiff would be filing a motion for reconsideration. (Doc. 184). Plaintiff also notified me, for the first time, that two and a half months earlier, the Eleventh Circuit Court of Appeals suspended the notices of appeal pending the resolution of three of PM

USA's tolling motions. (Doc. 184, Doc. 184-2).[4] I set a briefing schedule, granted Plaintiff leave to file a "post-*Soffer* motion," and set a date for oral argument. (Doc. 187).

On April 11, 2016, Plaintiff filed the motion for relief from judgment, pursuant to Rule 60(b), Federal Rules of Civil Procedure. (Doc. 190). Plaintiff argues that I have jurisdiction to entertain – and to grant – her own Rule 60(b) motion because the Eleventh Circuit suspended the notices of appeal until I resolved PM USA's tolling motions. (*Id.* at 4-5).[5]

As for the merits, Plaintiff argues that *Soffer II* represents an intervening change in the law that amounts to an extraordinary circumstance, thereby warranting relief from judgment under Rule 60(b)'s "catch-all" provision, Rule 60(b)(6). (*Id.* at 6-9). Relying on *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir. 1987), Plaintiff argues that *Soffer II* warrants Rule 60(b) relief because (1) the judgment has not yet been executed, (2) the four-and-a-half-month delay between the final judgment and her Rule 60 motion was "minimal, particularly given the 20-year history of the *Engle* litigation," (3) *Soffer II* arises from the same *Engle*-litigation as Plaintiff's case, and (4) relief is appropriate, in the interest of comity with the Florida state courts. (Doc. 190 at 6-8).

As for the remedy, Plaintiff argues that I should reinstate the $20.7 million punitive damages verdict. (*Id.* at 9-19). Plaintiff argues that I should unhook the punitive damages award from the fraudulent concealment and conspiracy-to-conceal claims that were the basis of the award, and attach the award to the negligence and strict liability claims, even though the jury did not specifically decide whether the conduct underlying the negligence and strict liability claims

---

[4] As the Notice of Supplemental Authority foreshadowed (Doc. 184 at 1 n.1), Plaintiff hoped to seize on the suspension of the notice of appeal to argue that I had jurisdiction to entertain – and to grant – a motion to either reinstate the punitive damages award or hold a new punitive damages trial. (*Accord* Doc. 190 at 4-5).

[5] At the time Plaintiff made the argument, I had not yet ruled on PM USA's three tolling motions.

warranted punitive damages. Alternatively, Plaintiff argues that "if the Court declines to reinstate the already determined punitive damages award, it should remand the case for 'a new trial limited to the issue of whether punitive damages should be imposed for the negligence and strict liability claims and, if so, the amount thereof.'" (*Id.* at 19) (quoting, without citation, *Soffer II*, 187 So. 3d at 1233).

PM USA responded on April 21, 2016. (Doc. 192). PM USA does not deny that, substantively, *Soffer II* entitles Plaintiff to seek punitive damages with respect to her negligence and strict liability claims in some way. PM USA instead argues that I lack jurisdiction to grant the Rule 60(b) motion. (*Id.* at 5-7). PM USA also argues that I should not grant Rule 60(b) relief because "Plaintiff will have the ability to seek relief through the ordinary appellate process." (*Id.* at 8). PM USA states that it had "identified no case where a court has granted extraordinary Rule 60(b) relief where a party could obtain relief through ordinary appellate proceedings – i.e., where a court has allowed a party to use the rule as a 'short-cut' to relief." (*Id.*).

As to the remedy, PM USA objects to reinstating the punitive damages award. (*Id.* at 10-13). PM USA argues that, because the jury never decided whether the conduct underlying the negligence and strict liability claims warranted punitive damages, reviving the punitive damages award and attaching it to the negligence and strict liability claims would violate its right to due process. In support, PM USA relies in part on *State Farm v. Campbell*, 538 U.S. 408, 422 (2003) (conduct "independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."), and *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("The Due Process Clause prohibits a State from punishing an individual without first providing that individual with an 'opportunity to present every available defense.'") (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). PM USA, however, also objects to holding a limited retrial on the issue

of punitive damages. (*See* Doc. 192 at 13-16). PM USA argues that due process forbids a retrial limited to punitive damages, but instead requires retrying the entire case from the ground up before a single jury because of how "interwoven" the issues of liability and punitive damages are.

II. Discussion

A. Jurisdiction

On May 5, 2016, I entered two orders (Doc. 196, Doc. 197), which resolved the three tolling motions (Doc. 135, Doc. 139, Doc. 140) that the Eleventh Circuit identified in its letter suspending the notices of appeal (*see* Doc. 184-2). Once I entered the orders resolving PM USA's tolling motions, the notice of appeal was unsuspended and jurisdiction vested once more in the Court of Appeals. *See* Fed. R. App. P. 4(a)(4)(B); *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 745-46 (11th Cir. 2013); (*see also* Doc. 197 at 5).

Although a notice of appeal typically deprives a district court of jurisdiction over a case, I still retain jurisdiction to consider Plaintiff's Rule 60(b) motion, and to take one of two actions. *Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003). I can either: (a) deny the motion, or (b) indicate my "belief that the arguments raised are meritorious." *Id.* For the reasons stated below, I choose to deny the motion.

B. Whether Rule 60(b)(6) Relief is Appropriate

I begin by noting that Plaintiff has identified a genuine legal error in the Court's punitive damages jury instruction, which told the jury not to consider whether to award punitive damages on Plaintiff's negligence and strict liability claims. (*See* Doc. 127 at 39-40). The Florida Supreme Court's March 17, 2016 ruling in *Soffer II*, 187 So. 3d 1219, clarifies that under Florida law, *Engle*-progeny plaintiffs may seek punitive damages on their non-intentional tort claims.

The question is whether Rule 60(b)(6) is the proper vehicle for relief where, as here, the moving party can seek redress on appeal. The answer is no. "'[T]he well-recognized rule… precludes the use of a Rule 60(b) motion as a substitute for a proper and timely appeal.'" *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) (citing *Burnside v. Eastern Airlines, Inc.*, 519 F.2d 1127, 1128 (5th Cir. 1975)). *See also Wagner v. United States*, 316 F.2d 871, 872 (2d Cir. 1963) ("The catch-all clause of Rule 60(b)(6), authorizing the court to relieve a party from a judgment for 'any other reason justifying relief,' cannot be read to encompass a claim of error for which appeal is the proper remedy."). The case before me is distinct from the case Plaintiff relies upon, *Ritter*, 811 F.2d 1398, where the State of Alabama resorted to Rule 60(b)(6). In that case, the State's appeal had already concluded by the time the Supreme Court rendered a decision that created a change in controlling law. *See id.* at 1400. Thus, Rule 60(b)(6) relief was appropriate in *Ritter* because, among other reasons, the State no longer had recourse to the appellate process. Here, however, PM USA and Plaintiff have each filed notices of appeal and notices of cross-appeal, respectively. (*See* Doc. 176, Doc. 179, Doc. 198, Doc. 200). Plaintiff, unlike the State of Alabama in *Ritter*, still has recourse to the appellate process. Additionally, the facts surrounding the punitive damages jury instruction do not appear to be in dispute, and the error it presents is purely one of law. Thus, the error is appropriate for correction on appeal.

I have due process concerns about Plaintiff's proposed remedy, i.e., simply reinstating the $20.7 million punitive damages verdict, even though the jury never decided whether the conduct underlying the negligence and strict liability claims called for punitive damages. I am equally skeptical of PM USA's argument that I cannot hold a limited retrial on the issue of punitive damages without retrying the entire case. Moreover, both proposals seem inconsistent with the remedy that the Florida Supreme Court contemplated in *Soffer II*, which is to conduct a limited

retrial on the issue of punitive damages. *Soffer II*, 187 So. 3d at 1233-34. I need not decide which remedy is proper, however, because I will defer to the remedy that the Eleventh Circuit Court of Appeals instructs me to implement.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED THAT

1. Plaintiff's "Motion for Reinstatement of Jury's Punitive Damages Award, or New Trial" (Doc. 190) is **DENIED**.
2. Upon the conclusion of the appeal, I am prepared to implement whichever remedy, if any, the Eleventh Circuit Court of Appeals instructs me to implement, whether that be a limited retrial on punitive damages, a complete retrial, a reinstatement of the punitive damages award, or something else.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge